

LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act*; and

IN THE MATTER OF a hearing (the "Hearing") regarding the conduct of
Austin Nguyen, a Member of the Law Society of Alberta

INTRODUCTION

- [1] On February 27, 2013 a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of Austin Nguyen, a Member of the LSA. The Committee was comprised of Anthony G. Young, Q.C. Chair, Miriam Carey, PhD, Bencher and Dennis Edney, Q.C., Bencher. The LSA was represented by Gillian Clarke. The Member was in attendance throughout the hearing. Also present at the Hearing was a Court Reporter to transcribe the Hearing.
- [2] The Member was charged with four citations. The hearing of the citations has been bifurcated as they relate to different fact situations and the Member has retained different counsel in relation to each. Mr. Jim Rooney, Q.C. was retained with respect to the Catherine Fox complaint and Mr. Hersh Wolch, Q.C. was retained with respect to the other citations.
- [3] As the matters were dealt with as separate hearings, a Hearing Committee Report has been prepared for each hearing.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

- [4] The Chair introduced the Committee and asked the Member and Counsel for the LSA whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.
- [5] 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.
- [6] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(a) and Rule 96(2)(b) of the Rules of the LSA ("Rules") pursuant to which the Director, Lawyer Conduct of the LSA, determined that the persons named therein were 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.

[7] At the outset of the hearing Exhibits 1 through 15 contained in the Exhibit Book provided to the Committee were entered into evidence in the Hearing with the consent of the parties. Further Exhibits 16 and 17 were added to the Exhibit Book as the hearing proceeded.

CITATIONS

[8] The Member faced the following Citations:

1. It is alleged that you improperly withdrew your representation and such conduct is conduct deserving of sanction.
2. It is alleged that you were less than candid with the Crown Prosecutor and the Court and such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

[9] An Agreed Statement of Facts was presented upon the understanding that additional evidence would be called and argument would be made with respect to a finding of guilt on the citations.

[10] Upon considering the Agreed Statement of Facts and hearing the evidence of the Complainant and the Member, the Member was found guilty of Citation 1. There was no evidence called with respect to Citation 2, as such, that citation was dismissed.

THE AGREED STATEMENT OF FACTS

[11] At the outset of the hearing, the Hearing Committee was presented with the Agreed Statement of Facts as follows:

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

and

IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF **AUSTIN Q. T. NGUYEN**
A MEMBER OF THE LAW SOCIETY OF ALBERTA

AGREED STATEMENT OF FACTS

1. Austin Q. T. Nguyen is a member of The Law Society of Alberta, having been admitted on the 19th day of July, 1999. He was a member at all times relevant to this proceeding.

2. Austin Nguyen faces 2 citations, as follows:

Law Society Complaint (CO20091739)

1. It is alleged that you improperly withdrew your representation and such conduct is conduct deserving of sanction.
2. It is alleged that you were less than candid with the Crown Prosecutor and the Court and such conduct is conduct deserving of sanction.

FACT SUMMARY

3. Mr. Nguyen was retained by a client, "EQ", to represent him in a criminal matter that was set for a trial in the Provincial Court of Alberta on May 21, 2009.
4. On May 20, 2009 at 9:32 p.m. Mr. Nguyen left a message for the Crown Prosecutor, IK ("Crown Prosecutor"), indicating that he had been fired by EQ and that EQ would be representing himself at the trial on May 21, 2009.
5. EQ attended before His Honour Judge Manfred Delong of the Provincial Court of Alberta (collectively referred to as the "Court") on May 21, 2009 as scheduled. EQ advised the Court that he had spoken with Mr. Nguyen a week previous to the trial and that he was aware that Mr. Nguyen was not going to be attending the trial on that date. He further advised the Court that he had been laid off from work and could not pay Mr. Nguyen and that was why Mr. Nguyen did not attend the trial on May 21, 2009.
6. At the courthouse on May 21, 2009 but not in front of the Court, EQ advised the Crown Prosecutor that he wanted to have a lawyer represent him in respect of the matter before the Court.
7. The Court ordered that the matter be adjourned until May 22, 2009 and directed that Mr. Nguyen appear to explain why he failed to attend on May 21, 2009.
8. On May 22, 2009, Mr. Nguyen appeared before the Court as directed and requested that he be allowed to withdraw as counsel of record. In the presence of the Court and the Crown Prosecutor, Mr. Nguyen explained that he did not

