File No. HE20090021

LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the "LPA"); and

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

INTRODUCTION

[1] On February 2, 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 Ivo Hula, a Member of the LSA. The Committee was comprised of Dale Spackman, QC, Chair, Larry Ohlhauser, MD, Member and Sarah King-D'Souza, QC, Member. The LSA was represented by Janet Dixon, QC. The Member was represented by Alain Hepner, QC. Also present at the Hearing were the Member, Karen Vanderweerde, LSA Investigator, Dr. Brian Plowman, Witness for the Member and a Court Reporter to record the transcript of the Hearing.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

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

[3] The Chair inquired as to whether there was any private hearing application. Counsel for the LSA advised that the LSA had received no application for the Hearing to be held in private and recommended that the Hearing be held in public, subject to the caution that no client names be identified. Counsel for the Member had no objection to the Hearing proceeding in public and it was so ordered by the Committee.

[4] Exhibits 1 through 4 contained in the Exhibit Book, consisting of (i) the Letter of Appointment of the Committee, (ii) the Notice to Solicitor pursuant to section 56 of the LPA, (iii) the Notice to Attend and Private Hearing Application Notice to the Member and (iv) the Certificate of Status of the Member with the LSA, respectively, established jurisdiction of the Committee and were entered as Exhibits in the Hearing with the consent of Counsel and the Committee.

[5] Exhibit 5 contained in the Exhibit Book, being the Certificate of Exercise of Discretion pursuant to 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 Notice, was entered as evidence in the Hearing with the consent of Counsel and the Committee.

CITATIONS

[6] The Member faced the following Citations:

1. **IT IS ALLEGED that you misappropriated trust funds, and that such conduct is conduct deserving of sanction**

2. **IT IS ALLEGED that you deceived or attempted to deceive your clients in creating false invoices which were paid with the clients' trust funds, and that such conduct is conduct deserving of sanction.**

3. **IT IS ALLEGED that you deceived or attempted to deceive the Law Society auditor and investigators, and that such conduct is conduct deserving of sanction.**

SUMMARY OF RESULTS

[7] In the result, on the basis of the evidence entered and heard at the Hearing and for the reasons set out below, the Committee found that Citations 1 and 2 and Citation 3 (amended as referred to below) were proven and that the Member was guilty of conduct deserving of sanction in respect of these Citations. The Member was disbarred and ordered to pay the actual costs of the Hearing.

STATEMENT OF FACTS AND ADMISSION OF GUILT

[8] Counsel for the LSA referred the Committee to the Statement of Facts contained at Exhibit 6 of the Exhibit Book. Counsel advised that, based on the Statement of Facts, the Member was prepared to offer an Admission of Guilt on Citations 1 and 2 and an amended Citation 3 to read **"IT IS ALLEGED that you failed to be candid with the Law Society investigators"**. Counsel for the LSA was prepared to accept the amendment to Citation 3 and the Admission of Guilt of the Member on the condition that the Statement of Facts was accepted by the Committee. Counsel for the Member confirmed the Admission of Guilt by the Member on Citations 1 and 2 and amended Citation 3.

[9] The Committee invited submissions of Counsel on the Statement of Facts and Admission of Guilt.

Submissions of Counsel for the LSA

[10] Counsel for the LSA referred to the Statement of Facts disclosing that the misappropriations of client trust funds by the Member involved total funds in an amount in excess of $100,000, occurred over a period of almost three years and involved an element of deceit and "hiding" by the Member to disguise the misappropriations by the creation of false invoices and payment details. Counsel pointed out that paragraph 1 of the Statement of Facts is incorrect in its characterization of the relationship of the Member to the firm of Thornborough Smeltz & Co and that the relationship was one of a space and cost sharing arrangement. Counsel summarized the balance of the Statement

of Facts and, in particular, the admissions made by the Member that he misappropriated client trust funds to use for personal purchases, prepared misleading statements of receipts and disbursements, prepared fictitious invoices or notes to support false charges, transferred trust monies between client files to cover shortages and lied to his clients to disguise his misappropriations. The Member acknowledged the accuracy of the summaries prepared by the LSA investigator and attached as Tabs 1 to 8 to the Statement of Facts with respect to the Member's misappropriation of funds and deceit with respect to his clients.

Submission of Counsel for the Member

[11] Counsel for the Member agreed with the submissions of Counsel for the LSA

[12] The Hearing was adjourned for a short period of time while the Committee considered whether to accept the Statement of Facts and Admission of Guilt by the Member.

[13] The Hearing was reconvened and the Chair advised that the Committee was prepared to accept the Statement of Facts and Admission of Guilt by the Member on Citations 1 and 2 and amended Citation 3, which would now be deemed, for all purposes, to be a finding that the conduct of the Member is deserving of sanction on those Citations. Exhibits 5 to 8 contained in the Exhibit Book were entered as Exhibits in the Hearing with the consent of Counsel and the Committee.

SUBMISSIONS ON SANCTION

Preliminary Submissions of Counsel for the LSA

[14] Counsel for the LSA advised that the LSA would be seeking disbarment as the appropriate sanction in this case and that she had not further submissions at this time.

Preliminary Submissions of Counsel for the Member

[15] Counsel for the Member indicated that he would be calling the Member and Dr. Plowman to provide evidence.

EVIDENCE OF THE MEMBER

Testimony of the Member

Examination by Counsel for the Member

[16] The Member was called as witness by Counsel for the Member and the Chair administered the oath.

[17] Counsel advised the Committee that, since the Member has been suspended since June 22, 2007, he would be submitting that the proper sanction in this case be an additional three year suspension prior to reinstatement with close monitoring by the Practice Review Committee after that per year and after the decision of this Committee.

