

LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

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

IN THE MATTER OF a Hearing regarding the conduct of
Calum J. Bruce, a Member of the Law Society of Alberta

INTRODUCTION

- [1] On September 9, 2008, 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 Calum J. Bruce, a Member of the LSA. The Committee was comprised of Dale Spackman, QC, Chair, Ron Everard, QC, Member and Carsten Jensen, QC, Member. The LSA was represented by James K. Conley. The Member and his Counsel, Timothy Meagher, were present at the Hearing. Also present at the Hearing during their testimony were the Complaint, A.S. and her father, W.M..

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

- [2] The Chair introduced the Committee and asked Counsel for the Member and Counsel for the Law Society 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 LPA, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established jurisdiction of the Committee.
- [4] 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 no one was to be served with a Private Hearing Application Notice was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing and, accordingly, the Chair directed that the Hearing be held in public.
- [5] Exhibits 6 through 26 contained in the Exhibit Book provided to the Committee and the parties were entered into evidence in the Hearing with the consent of the Committee and Counsel for the LSA and the Member.

CITATIONS

- [6] The Member faced the following Citation:

IT IS ALLEGED that you did fail to render statements of account to the complainant in a timely manner, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

- [7] In the result, on the basis of the evidence entered at the Hearing and for the reasons set out below, the Committee found that the Citation was not proved and that the Member was not guilty of conduct deserving of sanction in respect of the Citation.

OPENING STATEMENT OF COUNSEL FOR THE LSA

- [8] Counsel for the LSA advised the Committee that this Hearing was directed by an Appeal Panel of the LSA in its decision dated June 28, 2007.
- [9] The Member was retained by the Complainant, A.S., to represent her in respect of a family law (custody/guardian) matter in March of 2005. The Complainant had provided the Member with a \$5,000.00 fee retainer. The Complainant alleged that she only saw invoices and cover letters for the services performed by the Member on her behalf after the Member ceased to act and when the Complainant received her file from the Member. Counsel for the LSA indicated that the father of the Complainant had attended the court hearing held on May 30, 2005 and that he would testify that he also did not see an invoice from the Member at that time.

EVIDENCE

Evidence of LSA

- [10] Counsel for the LSA called the Complainant as a witness. The Complainant was administered the oath by the Chair.

Examination of Complainant by Counsel for the LSA

- [11] The Complainant testified that she had first retained the Member in March 2005 in respect of a custody/guardianship matter. She indicated that the Member ceased to act for her in respect of the matter on June 14, 2005, at which time she requested return of her client file. The Complainant picked up her client file on June 22, 2005. The Complainant testified that she had provided the Member with a retainer of \$5,000. This is confirmed by Exhibit 26, being the client trust ledger of the Member, which indicated receipt of the \$5,000 retainer by the Member on March 31, 2005.
- [12] The Complainant testified that communication with the Member was either by telephone or e-mail. The Complainant confirmed her e-mail address as [email address removed]. She indicated that she had not been provided by the Member with a retainer letter. The Complainant testified that she never received invoices or any cover letters for invoices and first saw the Member's invoices for services rendered on June 22, 2005 when she picked up her client file from the Member's office. She requested details of the accounts by e-mail. One example of this is contained in Exhibit 6, Tab 3. Counsel for the LSA referred to the handwritten notes on the Exhibit which indicate that her inquiries were

“not answered” and “not received”. The Complainant indicated that these handwritten endorsements had been placed on the e-mail when a copy of it was sent to her by the LSA. The Complainant testified that notwithstanding her inquiries, she never received a response from the Member respecting his accounts. A further e-mail was sent on May 26 (Exhibit 6, Tab 7) where the Complainant requested an “expense report so I may know how much of the retainer is left”. The handwritten notation of the Complainant on the e-mail indicates “not received, second request” and were again endorsed by the Complainant on the email after she received a copy of it from the LSA. The Complainant testified that in reviewing the Member’s file, she noted there were three cover sheets regarding legal expenses, which were undated. The cover letters in the file in respect of the Member’s accounts indicated that they were sent by e-mail. The Complainant testified that this was the first she knew of this.

