

LAW SOCIETY OF ALBERTA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*;
AND
IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF TERRY THOMAS
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:

Rob W. Armstrong, Q.C., Chair
Robert Dunster, Committee Member

Appearances:

S.L. Hunka for the Law Society of Alberta (LSA)
Terry Thomas on his own behalf

Hearing Date:

October 23, 2017

Hearing Location:

Law Society of Alberta at 800 Bell Tower, 10104 – 103 Avenue, Edmonton, Alberta

HEARING COMMITTEE REPORT: SANCTION

Introduction and Summary of Decision

1. A hearing into the conduct of Mr. Terry Thomas was conducted over 18 days. Mr. Thomas faced 13 citations. At the conclusion of the hearing, Mr. Thomas had either admitted guilt or been found guilty on 10 of the 13 citations. The citations and findings are summarized as follows:
 1. That the Member failed to uphold the law, and such conduct is deserving of sanction – found guilty;
 2. That the Member brought the profession into disrepute and such conduct is conduct deserving of sanction – found guilty;

3. That the Member misappropriated trust funds, and such conduct is conduct deserving of sanction – found guilty;
 4. That the Member failed to follow trust accounting rules, and such conduct is deserving of sanction – admission of guilt;
 5. That the Member failed to be candid with the LSA, and such conduct is deserving of sanction - dismissed;
 6. That the Member failed to cooperate with the LSA, and such conduct is deserving of sanction – found guilty;
 7. That the Member exchanged legal services for the services of clients without providing the clients with statements of account and without recommending that the client receive independent legal advice, and such conduct is deserving of sanction – admission of guilt;
 8. That the Member failed to properly serve the Complainant, and such conduct is deserving of sanction – found guilty;
 9. That the Member improperly billed the Complainant, and such conduct is deserving of sanction - dismissed;
 10. That the Member failed to cooperate with the LSA, and such conduct is deserving of sanction – found guilty;
 11. That the Member failed to follow the client’s instructions and such conduct is deserving of sanction – admission of guilt;
 12. That the Member failed to serve his client in a conscientious, diligent and efficient manner, and such conduct is deserving of sanction - dismissed; and
 13. That the Member is ungovernable, and such conduct is deserving of sanction – found guilty.
2. On October 23, 2017, the Committee re-convened at the office of the LSA in Edmonton to conduct a hearing to consider the appropriate sanction for Mr. Thomas.
 3. At the commencement of the hearing into the conduct of Mr. Thomas, counsel for the LSA communicated to the Committee and to Mr. Thomas that the LSA would be seeking disbarment of Mr. Thomas. That position has not changed throughout the proceedings.
 4. Mr. Thomas argued that an appropriate sanction would be a lengthy suspension plus payment of costs. He argued that any concerns relating to his eventual return to practice could be addressed through the imposition of conditions and the involvement of practice review.
 5. Given the findings of this Committee following the conduct hearing, and upon careful weighing of the evidence and consideration of the arguments presented at the sanctioning hearing and the factors to be considered in determining an appropriate sanction, the Committee orders that Mr. Thomas be disbarred.

The Evidence

6. At the commencement of the sanctioning hearing, counsel for the LSA tendered 2 exhibits. Exhibit 168 is the disciplinary record of Mr. Thomas and Exhibit 169 is the Estimated Statement of Costs in relation to these proceedings. There was no objection to the entering of these Exhibits.