[18] Mr. Hula testified that he is 50 years old and currently employed as a shuttle driver with a Calgary automobile dealership. The Member resides in Calgary and is separated with his wife, with one nine year old daughter who he sees approximately 27 hours per week. The Member declared bankruptcy in May of 2009 with his Trustee being Meyers Norris Penny. His current salary is $14 per hour and he works approximately 35 to 40 hours per week. The Member received his LLB from the University of Alberta in 1986 and was called to the Alberta bar in August of 1988. The Member has been involved in a number of firms on an office sharing basis and has been employed as a "fill-in" for persons on maternity leave.

[19] During the period when the events giving rise to the citations occurred, the Member was employed from 1997 until 2004 with Acadia Park Law Office and from 2004 to 2007 with Thornborough Smeltz. The Member's practice consisted mainly of wills and estates, real estate and corporate commercial law. For the years 2004 to 2007, the Member's practice consisted of approximately 40% real estate, 40% wills and estates and 20% corporate commercial law. The Member described himself as a "self-employed practitioner sharing office space and disbursements…or expenses". During his time with the Thornborough firm, the Member paid a proportion of the offices expenses on a monthly basis and during his time with the Acadia Park Law Office, the Member paid a certain percentage of his billings to the firm. The Member was responsible for the salary of his legal assistant.

[20] The Member testified that he began seeing a Psychiatrist, Dr. Plowman, in 2003 on a referral from his marriage therapist and that he continued to see Dr. Plowman, with certain interruptions for a month or several months at a time, during the period 2004 to 2007. The Member reiterated his agreement with the Statement of Facts and Exhibits in the Hearing.

[21] The Member was asked to provide a synopsis of what was going on in his life during this three year period. The Member indicated that he would divide his response into two categories, being the work and office side and the personal or marital side.

[22] The Member met his wife in 1998 and they were married in 1999 with their daughter born in October, 2000. The Member's wife was not happy with him and they argued extensively for days and nights on end. The wife of the Member accused him of not supporting her, picking sides and would ask if he had to pick, who would he love, her or their child. The Member's wife did not like his mother or his best friend and told him he couldn't see either of them. She had problems with his snoring and insisted he undergo surgical procedures that did not help. In July of 2005 the Member experienced leakage in his large intestine and septic shock, which resulted in surgery and three weeks of hospitalization. After discharge from the hospital, the Member's wife demanded a separation. The separation was delayed until April of 2006. The Member was off work due to complications from his illness during the Stampede week of 2005 until the last week of August. He was on a "bag" as his bowels remained disconnected until January, 2006. The Member testified that he was quite often "dead tired" and that his wife would call him at the office and they would argue over the telephone for periods of two to three

hours. The Member testified that his marital situation affected his work and that he was extremely busy during the time in question, having hundreds if not thousands of files.

[23] The Member testified that he did not personally know the clients from whom funds were misappropriated and that he chose the files to take money from "randomly". The Member testified that for the past decade he has been on a perpetual job search and that he is not a "great people person" and therefore more inclined to do corporate commercial and oil and gas work. The Member was working a few months here and there and he realized he needed a more stable type of practice. This led to the Member taking a position with the Acadia Park Law Office in 1998. The Member testified that he was the only lawyer doing other than personal injury work at the firm and he was successful at Acadia Law Office.

[24] In 2003 or early 2004 there was a transfer of power within the office from the father to the son, which resulted in changes to the practice circumstances of the firm, so the Member joined the Thornborough firm in May or June of 2004, which is where the incidents leading to the citations occurred. The Member went through a couple of mediocre assistants until he found one that was satisfactory. He found he was unable to take more than three or four days vacation as the lawyers who covered for him would bill him for their work on his files and it was more than he could actually bill the clients.

[25] The Member testified that he did not remember a lot of what brought him to this Hearing, that he was under enormous stress and not sleeping.

[26] The Member testified that with respect to his purchase of an expensive watch from J. Vair Anderson, there was "no need to buy it". He guessed that it was his attempt to assert independence from the control and domination of his wife and having to answer for every "little tiny aspect of my life throughout all of my existence at work and home". The Member again acknowledged the facts contained in the Statement of Facts and Exhibits. He does not dispute the facts, but does not recall them or why he chose those eight files. The Member testified that there was turmoil in the work place, which resulted in his assistant quitting her employment in the early fall of 2006 leaving him in a difficult situation; she had "escaped" the office situation. His wife was against loud music so the purchase of a music system was a way of escaping her grasp. When questioned by counsel as to why the Member used other people's funds to make these purchases, the Member testified that it was self-destructive behaviour he used as a release from the turmoil he was experiencing. The Member testified that he could have made the purchases with his own funds. The Member admitted to preparing false invoices but had no explanation as to why this occurred. The Member testified that he finally told Dr. Plowman about these issues after his suspension by the LSA in June of 2007 and thereafter saw Dr. Plowman on an average of twice per month. The Member testified that he has not seen Dr. Plowman since August of 2009 and is currently on no medication. This is strategic, as Dr. Plowman was trying to encourage his independence.

[27] Counsel inquired of the Member as to what he would like to see happen in this Hearing. The Member testified that he had been controlled throughout his life, firstly by his mother and then by his wife and that he was attempting to become an independent person

for the first time in his life. The Member saw the conduct giving rise to the citations as a grave mistake and admitted that he had done a number of things a normal person would not do, including signing an extremely one sided custody and property settlement with his wife. He was trying to have it overturned now. The Member tendered an explanation for the citations as being self-destructive behaviour. The Member testified that Dr. Plowman had helped him gain an insight into what happened. In future, the Member wants to do what he enjoys most, which is being a corporate lawyer. The Member does not want to operate trust accounts, does not want a lot of clients and his goal is to be employed in-house or in government and not in private practice.

