

THE LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT
(HE 20080044)

IN THE MATTER OF the *Legal Profession Act*,
AND IN THE MATTER OF a Hearing regarding the conduct of
BRADLEY ENGE, a Member of the Law Society of Alberta

INTRODUCTION

1. On December 1, 2009 a Hearing Committee of the Law Society of Alberta (LSA), convened at the Law Society's Office in Edmonton to inquire into the conduct of the member, BRADLEY ENGE. The Committee was comprised of J. Royal Nickerson Q.C., the Chair; Frederica Schutz and Larry Ohlhauser, M.D. The LSA was represented by Janet Dixon, Q.C. The Member was unrepresented. The Member was neither present nor represented by counsel.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1, 2 and 4 consisting of the Letters of Appointment of the Hearing Committee, the Notice to Solicitor and Notice to Attend with Affidavit of Service, and the Certificate of Status of the Member, established the jurisdiction of the Hearing Committee.
3. The Certificate of Exercise of Discretion was entered as Exhibit 5.
4. The following additional Exhibits were entered though the course of these proceedings:
 8. Affidavit of Personal Service of letter to solicitor and Notice to Attend – new Hearing date – December 1-2, 2009;
 9. Affidavit of Service of the Determination of the Director of Insurance;
 10. Curriculum Vitae of investigator – Nancy M. Stenson;
 11. Estimated Statement of Costs;
 12. Written Submission of The Law Society of Alberta.
5. There was no objection by counsel for the LSA regarding the constitution of the Hearing Committee.
6. The entire hearing was conducted in public.

BACKGROUND AND CITATIONS

7. The Member presently stands suspended in the Province of Alberta for non-payment of fees, but is a Member of the Northwest Territories Bar after having relocated his practice to Yellowknife, Northwest Territories.
8. The Member faced the following citations:

CITATION 1: IT IS ALLEGED that you failed to serve and properly account to your client, S.-K. and that such conduct is conduct deserving of sanction;

CITATION 2: IT IS ALLEGED that you charged your client S.-K. fees which exceeded a fair and reasonable amount, and that such conduct is conduct deserving of sanction;

CITATION 3: IT IS ALLEGED that you misappropriated trust funds, and that such conduct is conduct deserving of sanction;

CITATION 4: IT IS ALLEGED that you failed to cooperate with the Law Society during the course of its investigation, and that such conduct is conduct deserving of sanction;

CITATION 5: IT IS ALLEGED that you failed to honour trust conditions, and that such conduct is conduct deserving of sanction.

9. The Member was personally served with the Notice to Solicitor and the Notice to Attend by a Deputy Sheriff in the City of Yellowknife, in the Northwest Territories on the 27th of October, 2009 and further acknowledged receipt of the aforesaid Notices.
10. The Member was further personally served with the binder containing the Investigator's Report with attachments.

EVIDENCE

11. The Complainant who was the Member's client and is hereinafter referred to as S.-K., and the Investigator gave evidence at the Hearing.
12. The complaints and resulting Citations arise out of the Member undertaking to act for S.-K., whose husband was involved in a fatal motor accident on or about the 14th of September, 2004, near Carstairs, Alberta.
13. On or about the 21st of September, 2004, the Member attended at the home of S.-K. in Olds, Alberta and had S.-K. and the mother of the deceased execute a Contingency Agreement.
14. On or about the 5th of October, 2004, the Member had S.-K. only execute an identical Contingency Fee Agreement, deleting reference to the deceased's mother.
15. The relevant terms of the Contingency Fee Agreement are as follows:
 - ii) IN THIS AGREEMENT "claim proceeds" includes all damages and any other compensation I recover by way of settlement or judgment, and includes the fee portion of any costs recovered. Other compensation might include money recovered through SEF 44, and Section B benefit claims.
 - iv) I AGREE to pay you, for your services, by way of a percentage of the claim proceeds calculated as follows:
 - (a) Twenty Five percent of the claim proceeds before Examinations for Discovery;

16. S.-K. professed to not have read the Contingency Fee Agreements, nor to fully understand them. Considering the manner in which the Member handled her money, neither did the Member.
17. This matter never went to Examinations for Discovery, nor did the Member ever facilitate a settlement with the Tortfeasor's insurer.
18. S.-K. had instructed the deceased's insurer to forward all money to the Member to use as he would, ie. to prosecute her and the children's action against the Tortfeasor.
19. The Member did collect the following monies from the deceased's insurer (Exhibit 6 tab 60):

i)	For the loss of the deceased's motorcycle:	\$13,000.00
ii)	Section B benefits, funeral expenses:	2,000.00
iii)	Death Benefit for S.-K.:	12,080.00
iv)	Death Benefit for child 1	4,080.00
v)	Death Benefit for child 2	4,080.00
vi)	Death Benefit for child 3	4,080.00
vii)	Death Benefit for child 4	4,080.00
viii)	Death Benefit for child 5	4,080.00
	Total:	\$47,480.00

20. The 5 cheques for \$4,080.00 were each sent under the following trust conditions:

"This draft is forwarded to you under the following trust conditions:

That all funds must be sent to the Public Trustee for handling until such time as the monies can be released to the minors, once he turns the age of majority."