7. The LSA called no further evidence.
8. Mr. Thomas called 2 witnesses and gave evidence on his own behalf at the sanctioning hearing.
9. Mr. Thomas's first witness was his ex-wife and former legal assistant, EF. EF advised that she was living with Mr. Thomas and working for him while he was being investigated by the LSA. She was very concerned about his well-being. Between 2009 and 2013, Mr. Thomas was having significant difficulties, difficulties that roughly coincided with the opening of Mr. Thomas's own law practice, Thomas Law.
10. EF was of the view Mr. Thomas was incapable of responding to the LSA during the investigation. EF would sometimes hide LSA notices or correspondence from Mr. Thomas to protect him and shield him from further stressors, which could aggravate his situation.
11. EF stated that Mr. Thomas is now a changed man. He has made efforts to distance himself from negative people and bad influences in his life. He has reconnected with family members and has a good support system in place. He has brought his health issues under control.
12. EF thought Mr. Thomas was a very fine lawyer who helped lots of people and he should not be disbarred.
13. Mr. Thomas's next witness was PS, a long-standing member of the LSA and friend to Mr. Thomas. PS has known Mr. Thomas since the late 1980's when he first took an interest in the career of Mr. Thomas and started acting as an informal mentor for him. PS testified that he shares a common heritage with Mr. Thomas and he advised that he always felt a responsibility to provide support and encouragement to other members of his community.
14. PS testified that Mr. Thomas has resolved many of the issues that plagued him prior to 2013 and that Mr. Thomas appeared much healthier and more intellectually-alert. In PS's words, Mr. Thomas has "smartened up" in the last couple of years.
15. PS advised that Mr. Thomas has kept current with his knowledge of law throughout his suspension by reviewing case law and reading articles.
16. In PS's opinion, Mr. Thomas has learned a difficult lesson as a result of his actions and PS did not feel Mr. Thomas would be a danger to the public if he were allowed to practice again in the future.
17. Mr. Thomas gave evidence on his own behalf. He testified that he accepts the Committee's findings about his conduct but that his conduct, while not excusable, is explainable.
18. Mr. Thomas was called to the British Columbia Bar following his graduation from law school at the University of Alberta in 1996. He found success early in his career working as a Federal Prosecutor prosecuting drug charges and developing policy for border

control. Mr. Thomas was called to the Alberta Bar after successfully challenging the transfer exams.

19. Mr. Thomas summarized his career in Alberta. He eventually joined the firm of Hladun & Co. where he ran a very busy practice. As a result of a high volume of work and a shortage of qualified support staff, Mr. Thomas started having difficulties. He took some time off work in order to address his difficulties.
20. When Mr. Thomas returned to work at Hladun & Co. following a brief leave of absence, there was a falling out between him and the firm so Mr. Thomas left to start his own practice. With the benefit of hindsight, Mr. Thomas acknowledged he was not prepared to open a solo practice and did not have the proper infrastructure in place to manage the demands of practice as well as the regulatory requirements of the LSA. Mr. Thomas acknowledged that he was aware the LSA had assistance available in the form of the practice management group, but he chose not to avail himself of that help.
21. Significant problems became apparent within four to five months of Mr. Thomas starting his solo practice. He was unable to reconcile files and accounts he had brought over from his former firm. By 2009, he was aware there were problems with his trust accounting that he was not able to address. Mr. Thomas admitted that he was “effectively incompetent” when it came to understanding and complying with the LSA’s trust accounting rules.
22. The LSA commenced its investigation of Mr. Thomas and when faced with a possible suspension, Mr. Thomas elected to not pay his practice fees and became administratively suspended. He testified he was in “a very dark place” at that time. He had little or no appreciation of his actions and the consequences that would follow if he did not cooperate with the LSA’s investigation.
23. Compounding his issues, Mr. Thomas’s father had become gravely ill and he eventually passed away in October 2011. According to Mr. Thomas, the pressure of the LSA investigation, his father’s illness and his on-going health issues all contributed to the conduct that resulted in the findings of conduct deserving of sanction.
24. Mr. Thomas gave evidence that he is a different person today than he was at that time. He understands that the practice of law is a privilege and, had he been able to appreciate the consequences of his actions at the time, he would not have engaged in that conduct.
25. Mr. Thomas described the steps he has taken to address the issues that contributed to his conduct. He has discussed the seriousness of the issues he was facing with his family and this has resulted in stronger family ties and the development of a family support network that he did not previously enjoy. He has also sought treatment for his health issues, and advised that those issues which caused him difficulty in the past are no longer present in his life. Mr. Thomas assured the Committee that he is functioning at a high level, understands the gravity of his past actions and how those actions negatively affected his standing in the community, negatively impacted his clients and colleagues, and brought the public’s perception of the profession as a whole into disrepute.

26. Mr. Thomas urged the Committee to consider a suspension with strict conditions, including a restriction on his ability to operate a trust account, as an appropriate sanction for his conduct. Mr. Thomas emphatically assured the Committee that he would not repeat his past mistakes and that there would be no risk to the public when he returned to practice.
27. Under cross-examination by counsel for the LSA, Mr. Thomas acknowledged that the Assurance Fund paid out approximately \$43,000 to former clients on his behalf and that he has taken no steps to repay that money.
28. Mr. Thomas admitted that despite knowing his conduct negatively impacted some of his clients and colleagues, he has not made any apologies for that conduct. Specifically, he has not apologized for his conduct to the custodian who took over his practice following his suspension.
29. Mr. Thomas confirmed that he had been asked to respond to inquiries by the Chair of this Committee for the purposes of scheduling this hearing and that he did not do so by the deadline requested. When he did respond, he provided some limited information and advised he would provide a more fulsome response within a few days, but did not do so.