[28] The Member testified that he has repaid a significant portion of the funds misappropriated and thinks there is approximately $7,000 still owing. The Member still has a relationship with Dr. Plowman. He is separated from his wife, but not divorced. The Member continued to be involved in a matrimonial and custody dispute with his wife.

Cross Examination by Counsel for the LSA

[29] Counsel for the LSA confirmed that the Member graduated in 1986 and began practicing in 1988, reviewed with the Member the early years of his law practice, confirmed that the Member did not maintain his own trust account while associated with Acadia Law Office, but utilized the firm trust account with its requisite controls, and that the first Form S filed by the Member was in the Spring of 2004 when he joined the Thornborough firm and established his own separate trust account. The Member believed he filed the necessary forms with the LSA to establish his trust account, but could not recall the details. The member recalled having computer accounting, but could not recall the program he utilized.

[30] The Member confirmed that the troubles with his wife began early on in their relationship and preceded the marriage. They had many fights, which included fights about money, but most were about "control". The Member was the primary supporter of the family from 2000. Counsel confirmed with the Member that his wife had access to his personal bank account, would probably not have approved of the purchase by the Member of an expensive watch in April of 2004, that the Member did not advise his wife of the purchase, that the Member admitted that a way to disguise the watch payments would be to use client trust money to make the payments and that some payments were made out of the bank account of the Member, but the Member did not tell his wife this.

[31] Counsel asked the Member about when he first committed to buy the watch and the Member did not recall the details. After a short adjournment, Counsel produced a statement from J. Vair Anderson Jewellers dated September 21, 2007. The statement was shown to the Member, who confirmed that it appeared to be an accurate statement of payments made on the watch. The statement was entered as Exhibit 9 in the Hearing with the consent of Counsel and the Committee. Counsel established with the Member that he made a down payment on the watch while still with the Acadia Law Office in April of 2004, that the Member commenced his association with the Thornborough firm

on or about July 1, 2004 and that around that same time, the Member established a separate trust account.

[32] Counsel referred the Member to Exhibit 9 (the J. Vair Anderson Jewellers Statement) and the Client Trust Ledger Card at Exhibit 6 (the Statement of Facts), Tab 3 and the correlation of invoices and payments between the two documents. The Member could not recall the details of these transactions, although he did not deny they had occurred. Counsel showed the Member a trust requisition form purporting to requisition a trust cheque issued July 2, 2004 and confirmed with the Member that it was a form previously used at the Acadia Law Office that the Member recalled he might have used in his new practice in association with the Thornborough firm. The requisition was entered as Exhibit 10 in the Hearing with the consent of Counsel and the Committee.

[33] The Member acknowledged his handwriting on Exhibit 10 and that the cheque requisition was misleading and dishonest. Counsel suggested to the Member that this was the first time he stole money from trust, by referring the Member to the Statement of Facts (Exhibit 6) and the timing specified in the Tabs to that Exhibit for other purchases by the Member utilizing client trust money. The Member was not clear on the events and said his only recollection regarding the watch was "being in [the] jewellery store a couple of times and paying". In support of the Member's lack of recognition, he indicated that "…if [he] would have been smart, [he] would have destroyed a lot of the evidence to begin with and [he] never did because [he] didn't know it was there". Counsel again referred the Member to Exhibit 9 and Exhibit 6, Tab 4 and the false entry on the Member's sale file and the cheque relating to that entry being a payment on the watch, which the Member confirmed.

[34] Counsel produced a handwritten note dated December 6, 2004 and confirmed with the Member that it was in his handwriting. The note was entered as Exhibit 11 in the Hearing with the consent of Counsel and the Committee. Counsel confirmed with the Member that Exhibit 11 was a false note to the file to support an entry on a client trust ledger and that the Member "guessed" he didn't make the telephone call. The Member confirmed that there was no "Anderson Consulting" (the payee on the cheque requisition and invoice) or "Ken" (the party to whom the false note referred to the Member speaking to on the telephone). The Member referred to the note as "a sort of imaginary disbursement". The Member indicated that he has no recollection of when he first decided to make up "Anderson Consulting" to disguise the payments being made on his watch.

[35] Counsel produced an invoice dated April 25, 2005 from "Anderson Consulting", which the Member confirmed having prepared. The invoice was entered as Exhibit 12 in the Hearing with the consent of Counsel and the Committee. Counsel referred the Member to Exhibit 6, Tab 8. The Member confirmed that the invoice in question (Exhibit 12) was placed on the file referred to in Exhibit 6, Tab 8 to disguise the personal use by the Member of the client's trust funds. The Member was not aware of when he took the step of creating these false invoice, but confirmed that a supply of these invoices in blank were available in his office for future use.

[36] Counsel referred the Member to Mr. Hepner's question of whether the Member had his own money available to make these purchases and the Member confirmed his affirmative answer to that question. Counsel then referred the Member to Exhibit 7 (the transcript of the interview of the Member by the LSA Investigator), Page 8, Line 3, where the Member advised the LSA Investigator that he did not have his own funds available at that time. On further questioning and clarification, the Member advised that he had a line of credit of $100,000 and could have absorbed these payments and that the inconsistency in his answer to the LSA Investigator and Mr. Hepner was probably due to the fact that at the time of the interview he was "shell shocked" and his "mental state was horrible".

[37] Counsel concluded her cross-examination of the Member.

[38] Counsel for the Member had no further questions and the witness was thanked and excused by the Chair.

Testimony of Dr. Plowman

Examination by Counsel for the Member

[39] Dr. Plowman was called as a witness by Counsel for the Member. Counsel inquired of the Witness whether he had his file. The Witness indicated he did not need it and would retrieve it if needed. The Chair administered the oath.