21. On the 3rd of March, 2006, the Member reported to S.-K. as follows:

(a) Re: Appointment as Administrator and lawsuit against (Tortfeasor)

In preparation for upcoming legal work regarding the two captionally noted matters, I will be transferring funds to my trust account to my retainer (general) bank account. Below is a recap of the transactions thus far:

To		
Received from insurance company		39,320.00
June 28/05	L.S. as per request	7,000.00
June 28/05	Brad Enge – interim account	3,611.65
July 22/05	L.S. as per request	6,000.00
	Legal research – disbursement	122.50
	Legal research/drafting – disbursement	350.00
	Subtotal of Balance:	22,235.85
March 3/06	Transfer contingency fee remainder	12,116.35
March 3/06	Retainer balance (for estate lawsuit)	10,119.50
	Balance held in trust account:	Nil

(Exhibit 6 tab 19)

22. In addition to the meeting at S.-K.'s house shortly after the fatal accident, the Member met with S.-K. for the last time, at a restaurant in Red Deer, Alberta.
23. S.-K. never met with the Member again but communicated with him by telephone and e-mail. S.-K. found communicating with the Member difficult.
24. The Member negotiated in vain with the Tortfeasor's insurer to effect a settlement. Liability was in issue. Although no monies were apparently offered by the Tortfeasor's insurer, they proposed an equal apportionment of liability. S.-K. denies ever being apprised of an offer to apportion liability equally between the parties.
25. After an action was commenced against the Tortfeasor, the Member informed S.-K., by e-mail, that: "he has health issues and is shutting the rest of my Alberta law practice down as I have extended myself way too much." (Exhibit 6 tab 24)
26. The Member entrusts the matter to a David Barker who he refers to as his "legal assistant". David Barker at all relevant times was a law student, although not the Member's. Mr. Barker eventually, on the instructions of the Member, passes on S.-K.'s file to the lawyer, Melanie Watson.
27. S.-K. at no time met Mr. Barker, nor was she aware that he was not a lawyer.
28. S.-K. eventually finds communicating with the Member to be too challenging and on the 22nd of March, 2007, reports the matter to the LSA.
29. In addition to communication concerns, S.-K. was concerned about the manner in which the Member has handled the monies she hasn't seen.
30. The Member called the Manager of Complaints – Edmonton on the 3rd of July, 2007 and indicates his failure to respond to the LSA was because he has been extremely depressed to the point of having "suicidal ideations".
31. On the 1st of August, 2007, the Member responds in writing to S.-K.'s complaint by indicating:

"I do not have and never received \$21,000.00 that (S.-K.) is referring to in her letter."
32. Thereafter the Member did not respond to the following correspondence:
 - i) June 14, 2007, e-mail from LSA advising Member that:
 1. it is essential that you re-establish communication with the Law Society forthwith, and that you maintain such communication on a timely basis. Your failure to do so will force us to take alternative measures which could ultimately lead to your disbarment.
 - ii) August 13, 2007, letter from LSA requesting comments on S.-K.'s response to the Member's explanation;
 - iii) September 20, 2007, reminder letter from LSA;

- iv) November 15, 2007, warning letter from LSA;
 - v) January 2, 2008, Demand for Information letter from LSA pursuant to Investigation Order dated December 13, 2007;
 - vi) Personal service of March 18, 2008 Investigation letter upon Member;
 - vii) April 25, 2008, Demand letter by Investigator for interview;
 - viii) May 8, 2008, Personal service of Demand letter for interview by Investigator;
 - ix) June 2, 2008, further email from the Investigator to the Member demanding an interview;
 - x) July 8, 2008, letter from LSA containing Investigation Report;
33. LSA's Investigator is unable to leave voicemail with Member as his voicemail box is full.
34. It should be noted that while the Investigator was futilely trying to obtain a response from the Member, the Member was communicating with Ms. Watson, the lawyer to whom he had referred the subject file (Exhibit 6 tab 58, pages 3 and 6).
35. The Hearing Committee is satisfied from the evidence of the Investigator that the Member received all notices sent to him save for those which appear to have remained unclaimed at the post office.

