

THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

**IN THE MATTER OF THE *LEGAL PROFESSION ACT*, R.S.A. 2000, C. L-8
AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
BRIAN MCCULLOUGH
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

SUMMARY

The Member represented the client in a personal injury lawsuit spanning a ten year period. The Committee found that the Member failed to serve the client in a conscientious, diligent and efficient manner. He failed to respond to numerous reasonable requests for information; failed to respond to the client on a timely basis; failed to inform the client of the loss of her file; and failed to attend in court or to advance the client's lawsuit resulting in the dismissal of the lawsuit, with costs against the client, as no steps in the action had been taken for over five (5) years. Such conduct is conduct deserving of sanction. The Committee concludes that the protection of the public interest and the standing of the legal profession generally can be satisfied with the Member being suspended for thirty (30) days and a \$1,000.00 fine.

INTRODUCTION

1. A Hearing Committee of the Law Society of Alberta ("LSA") convened at the Law Society offices, in Calgary, on January 10, 2013 to consider the conduct of Brian McCullough (hereinafter referred to as the "Member").
2. The Committee was comprised of Dennis Edney, Q.C., Bencher (Chair), Robert Harvie, Q.C. Bencher, and Amal Umar, Lay Bencher. The LSA was represented by Ms. Tamara Friesen. The Member, Brian McCullough, chose to represent himself throughout the hearing. Also present at the Hearing was a court reporter to transcribe the proceedings.

JURISDICTION

3. Jurisdiction was established by the introduction of Exhibits 1 through 5, consisting of:
 - Letter of Appointment of the Hearing Committee Exhibit 1,

- Notice to Solicitor, pursuant to section 56 of the *Legal Profession Act* with acknowledgement of service, setting out the Citation Exhibit 2,
- Notice to Attend, with acknowledgement of service, directing the Member to attend the Hearing Exhibit 3,
- Certificate of Status certifying the Member is an active Member of the Law Society pursuant to section 49 of the *Legal Profession Act*. Exhibit 4,
- Certificate of Exercise of Discretion pursuant to Rule 96(2) (b) of the Rules of the Law Society of Alberta (“Rules”) by which the Director, Lawyer Conduct of the LSA, determined that no one, other than the complainant NL, was to be served with a Private Hearing Notice Exhibit 5,

EXHIBITS

4. Additional Exhibits, 6 through 15, were entered into the record, during the course of the proceedings, with the consent of the parties:
 - Exhibit 6 – Agreed Statement of Facts, dated January 10, 2012.
 - Exhibit 7 – Letters of NL dated February 21st, 2001; November 25th, 2009; February 08, 2010.
 - Exhibit 8 – Letter dated November 02, 2009 with attached Court of Queen’s Bench Order of Master Prowse dated November 02, 2009.
 - Exhibit 9 – Letters from Brian McCullough dated March 15, 2010; April 27, 2010; and May 20, 2010.
 - Exhibit 10 – Letter from NL to Katherine Whitburn dated May 01, 2010; Letter from NL to ALIA dated May 01, 2010.
 - Exhibit 11 – Joint Proposal to combine citations.
 - Exhibit 12 – Certificate of Member’s disciplinary record.
 - Exhibit 13 – Estimated Statement of Costs
 - Exhibit 14 – Letter dated December 05, 2010 to Member from Merry Rogers.
 - Exhibit 15 – Practice Review Committee report dated April 24, 2012.

CITATIONS

5. The Member faced two (2) Citations:

IT IS ALLEGED THAT you failed to serve your client N.L., and that such conduct is conduct serving of sanction.

IT IS ALLEGED THAT you failed to respond to your client N.L., on a timely basis, and that such conduct is conduct serving of sanction.

PRELIMINARY MATTERS

BIAS:

6. The Chair introduced the Committee and inquired from both the Member and counsel for the LSA whether they had any objection to the composition of the Committee on the basis of bias, a reasonable apprehension of bias or for any other reason. There was no objection by either party as to the composition of the Hearing Committee.

PRIVATE HEARING APPLICATION:

7. The Chair was advised that the Member wished to make a Private Hearing Application over certain information he wished to adduce to the Committee as a mitigating factor for past conduct.
8. The Committee acknowledges it has a mandate to act in the public interest. Once citations have been laid, the transparency of the disciplinary proceeding prevails. Public confidence in the Law Society as a self-regulatory body requires no less.
9. It is well established that hearings ought to be held in public unless a compelling privacy interest requires protection, and then only to the extent necessary. The desirability for public scrutiny is then satisfied.
10. The balancing process, however, is not simply the pitting of the Member's right to privacy against the public's right to know, as non – disclosure can also be in the public interest.
11. Once it is established, on any piece of evidence, that the desirability of avoiding disclosure outweighs the principle that hearings be open to the public, the panel must order that the evidence be received in the absence of the public.
12. The Member advised the information sought to be protected, touched upon a past personal health issue; a past health issue of a third party and a failed joint financial investment involving the same third party. No evidence was provided by the Member to suggest that public disclosure of the information sought to be protected, may unfairly damage the reputation of any person referred to in the

privacy request. The Member was unable to elaborate on the reasons behind his privacy request other than to state he is a private person.

