LAW SOCIETY HEARING

**IN THE MATTER OF THE LEGAL PROFESSION ACT
AND IN THE MATTER OF A HEARING INQUIRING
INTO THE CONDUCT OF ALAN COLLINS
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

REASONS FOR DECISION

1. On June 26, 2007, a hearing committee panel (the "Panel") comprised of Stephen Raby, Q.C. (Chair), Dale Spackman, Q.C. and Ron Everard, Q.C. convened at the Law Society offices in Edmonton, Alberta to enquire into the conduct of Alan Collins (the "Member"). The Member did not appear for any portion of the Hearing. The Law Society of Alberta ("LSA") was represented by Michael Penny.

Jurisdiction and Preliminary Matters

2. Jurisdiction was established by Exhibits 1 through 4 inclusive. Mr. Penny indicated that in a verbal discussion he had with the Member, Mr. Collins advised Mr. Penny that he had no objection to the composition of the Panel. No private hearing application was made and as such the hearing proceeded in public.

Citations

3. The Member faced four citations as follows:

1. IT IS ALLEGED that you failed to comply on a timely basis with the direction of the Hearing Committee, and that such conduct is conduct deserving of sanction.

2. IT IS ALLEGED that you misled your client, A.M., when you wrote to her by letter dated April 8, 2004, and that such conduct is conduct deserving of sanction.

3. IT IS ALLEGED that you misled your client, K.J., when you wrote to him by letter dated February 22, 2005, and that such conduct is conduct deserving of sanction.

4. IT IS ALLEGED that you have indicated an unwillingness to comply with directions of your regulating body, thus jeopardizing the public interest, and that such conduct is conduct deserving of sanction.

Evidence

4. The Panel also had the benefit of reviewing Exhibits 6 through 11 in the proceedings. Mr. Penny also introduced into evidence a transcript of an interview of the Member held on March 31, 2006 by Mr. Dan Dorsey, an investigator with the LSA. This was entered as exhibit No. 12. Mr. Penny also introduced some calculations regarding the manner in which contingency fees were initially calculated by the Member, how they were recalculated by the Member in the case of Client A.M. and what the LSA considers to be the appropriate calculation based on the Rules

of Court. These calculations were introduced as Exhibit 13. Finally, Mr. Penny called Dan Dorsey to give oral evidence in the matter. Mr. Dorsey testified under oath and answered questions asked of him by the Panel.

5. This matter essentially arose as a result of a decision of a hearing committee panel inquiring into the conduct of the Member, which hearing panel convened on January 8, 2004. For purposes of this decision, the January 8, 2004 hearing is hereinafter called the "2004 Hearing", the panel which conducted the 2004 Hearing is hereinafter called the "2004 Panel" and their decision is hereinafter called the "2004 Decision".

6. The 2004 Panel dealt with three citations in respect of the Member. Citations No. 2 and No. 3 were ultimately dismissed by the 2004 Panel but the 2004 Panel determined that Citation No. 1 had been made out and that this was conduct deserving of sanction. The said Citation No. 1 read as follows:

> "IT IS ALLEGED that you overcharged four of your clients by the manner in which you calculated the legal fees owing to you according to a contingency agreement, and that such conduct is conduct deserving of sanction."

7. In the 2004 Hearing, it became apparent that the Member was unaware of the change to the Alberta Rules of Court regarding the manner in which contingency fee arrangements could be calculated. This rule change, which was implemented in 2000, indicated that a member could no longer take the entirety of the taxable costs awarded but was only entitled to retain the percentage of such taxable costs equivalent to the percentage of the settlement amount or judgement award that was payable to a member pursuant to a written contingency fee agreement between such member and his or her client.

8. It was apparent that the Member had either a written contingency fee agreement or some sort of written or verbal arrangement with four of his clients that were entered into in 2001 (after the rule change) whereby he was entitled to take a certain percentage of the settlement amount or judgement award plus all of the taxable costs. These arrangements were discovered in the course of a Rule 130 audit and the auditor requested the Member to recalculate his contingency fee with respect to these four clients and to make the appropriate adjustment with them.

9. The member declined to do so and in the 2004 Decision, the 2004 Panel directed that there would be a fine of $4,000.00 and a reprimand was administered. In the course of delivering the reprimand, the chairman of the 2004 Panel reminded the Member that it was his responsibility to inform his clients of the error in the contingency agreements. To ensure that this was done, the 2004 Panel directed counsel for the LSA to make inquiries concerning the post-hearing notification to the clients by the Member and "the Member's responsibility to provide them with recalculated amounts".