DECISION

36. CITATION 1: The Hearing Committee finds that the Member has failed to serve and properly account to his client S.-K. and that conduct is deserving of sanction for the following reasons:
- a) By not reporting to S.-K. that he had received \$8,160.00 on behalf of children 4 and 5 in the form of Section B benefits;
 - b) By making it difficult, if not impossible, to communicate with;
 - c) Placing his file in the hands of a non-lawyer, whether or not he informs the client of the status of that person;
 - d) Failing to inform S.-K. of the issues of liability and the offer of the insurance company to apportion liability equally;
 - e) Failing to obtain S.-K.'s approval before sending the file to another law firm.
37. CITATION 2: The Hearing Committee finds that the Member is guilty of charging his client S.-K. fees which exceeded a fair and reasonable amount and that such conduct is deserving of sanction for the following reasons:

- a) Charging and retaining monies as legal fees well in excess of the amounts set out in the Member's Contingency Fee Agreement.
38. CITATION 4: The Hearing Committee finds that the Member has failed to cooperate with the Law Society during the course of its investigation and such conduct is deserving of sanction for the following reasons:
- a) The Member failed to respond to the enquiries of the Manager of Complaints, thus necessitating an investigation;
- b) The Member failed to cooperate in any manner whatsoever with the Investigator;
- c) The Member failed to comply with the Notice to Attend to give evidence at these proceedings.
39. CITATION 5: The Hearing Committee finds that the Member is guilty of failing to honour trust conditions and such conduct is conduct deserving of sanction. The trust conditions were imposed by the deceased's insurer through the payment of Section B benefits to children 1 - 3. These funds were disbursed to S.-K. or formed part of the monies retained as legal fees, in breach of the trust conditions imposed by the deceased's insurer.
40. CITATION 3: The Hearing Committee dismisses this Citation as it is not satisfied that the weight or volume of evidence in support of the LSA's contention that the Member misappropriated trust funds is sufficient upon which to base a finding of guilt.
41. The Hearing Committee acknowledges that there was a certain volume of direct and circumstantial evidence in support of this contention. The most damaging of which comes from the Member's letter to S.-K. of the 3rd of March, 2006, in which he:
- (a) Charges an interim account of \$3,611.65;
- (b) Transfers a contingency fee of \$12,116.35;
- (c) Transfers a further "retainer balance" to general of \$10,119.
42. Although the above action, without any regard for the Contingency Agreement, is sufficient to support a finding of guilt to Citation 2, the culpability for misappropriation is akin to fraud or deceit and the onus is greater on the LSA, although less than proof beyond a reasonable doubt.
- Rangrose v. College of Physicians and Surgeons of Alberta*, [1978] 2 W.W.R. 534 (Alta. CA)
The Law Society of Alberta v. Estrin, [1992] 4 Alta. LR (3rd) 373 (Alta. CA)
43. We are mindful of S.-K.'s permitting the Member to retain insurance money to use as he would "in the anticipated upcoming legal battle".
44. Although we do not feel that Mr. Barker or Ms. Watson have received these monies, we do not have their direct evidence on this point, as neither of them were called to give evidence in these proceedings.

45. We are cognizant of but not bound by the determination of the Director of Insurance that the Member “did misappropriate” money in her finding that S.-K. was entitled to a reimbursement of these monies.
46. With respect, we feel that the burden of the Director of Insurance is different than that placed upon this Hearing Committee.

SANCTIONS

47. Because of the Citation of which we have found the member guilty, we feel that we do not have any alternative but to impose the sanction of disbarment upon him.
48. The Member’s inaction in the face of inquiries and investigations to the point of elusiveness, makes him ungovernable and for the protection of the public, we have no choice but to impose this severe sanction.
49. We appreciate that finding the Member guilty of some of the Citations individually, especially Citations 1, 2 and 5, would not necessarily attract this sanction. We feel it would be moot to attach lesser sanctions to these sanctions when the Member’s ungoverned ability dictates a sanction of disbarment for Citation 4.
50. The totality of the Member’s conduct cannot be tolerated if the LSA is to “regulate its members in the public interest” (LSUC and Bronskein [1994], L.S.D.D. and O.10).

CONCLUDING MATTERS

51. The Member is to pay costs in the amount of \$4,222.05 forthwith.
52. A Notice of these proceedings will not be provided to the Attorney – General.
53. There will be a Mandatory Publication of a Notice to the Profession.
54. Any transcript of the proceedings or exhibits shall be redacted to remove identification of the Complainant.

DATED this 21st day of December, 2009.

J. ROYAL NICKERSON, Q.C., Bencher
Chair

FREDERICA SCHUTZ, Member

LARRY OHLHAUSER, M.D.