- [13] Counsel for the LSA referred the Complainant to Exhibit 12 and the attachments thereto, being a letter dated February 10, 2006 from the Member to the LSA Counsel inquired of the Complainant as to whether she was familiar with this letter and, in particular, the responses provided by the Member to the LSA respecting communication of his accounts to the Complainant, to which the Complainant responded in the affirmative. The Complainant referred to her letter of March 26, 2007 to the LSA providing further representations in respect of her appeal of the dismissal of her complaints (other than the one forming the subject of this Hearing) by the Conduct Panel. Reference was made to Exhibit 19, Tab 2 and Tab 3, being the cover letters of the Member dated March 25, 2005 and April 23, 2005 forwarding his accounts to the Complainant which were included with the letter from the Complainant. The Complainant testified that she only became aware of these letters upon her review of her client file after the Member ceased to act for her. When questioned regarding the inconsistency in the two letters from the Member contained in Exhibit 19, Tab 1 and Tab 2, the first letter (referring to statements of account dated March 22, 2005 and April 20, 2005) was contained in the Member’s file and that the second letter (referring only to an account dated March 22, 2005) was only received by her when the LSA sent her a copy of the Member’s response. Likewise, the letter contained in Exhibit 19, Tab 3 dated April 23, 2005 referring to statement of account dated April 20, 2005 was received by the Complainant from the LSA with the Member’s response. Counsel asked the Complainant as to the identity of [name of company removed], on whose letterhead certain correspondence was forwarded to the LSA in respect of the complaints of the Complainant. The Complainant indicated that this is her husband’s company. Counsel referred the Complainant to Exhibit 25, being a letter from the Member to the LSA with the Member’s comments with respect to the decision of the Appeal Panel. In particular, counsel referred the Complainant to paragraph 6 of that letter with respect to statements of account which the Member indicated were rendered to the Complainant. This paragraph reads as follows:

6. *With respect to the Statements of Account:*

- a) *I sent the March 22, 2005 Statement of Account to A.S. via e-mail on March 25, 2005. The March 22, 2005 Statement of Account confirmed my hourly rate was \$250/hour.*

- b) *I sent the April 20, 2005 Statement of Account to A.S. via e-mail April 23, 2005.*
- c) *I gave A.S. copies of the Statements of Account for March 22, 2005 and April 20, 2005, on May 30, 2005.*
- d) *The Statements of Account confirmed my hourly rate of \$250/hour and reflected the time that was spent on various matters.*

[14] The Complainant testified that she never received the accounts referred to. She testified that May 30 was a trial date and at that time there was no discussion with the Member about expenses or documents provided regarding expenses. She testified that her father was with her in court that day and also attended all other court proceedings and that no statements of account were received at any of such proceedings. The Complainant testified that she first learned of the Member's hourly rate when she received her client file from the Member. Counsel for the LSA referred the Complainant to Exhibit 12, Tabs 1 and 2, being letters from the Member to the Complainant dated June 15, 2005 (enclosing account dated June 15, 2005) and May 30, 2005 (enclosing account dated May 30, 2005). The Complainant testified that she had not received either of these letters by e-mail. The Complainant testified that she retained all e-mails from the Member on her computer and in hard copy and had not deleted any of such e-mails. She testified that nothing had been received by e-mail, that her husband works in the computer area and that everything on their computer is backed up. The Complainant further testified that she had not had any verbal communications with the Member regarding accounts.