13. The Committee considered various factors in arriving at its decision, including:

(a) balancing the privacy rights of the member and the public's right to be informed; and

(b) different degrees of privacy depending upon context;

14. The Member's privacy application is not of character involving personal information relating to medical, psychiatric, or psychological records or issues of mental capacity affecting reputation where strong privacy issues are engaged.

15. The Member failed to establish that the information sought to be protected rises to a level sufficient to trump the public's right to know. Inconvenience or potential embarrassment, without more, does not rise to a compelling privacy risk. Any potential risk of harm can be addressed by the reasonable alternative measure of redacting third party names.

16. The Chair then directed that the Hearing be held in public.

AMENDING CITATIONS

17. Counsel for the LSA then requested the Committee's approval that the Citations 1 (one) and 2 (two) be amended, with consent, to read as follows:

IT IS ALLEGED THAT you failed to serve your client N.L., and further, that you failed to respond to her on a timely basis, and that such conduct is conduct serving of sanction.

18. Consent being granted, a guilty plea was entered into by the Member.

AGREED STATEMENT OF FACTS AND ADMISSION OF GUILT:

19. At the commencement of the hearing, counsel for the LSA requested the Committee's approval that the Statement of Facts and Admission of Guilt be entered as an Exhibit in these proceedings, as complying with s.60 of the *Legal Profession Act*, having been received in a form acceptable to the Committee and deemed an admission of conduct deserving of sanction.

20. The Agreed Statement of Facts dated the 10th day of January, 2013 and signed by the Member, was entered into evidence by consent [Exhibit 6]. The Agreed Statement of Facts is attached as "Appendix A" to this report.

ACCEPTANCE OF GUILT:

21. On the basis of the Agreed Statement of Facts and Admission of Guilt, other evidence received at the hearing, and for the reasons that follow, the Committee finds that Citation one (1) is made out, as conduct deserving of sanction, pursuant to Section 60 of the *Legal Profession Act* and received in a form acceptable to the Committee.

BACKGROUND:

22. By way of overview, the Member acknowledged he was retained on October 2, 1999, to represent the client, in seeking compensation for injuries suffered in a motor vehicle accident.

23. After the initial meeting, the client attempted, on numerous occasions, over a ten year period, to contact the Member for an update on her file, leaving numerous voice messages and faxes, all with limited success.

24. The Member acknowledged he ignored or delayed responding to the client's numerous faxes sent to him almost daily from November 2009 to January, 2010.

25. Contrary to his initial response of May 20, 2010, to the Law Society, the Member admitted receiving various correspondence and phone calls from the client prior to November 2009, and that he did not respond to these communications appropriately or at all.

26. When pressed by the Committee, the Member acknowledged he may have contacted his client, NL, three (3) times over a ten year period. On those occasions, the Member led the client to believe her file was being taken care of.

27. The Member stated he had lost the client's file. He had not disclosed that fact until being required to account for his actions by the Law Society of Alberta.

28. The Member had no explanation why he had failed to advance the client's motor vehicle claim from November 2004 through to January 2009.

29. The Member acknowledged being informed that the client's lawsuit was dismissed, with costs against the client, by the Court of Queen's Bench, on November 2, 2009, as no steps in the action had been taken for over five (5) years.

30. The Member acknowledged he had been informed by the client of the nature of the pending court application to dismiss her lawsuit and advised that "he would take care of it and that she didn't have to attend to the court hearing". The Member failed to do so and did not communicate that fact to the client.

SUBMISSIONS ON SANCTION AND COSTS

31. By way of a submission on sanction, counsel for LSA requested the Member be reprimanded; with a fine in the range of \$1,000.00 to \$2,500.00 being imposed, and costs. The Member took no position on sanction. An Estimated Statement of Costs was admitted into evidence. (Exhibit 13).

