**LAW SOCIETY OF ALBERTA**

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

**AND**

**IN THE MATTER OF A HEARING REGARDING**

**THE CONDUCT OF MURRAY ENGELKING,**

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

**Hearing Committee:**

Kathleen Ryan, Q.C. (Bencher)

**Appearances:**

Counsel for the Law Society – Nancy Bains
Counsel for Murray Engelking – Self-Represented

**Hearing Date:**

April 25, 2016

**Hearing Location:**

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

## HEARING COMMITTEE REPORT

### Jurisdiction, Preliminary Matters and Exhibits

1. On April 25, 2016, a Hearing Committee (Committee) convened at the office of the Law Society of Alberta (LSA) to conduct a hearing regarding certain alleged conduct of Mr. Engelking. Mr. Engelking and counsel for the LSA were asked whether there were any objections to the constitution of the Committee. There being no objections, the hearing proceeded. Mr. Engelking attended throughout the hearing.

2. Exhibits 1 through 4 consisted 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. These exhibits established the jurisdiction of the Committee.

3. Pursuant to Rule 96(2)(a) and (b) of the *Rules of the Law Society of Alberta* ("Rules") several individuals were served with notice of a private hearing application. This notice

was confirmed by Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. The Chair directed that the hearing be held in public.

4. At the outset of the hearing, Exhibits 1 through 55, 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 56 being Mr. Engelking's record and Exhibit 57, an estimated Statement of Costs, were added to the Exhibit Book as the hearing proceeded. Collectively, the Exhibit Book was marked as Exhibit 1.

**Single Bencher Hearing and Statement of Admitted Facts**

5. The Conduct Committee of the Law Society directed that this matter be dealt with pursuant to Section 60 of the *Legal Profession Act*. The purpose of the hearing was to determine an appropriate sanction in respect of Mr. Engelking's conduct which was set out in the Statement of Admitted Facts and Admission of Guilt dated December 15, 2015 ("Statement of Admitted Facts").

6. The Statement of Admitted Facts was reviewed by a Conduct Committee Panel and that panel accepted the Statement of Admitted Facts that Mr. Engelking made a settlement offer on his clients' behalf without his clients' specific instructions and that such conduct is deserving of sanction.

7. The Statement of Admitted Facts is attached in its entirety as Appendix "A" with such redactions as are necessary to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

8. The only question for determination by this Committee is one of appropriate sanction.

9. Mr. Engelking readily admitted that he did not obtain the instructions of his client prior to making an unauthorized settlement offer on February 29, 2012 (the "Offer") to opposing parties in a real estate litigation matter. The Offer was accepted by an opposing party. The ultimate effect of this acceptance foreclosed Mr. Engelking's clients' right to litigate the very issue for which Mr. Engelking was retained.

10. Mr. Engelking states that it was not his intent to advance an offer capable of acceptance, but I find that this was the only reasonable construction of the Offer. I note that this was also the same finding of Judge Young of the Provincial Court of Alberta. Unfortunately, the Provincial Court ruling came only after several months of litigation respecting the fact of the Offer and whether it was capable of acceptance. Mr. Engelking did not report himself to the Law Society or his insurer during this time. Instead, he took the approach that he "made a mistake and… tried to fix it".

11. This approach likely compounded the unfortunate outcome as it exposed both Mr. Engelking's client and the opposing party to extended litigation. It is noteworthy, however, that at the time of the Offer, Mr. Engelking's actions were intended to protect his client from costs. Mr. Engelking's intentions were entirely without malice, but his actions demonstrated a serious failure in client service and failure to follow clear written instructions.

**Sanction**

12. The LSA sought a reprimand and a $7,500.00 fine. The LSA made the following submissions on sanction:

    a. It is necessary in order to protect the public and protect the legal profession that there be elements of specific and general deterrence which should be considered in sanction.

    b. Mr. Engelking did not only obtain instructions in writing, he then confirmed those instructions in writing. He then proceeded to ignore those instructions completely and then, worse, let the matter lag.

    c. There is a prior conduct record. Mr. Engelking was sanctioned by the LSA on April 16, 2009, in respect of the following misconduct:

        [1] Guilty, one count of conduct deserving of sanction - failing to honor trust conditions.
        [2] Guilty one count of conduct deserving of sanction - benefitting from client trust shortages.

        For this conduct, Mr. Engelking received a reprimand, fine of $5,000.00 and was ordered to pay 3/4 actual hearing costs of $5,985.00.

    d. The fine for the conduct in the Statement of Agreed facts should be higher than the fine in the past disciplinary proceedings.

    e. The range of sanction for this type of misconduct is broad and can vary from a reprimand to a suspension.