Cross Examination of Complainant by Counsel for the Member

[15] The Complainant testifies that the case for which she retained the Member involved the custody and guardianship of the two infant daughters (aged 5 years and 11 years) of her sister. The Complainant had custody and guardianship of the children, which her sister applied to terminate. Her sister and her partner were in British Columbia and the children had been removed from their custody by B.C. Children's Services. The Complainant testified that she has three children of her own and that this was "a very stressful time". She had custody of the children since August, 2003. She was concerned about the ability of her sister and her partner to properly care for the children. The Complainant testified that her sister applied for visitation rights pending the custody hearing. The Complainant was referred to Exhibit 6, Tab 2, being her email of March 3, 2005 to the Member, which contained the initial instructions of the Complainant to the Member and refers to the March 22, 2005 court date regarding visitation rights and the March 30, 2005 court date regarding guardianship. The Complainant confirmed that she provided the Member with a \$5,000 retainer. The Complainant testified that she doubted that her sister and her partner were "really taking steps to reform" and indicated that she continually tried, through the Member to obtain the records of the B.C. Child Welfare Department. The Court ordered visitation rights in favour of her sister, but her sister did not follow through initially, which was reviewed by the Court. The matter proceeded to a JDR on the main issue of custody and the Judge requested evidence of treatment being obtained by her sister and her partner. The Complainant again testified that this was a very stressful time

for her. Counsel referred the Complainant to Tab 3 of Exhibit 6 being an e-mail of May 17, 2005 from the Complainant to the Member, asking the Member to contact counsel for her sister and her partner to advise of their lack of cooperation and that of the B.C. Child Services Ministry. In that e-mail, the Complainant expressed concern about attending at the May 30th Court hearing without the documentation from the B.C. Child Services Ministry and again requested a breakdown of the expenses. Her hand written notes besides these requests indicate “not answered” and “not received”, respectively. Counsel referred the Complainant to Tab 7 of Exhibit 6, being an e-mail dated May 26, 2005 from the Complainant to the Member. In that e-mail, the Complainant again requested an expense report from the Member and her handwritten notes indicated “not received, second request”. The e-mail was sent on the Thursday prior to the May 30, 2005 trial date. The Complainant testified that the application was ultimately dismissed in August 2005, at which time she represented herself and that her and her husband received custody of the children. The Complainant again testified that she first received the invoices of the Member on June 20, 2005, on obtaining her file from the Member. Mr. Jensen inquired of the Complainant as to the discussions which were held between her and the Member regarding accounts at their first meeting. The Complainant testified that the retainer of the Member was not discussed. The Complainant further testified that at the time the retainer was provided, there was no discussion with the Member about use of the retainer or his hourly rate.

[16] There being no further questions, the witness was excused.

[17] Counsel for the LSA called W.M. as a witness. The Witness was administered the oath by the Chair.

Examination of W.M. by Counsel for LSA

[18] The Witness testified that he was the father of the Complainant and familiar with the proceedings at issue. He testified that he attended all Court proceedings with the Complainant and was familiar with the Member. The Witness testified that the subject of the accounts of the Member had been raised by the Complainant verbally with the Member and that the Member indicated that the accounts would be forthcoming. As far as he was aware, no accounts were provided at any of the Court proceedings by the Member to the Complainant.

[19] The Witness testified that he had been provided with correspondence from a social worker regarding drug tests administered to the Complainant’s sister and her partner. He testified that he personally reviewed all materials provided to the Complainant in connection with the proceedings and only saw the invoices of the Member on June 22, 2005 when she received the Member’s file.

Cross Examination of W.M. by Counsel for the Member

[20] The Witness testified that he attended all Court hearings in respect of the matters at issue, which he recalled number eight or nine. However, he was not in possession of his

calendar to confirm this. The Witness recalled at least two discussions with the Member regarding his accounts at the Court proceedings. The Witness was excused.

