

**THE LAW SOCIETY OF ALBERTA**

**IN THE MATTER OF THE *LEGAL PROFESSION ACT*;**

**AND**

**IN THE MATTER OF A HEARING REGARDING**

**THE CONDUCT OF DARRELL COHEN**

**A MEMBER OF THE LAW SOCIETY OF ALBERTA**

**Hearing Committee:**

Anthony G. Young, Q.C., Chair (Bencher)

Kathleen Ryan, Q.C., Committee Member (Bencher)

Amal Umar, Committee Member (Lay Bencher)

**Appearances:**

Counsel for the Law Society – Nancy Bains

Counsel for Darrell Cohen – James Rooney, QC

**Hearing Date:**

April 27, 2015

**Hearing Location:**

Law Society of Alberta at 500, 919 – 11<sup>th</sup> Avenue S.W., Calgary, Alberta

## HEARING COMMITTEE REPORT

### Jurisdiction, Preliminary Matters and Exhibits

1. The Member and counsel for the LSA were asked whether there were any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.
2. Exhibits 1 through 4, consisting of the letter of appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the *Legal Profession Act*, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established the jurisdiction of the Committee.
3. The Certificate of Exercise of Discretion pursuant to *Rule 96(2)(b)* of the *Rules* of the LSA (“Rules”) pursuant to which the Deputy Executive Director and Director, Regulation of the LSA, determined that there were no persons to be served with a private hearing application, was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. Accordingly, the Chair directed that the Hearing be held in public.
4. At the outset of the Hearing, Exhibits 1 through 21, contained in the Exhibit Book which had been provided to the Committee in advance were entered into evidence in the Hearing with the consent of the parties. Further, Exhibit 22 being an estimated Statement of Costs and Exhibit 23, being the Member’s Record were added to the Exhibit Book as the Hearing proceeded.

### Citations

5. The Member faced the following Citations:
  1. It is alleged that Mr. Cohen failed to fulfill his undertaking and that such conduct is deserving of sanction.
  2. It is alleged that Mr. Cohen failed to be candid with [the complainant] regarding the release of the bank draft to his client and that such conduct is deserving of sanction.

## **Agreed Statement of Facts and Admission of Guilt**

6. The LSA tendered an agreed Statement of Facts and Admission of Guilt regarding the two citations, attached as Schedule "A". The Committee reviewed the agreed Statement of Facts and Admission of Guilt and determined that it was in a form acceptable to it. As such, pursuant to section 60 of the *Legal Profession Act*, RSA 2000 c L-8 (Act) the conduct noted therein was deemed for all purposes to be a finding of this Committee that the conduct of the member is conduct deserving of sanction.
7. No additional evidence was led by either Party.

## **Discussion Regarding the Joint Submission on Guilt**

### **Citation No. 1**

8. Rule 4.01(7) of the Professional Code of Conduct states:  
*"A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation."*
9. Further, at Rule 6.02(13):  
*"A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted."*
10. The commentary to Rule 6.02(13) states, in part:  
*"Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person."*
11. In this case, the following trust condition was formulated and accepted by the Member:  
*"A bank draft in the sum of \$10,000.00, made payable to [the complainant] is to be held in trust by our office pending notification to [JV] by MEPS that the process of program withdrawal is complete, at which time funds shall be released to you."*
12. The complainant then completed the form of "*Withdrawal from Alberta Justice Maintenance Enforcement Program*" on August 28, 2012. The complainant emailed the Member to confirm that the MEPS file had been closed, and attached the print screen of

the MEPS account, noting the upper right hand corner indicated the file status as “closed”. As the complainant had fulfilled the requirement of the trust condition, she advised the Member that she would attend at his offices the next day to pick up the bank draft.

13. Subsequent to receiving notice that the complainant had complied with the trust condition, the Member’s assistant emailed the complainant advising that the file had been “pulled” from the Member’s office and that she should direct any further correspondence to the new lawyer.
14. The Member did not have the bank draft for payment to the complainant.
15. Trust conditions for lawyers are sacrosanct within the profession. They are inviolate applications that, once created, must be fulfilled. Trust conditions are the unimpeachable assurances that accommodate and facilitate commerce and settlement. A lawyer’s word must be paramount. Trust conditions are fundamental to the protection of the public.
16. In this case, the Member failed to honour his trust condition. There is no denial that he had been in possession of the bank draft in the amount of \$10,000.00. As such, the bank draft was in his control. The complainant’s expectation was that upon providing notification by MEPS that the process of Program Withdrawal was complete, she would receive the bank draft held by the Member.

