THE LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF THE *Legal Profession Act*,
and in the matter of a Hearing regarding the conduct
of Timothy P. Chick, a Member of The Law Society of Alberta

Jurisdiction and Preliminary Matters

1. The Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of Timothy P. Chick on April 2nd and 3rd, 2008. The Committee was comprised of Vivian Stevenson, Q.C., chair, John Higgerty Q.C. and Dr. Larry Ohlhauser. The LSA was represented by Lindsay MacDonald Q.C.. The Member was present throughout the hearing and was represented by Pat Peacock Q.C..

2. Exhibits one through four, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, established the jurisdiction of the Committee.

3. There was no objection by counsel for the Member or counsel for the LSA regarding the membership of the Committee.

4. The Certificate of Exercise of Discretion was entered as exhibit five. Counsel for the LSA advised that no request was received for a private hearing. The hearing was held in public.

Citations

5. The Member faced two citations as follows:

    1. IT IS ALLEGED that you continued settlement negotiations after your retainer had been terminated, and thereby breached the *Code of Professional Conduct,* and that such conduct is conduct deserving of sanction.

    2. IT IS ALLEGED that you failed to serve the Statement of Claim in time, did not tell the client of this error, and consented to a discontinuance of action without advising the client and without advising the client that she should

get independent legal advice with respect to the error, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Summary of Result

6. The Hearing Committee found the Member guilty on both Citations and directed a reprimand, a fine of $4,000 and that the Member pay the actual costs of the Hearing.

Evidence

7. There were two volumes of Exhibits numbered 6 through 61 that were marked and entered at the outset of the Hearing. During the Hearing two additional exhibits were entered.

8. Counsel for the Law Society called 4 witnesses: the Member's clients WE and TW, and two lawyers (Ms. Steblyk and Mr. Reh) who had worked with the Member during the relevant period and afterwards. The Member testified on his own behalf.

Summary of Facts and Evidence

9. WE and TW retained the Member in November of 1999 to represent them and their two children with respect to a motor vehicle accident that had occurred on May 28th, 1998.

10. The Member issued a statement of claim on May 26th, 2000 on behalf of WE, TW and their children. The statement of claim named three Defendants: the driver of the other vehicle (the "Driver"), "X Ltd." and a leasing company ("G…").

11. WE testified that she understood that X Ltd. had been included in the action because of the fact that her vehicle's airbag did not deploy in the accident. She believed that the failure of the airbag to deploy might have had an impact on the injuries she sustained in the accident.

12. The Member confirmed that the airbag issue had been raised with him by the Plaintiff. He testified that he had included X Ltd. in the Statement of Claim out of an abundance of caution. Since WE's vehicle had not been involved in a head-on collision, but had collided at an angle, the Member felt it was unclear whether the airbag should have deployed in any event. Furthermore, the vehicle had been written off and destroyed before the Member was retained and there had been no professional inspection of the vehicle so in the Member's view there was a significant evidentiary problem in trying to establish that the airbag had been defective.

13. In September of 2000 the Member instructed an associate of the firm, Ms. Steblyk (then Ms. Kolibar) to serve the Statement of Claim on the Driver. Service was effected on the Driver in the Fall of 2000. It was unclear from the evidence if there was discussion between Ms. Steblyk and the Member at that time about serving the other Defendants. However, the other Defendants were not served.

14. Some 8 months later, on June 10th, 2001, counsel for the Driver contacted Ms. Steblyk by email requesting a copy of the affidavit of service on the Driver and asking whether the other Defendants had been served.

15. The time records entered in evidence show that two days after this email exchange Ms. Steblyk conducted research with respect to the extension of time for serving a Statement of Claim. She did not recall receiving instructions from the Member to conduct the research, but says that at that stage in her career she would not have conducted that type of research except at the request of the senior lawyer on the file, being the Member.

16. According to Ms. Steblyk's notes, her research divulged that the action was dead as against the Defendants other than the Driver because the Statement of Claim had not been served within one year and had not been renewed within that time period as required by the Rules of Court.

17. Ms. Steblyk did not recall reporting on her findings to the Member, but she assumes that she did and the time records indicate a conversation between them the following day.