Evidence of Member

- [21] Counsel for the Member called the Member as a witness. The Witness was administered the oath by the Chair.
- [22] The Member testified that he was called to the Alberta bar in May of 1995 and articulated for nine months with the Scott Law Firm and the remaining three months of his articles with K. Fraser McConnell. The Member provided a history of his subsequent employment. The Member testified that at the time of the matters in issue, his practice consisted of approximately 2/3rd family and estate litigation matters and 1/3rd corporate commercial matters. Since then, his practice has focused on oil and gas and corporate and estate litigation.
- [23] The Member testified that he advised the Complainant at their initial meeting that he required a \$5,000 retainer that would be held in trust, that he advised the Complainant of his hourly rate and that she would be responsible for his fees, disbursements and out of pocket expenses. He confirmed that he was retained to represent the Complainant in respect of the custody dispute involving her sister's children. The Member was referred to Exhibit 8, being his letter of September 30, 2005 to the LSA responding to the complaint. The Member referred to the discussion on page 3 of that letter and indicated that he advised the Complainant that if the natural parents of the children were going through drug rehabilitation treatment and could demonstrate this to the Court that she would have to expect that they would obtain custody of their children. The Member testified that the Complainant showed resistance to this suggestion. He referred to page 4 of the letter where he summarized for the Complainant the Order of Judge Tousignant made on March 22, 2005 which provided that the mother of the children would be permitted interim access to the children and scheduling a Judicial Dispute Resolution hearing for April 20, 2005 at which the "Treatment Records for Recovery and Current Program" for the children's parents would be produced. The Member testified that he advised the Complainant that the parents were resisting the production of the Treatment Records for Recovery and Current Program without a Court Order. The Member referred to the discussion on page 5 of his letter and the fact that he rendered his account of March 22, 2005 to cover the services rendered to date, which the Member testified he e-mailed to the Complainant confirming his hourly rate of \$250 per hour. He also summarized for the Complainant the steps he had been taking to obtain information from the B.C. Ministry of Children and Family Development regarding the rehabilitation being undertaken by the parents of the children. The Member referred to the e-mails received from the Complainant on April 1, 2005 and April 12, 2005 advising that the "Court Ordered Access was a disaster". The Member testified that it was his practice to review his files monthly for billing depending on the services performed. He testified that he had received no instructions from the Complainant to "withhold" any accounts. The Member testified that his practice at the time was that he would personally send accounts by e-mail and ask his bookkeeper to pay the account out of any monies held in trust as a retainer. The Member testified that he had received no indication on his e-mail system

that the e-mails forwarding the accounts had not been received by the Complainant. The Member was referred to Exhibit 8, page 6, where the Member refers to the JDR hearing held on April 20, 2005 before Judge Carruthers. The Member confirmed his advice on page 7 of the letter that he sent the April 20, 2005 statement of account (Exhibit 12, Tab 7) on April 23, 2007. The Witness was referred to Exhibit 12, Tab 3, being the cover letter for the account and the Member testified that it is his practice to enter a draft account for review by his bookkeeper. The Member further testified that he made numerous attempts through counsel to get the treatment records of the parents of the children. The Member was referred to Exhibit 6, Tab 3, being the e-mail from the Complainant requesting advice regarding his expenses and retainer. The Member testified that he did not respond because he understood he had already sent the March and April accounts to the Complainant. The Member was referred to Exhibit 6, Tab 7 containing a similar request from the Complainant regarding his accounts. Again, the Member testified that he did not respond because he understood she had the accounts showing this information. The Member was referred to Exhibit 12, Tab 6, being the May 30th account and Exhibit 12, Tab 2 being the cover letter for this account. The Member testified that he had written off certain fees which had been earned in this matter due to insufficient funds. The Member testified that the only discussion he had with the Complainant in the presence of her father was his request for an additional \$5,000 retainer if the matter were to go to trial and he was to act for the Complainant, which discussions took place on June 14, 2005. The Member testified that he asked for an adjournment of the May 30, 2005 hearing date due to the fact that he had not received the treatment records of the parents and that the matter was adjourned to June 14. The Member was referred to Exhibit 19, Tab 2 and the conflicting cover letters respecting his accounts. The Member testified that he did not know where the first letter came from and had not reviewed the file prior to its being released to the client. He indicated that the first letter should not be on the file and was never sent. The Member was referred to Exhibit 25, being his letter of August 17, 2007 to the LSA in response to the appeal by the Complainant and, in particular, his statement in Section 6(c) that "I gave A.S. copies of the statements of account for March 22, 2005 and April 20, 2005 on May 30, 2005." With reference to the testimony of the Complainant that she did not receive these accounts, the Member testified that he did provide the March and April accounts to the Complainant at the May 30 Court hearing.