DECISION REGARDING SANCTION and COSTS

32. Section 49 of the *Legal Profession Act* defines conduct deserving of sanction:

49 (1) for the purposes of this Act, any conduct of a member, arising from Incompetence or otherwise, that

(a) is incompatible with the best interests of the public or of the members of the Society, or

(b) tends to harm the standing of the legal profession generally,

is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

33. The Committee must consider all of the evidence in arriving at an appropriate sanction.

34. In doing so, the Committee is mindful that the primary purpose of disciplinary proceedings found in *S.49 (1) Legal Profession Act* is the protection of the public interest and the standing of the legal profession generally.

35. In *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

“In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in criminal cases. However, where the legislature has entrusted the disciplinary process to a self –governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public are matter's that professional peers are better able to assess than a person untrained in the particular professional art or science.”

36. While acknowledging the primary purposes of the sanctioning process is the protection of the public and maintaining confidence in the legal profession, the

objective of the *Act* is not about punishing the offender and exacting retribution but rather imposing a sanction which is just and measured.

37. The evidence demonstrates the Member failed to be candid and honest with his client, over a prolonged period of time, spanning ten years. He also failed to advise the client that he had lost her file; and that he had failed to attend in court, having committed to doing so; and that her lawsuit, had been dismissed with costs as a result of no steps being taken in the action for over five (5) years.
38. The Member provided no explanation for the loss of the clients' file and had no explanation why he failed to take any steps to advance the client's lawsuit from 2004 to 2009, despite receiving reminders to do so.
39. The Member provided no proper explanation for his unresponsiveness to the numerous enquiries from the client, over the years. He admits the client tried on numerous occasions to contact him. The Member acknowledges speaking to the client three times, over the course of the file, and in each case advising the matter was being taken care of.
40. It is reasonable to infer from the evidence the Member chose to embark upon a strategy of non- responsiveness to the client, in the hope she would simply go away and he would thereby avoid being made accountable for his conduct.
41. A fundamental principle of professional conduct is that a lawyer must discharge with integrity all duties owed to a client. The Member had a duty to report his conduct to the Law Society and the Alberta Lawyers Assurance Fund to remedy the injury caused. He chose not to do so, instead he placed his own self - interest first.
42. When a Member acts without integrity, it is not only his reputation which suffers but that of the profession, as a whole.

The legal profession's most valuable asset is its collective reputation and the confidence which that inspires. See: *Bolton v. Law Society, (1994) 2 All ER 486 at 492 (C.A.)*.

43. Mitigating circumstances must also be considered and in this case include:
 - (a) The Member has a previous disciplinary record dating back to August 29, 1988. The Hearing Committee agrees that the length of time between the Member's last conviction and the current conduct is a relevant and mitigating factor.
 - (b) The Member's cooperation in preparing an Agreed Statement of Facts and admission of guilt expedited the hearing process, is a relevant and mitigating factor.

44. Other factors such as past health issues involving the Member, his spouse and a failed business venture failed to mitigate the Member's conduct in any significant way.
45. Having regard to all the foregoing factors and evidence, the Committee concludes that the protection of the public interest and the standing of the legal profession generally can be satisfied with the following conditions:
- (a) The Member will be suspended for thirty (30) days to take effect on the 9th of February, 2013.
 - (b) The Member is fined \$1,000.00 to be paid forthwith.
 - (c) There will be a Notice to the Profession, with the oral reasons attached, pursuant to Rule 107.
 - (d) Costs.
 - (e) The Member having recently been subject to the Practice Review process, the Hearing Committee made no further Order in that regard.

CONCLUDING MATTERS

46. No referral to the Attorney General is required.
47. There will be a redaction of names of third parties and other relevant privacy concerns.
48. There will be hearing costs awarded against the Member.

Dated January 10, 2013, at Calgary, Alberta.

Dennis Edney, Q.C

Robert Harvie, Q.C

Amal Umar

Appendix A

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF BRIAN MCCULLOUGH, A MEMBER OF THE LAW SOCIETY OF ALBERTA

AGREED STATEMENT OF FACTS

INTRODUCTION

1. Brian McCullough was admitted to the Bar on June 10, 1977, and practices law in Calgary, Alberta with the Kensington Law Group, an association of independent law practitioners.
2. Mr. McCullough's primary area of practice is civil litigation law.
3. Mr. McCullough's current status is Active/Practicing.

CITATIONS

4. On March 15, 2012, the Conduct Committee referred the following conduct to hearing:
 1. IT IS ALLEGED THAT you failed to serve your client, N.L., and that such conduct is conduct deserving of sanction; and
 2. IT IS ALLEGED THAT you failed to respond to your client, N.L., on a timely basis, and that such conduct is conduct deserving of sanction.

FACTS

5. The Complainant, N.L., was involved in a motor vehicle accident on October 2, 1999. She initially retained Litwiniuk & Company to handle her claim, but eventually moved her file to Brian McCullough for handling.