[40] The Witness confirmed that (i) he is a physician duly licensed in Alberta with a specialty in psychiatry, (ii) he obtained his M.D. from the University of Manitoba in 1974 and his fellowship in psychiatry in 1978. (iii) he first worked in Winnipeg at the Health Science Centre and the Manitoba Youth Centre, (iv) he moved to Calgary in 1979 and ran the Young Adults Program at the Foothills Hospital and Woods Home for a number of years until about 1982 or 1983, (v) he worked at the General Hospital and at the Health Science Centre in out-patient adolescence, (vi) since 1979, he has carried on a general adult psychiatric private practice in Calgary and (vii).he is currently an assistant clinical professor at the University of Calgary.

[41] The Witness testified that he first met the Member on July 14, 2003 when he was consulted by the Member regarding the request of his wife that he break off any relationship with his mother and family of origin. The Witness continued to see the Member and determined that he had a "symbiotic relationship" with his mother that the Member was transferring to his wife and that the wife was not "quite as healthy an individual as his…mother was". The Witness continued to see the Member regularly (weekly or bi-weekly) until December 2005 when there was a gap until March 2006, to allow the Member to develop more independent growth and so the Member would not become dependent on or symbiotic with the Witness.

[42] The Witness testified that he was familiar with the Statement of Facts and that the Member was suspended by the LSA on June 22, 2007. The Witness confirmed that he was seeing the Member during the relevant period that is the focus of this Hearing, but that the Member did not make him aware that he was taking money from his clients until their first meeting after the Member was suspended. The Witness confirmed that he

continued to see the Member until August of 2009, but broke off their meetings at that time to let the Member handle the things that he was then confronted with (issues with his wife and the issues before this Hearing) as an "independent adult".

[43] The Witness testified that during the timeframe that he was treating the Member, the Member showed "regressive behaviour" and had not progressed from the co-dependent stage of development. The member acted like a teenager in a symbiotic relationship with his mother and then his wife. He became co-dependent with his wife, became like an "adolescent who starts to act out" and exercised his independence in inappropriate ways. The Witness categorized the condition of the Member as "projective identification" and used the analogy of the "Patty Hearst syndrome". The Witness felt that the "projective identification" was not still an issue with the Member and that the Member had become much more independent. The Member had a "co-dependent relationship" and progressed along an "axis" to a "dependent personality disorder". The Witness indicated that the Member did not now suffer from these conditions "to the same degree at all". If the Member were to get into another relationship, the Witness would endeavour to ensure that the Member "is aware of his own identity" and that "there's always a danger of the Member being compelled to repeat the pattern" based on the Freudian theory of "repetition compulsion". The witness testified that this is where therapy can help and the Member needs to "have some controls and organization in his life". The Witness felt that an "in-house" position would be suitable for the Member. Counsel inquired of the Witness as to how taking trust money "would fit into this projective identification"? The Witness made the analogy to an adolescent taking alcohol from the "cabinet' or going out to "toke up with some friends". The Witness indicated that he "saw a fair amount of remorse when [he] followed up…". When questioned by Counsel on this and whether the Member acknowledged that what he did was wrong, the Witness testified that :"a part of him realized after being detected that it was wrong" and "it was more to live up to the status that was being projected on him in his relationship". The Witness was of the opinion that the files chosen by the Member were "totally random and that "whatever file was sitting in front of him would have been the one that would have been abused".

[44] The Witness testified that the diagnosis of "projective disorder" is common among "borderline personality disorders" and "psychopaths". The Witness testified that the Member is not a psychopath and that he would not say whether his wife "is either a borderline or a psychopath" as "this isn't a blame thing". The Witness recommended ongoing treatment for the Member but stopped treatment at this point to allow the Member to work out his present legal problems with assistance of Counsel.

Cross Examination by Counsel for the LSA

[45] Counsel established with the Witness that he did not do an "MMPI" on the Member and that his training was psychoanalytic and that no psychological tests were done on the Member as part of the diagnosis. Counsel referred to the references of the Witness to "Axis I and Axis II" and asked for the DSM diagnosis. The Witness confirmed that he had made a diagnosis of the Member on the "DSM basis" as "projective identification or symbiosis", or "co-dependent relationship". The second diagnosis was "dependent personality disorder". The Witness advised that "Axis III" is "medical stuff" and that "he

didn't have much medical stuff" other than the surgery that the Member had. "Axis IV" is the ability of the Member to function in society "and that was really down at the end when [the Member] finally was sanctioned". The Witness confirmed that prior to the suspension of the Member his ability to function was reduced to the point where he would qualify for short-term disability.

[46] The Witness confirmed that "projective identification", symbiotic relationship" and "co-dependency" are all terms to describe the concerns of the Witness on "Axis I" of the "DSM". Counsel referred to the two primary concerns of the LSA as the regulator of lawyers as "protecting the public" "and protecting the reputation of the profession".

[47] The Witness advised that about five percent of adolescents do "illegal things". However, the Witness could not tell Counsel what percentage of people with the diagnosis of the Member commit criminal acts like stealing money. He indicated that it would be very rare for an adult to have regressed to that level. When Counsel asked the Witness whether the Member was "cured" of his co-dependency, the Witness testified that the co-dependency was not now a problem "because he's not in a relationship".

[48] When questioned by Counsel in relation to the "Axis II" diagnosis of "dependent personality disorder", the Witness indicated that there had been a "significant improvement" and that the Member has been more independent. The Witness testified that the prognosis for the Member is "significantly better".

[49] Counsel inquired of the Witness whether it is symptomatic of the illness of the Member to "reflect to everyone else the responsibility for his conduct…to deflect the responsibility to some third party other than himself". The Witness testified that it was not "so much saying fault as he was trying to explain why he was operating the way he was" and "that what he tried to honestly answer is that he didn't remember the events".