- appear the previous day as he had been unable to receive financial instructions to pursue the trial.
9. On May 22, 2009, the Court advised Mr. Nguyen that he had responsibilities to his client, to the Court, and to the Law Society of Alberta (the "Law Society"). Judge Delong stated that Mr. Nguyen's lack of financial instructions did not justify a withdrawal, but he ultimately granted the application to withdraw. The Court, with the Crown Prosecutor's assistance, put the matter over to June 4, 2009 to be heard in a special sitting in Calgary.
 10. After the Crown Prosecutor left the Court and other matters had been spoken to, Mr. Nguyen returned to the Court and made further submissions regarding why he could not attend in Court on May 21, 2009. Specifically, he stated that his wife had been sick and was still sick on May 22, 2009.
 11. At no time did Mr. Nguyen advise the Crown Prosecutor about his wife's illness.
 12. On June 25, 2009, the Law Society received a letter from the Court enclosing a transcript of the proceedings in Banff on May 21, 2009 and Calgary on May 22, 2009 regarding R v. EQ (Exhibits 6 and 7, respectively).
 13. A formal complaint, with the Law Society listed as complainant (the "Law Society Complaint"), was opened and on June 26, 2009, a letter (Exhibit 8) was sent to Mr. Nguyen requesting his formal response to the reported complaint pursuant to S.53 of the *Legal Profession Act*. The member received this letter on July 4, 2009.
 14. On July 17, 2009, The Law Society received a second letter of complaint from the Crown Prosecutor (Exhibit 9) with respect to the same matter (the "K Complaint").
 15. On July 17, 2009 Mr. Nguyen was sent a copy of the K Complaint and asked to provide his response in respect of the same (Exhibit 10).
 16. On September 15, 2009 Mr. Nguyen responded to the Law Society Complaint (Exhibit 11) which response is summarized as follows:

16.1 His client, EQ, failed to pay Mr. Nguyen's legal fees despite numerous promises to do so.

16.2 On the evening of May 20, 2009, Mr. Nguyen called EQ, reminded him of the Court appearance scheduled for the following day and also reminded EQ that EQ had to pay his legal fee.

16.3 During that telephone conversation, EQ advised Mr. Nguyen he could not pay his legal fee, specifically requested that Mr. Nguyen not come to Court on May 21, 2009, that Mr. Nguyen was no longer his counsel, and that he would handle the matter himself. Mr. Nguyen provided a notarized statement from EQ (Exhibit 12) pursuant to which EQ confirmed this information and also stated that he forgot to tell the Court that he had fired Mr. Nguyen the day before because he was nervous and unfamiliar with the court system.

16.4 Minutes after speaking with EQ on the evening of May 20, 2009 Mr. Nguyen telephoned the Crown Prosecutor and left her a voice-mail message in which he indicated that his client had dismissed him and that he would not be present in Court the following day;

16.5 Mr. Nguyen stated he did not attend in Court on May 21, 2009 as his client had lost confidence in him and specifically requested that he not attend.

16.6 Mr. Nguyen advised that his wife had returned to Canada from the United States on May 19, 2009 and that she developed flu-like symptoms with a persistent fever for several days. Mr. Nguyen provided a note dated May 21, 2009 from his wife's doctor (Exhibit 13) regarding her illness.

16.7 Mr. Nguyen stated his wife was an integral part of their law practice and with her unable to attend due to her illness, it was important for him to remain in the office. He stated he forgot to mention these facts to the Crown Prosecutor.

16.8 On May 21, 2009 Mr. Nguyen received a telephone call from the Crown Prosecutor requesting he attend in Court on May 22, 2009. He attended as requested.

17. By letter dated November 23, 2009 Mr. Nguyen responded to the K Complaint (Exhibit 14) which response is summarized as follows:

17.1 Minutes after his telephone conversation with EQ in which EQ had dismissed him as counsel, Mr. Nguyen left the Crown Prosecutor a telephone message advising her of the problematic development in the case so she would be aware of the facts before attending Court on May 21, 2009;

17.2 Mr. Nguyen confirms he received a telephone call from the Crown Prosecutor on 21 May, 2009 (reference to 2008 in the letter is a typographical error) to attend in Court at 9:30 a.m. on May 22;

17.3 Mr. Nguyen was unaware the Crown Prosecutor had communicated with EQ and denied that he was trying “to do something”.