18. The Statement of Claim was served on X Ltd.'s registered office by letter dated June 14, 2001. On June 18th counsel for X Ltd. wrote acknowledging service of the Statement of Claim. On June 27th, 2001 counsel for X Ltd. wrote indicating that the Statement of Claim had been served out of time and indicating that he would recommend acceptance of a Consent Dismissal Order.

19. Counsel for X Ltd. followed up on July 30th, 2001. Ultimately the Member signed a Consent Dismissal Order and the Consent Dismissal Order was obtained and filed on September 18th, 2001.

20. The Member testified that he had a clear recollection of discussing the issue of the lack of service on X Ltd. with TW in the Fall before signing the Consent Dismissal Order. The Member said that he called TW, explained the situation with X Ltd., advised that he had made a mistake and apologized. The Member says he told TW that the failure to serve did not materially affect the case because he thought there would be sufficient funds to cover any judgment. He testified that he advised TW that there was no option other than to sign the Consent Dismissal Order and that TW instructed him to sign the Order.

21. The time records do indicate that there was a telephone discussion between the Member and TW in September of 2000, but the time records do not indicate what that discussion was about.

22. In contrast to the Member's testimony TW testified that he had no recollection of a discussion with the Member about the Consent Dismissal Order in the September 2000. He denies that such a discussion had ever occurred.

23. There was also evidence called about a meeting involving the Member, TW and WE some time after the Fall of 2001 at which the issue of the service of the Statement of Claim on X Ltd. was discussed. The witnesses differed as to when

that meeting took place, whether there was any one else present besides the three of them, and as to precisely what was discussed at that time.

24. It was WE's evidence that at that meeting she asked the Member what the status of the action was with respect to X Ltd. and G…. She says that the Member told her that it was "redundant" for X Ltd. to be included because the Driver had been sued, and that it was up to the Driver's insurer to third party them if they wanted to. WE says that the Member advised her at that time that if the Driver's insurance fell short of any judgment she obtained, that recourse could be had to WE's own insurer under the SEF 44 endorsement to her automobile insurance policy.

25. TW recalled a brief discussion about X Ltd. and G… at a meeting with the Member, which he thought occurred in 2003. He says that he and WE asked where X Ltd. and G… were in the process because they hadn't seen or heard anything of them and that the Member said it was "redundant" to pursue them; that the liability was with the Insurer; and that it was up to the Insurer to third party the others; it was of no concern or consequence to them. TW believes that the Member referred to the fact that if the Driver's liability coverage was not sufficient that their insurer would pick up the shortfall. TW says that he accepted this explanation as it sounded logical.

26. The Member testified that there was a discussion involving him, WE and TW about X Ltd. and G… at a meeting on January 31st, 2001. His recollection was that there was a brief discussion about his failure to serve X Ltd., and that he advised WE that he did not feel this materially impacted the claim. He says that he told WE that she could see another lawyer, but that she said it was fine and that they could continue forward. He says the SEF 44 issue came up because it was the first time that he appreciated the potential magnitude of WE's claim for loss of income. He put the SEF 44 insurer on notice around this time.

27. On cross-examination, the Member acknowledged that he did not report the matter to ALIA in the Fall of 2000 and did not provide written advice to his clients

on the issue then or after the meeting at which service on X Ltd. and G… was discussed. Nor did his file contain any notes of a discussion with WE or TW on this issue. He said that he did not report the matter to ALIA because, after consulting with other members of the firm, he felt there was no need to report since there was no damage as a result of his error.

28. The Member was also confronted in his cross-examination with the memo that he had written to his own counsel after citations were directed, when the issue of failure to serve X Ltd. was front and center. Nowhere in that memo did the Member indicate that he specifically recalled having discussed the matter with TW during a phone call in the Fall of 2000 or having discussed the matter with WE and TW at a meeting in January of 2001. In his memo he does set out reasons why he believes TW and WE were aware of the situation, and also says that he believes that he would have discussed the issue with WE and/or TW. The vagueness of these assertions stands in stark contrast to his testimony at trial that he had a clear recollection of discussions on the issue with his clients.