Cross Examination of Member by Counsel for the LSA

[24] The Member testified that at the time in question he shared a junior assistant on a part time basis and used his computer and e-mail extensively in his practice. The Member testified that he did his own word processing including the creation of many of his own letters and did not use a dictaphone. To the best of the Member's recollection, he generated all letters to the Complainant on the file in question and that all communications were sent by e-mail and not by post. He did not create a separate file for letters and other communications to the Complainant initially but did ultimately create a file, but did not recall when. The Member testified that it was his practice to keep hard copies of all correspondence on client files which were sent by post, but not necessarily all e-mails. When questioned as to his methodology as to what copies were kept on his file, the Member's answer was confusing. The Member testified that there was no firm

policy on procedures in this regard. He testified that he creates draft invoices and cover letters for review by his bookkeeper but did not always send cover letters with accounts. The Member testified that his cover letters and invoices would be attached to an e-mail sent to the client and that if he received an error message indicating that the e-mail was not received he would first try to send again and, if not successful, would contact the client. The Member testified that there were no hard copies of cover letters or invoices on this file to the best of his recollection. The Member ceased to act for the Complainant at the Court date on June 14, 2005. The Member testified that the father of the Complainant advised him that he would “fire him if he was his lawyer” and that since the father would be a witness at trial, he felt that he could not continue to act and that it would be in the best interest of the Complainant to obtain alternate counsel. The Member testified that he gave his actual file to the Complainant and made copies for his records. The Member testified that he removed certain memos regarding telephone conversations with opposing counsel and the Complainant’s father from the file (this was inconsistent with his previous testimony that he did not review the file before sending it to the Complainant). The Member testified that his instructions to his assistant were to “clean up the file, make a copy and send the original to the client”. The Member testified that since commencing employment with the Fleming firm he obtained his file from the Moore firm and gave it to his counsel and that he had reviewed the file prior to this Hearing. The Member was referred to Exhibit 12, being his letter of February 10, 2006 to the LSA responding to the complaint of the Complainant in her correspondence of November 3, 2005. The Member testified that he is familiar with that letter and its enclosures and that he personally created and typed the letter and assembled the enclosures. He testified that the enclosures came from “the server and [his] computer” and not the file. When questioned by counsel as whether the “server” would have copies of e-mails, the Member testified that he is aware the file does not contain the letters at Exhibit 12, Tabs 3 and 4, but does contain the letters the client received from the LSA at Exhibit 19, Tab 2. He testified that he was not aware of why there are two different letters dated March 25, 2005. The Member testified that he does not recollect if he sent the March and April cover letters, but does recollect sending the accounts. The Member testified that he chose not to respond to the client’s requests for account information as he was of the understanding that he had forwarded the March and April accounts. The Member did not recall where he got the invoices allegedly given to the client on May 30 but felt they “must have been pulled off [his] computer”. He testified that the accounts were given to the Complainant at the same time as the treatment notes for the parents and that he did not discuss the accounts with the Complainant at that time. The Member testified that he probably gave the accounts to the Complainant on May 30th in response to her e-mails. On receipt of the May 2005 requests from the Complainant for account information, the Member did not address his mind to the fact that she may not have received his e-mails nor did he consider this when he sent the May 30th account. The Member was referred to Exhibit 21, being the letter from the Member to the LSA of May 22, 2007 responding to correspondence from the LSA dated April 11, 2007 for further information regarding his accounts. The Member reiterated the advise contained in that letter. He reiterated that certain of the correspondence referred to by the Complainant was not available on the server of his new firm due to it having been upgraded in August of 2006 and further reiterated his testimony that statements of account had been sent to

the Complainant by e-mail and provided to her at the Court hearings. Counsel had no further questions.