## **Citation No. 2**

17. An inquiry was made by the complainant to the Member the day following the release of the file to a new lawyer. She asked how funds that were held in trust could be legally released to someone else after she had complied with the obligations in the Agreement. The Member replied by email that the funds were held in trust and were not to be released until his former client had agreed to the funds being released. This statement was not candid.

18. Later that day the Member reported to the complainant that the new lawyer had the bank draft and that the complainant should direct all further questions and concerns to her.
19. The new lawyer was not in possession of the bank draft. There was no evidence at the hearing that trust conditions were imposed upon the new lawyer regarding the bank draft. In fact, it was discovered by the Member that the Member's former client had attended at the Member's office, taken the bank draft and returned it to the bank to convert it to a retainer.
20. When the Member replied by email that the funds were held in trust and were not to be released until his former client had agreed to the funds being released he was not being straightforward and frank with the complainant. He knew that once the complainant complied with the condition set out in the Member's letter the funds were unconditionally releasable.
21. The reply given by the Member was not candid.

### **Joint Submission on Sanction**

22. A joint submission was made that a fair and reasonable sanction in this matter was a reprimand and an Order for costs of approximately \$2,000.

### **Discussion regarding the Joint Submission on Sanction**

23. Paragraph 56 of the Hearing Guide states:  
"If a submission on sanction is made jointly by the Member and Law Society counsel, the Hearing Committee should give serious consideration to the joint submission, and accept it unless they consider it unfit or unreasonable or contrary to the public interest. The Hearing Committee, however, is not bound by the submission, and may determine the more appropriate sanction, but only do so after the member and Law Society counsel are given an opportunity to speak to the matter."

24. There is to be a purposeful approach to sanctioning. The goal of sanctioning is to ensure that high professional standards are maintained and the public confidence in the legal profession is preserved. The overarching goal is protection of the public.
25. In this case the Committee heard that the Member:
  - a) has been practicing for 22 years without and did not have a prior conduct record;
  - b) admitted his conduct;
  - c) has cooperated in these proceedings; and
  - d) admitted that he would now do things differently.
26. In accepting the joint submission on sanction the Committee notes that a reprimand is a serious sanction. The Member's otherwise spotless record is now forever tarnished. The Committee is satisfied that this sanction will help ensure that high professional standards are maintained and that public confidence in the legal profession is preserved.

### **Concluding Matters**

27. The Member was reprimanded, a copy of the reprimand appears as Schedule "B" to this Decision.
28. The Member was ordered to pay the actual costs of the hearing within 2 weeks of the delivery of the finalized Statement of Costs to the Member.
29. There shall be no Notice to the Attorney General.
30. There shall be no Notice to the Profession.
31. Counsel for the LSA is directed to provide a PDF and Word copy of the agreed Statement of Facts and Admission of Guilt for incorporation into this Decision.

32. There will be a redaction of the Exhibits, including the Statement of Facts and Admission of Guilt, as may be necessary to protect solicitor/client privilege or confidentiality.

Dated at the City of Calgary, in the Province of Alberta on this 17th day of February, 2016.

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Anthony G. Young, Q.C.

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Kathleen Ryan, Q.C.

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Amal Umar

## Schedule "A"

IN THE MATTER OF *THE LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF DARRELL COHEN

A MEMBER OF THE LAW SOCIETY OF ALBERTA

### **STATEMENT OF FACTS AND ADMISSION OF GUILT**

#### INTRODUCTION

1. I was admitted as a member of the Law Society of Alberta on July 30, 1993.
2. My present status with the Law Society of Alberta is Active/Practicing.
3. I have practiced in Calgary, Alberta from July 30, 1993 to present.
4. My practice comprises Corporate (8%), Commercial (20%), Real Estate Conveyancing (62%), and Wills, Estates and other (10%).

#### CITATIONS

5. On October 23, 2014, the Conduct Committee Panel referred the following conduct to hearing:
  1. It is alleged that Mr. Cohen failed to fulfill his undertaking and that such conduct is deserving of sanction;
  2. It is alleged that Mr. Cohen failed to be candid with [the complainant] regarding the release of the bank draft to his client and that such conduct is deserving of sanction.