29. WE denied any knowledge of the Consent Dismissal Order until after she had terminated the Member's retainer. She denied having had any discussion with the Member about the Order or the fact that the Statement of Claim had not been served on X Ltd. within the time required by the Rules of Court.

30. In support of this evidence is the fact that this particular complaint was not listed in WE's first detailed account of her various complaints about the Member, but was made only after WE had obtained and reviewed her file. Given the level of animosity that WE exhibited towards the Member, and the degree of detail she provided in her letters of complaint, it seemed unlikely that had WE known about this error in 2001 that she would not have included it in her initial complaint letter.

31. In December of 2004 WE attended a JDR with the Member before a Justice of the Court of Queen's Bench. TW also attended part of the JDR. During the course of the JDR, the presiding Justice indicated that he did not accept the basis of the loss of income claim being advanced on the Plaintiff's behalf and

suggested that recovery for claims for the type of soft tissue injury sustained by the Plaintiff should be restricted to a short time frame.

32. WE was unhappy with the JDR proceedings, and testified that her husband expressed both their displeasure to the Member at some point during the day.

33. Following the attendance at a JDR, an issue arose as to whether the offers advanced on behalf of the Driver had been inclusive of costs or not. WE felt that the Member had misled her in this regard and ultimately she decided to terminate the Member's retainer.

34. In her complaint to the Law Society and during the course of her testimony, WE advised that she was unhappy with a number of things that the Member had done in the course of the file that manifested themselves at the JDR. She had a long list of complaints, none of which are directly relevant to the citations, but which demonstrated a certain animosity on her part towards the Member, and a certain degree of meticulousness in her review of the matter. WE also testified that besides complaining to the Law Society, she had commenced a lawsuit against the Member, which had since been resolved.

35. On the evening of December 9th, 2004 WE sent a letter to the Member by fax and by email in which she indicated "Effective immediately, I advise you that I am unable to continue with you as my legal representative in this matter. I also suggest that under your circumstances you are no longer able to continue to act on my behalf."

36. In the last paragraph of the letter WE indicated that she was amenable to attempting to work out a fee settlement with the Member the following morning that would perhaps allow her to accept the Driver's offer of settlement and allow the Member to wash his hands of the matter immediately as well.

37. The following day, on December 10th in response to her letter, the Member sent WE an email at 9:52. That email confirmed that the Member had received WE's letter. The email went on to propose a waiver of the contingency fee and a

reduction of the outstanding time on the file, and to indicate what this would net WE in terms of the current settlement offer from the Driver.

38. The Member left his office before noon to attend his son's Christmas concert and was out of the office the rest of the day.

39. Also on December 10th, WE contacted counsel for the Driver and advised him that she had fired the Member.

40. At 1:06 the same day, counsel for the Driver spoke to the Member. According to the notes of counsel for the Driver, he advised the Member that until the Member filed a Notice of Ceasing to Act, he considered him to be the solicitor of record. The Member advised that he thought he might still be able to pull it together.

41. At 1:21 the Member spoke again to counsel for the Driver. According to the notes of counsel for the Driver, the Member advised him that he was "unofficially still on" and that WE wanted to resolve it, but wanted more money.

42. At 1:49 WE emailed the Member advising that his fee proposal was not acceptable and furthermore "that you appear to be carrying on as if you are still representing me, which you are not."

43. The Member had no further interaction with counsel for the Driver after that email.

44. The Member's initial written response to the Law Society regarding WE's written complaint that he had continued to negotiate on her behalf after he had been fired was as follows:

> I agree with (WE). In my effort to procure the best possible settlement offer, I continued my discussions with counsel for the Defendant for, I believe, approximately a day after my retainer was terminated. I did not see anything wrong in making one final effort to have the offer that the Defendant would place before (WE) to be as high as possible.

45. During the Hearing, the Member testified that when he received WE's letter of December 9th he understood that he was fired, but thought that if he could work

something out with WE on is fees, that she would still be agreeable to him assisting in concluding the settlement. He said that he had already called the Driver's counsel that morning before receiving WE's letter and had left a message. He said that all he was doing after that point was trying to help. He could not explain why he told counsel for the driver that "unofficially" he was still on or what precisely he meant by that.