[50] Counsel inquired as to whether there was a correlation between co-dependency and memory loss. The Witness testified that it is not a memory loss "but a dissociative phenomenon, which is a projection that you see going on with the projective identification". Counsel identified the concern of the LSA regarding safeguarding trust funds in the context of the scenario that the Witness put forward regarding the Member. Although the Witness agreed "a hundred percent", he referred to the fact that the Member had received and would continue to receive treatment and that being "a very positive plus factor". The Witness was confident that with continued treatment, the Member would not repeat the conduct that is the subject of this Hearing.

[51] Counsel inquired of the Witness how the lack of integrity relates to the DSM diagnosis. The Witness responded by referring back to the "adolescent example" and that "[they] don't think they lack integrity".

Re-Examination by Counsel for the Member

[52] Counsel inquired whether the treatment provided by the Witness has been successful for the Member and whether the Member now has "insight into the problems with respect to taking other people's money". The Witness testified the member " has come quite a long

ways" and that the Member "has significantly more insight [into the problems] than he did when he did it", but "could get …more insight and more treatment". When asked by Counsel whether the Member knew what he was doing was wrong, the Witness testified that the Member "didn't care", "didn't think about it" and "just did it...like the adolescent who, almost on the impulse". The Witness testified that the biggest single tool he has given the Member in his treatment "is to be independent and be himself and not be under the auspices of someone else who I think really didn't care about him being okay" and that the prognosis for the Member is good.

Questions from the Committee

[53] The Chair inquired whether there were any questions from the Committee.

[54] Dr. Ohlhauser asked the Witness about the connection between the Member being more independent and how that is relevant to the Member practicing as a sole practitioner or in a corporate environment. The Witness testified that "one of the safety nets that the Society would want and… he would love to have, is knowing the he's in a structured environment…safe and dependable…and I don't think he would want to have control over trust funds like that anymore himself" and "I don't think he'll regress down to being an adolescent again…it's sort of like an alcoholic who's got himself cured, he sure doesn't want to go anywhere near working in a bar or anything like that…".

[55] Dr. Ohlhauser confirmed the testimony of the Witness that the Member would be happy to continue treatment and asked why this was necessary if the Member is cured. The Witness again used the analogy of an alcoholic and that they are never "cured"; they are in recovery and "there's issues that come". The Witness testified that the big issue the Member still faces is his relationship and breaking that up, that he doesn't see his daughter very often and that continued treatment would be on those issues rather than work related issues.

[56] Dr. Ohlhauser questioned the Witness on his "Axis I" diagnosis of "projective identification" and how it is possible that a person can deselect certain memory and not others. The Witness testified that "it's very common amongst the borderline and psychopaths to dissociate and live", that there is no such thing as separate personalities, but "dissociative phenomena". The Witness referred to it as "splitting" and that "a person can do it within seconds".

[57] Dr. Ohlhauser asked whether the likelihood of this recurring again is minimal and the Witness responded that the Member "was having a projected identification on him from his relationship" and that "it sounds like [the Member is] laying blame on someone else all the time here, but I think unless a person has actually been under that kind of influence from somebody, it's pretty hard to imagine that it can have that kind of impact".

[58] Ms. King-D'Souza inquired of the Witness whether the ongoing issues between he and his wife, such as custody of his daughter, was a continuation of the co-dependence and how the Committee has any assurance there will not be any further recurrences of the conduct of the Member at issue. The Witness testified that the Member "does not want to

hold on", but that the Member wants to continue to see his daughter and that in the process of doing that, he will have some contact with his wife who "will continually try to hold on and try to influence and stuff like that". The Witness would want to be involved or have someone else involved in continued therapy for the Member "to help him not get drawn into that…because she is going to be extremely powerful in her attempts to do that, and has been".

[59] There being no further questions for the Witness, he was thanked and excused by the Chair.

[60] The Chair apologised that he had not asked the Committee if they had questions for the Member during his testimony and confirmed that Counsel had no objection to him making that inquiry now. There were no questions from the Committee for the Member.

SUBMISSIONS ON SANCTION

Submissions of Counsel for the LSA

[61] Counsel tendered a letter dated January 12, 2010 from the Director, Lawyer Conduct of the LSA indicating that the Member has no discipline record with the LSA and an Estimated Statement of Costs for the Hearing, which were entered as Exhibits 14 and 15 in the Hearing with the consent of Counsel and the Committee (Note that these should have been Exhibits 13 and 14, as the last prior Exhibit entered was Exhibit 12).

[62] Counsel pointed out that the Member had been found guilty on Citations 1 and 2 on the Notice to Solicitor (Exhibit 2), that the Member misappropriated trust funds and he attempted to deceive his clients in creating false invoices which were paid with client trust funds, and on the third Citation that the Member failed to be candid with the LSA Investigators.

[63] Counsel summarized the misappropriations by the Member as shown in the Exhibits as follows:

Total funds taken	$101,820.97
Transfers between client files	46,041.47
Misappropriation of client trust funds	$ 55,779.50
Restitution	48,085.17
Outstanding	$ 7,694.33

Counsel for the Member agreed with this analysis.

[64] Counsel for the LSA advised the Committee that she was seeking as the sanction in this case, disbarment of the Member, a referral to the Attorney General and payment of actual costs of the Hearing.

[65] Counsel provided the Committee and Counsel for the Member with copies of four cases that she would be referring to in her submissions. Counsel submitted that the Committee

should take primary guidance in sanctioning the Member from the Hearing Guide and apply the "purposeful approach" discussed in the Hearing Guide. Counsel referred to Section 49 of the Act, which sets out the general definition of conduct deserving of sanction and reads as follows:

> 49(1) *For the purposes of this Act, any conduct of a Member, arising from incompetence or otherwise, that*
>
> > *(a) is incompatible with the best interests of the Public or of the Members of the Society, or*
> >
> > *(b) tends to harm the standing of the legal profession generally,*
>
> *is conduct deserving of sanction, whether or not that conduct relates to the Member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.*

Counsel referred to section 49 of the LPA as defining misconduct as conduct that puts the public at risk or could bring the profession into disrepute and the fundamental purpose of the sanctioning process not being to punish the Member but to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.