6. Litwiniuk & Company had initiated a claim on Ms. L's behalf in the Court of Queen's Bench against the uninsured Defendant, and the Motor Vehicle Claims Fund. Mr. McCullough, not realizing this, also initiated a claim on Ms. L's behalf in the same court, against the same Defendants.
7. After their initial meeting, Ms. L tried many times over the years to contact Mr. McCullough for information on her file, leaving numerous voice messages and faxes. From time to time she would receive letters from opposing counsel and she would forward these to Mr. McCullough. She remembers receiving only three phone calls from Mr. McCullough regarding her file, and in each case the only information she was given was that her matter was being taken care of.
8. On February 21, 2007, Ms. L sent a fax to Mr. McCullough requesting an update on her file **[TAB 1]**. On November 25, 2009, she sent another fax requesting an update on her file, indicating that she had been trying to contact Mr. McCullough by phone **[TAB 2]**.
9. Beginning on November 10, 2009 and thereafter almost every day until January, 2010, Ms. L sent a copy of the same fax to Mr. McCullough **[TAB 3]**. The fax referred to an Order for costs granted against her in favour of the Defendant in her motor vehicle action. She sent a copy of the Order to Mr. McCullough together with the fax, and requested to meet with Mr. McCullough to find out what was going on **[TAB 4]**. He did not respond.
10. In fact, the Order she had received indicated that on November 2, 2009 her claim had been dismissed with costs as a result of no steps being taken in the action for over 5 years.
11. On February 7, 2010, Ms. L contacted the Law Society to make a complaint against Mr. McCullough. She provided copies of faxes that she had sent to Mr. McCullough all of which requested updates from him with respect to the status of her file.
12. On February 23, 2010, a Complaints Resolution Officer at the Law Society contacted Mr. McCullough to provide a written response to address Ms. L's complaint. He

provided this response on March 15, 2010 and it was forwarded to Ms. L. Ms. L learned only then that Mr. McCullough had lost her file **[TAB 5]**.

13. In his initial response, and in a subsequent letter to the Law Society dated April 27, 2010, Mr. McCullough attributed his failure to respond to Ms. L's faxes sent November 2009 to January 2010 to an increased workload due to developments in the area of personal injury law **[TAB 6]**. He also indicated he had since taken steps to deal with his health issues and work-related stress. He apologized to Ms. L for his actions.
14. Ms. L replied in a letter dated April 30, 2010, pointing that he had only responded to her after she had made a complaint to the Law Society **[TAB 7]**. In that letter, she attached correspondence she had sent to the Alberta Lawyers Insurance Association. In that correspondence, she outlined her problems with Mr. McCullough and set out the details of her modest personal injury claim, estimating her losses to be \$4585, an amount that does not include costs awarded against her in the November 2, 2009 Order **[TAB 8]**.
15. Mr. McCullough did not report himself to ALIA.
16. On May 20, 2010, Mr. McCullough responded to Ms. L's letter of April 30, 2010, stating that he did not remember receiving phone calls or correspondence from Ms. L prior to the November set of faxes. He repeated the fact that her file had been misplaced and suggested that she should have come in person to see him **[TAB 9]**.
17. Ms. L was not satisfied with Mr. McCullough's explanation and again requested information about her case. Specifically, she wanted to know what he was planning to do to take responsibility for it. Mr. McCullough offered no further response.
18. Mr. McCullough has no explanation for why he failed to take any steps to advance Ms. L's claim from 2004 to 2009 despite receiving reminders from her to do so. He admits that he lost her file, and failed to inform her of this fact. His mishandling of her file resulted in the dismissal of her claim and a costs award against her.
19. Mr. McCullough further admits that he ignored or delayed responding to Ms. L's numerous faxes sent to him almost daily from November 2009 to January 2010, in

which Ms. L sought information about the dismissal of her claim, because he could not locate her file. He further admits that even prior to the series of faxes Ms. L sent him from November 2009 to January 2010, he had not communicated with Ms. L for quite some time. Contrary to his letter of May 20, 2010, Mr. McCullough admits receiving various correspondence and phone calls from Ms. L prior to November 2009, and admits that he did not respond to this correspondence appropriately or at all.

ADMISSION OF FACTS AND GUILT

20. Mr. McCullough admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings.

21. For the purposes of Section 60 of the *Legal Profession Act*, the Member admits his guilt, and that the conduct in question amounts to conduct deserving of sanction.

THIS AGREED STATEMENT OF FACTS IS MADE THIS 10 DAY OF JANUARY, 2013.

Brian McCullough

Witnessed by