Submissions

46. Both counsel were agreed as to the applicable burden and standard of proof that applied with respect to the two citations: namely that the burden of proof was on the LSA to establish guilt by a fair and reasonable preponderance of credible testimony.

47. Counsel for the LSA pointed to the December 9th letter sent by WE to the Member and submitted that the effect of that letter could not have been clearer. The only permission given by WE to the Member to continue in any fashion was to negotiate fees with her.

48. Counsel for the LSA also referred to the Member's first response to WE's complaint where he essentially conceded that he had continued to negotiate in an effort to get a higher offer. This was consistent with the notes of opposing counsel that the Member had said that he still thought he might be able to pull a deal together and that unofficially he was still on.

49. Counsel for the Member took the position that the Member's efforts to obtain a higher offer for WE were not improper. He submitted that the Member's conduct had no negative impact on WE, and even if the Member should not have continued negotiating with counsel for the Driver, "so what?". In his view this was not conduct deserving of sanction.

50. With respect to the second citation, counsel for the LSA submitted that there was no doubt on the evidence that the Member had failed to ensure that the Statement of Claim was served on X Ltd. in accordance with the Rules. He

conceded that this in and of itself was not conduct deserving of sanction. However, it was counsel for the LSA's position that the Member had engaged in sanctionable conduct by failing to tell the client of this error, consenting to a Discontinuance of Action without advising the client, and failing to advise his clients to get independent legal advice.

51. Counsel for the LSA submitted that the Committee could also conclude that the Member had deliberately misled his clients with respect to his failure to serve the Statement of Claim and that, if proved, this would be an aggravating factor. With respect to an allegation of deceit, counsel for the LSA acknowledged that the standard of proof was a higher standard than on a balance of probabilities.

52. Counsel for the LSA submitted that as of June 13th, 2001 when he discussed Ms. Steblyk's research with her, the Member knew that WE and TW's claim against X Ltd. was dead. He argued that the Member deliberately served the other Defendants out of time, sent a letter to counsel for the Driver indicating that the other Defendants had been served and copied that letter to WE and TW in order to lead them to believe that the Statement of Claim had been served.

53. Counsel for the LSA argued that there was no reason for the Member to delay advising the clients about his mistake. He challenged the Member's explanation that he hoped X Ltd.'s counsel might waive the service limitation and questioned why the Member would not immediately notify the Plaintiffs, notify ALIA and proceed to document the advice, thereby covering his liability. In his view the Member chose to ignore the problem in the hope that it would go away through a settlement.

54. Counsel for the LSA argued that the evidence of TW and WE that the Member did not advise them of the issue prior to signing the Consent Dismissal Order should be preferred to the evidence of the Member.

55. He also pointed to the Member's failure to respond to this complaint initially and his failure to mention a clear recollection of discussions with WE and TW on this

point in his memo to counsel. In that memo, the Member indicated: “I have now had a chance to review the entire file and can respond in detail to the allegations.” Yet nowhere does he say that he recalls speaking to TW in September of 2001. He goes on to say “… I believe that I would have discussed that topic with them at that time.” He does not suggest he has a clear recollection of such a discussion, and in fact does not even appear to remember whether he spoke to WE or TW.

56. With respect to the later meeting he indicates “While I have no notes, I believe (because it would be my normal practice) that at this meeting I advised (WE) of her potential recourse…and her agreeing not to pursue because no harm would come of it….”

57. Counsel for the LSA further submitted that even if the Committee found that the Member honestly believed that there was no requirement to tell his clients about the mistake because there would be no harm to them, that this would still constitute conduct deserving of sanction because this was not his call to make. Whatever he thought, he had an obligation to ensure his clients were aware of the situation and were given the option to obtain independent legal advice.

58. Counsel for the Member conceded that the Member had not done a proper job of documenting his file and providing written advice to his clients. He also agreed that the TW and WE should have been told to obtain independent legal advice. However, he took the position that if they had been sent out, it would have made no difference. He submitted that the claim against X Ltd. was questionable at best, and the advice WE and TW would have received would have been to let the Member try to reach a settlement with the Driver and to see if there was any shortfall. Since there was no shortfall, there was no loss, and no harm to WE or TW.