[66] Counsel referred to the leading case relied upon in the LSA Hearing Guide for sanctioning on misappropriation and integrity related offences as the *Bolton and the Law Society* case from the Court of Appeal in Britain, which has been cited .as recently as July 18, 2010 in the Commonwealth. Counsel suggested that, based on the evidence of Dr. Plowman, the Committee is being invited by Counsel for the Member to fashion a set of conditions through the LSA practice review process on reinstatement of the Member to protect the public and, if the public is protected, the purposeful approach [to sanctioning] is met and the Member does not need to be disbarred. However, Counsel for the LSA suggested that this disregards the second purpose of sanctioning, being to protect the reputation of the profession. Counsel submitted that for the purpose of protecting the reputation of the legal profession, it is critical that the LSA, as regulator, disbar the Member to ensure that the public is confident that they can continue to place their trust funds in a lawyer's trust account with the certainty that they will not be stolen. Counsel quoted the Bolton case as follows:

> *Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less affect on the exercise of this jurisdiction than on the ordinary run of sentences imposed on criminal cases. It often happens that a solicitor appearing before the tribunal can induce a wealth of glowing tributes from his professional brethren. He can often show for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say convincingly, that he has learned his lesson and will not offend again. On applying for restoration after*

> *striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered but none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case…The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.*

Counsel again submitted that in applying the purposeful approach to sanctioning, not to disbar the Member will not achieve the second object of the purposeful approach to denounce the misconduct of the Member to the public and would not have the consequential result that the public maintain confidence in the legal profession.

[67] Counsel submitted that the facts in this Hearing are particularly troubling, in that the Member engaged in a pattern of conduct over a period of approximately two years of misappropriation of client trust funds with progressing sophistication and the development of strategies to disguise the misappropriations. Counsel also pointed out that the misappropriations started within 14 days of the Member having access to a trust account in his practice.

[68] Counsel submitted that while the medical evidence might explain what the Member did from a medical perspective, the explanation of the acts being "random" is not helpful from a regulators perspective and in the context of the governability of lawyers. The evidence of Dr. Plowman equates the Member to an alcoholic where there is a chance of relapse and that the Member needs continued counselling. Dr. Plowman confirmed that the Member still has issues in his life (such as his matrimonial and custody issues) that could trigger a relapse. Also troubling is the fact that the Member disassociates when he steals. Counsel submitted that even if the evidence of Dr. Plowman and the Member is accepted, from the position of a regulator of the public interest, this shows a lack of integrity.

[69] Counsel pointed out that in the case of a suspension, the Member could apply under Rule 115 to be reinstated, which reinstatement process does not involve any assessment of whether or not the Member has rehabilitated his character in the community and re-established good character. Counsel submitted that the Committee is faced with evidence that would suggest that there continues to be a risk of lack of integrity and "character deficits" in the Member. Therefore, counsel submitted that the appropriate sanction in this case is to disbar the Member and hold him fully accountable for his conduct and that the Member would be entitled to apply for readmission after one year. The process of readmission is more comprehensive than the reinstatement process, whereby there is an inquiry and an investigation is done to determine whether or not the Member has rehabilitated his character in order to meet the second purpose of sanctioning which is to maintain the reputation of the profession.

[70] Counsel summarized the four cases provided to the Committee and Counsel for the Member. The first decision is *The Law Society of Alberta and Kiester*. In that case, the member admitted the facts, as did the Member in this Hearing. The member in that case did not have medical evidence although he did offer an explanation around financial and social pressures which made it difficult for him to cope in his practice and Counsel submitted that the comments made by her in this Hearing are very similar to those commencing at paragraph 13 of the *Kiester* decision. In that case, the member was very remorseful, had been cooperative [with the LSA], had showed insight and had been straightforward and respectful throughout the disciplinary process. Counsel submitted that the Member in this Hearing has not been remorseful, that his evidence indicates the contrary and that he continues to characterize the misconduct, in his experience, as being largely the fault of those around him. The explanation proffered by the Member in this Hearing is that his conduct was his wife's fault and "that he was doing it…in reaction to the subordination he experienced in his relationship with his wife…that Dr. Plowman said he was taking money to buy items to live up to the status projected on him in his relationship". Counsel submitted that what would be expected at a Hearing of this nature to show that the Member demonstrates remorse is to indicate "whatever caused me to do it, I'm ashamed that as a professional I did it, it's absolutely unacceptable, there is no excuse and I have to be accountable for my own conduct here". Counsel submitted that there is no indication from the Member of an assurance that he will not repeat the conduct in question. Counsel submitted that the Member was not cooperative in the course of the investigation unlike the member in the *Kiester* case. The Member did not cooperate with the investigators and, he failed to be candid with them and he did not volunteer "these other incidents". Counsel submitted that the language used by the Member in responding to questions is consistent with avoiding or evading responsibility or trying to deflect blame and that the Member has not fully come to terms with the unprofessional and unacceptable misconduct in which he found himself regardless of the external factors which led to that conduct.