17.4 Mr. Nguyen denies trying to mislead the Court and reiterated that his wife had been ill but he initially forgot to mention that to the Crown Prosecutor and the Court. He returned to Court to provide a fulsome explanation for his absence from the trial on May 21, 2009;

17.5 Mr. Nguyen noted he was dismissed as counsel and his wife was ill and that was the explanation he provided to the Court for his absence from Court.

ALL OF THESE FACTS ARE AGREED TO AND ADMITTED.

I agree that the facts set out above constitute conduct deserving sanction with respect to Citation 1.

This Agreement and Admission is dated the 17th day of February, 2013.

“Hersh Wolch”
WITNESS

“Austin Q.T. Nguyen”
AUSTIN Q. T. NGUYEN

DECISION

[12] The Code of Conduct states:

“Non-payment of Fees

2.07 (3) If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Commentary

When the lawyer withdraws because the client has not paid the lawyer’s fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial. Also see the Commentary to Rule 2.07 (4).”

“Withdrawal from Criminal Proceedings

2.07 (4) If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

- (a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;
- (b) accounts to the client for any money received on account of fees and disbursements;
- (c) notifies Crown counsel that the lawyer is no longer acting; and
- (e) complies with the applicable Rules of Court.

Commentary

In Alberta, when a lawyer seeks to withdraw in criminal proceedings the usual practice is to apply for leave in open court.

A lawyer who has withdrawn, or intends to withdraw, because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn. If the court requests that the lawyer provide reasons for withdrawal, then the lawyer may indicate that there are “ethical reasons” or an inability to obtain proper instructions, making the least possible

disclosure of privileged information. In certain circumstances, the court may refuse to allow a lawyer to withdraw for non-payment of fees.”

[13] Rule 2.31 of the Alberta Rules of Court states:

”Withdrawal after trial date scheduled

2.31 After a trial date is scheduled, a lawyer of record may not, without the Court’s permission, serve a notice of withdrawal as lawyer of record and any notice of withdrawal that is served without the Court’s permission has no effect.”

[14] The Member left a message with the Crown that he would not be attending as counsel in the EQ matter less than 24 hours before the trial was about to commence. In fact, the message was left at 9:32 p.m. on Crown Counsel’s e-mail on the eve of a morning trial. The understanding of EQ was that the Member was not appearing on the matter because EQ had not paid him.

[15] The usual practice in Alberta is that when a lawyer seeks to withdraw in criminal proceedings, it is done in open Court. The reason why the application is to be made in open Court is so that the Court may weigh the responsibilities of counsel to his client, to the profession and to the Court before making a decision whether there is sufficient reason to justify withdrawal. In this case, the Member denied the opportunity of such a review by simply not appearing.

[16] There is some evidence that the Member had advised EQ one week prior to the date of trial that he would not be appearing unless he was sufficiently retained. The timing of this advice is not a saving factor. The Member was obligated to take further steps at the late stage of proceedings. This obligation, in the view of this Hearing Committee, was to make a personal appearance together with his client on the morning of trial. At best, the Member would have appeared ready to conduct the trial if his application to withdraw was denied.

[17] The Member could have prevented the inconvenience to the Court, the witnesses, the Crown and his client. The matter was scheduled on September 29, 2008 for trial on May 21, 2009, some 234 days (almost 8 months), later. The Member could have attempted to make financial arrangements with EQ well in advance of the trial date. If the arrangements were not honoured within a reasonable time before the trial, the Member would then have had the opportunity to have the matter called forward for an application to withdraw.

[18] If a lawyer withdraws because he has not been sufficiently retained, the lawyer must ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to appropriately prepare for trial. What is “sufficient time” will vary from case to case and depend upon the unique circumstances that may arise. In this case, however, it is clear that the Member did not give the client this opportunity.

[19] It is recognized by the Hearing Committee that there may be circumstances where a client reneges on a financial arrangement on the eve of trial. This would be a factor taken into account by the Court in considering a late application to withdraw. In this matter, however, there is no evidence such circumstances.

[20] The Hearing Committee finds the Member guilty of conduct deserving of sanction on Count Number 1.

SANCTION AND ANCILLARY MATTERS

[21] The Hearing Committee accepted the joint submission by Counsel for the Law Society and Member's Counsel that there should be reprimand and payment of the actual costs of the hearing.

[22] A reprimand was administered by the Chair.

[23] The Member shall be responsible for the actual costs of this hearing.

[24] There shall be no referral to the Attorney General.

[25] There shall be no notice to the profession.

Dated this 30th day of August, 2013

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

Miriam Carey PhD (Bencher)

Dennis Edney, Q.C. (Bencher)