

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 GERALD SMITH, a Member of The Law Society of Alberta

Introduction

1. On April 16th, 2007 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society office in Edmonton to inquire into the conduct of Gerald Smith (the "Member"). The Committee was comprised of Vivian Stevenson Q.C. as Chair, John Higgerty Q.C, and Yvonne Stanford. The LSA was represented by Janet Dixon Q.C. The Member was present for the Hearing. The Member was represented by Alex Pringle Q.C..

Jurisdiction and Preliminary Matters

2. Exhibits 1 through 4, 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 jurisdiction of the Committee.
3. There was no objection by the Member or Counsel for the LSA regarding the constitution of the Committee.
4. The Certificate of Exercise of Discretion was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. Counsel for the Member confirmed that no request for a private Hearing was being made. The Hearing was held in public.

Citations

5. The Member faced the following citations:
 1. IT IS ALLEGED that you failed to serve your client in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.
 2. IT IS ALLEGED that you lied to or misled your client, and that such conduct is conduct deserving of sanction.

Evidence

6. There were 42 exhibits marked during the course of the Hearing. These exhibits are as follows:

- a. A binder containing Exhibits 1 to 35 was provided to the Committee before the Hearing by consent of counsel and was entered at the Hearing.
- b. A Statement of Facts was entered as Exhibit 36.
- c. A time line of relevant events prepared by counsel for the Law Society was entered as Exhibit 37.
- d. The Member's discipline record was entered as Exhibit 38.
- e. A psychological assessment was entered as Exhibit 39.
- f. A letter dated April 13, 2007 from John Carlson was entered as Exhibit 40.
- g. An Estimated Statement of Costs was entered as Exhibit 41.
- h. An excerpt from the minutes of the Three Hundred and Sixty-Seventh Meeting of the Benchers of the Law Society of Alberta was entered as Exhibit 42.

In addition to the documentary evidence, counsel for the Member called the Member and Walter Remondini with respect to sanction.

Findings of Fact

- 7. Mr. Smith was admitted to Membership in the Law Society of Alberta on August 2nd, 1996. At the times relevant to the Citations, he practiced as an associate and then as a partner with the firm of Dean, Duckett and Amelio.
- 8. On March 21st, 2003, Mr. Smith was retained to defend a corporate client with respect to some commercial litigation. The corporate client was a manufacturer and distributor of certain agricultural products and had entered into various distributorship agreements and other agreements with the plaintiff. For the purposes of the Statement of Facts and the Hearing, Mr. Smith's client was referred to as the "Distributor" and the plaintiff was referred to as the "Seller".
- 9. Mr. Smith was originally retained to file a Statement of Defence and a Counterclaim in relation to outstanding invoices issued by the Distributor to the Seller.

10. Mr. Smith filed a Statement of Defence in the action on May 30th, 2003 and served the Defence upon counsel for the Seller. No counterclaim was filed. On the same day, Mr. Smith sent a draft Affidavit to his client in support of an application to stay the action and to order that the matter proceed to arbitration in the United States in accordance with an arbitration clause in the distributorship agreement.
11. The client appears to have had some difficulty with the proper execution of the Affidavit and on August 27th, 2003, before the completed Affidavit was returned, counsel for the Distributor served Mr. Smith with an Affidavit of Records.
12. Mr. Smith testified that once he received the Affidavit of Records he was of the view that his application for a stay could not proceed until an Affidavit of Records had been filed on behalf of the Seller as well. Accordingly, Mr. Smith and his client began the process of assembling the Affidavit of Records.
13. It appears that there was very limited communication between Mr. Smith and his client from October of 2003 to June of 2004. In May of 2004 Mr. Smith received an e-mail from his client indicating that he desperately needed an update on the case.
14. By letter dated June 24th, 2004, (Exhibit 19) Mr. Smith wrote to his client attaching a draft Affidavit of Records. He indicated "In terms of an update, I can advise that we have now scheduled another Court application to again deal with this issue of transferring jurisdiction to North Carolina. I am hopeful that this will prompt matters. This application is set for July 8th, 2004".
15. In the same letter, Mr. Smith indicated that he would also be bringing an application on July 8th, 2004 to deal with the amounts owing to his client. He indicated that he was hopeful that the Court would order that the undisputed amounts be paid and that another Affidavit would be sent in relation to that matter.
16. Mr. Smith admitted that the advice to his client that an application had been scheduled for July 8th, 2004 was untrue. Furthermore, since he had not filed a counterclaim or an action in relation to the amounts owing to his client, his advice to the client that he would be bringing an application on July 8th to deal with these amounts was also inaccurate.
17. On July 8th Mr. Smith e-mailed his client indicating that he was going to file the Affidavit of Records that morning prior to Court and noticed that the Affidavit mistakenly indicated that it was sworn in 2003 not 2004. He stated that "As a result I have had to delay the court application this morning. It should be back to the courts near the end of the month."