[25] Mr. Jensen inquired of the Member as to where copies of the e-mails to the Complainant forwarding accounts would be. The Member testified that these were never kept due to there being no set procedure to print e-mails and attachments. The Member testified that when he inquired of his new firm if this data was available he was told that the network had been upgraded and the data lost. On questioning by Mr. Everard with reference to Exhibit 26, being the Member's client ledger, the Member testified that he did not know what accounting system was used but that his practice was to prepare draft accounts using his handwritten notes from the file to be reviewed by his bookkeeper. On questioning by the Chair, the Member testified that certain clients requested accounts by e-mail to save costs and reiterated that there was no set policy in this regard at his firm. The Member testified that his current practice is now to send all accounts by mail, e-mail and, in some situations, by facsimile. At the time of the matter in question, the Member testified that most communication was by e-mail and that he did not necessarily print the e-mails for the file. The Member testified that his current practice is to immediately print any e-mails received and sent and to ensure that his files are properly organized. Counsel for the LSA asked the Member if he was aware of the rules regarding transfer of trust funds to pay accounts. The Member testified that he was not privy to the accounting policies of the firm at the time and was not aware of this rule. He testified that the partners determined when accounts would be rendered. The witness was dismissed.

CLOSING ARGUMENTS

LSA Counsel

[26] Counsel referred the Committee to Rule 124(2)(b) of the Rules, which reads as follows:

Money may be withdrawn from a trust account of a law firm pursuant to subrule 1(b), if not held for a designated purpose, only in accordance with the following conditions:

...(b) money may be paid from the trust account to the law firm to pay for the law firm's fees for services if the law firm has prepared a billing for the services, the billing relates to services actually provided and is not based on an estimate of the services, and the firm either delivers the billing to the client before the withdrawal or forwards the billing to the client concurrently with the withdrawal.

Counsel submitted that the Member provided copies of his accounts to the LSA, but no evidence that the accounts were sent. Counsel submitted that this information should have been available to the Member. Counsel referred to the May 17 and 26, 2005 requests from the Complainant for information regarding accounts and the testimony of the Member that he did not respond as he anticipated rendering further accounts on May 30. Counsel submitted that the Member should have responded to these requests which would have been a simple matter and brings into question when the letters and accounts were actually prepared. Counsel reiterated that both the

Complainant and her father say they did not receive the accounts on May 30th which again brings into question whether the accounts were actually prepared at that date. Counsel questioned why the March 2005 letter refers to an April account and that the letters that were not in the Member's file suggest that the accounts did not exist at that time. Counsel reiterated that the inquiries of the Complainant justified a response and submitted that the citation was made out.

Counsel for the Member

[27] Counsel submitted that the truthfulness of his client is being questioned in this matter and that the Member, in his mind, felt that he had billed the file at the appropriate times and sent the bills to the Complainant. The trust reconciliation of the Member supports that the accounts were rendered and paid. Counsel reiterated the excuse of this client for not responding to the May 17 and 20, 2005 requests for information from the Complainant was that the Member thought he had sent the accounts. Counsel submitted that this case demonstrates a problem with e-mail and communication by that means and is not a matter for sanction. Counsel further submitted that the matters in question show poor business practices of the Member at the time and do not go to his ethics. As to the inconsistency in the account letters, Counsel submitted that this was just a problem with draft documentation.

DECISION AS TO CITATION

[28] The Committee accepts the evidence of the Member and his honest belief that he sent his accounts to the Complainant. The Committee also accepts the evidence of the Complainant that she did not receive the accounts of the Member. However, the Committee was of the view that the fact that the Complainant did not receive the accounts was due to inadvertence and faulty business practices on the part of the Member and that this is not conduct deserving of sanction. The Committee further observed that the business practises of the Member in rendering and communicating accounts to clients has been improved since this matter occurred. In the result, the citation was dismissed.

DATED this 3rd day of March, 2009.

Dale Spackman, QC (Chair)

Ron Everard, QC (Member)

Carsten Jensen, QC (Member)