10. In the course of completing the follow-up directed by the 2004 Hearing, auditors for the Law Society determined that the Member had not had any further communication with two of the four clients involved.

11. With respect to client A.M., the evidence of Mr. Dorsey is that on April 8, 2004, the Member prepared a revised account and sent that along with a covering letter to A.M. The original account had, in accordance with the contingency fee agreement that had been entered into, included 25% of the damages recovered plus 100% of all of the court costs. In aggregate, that amounted to $8,764.95. The court costs included disbursements. Excluding disbursements, the aggregate recovery including costs was $18,000.00. Pursuant to the April 8, 2004 revised invoice, the member included disbursements of $2,389.95 as a separate category and then charged his legal fees as "35% for recovering general damages and court costs on your behalf of $18,000.00" or $7,100.00. Accordingly, his revised total of fees and disbursements was $9,489.95 whereas the January 9, 2002 invoice totalled $8,764.95.

12. It is worth reproducing the Member's letter to A.M. of April 8, 2004 as this is the basis for Citation No. 2. The contents of that letter are as follows:

> "During a Law Society audit, the auditor complained that my account to you dated January 9, 2002 did not conform to the ruling adopted in May of 2000 which requires me to charge you a specified percentage of all of the money I recover for you less disbursements which I have paid. I have redone the account to comply with the new rule which amounts to more than my original retainer agreement with you but you do not owe me anymore money. The purpose in preparing the new account is simply to comply with the Rules of Court as changed in May, 2000 and my agreement with you was before that date."

In fact, the contingency fee agreement with A.M. was in writing and was dated June 8, 2001.

13. In the course of his interview with Mr. Dorsey and as Mr. Dorsey testified, the Member consistently took the position that his April 8, 2004 letter to A.M. was compliant with the requirements of the 2004 Decision. The Member consistently took the view that there was no issue with respect to the aggregate of his fees charged, that there was no issue that his clients were unhappy with the fees charged and that there was no issue of overcharging. There was simply the problem that his contingency fee agreement did not comply with the rules in effect and that somehow the unilateral change by the Member of the percentage from 25% to 35% is justified because there was no issue of fees. Despite attempts by Mr. Dorsey to remind the Member that the citation that was made out pursuant to the 2004 Decision specifically involved overcharging clients, the Member adamantly maintained that the issue had nothing to do with the fees that he actually charged.

14. The calculation of the fees based on the Rules of Court in accordance with the LSA's calculations as set forth in exhibit 13 would have resulted in a total fee to A.M. of $6,889.95. The client, in fact, paid $8,764.95 resulting in a discrepancy of $1,875.

15. The evidence with respect to the Member's client K.J. is essentially similar to that of A.M. In this circumstance, the agreed upon percentage was 30% and the original account was dated January 31, 2002. The revised account was prepared by the Member on February 22,

2005, some 13 months after the 2004 decision and a cover letter was sent to K.J. on the same date.

16. Again, for purposes of dealing specifically with Citation No. 3, a portion of the contents of the Member's letter to K.J. of February 22, 2005 is reproduced as follows:

> "The Law Society has pointed out that I framed my account to you herein dated January 31/02 improperly, and should have charged you a percentage fee on the total recovered rather than charging you court costs separately.
>
> Accordingly, I have prepared the enclosed, corrected account to complete my file. You do not owe me any additional legal fees."

17. In this case, the revised account dated February 22, 2005 increased the percentage from 30% to 40%, but rather than showing an increased total amount as was done in the case of A.M., the February 22, 2005 account, after doing the appropriate calculations, provides for a "discount to the client" equivalent to the overage such that the balance paid showing under the second account is the same as the total showing in the first account. The difference between the amount originally charged by the Member and that which the LSA indicated would be appropriate under the Rules of Court using a 30% recovery is $271.60.

18. With respect to the other two clients, no revised account nor correspondence to these clients ever occurred. Mr. Dorsey indicated that the Member advised him that he had no forwarding addresses for these two clients and given that the amounts were not significant, he simply didn't bother to deal with them. When pressed by Mr. Dorsey, the evidence indicates that the Member essentially did nothing in terms of attempting to find a new address for either of these two clients. Based on the Law Society's calculation, the amount owed to the third client (P.L.) was $241.25 and the amount owing to the fourth client (G.S.) was $325.96.