18. Again, Mr. Smith admits that there was no application scheduled for July 8th and that the suggestion that the application was delayed as a result of his client's error in the Affidavit was untrue.
19. On July 12th, 2004, Mr. Smith filed a Statement of Claim on behalf of his client for the amounts owing under the invoices issued by the Distributor to the Seller (the "Second Action"). The Statement of Claim was not served at this time.
20. On July 19th, 2004, Mr. Smith sent a letter to his client enclosing a draft Affidavit in support of an application for summary judgment in the Second Action.
21. At some point in the Fall of 2004, Mr. Smith had a telephone discussion with a representative of the Distributor. Mr. Smith lied to the representative and said that the applications had been heard and a decision was pending. Mr. Smith repeated this lie on two subsequent occasions to a representative of the Distributor and to the US lawyer for the Distributor.
22. On February 17th, 2005, Mr. Smith served the Statement of Claim in the Second Action. It was around this time that Mr. Smith requested the assistance of an associate. The associate filed and served a Notice of Motion for summary judgment in February of 2005. The application was adjourned at the request of counsel for the Seller.
23. A second associate became involved in the file in the summer of 2005 and attempted to schedule the application for the stay. The associate filed a Notice of Motion returnable on November 17th, 2005 and served the Affidavit sworn by the representative of the Distributor in 2004 with the Notice of Motion.
24. The November 17th application was adjourned at the request of counsel for the Seller. In a letter dated November 11th, 2005, counsel for the Seller set out his position in relation to the Affidavits and also advanced a settlement proposal.
25. Mr. Smith left his firm on December 31st, 2005 for a job as in-house counsel.
26. On January 17th, the second associate involved in the file forwarded to the Distributor a copy of the November 11th, 2005 letter from opposing counsel.
27. It was at this point that the firm learned of the deceit and misrepresentations of Mr. Smith. The partners of the firm met with Mr. Smith and it was agreed that he would report himself to the Law Society. He did so on January 27th, 2006 (Exhibit 6).
28. The Member admitted the facts set out in the Agreed Statement of Facts (Exhibit 36) and tendered that Statement as an admission of guilt with respect to both citations.

29. The Committee accepted the admission of guilt. Pursuant to s.60 of the *Legal Professions Act*, the admission is deemed to be a finding of the Committee that the conduct of the Member is conduct deserving of sanction with respect to both Citations.

Evidence Regarding Sanction

30. Mr. Smith testified on his own behalf. At the time of the Hearing he was 39 years old. He obtained his LLB from the University of Saskatchewan in 1993. He was married in 1995, admitted to the Alberta Bar in 1996 and had two children born in 1997 and 1998. He became a partner at Dean Duckett Amelio in 2003. At that time his practice was in litigation and primarily in the area of insurance defence.
31. By the end of 2003, Mr. Smith's practice was extremely busy, he was carrying between 170 and 180 files, and he was finding his case load unmanageable. The pressure that he was under was magnified when one of his major insurance clients performed an audit of all of the files he was handling for them, although the client ultimately decided to leave those files with him.
32. During 2004, Mr. Smith was also having marital issues. In January of 2005 Mr. Smith's wife asked him for a divorce, and the two were separated in March of 2005.
33. It was against this background that Mr. Smith was handling the matter which was the subject of the Hearing.
34. Mr. Smith could not explain why he advised his client in June of 2004 that an application was set for July 8th, 2004 when that was not the case. He does not recall his secretary raising this with him or pointing out that no application had been filed. He said that he certainly intended to bring this application, but conceded that this was not what he told his client. Mr. Smith also conceded that the advice to his client that he would be bringing an application to deal with the amounts owing to it was untrue, since there was no originating document filed that would have given the Court jurisdiction to deal with this issue.
35. Mr. Smith could not explain why he advised his client on July 8th that he was delaying the application that morning because the Affidavit in support had been completed improperly. He could not explain why he told his client in November of 2004 that an application had been brought and heard and that he was waiting for a decision, when no application had ever been brought.
36. Mr. Smith left his firm on December 31st, 2005. At the time that he left, he did not bring to his partners' attention the fact that his client was under a misapprehension as to the status of the matter. He could not explain why.

37. Since January of 2006, Mr. Smith has been working as in-house counsel. He handles a smaller amount of files than he did in practice and testified that all of his files were under control. Mr. Smith's employer has been aware of the Law Society proceedings since the issue first arose.
38. Mr. Smith offered no explanation for why he had behaved as he had done. He said that he had never done anything like that before or since. He testified that the Law Society proceedings had been very difficult for him, and that he never envisioned ending up in this situation.
39. In-house counsel at Mr. Smith's current employer was also called as a witness with respect to sanction. He testified that he became acquainted with the Member in 2002/2003 and that he liked his approach to files and used his services regularly after that point. He recalled the audit that had been done on Mr. Smith's files by his company in 2004 and recalled that the audit result had been positive and that the company continued to send Mr. Smith work. He did not know what the consequences of a suspension would be from the corporation's perspective, but he was supportive of Mr. Smith continuing to work for him.