13. Mr. Engelking also made submissions on sanction:

    a. The circumstances here were less severe than the prior incident and should attract a lesser sanction;

    b. Mr. Engelking had compensated his clients roughly $20,000.00 for their loss in an effort to make the client whole;

c. No sanction was required in these circumstances.

14. Both the Law Society and Mr. Engelking rightly noted that Mr. Engelking in mitigation had freely admitted his error after reporting the matter. Both agreed that Mr. Engelking's approach in readily acknowledging the material facts meant there was no need for the matter to even proceed to the citation phase of conduct proceedings.

15. The approach taken by both Mr. Engelking and the LSA in dealing with this matter through a Single Bencher hearing avoided an unnecessary contested hearing, witness inconvenience, and process costs. This is commendable.

**Discussion on Sanction**

16. The impact on Mr. Engelking's client and on the opposing party is indicative of a significant departure from the norm of conduct. For an experienced practitioner, Mr. Engelking should have known better. The conduct is deserving of sanction.

17. Although there is a prior discipline record, the prior incident involved significant sums of money, misappropriation and theft over time by a staff member, and a fully contested hearing. This matter involves a single file and a serious failure to follow client instructions, but without any malicious intent whatsoever. But for that record, the fine may have been lower. However, there is no need on these facts to increase the fine because an increase beyond $5,000.00 would be a disproportionately harsh outcome for this conduct.

18. Discipline in law society proceedings requires a purposeful approach. The purpose is not to punish, but to "protect the public, maintain high professional standards, and preserve public confidence in the legal profession." Lawyers & Ethics: Professional Responsibility and Discipline, by Gavin McKenzie (at pages 26-1).

19. A fine of $5,000.00 and a reprimand are the appropriate sanctions on these facts. The reprimand was delivered at the oral hearing. The form of the reprimand is attached to this decision as Appendix "B".

**Concluding Matters**

20. The parties agreed on costs of $1,644.85. Mr. Engelking required no time to pay and was prepared to make payment immediately.

21. There will be no Notice to the Attorney General.

22. No Notice will be issued.

23. The exhibits and this report will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that identifying information in relation to persons other than Mr. Engelking will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated at the City of Edmonton, in the Province of Alberta, this 9th day of August, 2016

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Kathleen Ryan, QC

**APPENDIX "A"**

IN THE MATTER OF THE LEGAL PROFESSION ACT

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF

MURRAY L. ENGELKING,

A MEMBER OF THE LAW SOCIETY OF ALBERTA

STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT

INTRODUCTION

1. I was admitted as a member of the Law Society of Alberta on July 22, 1983.

2. My present status with the Law Society of Alberta is Active/Practicing.

3. I have practiced in Edmonton, Alberta from July 22, 1983 to present.

4. My practice comprises Civil Litigation (60%), Corporate (15%), Commercial (10%), Employment/Labour (5%), Real Estate Conveyancing (5%), Arbitration (2%), Estate Planning & Administration (2%) and Bankruptcy/Insolvency (1%).

CITATIONS

5. I understand that the following conduct is being referred to a Hearing Committee:

    1. It is alleged that Mr. Engelking made a settlement offer on the clients' behalf without their specific instructions, and that such conduct is conduct deserving of sanction.

FACTS

6. On or about June 24, 2011, I was retained by [ME], [CE] and [MR] ("the Complainants) to pursue litigation regarding a claim for damages relating to a house purchase.

7. The Complainants had purchased a house on five acres near [●], Alberta ("the House") in August 2010. The building inspector only found small problems with the House but after the Complainants moved in, they discovered that the House needed tens of thousands of dollars in repairs and learned that the House was several decades older than advertised.

8. The series of problems with the House included the following: the House was advertised as being built in 1978 but was actually built in 1940 with several additions added on up to

1965. Insects began crawling out of the wall. The kitchen ceiling collapsed during a rainstorm and revealed rot and mould in ceiling and walls. The roof and main floor construction did not follow the Alberta Building Code. The House eventually went into foreclosure.

9. The Complainants retained me to file a civil claim seeking damages arising out of the House Purchase. The claim I filed named the selling realtor, [C Ltd], and the Defendants. I discussed with [ME and CE] the advisability of naming the Inspector, and in view of the limitations in his report and the scope of the inspection it was agreed initially that the Inspector would not be named. The Complainants wished also to have the listing realtor named but in my professional opinion the listing realtor was not likely to be liable to [ME and CE] as:

   (a) [ME and CE] engaged their own realtor upon whom they relied and if he in turn relied on the listing realtor (against whom the selling realtor would have a claim over);

   (b) [ME and CE] had no dealings directly with the listing realtor;

   (c) the misrepresentation as to the age of the property originated from the Sellers not the realtors;

   (d) the listing realtor had no liability for the condition of the property, made no representation upon which [ME and CE] relied, and was not responsible for ensuring a term was inserted into the contract to deal with the roof.