Summary of the Arguments

30. Counsel for the LSA argued that the citations founded against Mr. Thomas fell into three main categories: 1) failing to uphold the law and bringing the profession into disrepute, 2) misappropriation of funds; and 3) ungovernability. Counsel for the LSA categorized these types of citations as the most serious that can be issued against a member and any one of them alone may result in disbarment.
31. LSA counsel argued that the weight of authority establishes that disbarment is an appropriate sanction for misappropriation of trust funds, even where the misappropriation falls short of an actual theft with intent (*Doolan v. Law Society of Manitoba*, 2016 MBCA 57; *Law Society of Alberta v. Beaver*, March 9, 2017 HE20160048).
32. Furthermore, the usual punishment for a finding of ungovernability is disbarment (*Law Society of Upper Canada v. Carter*, 2005 ONLSHP 24 at paras. 69-70; *Law Society of Upper Canada v. Thomas Michel Hicks*, 2005 ONLSHP 0002 at paras. 44-45; *Law Society of Alberta v. Riccioni*, 2012 ABLS 15 at pp. 14-15; *Law Society of Alberta v. Dewett*, March 13, 2016 HE20120017; *Law Society of Alberta v. Broda*, June 17, 2016 HE20070043).
33. Counsel for the LSA noted that there was no expert or medical evidence presented linking Mr. Thomas's struggles to the conduct deserving sanction, and that the Committee should be concerned by this lack of medical evidence. The observational evidence of EF and PS was not particularly helpful in determining whether Mr. Thomas's health issues caused or contributed to his conduct. While Mr. Thomas gave evidence that he was no longer suffering from any ill health effects, he still refused to be responsive to requests for information by this Committee. LSA counsel argued this supports the LSA's contention that Mr. Thomas remains ungovernable and should be disbarred.

34. Mr. Thomas argued that disbarment is the ultimate sanction and that a sanction short of disbarment can be appropriate even in cases where there have been findings of ungovernability. There are mitigating factors in his case, including the fact that he has no prior disciplinary history and that his actions were a result of health issues that he suffered from at the relevant time. He argued a lengthy suspension plus practice restrictions is a more appropriate sanction for him.
35. Mr. Thomas distinguished the facts in many of the cases relied on by the LSA. He noted that in his case, the misappropriation was not a theft *per se* but amounted instead to carelessness with respect to the use of the funds to pay accounts for work that had been completed on files.
36. Mr. Thomas argued that he can be rehabilitated. He met the required standards to practice for many years prior to his administrative suspension and he can be an asset to the profession and to the public again in the future. He argued that a lengthy suspension will have the required deterrence effect and that carefully constructed conditions on his return to practice would ensure the public is protected.

Analysis

37. Section 49(1) of the *Legal Profession Act* sets out the purpose behind disciplinary proceedings. Those purposes are:
 1. The protection of the best interest of the public (including the members of the Society) and
 2. Protecting the standing of the legal profession generally.
38. The purpose of disciplinary proceedings is further explained in *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin Mackenzie. At section 26-1, he states:

The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

...

The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of a recurrence of the misconduct, even if that

possibility is remote. Any other result would undermine public trust in the profession.

39. There are limited sanctions available to a Hearing Committee. Section 72(1) requires a Hearing Committee that has found a member guilty of conduct deserving of sanction to disbar, suspend or reprimand the member.
40. The 2013 Hearing Guide of the LSA sets out a number of general factors that may be taken into account when determining the appropriate sanction to impose on a member. Those factors include:
 1. 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.
 2. Specific deterrence of the member in further misconduct.
 3. Incapacitation of the member (through disbarment or suspension).
 4. General deterrence of other members.
 5. Denunciation of the conduct.
 6. Rehabilitation of the member.
 7. Avoiding undue disparity with the sanctions imposed in other cases.
41. Mr. Thomas and counsel for the LSA agreed that a reprimand would not fulfill the purposes of sanctioning given the seriousness of the conduct deserving of sanction in this case. Mr. Thomas argued that when the mitigating circumstances of his case are considered, a lengthy suspension best fulfills the purpose of sanctioning. Counsel for the LSA argued that only disbarment will fulfill the requirements of denouncing the conduct in question, protecting the public and the standing of the profession generally.
42. In the view of the Committee, the impact of the mitigating circumstances that Mr. Thomas urged this Committee to consider must be subordinated to the primary purposes of sanctioning including protecting the public and preserving the standing of the legal community:

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

off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among the members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequences for the individual and his family may be deeply unfortunate and unintended. But it does not make the suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of an individual member. Membership of a profession brings many benefits, but that is a part of the price. (*Bolton v. Law Society*, [1994] 1 W.L.R. 512 at 519 (CA))

43. The circumstances of the present case warrant the imposition of the most serious sanction available: disbarment. The sanctioned conduct is more fully set out the May 1, 2017 Hearing Committee Report, however particularly egregious examples of his conduct and other relevant factors are summarized below and weighed heavily in the Committee's decision to disbar Mr. Thomas.
44. With respect to citations one and two, Mr. Thomas's conduct was serious and involved attempts to mislead law enforcement officials. Mr. Thomas ultimately represented to the court that he was guilty of the offences he was charged with but then gave evidence under oath in the conduct proceeding that he did not commit those offences. He either misled the court during the criminal proceedings or lied under oath in the conduct proceedings, either of which acts are inconsistent with his continued membership in the LSA.
45. Mr. Thomas misappropriated a substantial amount of funds and the misappropriation continued over an extended period of time. The carelessness with which Mr. Thomas treated his clients' trust funds is incompatible with the level of trust required in a solicitor and client relationship and the associated requirements on members of the profession. Maintaining the public's trust in the members of this profession requires removal of Mr. Thomas from the profession.
46. Mr. Thomas's failure to respond in a timely manner, comply with LSA rules, and cooperate with LSA investigators and the custodian of his practice does not support his request for leniency in his sanction. Instead his conduct makes it clear that he is ungovernable. His lack of responsiveness to matters relating to the Society continues to the present day. This Committee has no confidence that Mr. Thomas is now governable or will be governable in the future.
47. The degree of rancor and combativeness that Mr. Thomas displayed towards LSA personnel, including investigators, the custodian of his practice and staff, demonstrates

an inability or unwillingness to respond appropriately to the LSA and other authorities. This disdain for the governing body cannot be reconciled with his continued membership in the Society and the protection of the public.

48. There is no medical evidence to substantiate the argument that health issues caused or contributed to Mr. Thomas's conduct. Nor was any medical or expert evidence presented regarding successful treatment of these issues or fitness for practice. The Committee is left with serious concerns about Mr. Thomas's ability to manage the responsibilities and stresses that inevitably arise in a legal practice. This leaves the Committee with serious concerns that the public will be placed at risk if Mr. Thomas is permitted to return to his practice following a suspension.
49. While Mr. Thomas appears genuine in his assertions that he has learned from this process and that he will not re-offend, he has not taken any steps that would demonstrate to this Committee that he is willing to make amends for his past conduct. He has not made any attempt to repay the amounts paid out on his behalf to his clients whose trust funds were misappropriated nor has he apologized to any of those individuals who were negatively affected by his conduct. Assertions without actions are not sufficient to satisfy this Committee that any meaningful rehabilitation has taken place to date.
50. Mr. Thomas's actions are not compatible with the duties of a lawyer to ensure the proper administration of justice, they are not compatible with a lawyer serving the best interests of his clients, and they are not compatible with the high standards of conduct required of members of a self-regulated profession. These are three main pillars underlying the public's trust in the legal profession and conduct that undermines all three pillars must be denounced in the strongest possible way.

Disposition and Costs

51. The Committee orders that Mr. Thomas be disbarred, effectively immediately. There shall be a Notice to the Profession to that effect.
52. No referral to the Minister of Justice and Solicitor General is required.
53. The public shall have access to transcripts, exhibits and reports in this matter, subject to redactions for the names of third parties and any privileged or confidential information.
54. The Estimated Statement of Costs, Exhibit 169, sets out costs in the amount of \$225,173.84. The final costs are not expected to be substantially more than the current estimate.
55. Counsel for the LSA noted that due to a change in LSA counsel after the commencement of these proceedings, there was some duplication of costs and the costs should be reduced to account for that duplication. She also conceded that the LSA did not prove all

of the citations and some reduction for that might be warranted. Mr. Thomas did not take exception with any of the costs claimed although he did note that reduction should be warranted for the reasons articulated by counsel for the LSA.

56. Costs are assessed against Mr. Thomas in the amount of \$150,000.00, that being approximately 2/3 of the Estimated Statement of Costs.

Dated at the City of Calgary in the Province of Alberta this 14th day of November, 2017.

Rob W. Armstrong, Q.C. (Chair)

Robert Dunster