Submissions Regarding Sanction

40. Counsel for the LSA advised that she had notified the Member and his counsel that she would be seeking a lengthy suspension or disbarment. That position was moderated somewhat at the Hearing, as LSA counsel took the position that the appropriate sanction would be a suspension for a period of 3 to 6 months.
41. In addressing sanction, counsel for the LSA spoke to the purposeful approach to sanctioning set out in the Hearing Guide. The Guide indicates that the fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.
42. There are a number of general factors that the Guide suggests should be taken into account:
 - 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 own members;
 - b. Specific deterrence of the member in further misconduct;
 - c. Incapacitation of the member (through disbarment or suspension);
 - d. General deterrence of other members;

- e. Denunciation of the conduct;
 - f. Rehabilitation of the member;
 - g. Avoiding undue disparity with the sanctions imposed in other cases.
43. Counsel submitted that where a Member has demonstrated a lack of integrity, sanctioning presents a unique set of challenges. As stated in the preface of the Alberta Code of Professional Conduct:

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.

44. Since integrity and honesty are essential to the protection of the public and its confidence in the profession, conduct that shows a lack of these attributes must be treated seriously. Counsel for the LSA suggested that a suspension should be imposed when a Member's integrity and honesty were in question unless there were exceptional circumstances. She pointed to the fact that in this case there was a lack of any real explanation by the Member for his breach, which Counsel submitted made it difficult to be satisfied that the public would be safe from a similar deception in the future. She argued that the suggestion by the Member's doctor that the dishonest conduct had been the product of the stressors of a heavy workload and a deteriorating marital situation was difficult to reconcile with the length of time over which the deception had been practiced
45. Law Society Counsel conceded that dishonest conduct had not always involved a suspension in the past. She referred to two cases decided prior to the adoption of the Hearing Guide, in which Members had arguably deceived their clients to a greater extent than had occurred here, and no suspension had been imposed. Counsel urged the Committee that the age of those cases, and the purposive approach to sanctioning that had been captured in the Hearing Guide since then, justified the Committee imposing a suspension in this case. Counsel also suggested that general deterrence to other Law Society members justified a suspension in this case.
46. Counsel for the Member suggested that the Member was a work-oriented and successful lawyer who took on an unrealistic workload. He suggested that the personality of the Member was such that he could not admit to the client that he had not done a good job. His problems were compounded by the stress surrounding his marital situation. Counsel for the Member pointed to the fact that there was no evidence of similar problems on other files, and the fact that the Member had obviously reassessed his situation and taken steps to deal with it by finding a less stressful job. In his view, this was simply a case of a Member making some bad decisions because he could not admit failure.

47. Counsel for the member suggested that a suspension was not warranted in the circumstances or as a matter of general deterrence. He pointed to the other cases where no suspension had been imposed and indicated that no distinction could be drawn between those cases and the current one. He suggested that a reprimand, a significant fine and conditions would be appropriate. Counsel for the Member also suggested that there was no need to be concerned about this happening again because he said that the Law Society proceedings had taught the Member a tremendous lesson and ensured that he would not put himself in a similar situation again.

Decision as to Sanction

48. The Committee struggled with the appropriate sanction in this particular case, but ultimately decided to impose a 30 day suspension.
49. There is no doubt that honesty and integrity are of fundamental importance to the protection of the public and to the reputation of the legal profession. The Committee felt that a sanction for a breach of integrity should reflect that importance, particularly where there is some uncertainty around the cause of that breach.
50. The Committee was satisfied that a 30 day suspension in this case was consistent with the purpose of the sanctioning process as set out in the Hearing Guide.
51. In doing so, the Committee recognizes that this sanction was more severe than the sanctions imposed in both *Law Society of Alberta v. Hope* [1995] LSDD No. 297 and *Law Society of Alberta v. Beresh* [1994] LSDD No. 196, cases that were referred to by both counsel in their submissions. While previous decisions are not binding, the Committee acknowledges that the sanctions imposed in those cases were reasonable in the circumstances. The Committee notes that these decisions were both written before the Hearing Guide and that there is little discussion of the factors taken into account by the Committees in reaching their decisions.
52. The actions of the Member in this case showed a fairly calculated effort to mislead the client over an extended period of time, which was perpetuated even when another member of the firm became involved in the file. The Committee was not satisfied that the Member's behaviour was solely the result of stress, and in fact, the Member did not explain his behaviour on that basis. The lack of any clear explanation for the Member's dishonesty was troubling to the Committee, as was the fact that the Member did not bring the matter to the attention of his firm when he left, and only addressed the situation when he was contacted by the firm.

Sanctions and Orders

53. In the circumstances, the Committee ordered the following sanctions:
- a. The Member is suspended for a period of one (1) month effective April 20th, 2007;
 - b. The Member will pay the actual costs of the Hearing;
 - c. For the next 5 years the Member is required to practice with an employer approved by the Law Society. In the event that the Member seeks to be relieved of this condition, he may apply to the Executive Director who may treat this as a change of status under Rule 112.

Concluding Matters

54. The Exhibits and proceedings will be available for public inspection, subject to the removal of any information which might identify a client or be the subject of solicitor-client privilege.
55. No notice to the Attorney General is required.
56. The usual procedure concerning Notice to the Profession will apply.

Dated this _____ day of _____, 2007.

Vivian Stevenson Q.C.
Chair

Yvonne Stanford, Bencher

John Higgerty Q.C, Bencher