#### FACTS

6. In 2012, [JV] was my client. In August 2012, [JV] and his ex-wife were involved in a dispute over child support payments. Specifically, [the complainant] was a creditor registered with the Maintenance Enforcement Program ("MEP") and [JV] was the debtor.
7. I agreed to represent [JV] in this matter and attempted to negotiate a settlement agreement between them. An agreement was made and I prepared a written Agreement, dated August 27, 2012, which included the following terms:

“As agreed to both parties, this letter shall serve as notice to the settlement terms regarding ongoing support payments by [JV] to [the complainant].

[JV] agrees to the following:

1. A bank draft in the sum of \$10,000.00 made payable to [the complainant] is to be held in trust by our office pending notification to [JV] by MEPS that the process of program withdrawal is complete, at which time funds shall be released to you.”
8. [JV] executed the Agreement with me signing as his witness. [The complainant] executed the Agreement and also completed the form ‘Withdrawal from Alberta Justice’s Maintenance Enforcement Program’ on August 28, 2012. She emailed the Withdrawal form to MEP and both the executed Agreement and the completed Withdrawal form to ●●●●●, my legal assistant, on August 28<sup>th</sup>.
9. At 4:20 p.m. on September 6, 2012, [the complainant]’s husband called [my assistant] and confirmed that I still held the bank draft in trust. Two minutes later, [the complainant] emailed [my assistant] to confirm that the MEP file had been closed, and attached the print screen of the MEP account, noting the upper right corner indicated the file status as “closed”. [The complainant] advised [my assistant] that as she had fulfilled the requirement in clause 1 of the Agreement she would attend at our offices the next day pick up the bank draft. Approximately 4½ hours later, [my assistant] emailed [the complainant] advising that the file had been pulled from our office and that she should direct any further correspondence to [E.L.], Q.C..
10. The following day, on September 7, 2012, [the complainant] sent an email to [my assistant] again asking how funds that were held in trust could be legally released to someone else after she had complied with the obligations in the Agreement. I replied by email that the funds were held in trust and were not to be released until [JV] had agreed to the funds being released.
11. [The complainant] responded by email a few minutes later on September 7, 2012, restating the terms of clause 1 of the Agreement and indicating that the clause did not say “until [JV] agreed to such release.” She questioned how the funds were released after [JV] was notified by MEP several days prior that the file was closed, which she confirmed with MEP, and after she sent proof that the MEP file was closed. [The complainant] wondered how the file and the bank draft were pulled from my office between 4:20 p.m. and 8:48 p.m. on September 6th.
12. I replied minutes later on September 7, 2012 that [E.L.] had the bank draft and the Agreement and [the complainant] should direct all further questions and concerns to her. I understand that [the complainant] then emailed [E.L.] who advised her that she was not aware that she possessed the bank draft.
13. I understand that [the complainant] then made a complaint to the Law Society of Alberta (“LSA”) on September 9, 2012 and at the time of her complaint, [the complainant] advised that she did not know where the bank draft was. [The complainant] believed that [JV] and I had tricked her into withdrawing from MEP and had no intention of releasing the bank draft to her.