   In addition, as it turned out both realtors were associated with [C Ltd.] in any event who was already a Party Defendant. Ultimately it was agreed the claim would be amended to include the Inspector notwithstanding the obvious obstacles in making a claim against him.

10. By telephone on February 16, 2012 I was advised by the Complainants that they did not wish me to take any further steps on their behalf in the civil claim for the time being. In a letter dated February 21, 2012, I confirmed the same and further advised the Complainants that I "[would] not take any further steps in this action without direction from [them]".

11. I assumed, wrongly as it turned out, that the Complainants did not wish to pursue the claim. I was concerned about their potential exposure to costs and thought I should attempt to see if I could mitigate that exposure. So, on February 29, 2012, I sent the solicitors for the Defendants a letter stating that "[m]y clients propose to discontinue this Action on a without costs basis. Are you prepared to accept such a discontinuance?"

12. The purpose of my contact was to make inquiries of the solicitors for the Defendants to see if their clients would be inclined to accept a discontinuance on a without costs basis, after which I then intended to communicate that advice to the Complainants.

13. It was not my intention to make an actual offer on behalf of the Complainants, who were Plaintiffs in the claim, of a discontinuance on a without costs basis. However, admittedly, the wording of my letter on February 29, 2012 could be construed as an offer.

14. I further admit that I had no discussion with the Complainants regarding discontinuance.

15. Furthermore, the solicitors for the Defendants responded immediately to the February 29, 2012 letter accepting the offer of discontinuance without costs. I had discussions with one or more of the solicitors for the Defendants wherein I disputed their interpretation of my February 29, 2012 correspondence. I responded in writing on May 16, 2012.

16. Subsequently, the Honourable [●] of the Provincial Court, in her decision [●], 20[●●], allowed the Defendants' application for summary judgment to dismiss the Complainants' claim. I acknowledge that the basis for the dismissal of the claim was that my letter of February 29, 2012 constituted a settlement, which was accepted by them, and thus a binding settlement was made between the Complainants and Defendants. As a result, the Complainants were unable to pursue their claim.

ADMISSION OF FACTS AND GUILT

17. I admit as facts the statements in this Statement of Admitted Facts and Admission of Guilt for the purposes of these proceedings.

18. I admit that I made a settlement offer on the clients' behalf without their specific instruction, and that such conduct is conduct deserving of sanction.

19. For the purposes of section 60 of the *Legal Profession Act,* I admit my guilt to the above conduct.

20. I acknowledge that I have had the opportunity to consult legal counsel and provide this Statement of Admitted Facts and Admission of Guilt on a voluntary basis.

THIS STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT IS MADE THIS "30" DAY OF "November", 2015.

"Murray L. Engelking"

MURRAY L. ENGELKING

## APPENDIX "B"

## REPRIMAND

Mr. Engelking, you are before me on a conduct matter with an Agreed Statement of Facts related to your representation of purchasers of a home involved in a dispute about representations made at the time of purchase.

On February 16, 2012, your clients instructed you to take no further steps without direction.

On February 21, 2012, you confirmed those specific instructions in writing.

Without any new instructions, you offered the defendants a discontinuance of costs on February 29, 2012. In my view, that is the only reasonable interpretation of that letter and Assistant Chief Judge Young also made that finding on August 17th, 2014 after protracted litigation.

You recognize your error, but you say you were astonished that the Law Society is seeking a sanction today. I disagree.

Your conduct, while apparently founded on the noble intent of reducing your clients' cost exposure, is a blatant failure to follow clear instructions - - instructions which you confirmed in writing.

Perhaps even more concerning to me is your submission today that your effort to "fix it" was appropriate rather than immediately reporting the issue, at minimum, to your insurer.

Your error, and the subsequent steps taken, exposed your client and their opponents to risk and protracted litigation. This is neither in your clients' interests nor the public interest. This conduct tends to bring the standing of the profession into disrepute.

Notwithstanding the above, your intention was clearly without malice, but was more likely evidence of a misguided view of the clients' interests.

You compensated the client and you have facilitated an outcome which has minimized the time and resources that could have otherwise been spent in a disputed hearing.

Nevertheless, your regulator expects and requires that in the future you will follow client instructions.