Submission as to Guilt

19. Mr. Penny urged the Panel to find that Citation No. 1 had been made out. Mr. Penny suggested that if a hearing committee imposed a fine on a member and had suggested that certain actions needed be taken by the Member, most members would immediately comply with those directions. In this circumstance, the Member waited three months to deal with Client A.M., waited 13 months to deal with Client K.J. and did not deal with the other two clients at all. The only defense offered by the Member was that the 2004 Panel had not placed a deadline on compliance with their directives and given the small amount of money involved, he did not consider the matters to be urgent.

20. Mr. Penny urged the Panel to conclude that Citations No. 2 and 3 had both been made out and that the correspondence to Clients A.M. and K.J. was, in fact, misleading. Mr. Penny acknowledged that the 2004 Decision was not as clear as it could have been in terms of requiring the Member to refund the overcharged amounts to his clients. However, Mr. Penny suggested that this was the clear implication of the 2004 Decision. He suggested that the Member's consistent position that this was not an issue of fees but simply an issue of form was either incredible or completely misguided. The Member's allegation that he did not view the sanction

imposed upon him pursuant to the 2004 Decision as being one where he had overcharged his clients ignores the wording of the one citation that was made out pursuant to the 2004 Decision, namely that he overcharged his clients. Mr. Penny indicated that even if the Member truly believed that this was not an issue of overcharging, the proper course of conduct would have been to set out the proper calculation and advise the client that they were entitled to a refund and determine whether the client wished to pursue the matter any further. Mr. Penny urged the Panel to conclude that the cover letter indicating that the new account was simply a change in format was misleading in that it did not draw to the client's attention the fact that the Member had made a unilateral change in the contingency fee percentage. He further urged that it was misleading to suggest to the client that somehow they had obtained a break from the Member by his not requiring them to pay the shortfall between the amount owing pursuant to the new account and the amount owing pursuant to the original account.

21. In the case of Client K.J., Mr. Penny indicated that in his view, the suggestion in the new account itself that there was a discount involved, was even further misleading.

22. Finally, Mr. Penny urged the Panel to conclude that Citation No. 4 had been made out as the overall reaction by the Member to the 2004 Decision must be taken to be an unwillingness on the part of the Member to comply with the directives of the Law Society of Alberta such that there was a serious question of governability which goes to the heart of the public confidence in the legal profession as a self regulating profession.

Decision as to Guilt

23. The Panel concurred with the submissions of Mr. Penny in respect to Citation No. 1. Other than determining a contact address for each of the four clients, there was no further information that the Member required in order to comply with the directive of the 2004 Panel. While the delay in the case of A.M. may not have been significant, the delay in dealing with Client K.J. was clearly unacceptable. Further, the minimal to non-existent efforts that the Member used to try to contact the other two clients also contributed to making out this citation.

24. With respect to Citations No. 2 and 3, the Panel concurred with the submissions by Mr. Penny that no matter what the Member's mind-set was concerning whether or not he had an obligation to refund monies to each of the four clients, the manner in which he drafted the new accounts to Clients A.M. and K.J. and the covering letters to them cannot be considered to be anything other than misleading. In fact, misleading is probably a polite term for the effect of the correspondence on the clients. The Panel was especially troubled by the evidence of the Member in his interview with Mr. Dorsey that each of the clients was unsophisticated and was unlikely to understand the issues surrounding the calculation of the contingency fee arrangement. The Panel concluded that given the vulnerability of these clients as a result of their probable lack of understanding of the issues, and the Member's obligation to fully explain the problem with respect to his original contingency fee agreement, the effect of the 2004 Decision and the options available to the client arising therefrom, Citation Nos. 2 and 3 were made out.

25. The Panel did however struggle with Citation No. 4. A finding of unwillingness to comply with directions of the LSA is a very serious charge indeed and Mr. Penny quite rightly suggested that such an unwillingness indicates an ungovernability issue and when

ungovernability is at issue, disbarment is a sanction that needs to be seriously considered. While the Panel had some sympathy for Mr. Penny's submission that the conduct of the Member here was a deliberate course of action on the part of the Member to circumvent the 2004 Decision, the Panel concluded that the evidence was not sufficient to make out the citation given the high threshold of proof required therefor. The Member consistently took the position in his correspondence and in his interview with Mr. Dorsey that in his view this was not an issue of the ultimate fee charged to the Client but simply a matter of formatting his accounts to comply with the requirements of the Rules of Court in light of his improperly drawn contingency fee agreements.