14. In my response to the complaint, on October 9, 2012, I advised that I did not dispute any of the basic facts set out by [the complainant]. Further my recollection of events is as I set out in the October 9, 2012 letter:
- a. Although I advised [JV] that I did not believe the provisions regarding child support would be enforceable, my client insisted that he prepare the Agreement.
  - b. On August 31, 2012, [JV] came to my office and informed me that he had retained a new lawyer, [E.L.], who he had discussed the circumstances with and she advised him that the terms of the Agreement were not enforceable and he was taking the bank draft to her. I do not actually remember handing the bank draft to [JV], However, when my assistant enquired the following week as to its whereabouts I then remembered my client saying [E.L.] would deal with it. My assistant emailed [the complainant] to let her know she should contact [E.L.].
  - c. I then immediately contacted [E.L.] who informed me that [JV] had not provided her with the bank draft from his office, but with a bank draft for a retainer. I then called [JV] to find out where the bank draft was. [JV] informed him that he had returned it to the bank to convert it to a retainer.
  - d. I then made both Ms. Lenz [E.L.] and [JV] aware that this was unacceptable and that I was put in an awkward position with [the complainant]. [E.L.] understood and informed me that they would soon be making a Court application regarding child support and custody. [E.L.] advised [JV] that he had to replace the bank draft and provide it to me. [E.L.] requested that I not release the funds until the matter was decided by the Court. I requested that [E.L.] incorporate the issue of my payment of the \$10,000.00 to [the complainant] into the Court application. [E.L.] requested that I not release the funds until the Court determined the issue.
  - e. I advised that the new bank draft was in my possession. I had not released it to anyone as [JV] had not confirmed receipt of notification from MEP that withdrawal from MEP is complete and because [E.L.] had requested that I not release it. Since the matter was still in dispute I was not comfortable releasing the bank draft and preferred the Court make a final disposition.
  - f. I also stated I did not try to trick [the complainant]. However, "looking back, I would have definitely handled this matter differently to ensure that the integrity of the draft and the conditions thereon." I also advised that [the complainant] could and had not lost any right to opt back into MEP.
15. I am aware that [the complainant] entered into the Agreement because I was a lawyer in Alberta and she trusted that if she complied with the terms of a contract, that I would do the same.
16. I am also aware that [the complainant] believed that [JV] used the Agreement to have the MEP account closed, in order to reinstate his passport so he could take a trip to the United States. I was never aware that [JV]'s passport had been revoked nor that he had a scheme to have it reinstated.

17. Ultimately, I released the bank draft on misapprehension that [E.L.] would take the draft on the same conditions I had. I was surprised when I learned [JV] had reversed the bank draft. When I became aware of the problem I had the bank draft replaced.
18. After I was advised of the complaint to the LSA, it was then that [JV] advised me that he had actually taken the bank draft without my knowledge. Initially, he had advised me that he had taken the draft to[E.L.]. It was not until further inquiry that I determined that [JV] had converted the bank draft and provided [E.L.] with a new bank draft representing her retainer.
19. [JV] has contacted me and my assistant on at least three occasions offering to provide a statement confirming that I had no knowledge that he had taken the bank draft. I have yet to receive anything in writing from him.
20. Further to the Court application [E.L.] made on behalf of [JV], on May ●, 2013, Madam Justice Nixon ordered [JV] to pay retroactive child support in the total amount of \$5,000.00. This order also confirmed that most of the funds were available to [the complainant] by garnishment and MEP which she was enrolled in and the balance of all child support claimed was zeroed out.

#### CONDUCT – CITATION No. 1

21. I admit that I failed to fulfill my undertaking and that such conduct is deserving of sanction.

#### CONDUCT – CITATION No. 2

22. I admit that I failed to be candid with [the complainant] regarding the release of the bank draft to my client and that such conduct is deserving of sanction.

#### ADMISSION OF FACTS AND GUILT

23. I admit as facts the statements in this Statement of Facts for the purposes of these proceedings.
24. I acknowledge that I have had the opportunity to consult my legal counsel and provide this Statement of Facts and Admission of Guilt on a voluntary basis.
25. For the purposes of Section 60 of the *Legal Profession Act*, I admit my guilt to Citations 1 and 2 directed October 23, 2014.

THIS STATEMENT OF FACTS AND ADMISSION OF GUILT IS MADE THIS 20<sup>th</sup> DAY OF April, 2015.

“Darrell Cohen”

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DARRELL COHEN

**Schedule "B"**

IN THE MATTER OF *THE LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF DARRELL COHEN

A MEMBER OF THE LAW SOCIETY OF ALBERTA

**Reprimand**

There is a need to maintain public confidence in the integrity of the profession.

In this case, you were given a bank draft to be held in trust pursuant to an agreement that you had drafted. The complainant, should have been able to rely upon you as the custodian and trustee of the bank draft. She should have been able to rely upon you as a lawyer and as a Member of this profession. Her reliance would have been that the bank draft would be preserved, remained in your possession and delivered in accordance with the terms of the Agreement.

We have talked a little bit about the practice of pinning the draft to a bulletin board or to a corkboard. Your practice in this regard at protecting what is essentially trust property is, in the view of this Panel, at best, sloppy.

A lawyer who has agreed to a trust condition is bound by it.

You failed to do that.

The seriousness of the matter is further complicated by your lack of candor after the release of the bank draft. There is some explanation with respect to how that came about, and that explanation as set out in the statement of facts is accepted, but it is a serious matter, and I want you to keep that in mind, hopefully, for your next years of practice.