59. Counsel for the Member denied that there was any evidence of a deliberate cover-up and pointed to the evidence of Ms. Steblyk and the Member’s other associate that they had never been advised not to tell the clients about the

service issue. He also referred to the evidence of the meeting involving the Member, TW and WE at which it appears that X Ltd. was discussed and the clients advised that there was no need to pursue that entity.

Decision

60. With respect to the first citation, the Committee agreed with counsel for the Law Society that the letter from WE to the Member was clear that his services were terminated. While the Committee did not necessarily ascribe any negative motive to the Member in continuing settlement discussions, the Member was potentially in a conflict position because of the error regarding the service of the Statement of Claim, and the Member had no authority to continue those discussions in light of his termination.

61. Nor was the Committee convinced by the submission of the Member's counsel that the Member's conduct could have had no negative consequences for TW. In his discussion with counsel for the Driver, the Member indicated that his client "wanted to settle". Even this disclosure of the client's state of mind could have potentially affected her settlement position (although there is no evidence that it did).

62. The Committee concluded that the Member had acted improperly in continuing his representation of his clients in the face of clear instructions to the contrary. The Committee was of the view that this was, however, the less serious of the two citations and that a reprimand was sufficient sanction.

63. With respect to the second citation, the Committee accepted the evidence of TW and WE that the Member did not explain to them that he had made an error in failing to serve X Ltd. and G…; that he did not seek their instructions to consent to the Consent Dismissal Order in favour of X Ltd. and that he did not advise them to obtain independent legal advice.

64. It may well be that had the Member told his clients of the error and advised them to obtain independent legal advice, that the lawyer retained to give the ILA might

have advised WE and TW to allow the Member to continue the lawsuit on their behalf and to wait and see what happened. Only if the Driver had insufficient insurance to respond to a judgment, would there be any prospect that TW and WE had suffered any loss as a result of the Member's error in failing to serve the Statement of Claim on X Ltd.

65. That type of analysis is appropriate in the context of a negligence action against the Member for damages arising from the failure to serve the Statement of Claim on X Ltd. The Committee did not consider it an appropriate analysis in considering the nature and extent of the Member's ethical obligations to his clients to make full and frank disclosure to them and to avoid acting in a conflict of interest without informed consent.

66. The Member had a positive obligation to promptly inform his clients of any material error or omission in connection with his representation of them. An inadvertent failure to serve a Statement of Claim within the time provided by the Rules of Court was such a material error or omission.

67. Furthermore, it was not up to the Member to reach his own conclusion that his error would not harm his clients. In fact, at the time that he became aware of the failure to serve, and at the time of the meeting where the status of the action against X Ltd. and G… was discussed, it is difficult to see how he could have definitively reached that conclusion. He did not know the amount of the Driver's insurance limits, and regardless of the limits of the clients' own SEF 44 endorsement, the recovery under that endorsement could have been affected by X Ltd's liability.

68. Finally, if it was appropriate for the Committee to consider whether or not disclosure by the Member would have changed the outcome in any material respect, the Committee did not have enough information to make any kind of meaningful decision on that point.

69. The Committee wishes to make it clear that it did not believe that the Member's testimony was deliberately dishonest, but thought that given the time that had passed the Member had to some extent reconstructed what had occurred based on the file material and his general practice.

70. In the circumstances, the Committee considered it appropriate to impose a fine of $4,000 and reprimand in relation to the second citation.

71. The reprimand was delivered by the Chair at the conclusion of the Hearing.

72. The Committee ordered payment of the actual hearing costs within 60 days of the statement of costs being provided to the member.

73. The Committee did not require notice to be provided to the profession.

74. The hearing having proceeded in public, the public will have access to the exhibits, after the exhibits have been appropriately redacted.

Dated this 31st day of July, 2008.

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Vivian Stevenson, Q.C. Chair and Bencher

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John Higgerty, Q.C., Bencher

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Dr. Larry Ohlhauser, Bencher