26. The Panel however felt that a decision as to guilt on Citation No. 1 as drafted and a dismissal with respect to Citation No. 4 would not properly reflect the Panel's denunciation of the conduct of the Member in dealing with compliance with the 2004 Decision. Accordingly, the Panel concluded that Citation No. 1 and Citation No. 4 should be amalgamated into a new Citation No. 1 which will read as follows:

> "IT IS ALLEGED that you failed to comply on the timely basis with the direction of the Hearing Committee, contrary to the public interest, and that such conduct is deserving of sanction."

The Panel has concluded that amended Citation No. 1 is made out for the reasons set forth above.

Submission re Sanctions

27. Mr. Penny advised that the circumstances surrounding the Member's practice were such that his submissions regarding sanction were quite unusual. The Member has practiced for over 45 years and is 76 years of age. The Member had originally indicated his intention to wind-up his office and retire from the practice of law effective August 31, 2007, but had now advised Mr. Penny (by telephone) that he had effectively wound-up his practice effective June 22, 2007 by transferring all of his remaining outstanding files to different counsel. The Member advised Mr. Penny that he was intending on remaining in his office during the week of June 25, 2007 to wind up his affairs and complete the billing of his remaining files.

28. Mr. Penny noted that from a client perspective, a smooth transitioning of files would be beneficial and that if a custodianship could be avoided, this would be in the best interest of both the clients and the Law Society.

29. Mr. Penny further advised that the Member had indicated that he intended to retire to San Diego and it appears that his departure from the jurisdiction will be relatively imminent. Mr. Penny indicated that any monetary sanction imposed by the Panel may therefore be academic.

30. Notwithstanding the foregoing, Mr. Penny urged the Panel that a significant suspension was likely warranted under the circumstances given the nature of the citations made out. Misleading clients and failing to comply with directives of the Law Society on a timely basis, thus jeopardizing the public interest were indeed serious charges that would, in the normal course, generally lead to a request for the suspension or even disbarment. Further, the Member's record was introduced and filed as Exhibit 14. There were five hearings involving the Member where one or more citations were made out and Mr. Penny urged the Panel to conclude that the

more recent of the citations showed an escalating behaviour on the part of the Member to simply ignore the rules and directives of the Law Society and that notwithstanding the amendment by the Panel to Citations No. 1 and No. 4, there was a sufficient pattern of ungovernability with respect to this Member that required a significant suspension even though that suspension may well be academic, if in fact, the Member leaves the jurisdiction and fully retires from the practice of law.

31. Mr. Penny indicated that a fine was likely academic but that the Member should be responsible for the actual costs of the hearing. The Panel asked Mr. Penny whether it would be appropriate to direct the Member to refund the overcharges to the four clients incidents dealt with in the 2004 Decision. Mr. Penny again indicated that while this might be academic, it would certainly be appropriate.

Decision As To Sanction

32. The Panel accepted the submissions of Mr. Penny and concluded that the conduct of the Member was, in fact, a serious breach of his professional obligations, did in fact go to undermining the public confidence in the legal profession and was consistent with a pattern of conduct as evidenced by previous hearing decisions of an unwillingness on the part of the Member to comply with his professional obligations and specific directives imposed upon him by the Law Society. As a result, the Member stands suspended effective June 26, 2007 for a period of 1 year. The Panel noted that it has no jurisdiction to deal with any custodianship issues but that that would be a matter for LSA administration to determine based upon the status of the Member's practice as of the date of suspension.

33. The Panel also agreed with Mr. Penny's submission that it would be appropriate that the Member be responsible for the actual costs of the hearing. Those actual costs shall be paid within 30 days of submission to the Member of such actual costs.

34. The Panel further determined that it was appropriate to order the Member to forthwith refund to the four clients involved in the 2004 Decision the following amounts after using reasonable efforts to locate those clients whose whereabouts are currently unknown:

- A.M. - $1,875.00
- K.J. - $271.60
- P.L. - $241.25
- G.S. - $325.96

35. As a result of the suspension of the Member, a notice to the profession is required.

36. No referral to the Attorney General is required in this matter.

37. This decision, the evidence and the exhibits in this hearing are to be made available to the public, with the name of the Member's clients to be redacted therefrom wherever they appear.

Dated this 26th day of June, 2007.

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Stephen Raby, Q.C.

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Dale Spackman, Q.C.

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Ron Everard, Q.C.