[71] Counsel then referred to the *McGechie* decision, which involved a misappropriation without disbarment. There was also psychiatric evidence in that case. The misappropriations occurred as a result of draws taken by the member without issuing statements of account at a point where his practice was so out of control that he could not reasonably know whether or not he had earned the fees. The member was also under Canada Revenue Agency garnishees and the member acknowledged that his improper transfer of trust funds resulted in an overall trust shortage of approximately $16,000, which the member repaid at the time of that hearing. The hearing committee in that case found that the failure of the member to keep proper books of account was largely due to the serious depression suffered by the member and that medical expert evidence established that the mental element of misappropriation in that case was based on careless behaviour as opposed to intentional and deliberate behaviour. Counsel advised that in that case she argued recklessness as an inferred intent. The hearing committee in that case made a finding after hearing evidence from a medical professional that "The member's diligent seeking of treatment for his depression, clearly intended to effect recovery from his illness and not simply a charade to evoke sympathy from the committee". Counsel submitted that the *McGechie* case can be distinguished in that the conduct in that case did not involve elements of deceit as we have in this case with the

creation of false invoices. In the *McGechie* case the money was taken from a mixed trust account without being able to confirm whether or not the fees were earned as opposed to the deliberate and deceitful taking of money and hiding the misconduct as we see in this case.

[72] Counsel referred to the *Casuga* case where the Committee found that the aggravating factors were:

The deliberate and calculating nature of the conduct;
The long time over which the conduct was carried out;
The number of incidents involved;
The breach of loyalty and trust owed to clients whose money were…utilized;
The risk to his clients were exposed…

Counsel submitted that these were the only similar factors to the case in this Hearing. The failure to meet regulatory accounting requirements and continuation of conduct under audit are not present. In that case, the mitigating factors were that the funds were repaid, there was no prior record, the member's expression of remorse and the existence of family and community support. Notwithstanding these mitigating factors, the member in that case was disbarred.

[73] The final case referred to by Counsel for the LSA was the *Sondermann* case where the member was found guilty of misappropriation and was suspended. In that case there was a single act of misappropriation and counsel submitted that the case is completely distinguishable from the facts of the conduct before this Hearing. Counsel pointed out that one of the members of the hearing committee in that case dissented from the majority decision and stated:

> However, none of this…[none of the mitigating factors] … out weighs the harm to the reputation of the legal profession should the member's theft from his client not attract the Societies most severe sanction of disbarment.

The dissenting member of the Hearing Committee emphasized a purposeful approach to his descent.

[74] Counsel for the LSA advised that this concluded her submissions and asked if the Committee had any questions. There being no questions from the Committee, the Chair invited Counsel for the Member to make his submissions on sanction.

Submissions of Counsel for The Member

[75] Counsel for the Member urged the panel to consider a lengthy suspension, perhaps a three year suspension, followed by strict monitoring by the Practice Review Committee, in order to allow the Member some type of practice again, albeit not in the private sector. Counsel referred to the initial comments of Counsel for the LSA in referring to the "purposeful approach" and quoted the following passage from the *Bolton* decision:

> *It is important that there should be full understanding for the reasons why the tribunal makes orders which might otherwise seem harsh…in most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards.*

Counsel submitted that given the age of the Member, that the Member has no prior record with the LSA, that the Member admitted his indiscretion in the three citations and that the Member will not practice in a law firm but in a "in-house" or government position, a lengthy suspension coupled with ongoing counselling could address the concern of the Member repeating the offence as referred to in the above quote. Counsel submitted that hopefully by then, the matrimonial matters would be resolved and the Member would be dealing with custody issues relating to his daughter only, which would address that particular issue.

[76] Again quoting from the *Bolton* decision:

> *The second purpose is the most fundamental of all: To maintain the reputation of the solicitors' profession as one in which the member, of whatever standing, may be trusted to the ends of the earth.*

Counsel advised that he initially thought this was a case for disbarment, but was convinced by the evidence of Dr. Plowman and the circumstances of the case that a suspension is more appropriate. Counsel submitted that the admission of guilt by the Member on the three citations is an indication of remorse and that the Member's explanation for his conduct is not an attempt to blame others, but to explain how these factors related to manifestation of the medical issues of the Member. Counsel reminded the Committee that the Member has been suspended since June 22nd of 2007 and that if the Member is suspended for an additional three years, this will be approximately 5½ years of suspension and that being under the direction of the Practice Review Committee would significantly restrict the ability of the Member to practice. Counsel referred to the submissions of Counsel for the LSA that the cases cited by her are distinguishable and quoted the following paragraph from the *McGechie* decision:

> There is no 'rule' that misappropriation of trust funds must result in disbarment. Each…must be looked at on its own merits and its sanction must be individually crafted to suit behaviour being sanctioned. Factors pointing to the appropriateness of disbarment in this case are: The taking of trust funds in a dishonest manner…

In referring to the number of misappropriations committed by the Member, Counsel referred to "the deliberate breach of a court order…" referred to in the *McGechie* decision, which factor is not present in the conduct subject to this Hearing. Counsel submitted that the issue of the lack of cooperation by the Member with the LSA is less

serious. Counsel submitted that the Member did not offer any additional information to the investigator during his interview, as the Member chose to wait until matters came "to the surface following the audit".

[77] Counsel referred to the Member making restitution and referred to the quantum of the actual misappropriations with reference to the transfers of client trust funds from one client trust account to another. Although Counsel did not see this as a positive factor, he submitted that it makes it "perhaps less egregious than what may appear on the surface". Counsel submitted that although the facts in the *McGechie* case were different, there is a psychiatric diagnosis by Dr. Plowman in this case and quoted the following passage from the *McGechie* decision:

> *The fact that the mental element of misappropriation in this case was based on careless behaviour, as opposed to intentional and deliberate behaviour.*

Counsel submitted that the conduct of the Member at issue in this Hearing is part of the psychiatric diagnosis of Dr. Plowman and quoted the following passage from the *McGechie* decision:

> *The member's diligent seeking of treatment for his depression, clearly intended to affect recovery from his illness and not simply a charade to evoke sympathy from the committee.*

Counsel submitted that similar circumstances apply in this case and that the treatment sought by the Member from Dr. Plowman over an extended period of time was not "an attempt or a charade to put before this Committee".

[78] Counsel submitted that the concern in maintaining public confidence and integrity of the profession is real and can be dealt with in terms of a rehabilitative aspect by suspension of the Member and monitoring by the Practice Review Committee. With reference to the submissions of Counsel for the LSA regarding a character analysis and character investigation being required on application for readmission after disbarment, Counsel submitted that strict conditions for practice review could have an equal affect after a three year suspension, during which the Member could seek counselling, resolve his personal issues and obtain reports from Dr. Plowman to assure the LSA that the Member is "even better off now than he was during this period of time that this occurred". Counsel acknowledged the final two cases referred to by Counsel for the LSA and that the misappropriation of trust funds in this case was significant, but that in the circumstances of this case a suspension would achieve the same result as disbarment.

[79] The Chair invited questions from the Committee and there were no questions.

[80] Counsel for the Member referred to the submissions of Counsel for the LSA regarding the time when the Member first misappropriated trust funds and submitted that the Member could have requisitioned trust funds during his association with the Acadia Law Office and that the conduct in question occurred during the "thrust of this projective

identification problem, this Axis I and Axis II". Counsel stressed the fact that the diagnosis of Dr. Plowman is significant in terms of the Member being assessed by "a well-established, seasoned and well-known practitioner in Calgary who has been practising psychiatry here since 1979". Counsel again stressed that the remorse of the Member is significant in terms of the pleas of guilty.

[81] The Chair again invited questions from the Committee and there were none.

ANALYSIS AND DECISION AS TO SANCTION

[82] The Committee carefully considered the Statement of Facts, the evidence and the submissions of Counsel for the LSA and Counsel for the Member. The Committee noted the preface to the Alberta Code of Professional Conduct, which reads as follows:

> *Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach.*

Paragraph 67 of the Hearing Guide quotes Lawyers & Ethics: Professional Responsibility and Discipline By Gavin McKenzie as follows:

> *The requirement that lawyers must be of good character finds expression also in what is in most jurisdictions not coincidentally the first rule of professional conduct: lawyers must discharge with integrity all duties owed to clients, the court, the public and other members of the profession. 'Integrity', the first commentary to this rule says, 'is the fundamental quality of any person who seeks to practice as a member of the legal profession'.*
>
> *Lawyers who by their conduct have proven to be lacking in integrity are likely to lose their right to practice…*

[83] Although the Committee accepted the psychiatric/medical evidence of Dr. Plowman that the Member was in a "dissociative" or subconscious state when he engaged in the conduct at issue in this Hearing, the Committee was of the opinion that this still shows a lack of integrity and basic honesty on the part of the Member which does not equate to good character. The Member stole money from client trust funds over an extended period of time through a calculated scheme including transferring funds from one client trust account to another and creation of false invoices (a supply of which were created by the Member for future use). The Member was not candid with the LSA Investigator with respect to the transgressions that had occurred prior to the investigation and his interview with the Investigator. Based on the evidence, the Committee was not convinced that the Member has been cured of his underlying psychological conditions and there is no certainty that the Member would not relapse and engage in similar conduct if he were to enter a new co-dependent relationship.

[84] The suggestions of Counsel for the Member that a referral of the Member to the Practice Review Committee and the imposition of conditions on the practice of the Member were not persuasive on the Committee. Even if the Committee were convinced that the Member has been cured, the Practice Review Committee would not be able to help the Member with his psychological problems or his lack of basic honesty and integrity and there have been no issues raised as to the competence of the Member to practice law. Dr. Plowman clearly advised that the Member requires further counselling and treatment. The Committee was not convinced that restricting the Member to practice in the corporate or public sector would necessarily safeguard the public, as there are opportunities to misappropriate funds in that setting, just as there are in private practice.

[85] The Committee took particular note of the primary purpose of sanction being to protect the public and to protect the reputation of the profession and the following discussion from the *Bolton* decision relating to factors that may mitigate against disbarment in a particular case:

> *Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment [referring to more of a criminal context] have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All of these matters are relevant and should be considered. But none of them touches on the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.*

The Committee was of the opinion that the same principles may be applied to the psychiatric and medical evidence adduced in this case.

The Committee also took particular note of the following quote form the *Bolton* decision:

> *The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth.*

[86] The Committee took note of the significance between disbarment and a suspension on a "practical analysis". In the event of suspension, the Member has the right to apply for reinstatement and, pursuant to Rule 115, the character and integrity of the Member are assumed so the Member does not have to bring evidence to show he has rehabilitated his

character. The powers of the Reinstatement Committee are restricted to a referral to Practice Review or to the Credentials and Education Committee in respect of competency. In the case of disbarment, the onus is on the Member to show that he has rehabilitated his character. These factors drive disbarment in cases such as the one being considered because the basic misconduct at issue brings into question the character, honesty and integrity of the Member. The "incapacitation of the Member" through disbarment would be a neutral factor in this case, given that the Member is currently suspended.

[87] In applying the "purposeful approach" as referred to in the Hearing Guide and considering the issues of lack of integrity and character displayed by the Member in his misconduct forming the subject of this Hearing, the Committee was of the view that it had no option other than to disbar the Member. The Committee also took note of the general factors referred to in paragraph 60 of the Hearing Guide and, in particular those referred to in subparagraphs 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 members, b) (specific deterrence of the member in further misconduct and e) (denunciation of the conduct). Of particular significance in the decision of the Committee is the level of intent involved in the misconduct, the number of incidents involved and the length of time over which the misconduct occurred.

[88] The Committee ordered a referral of this matter to the Attorney General and ordered that the Member pay actual costs of the Hearing prior to September 30, 2010. The Exhibits entered in the Hearing shall be available for public inspection with the proviso that any information that may identify a client is to be redacted.

[89] The Hearing was terminated.

DATED this 29th day of July, 2010.

Dale Spackman, QC (Chair)

Sarah King-D'Souza, QC (Member)

Larry Ohlhauser, MD (Member)