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 CHRISTIAN OUELLETTE, A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE:

JAMES EAMON, Q.C. (CHAIRPERSON)

FRED FENWICK, Q.C.

JAMES GLASS, Q.C.

COUNSEL APPEARANCES:

M. NABER-SYKES, FOR THE LAW SOCIETY OF ALBERTA ("LSA")

J. ROONEY, Q.C., FOR CHRISTIAN OUELLETTE (THE "MEMBER ")

DATE AND PLACE OF HEARING:

CALGARY, ALBERTA

MAY 7, 2012

HEARING REPORT

I. INTRODUCTION

1. This matter arises from the Member's representation of a spouse (referred to in this report as "H.R.") in a matrimonial dispute. The Complainant, referred to as "E.M.", is an Alberta lawyer who represented the other spouse, "I.D." Both the Member and E.M. held trust funds for their respective clients. The Member paid his outstanding account from the trust funds which he held. He could not do so without a Court order or "agreement between the parties". Everyone agrees there was no Court order permitting the payment,

but the Member and E.M. did not agree in these proceedings whether there was an agreement permitting the payment.

2. The Member was cited under Part 3 of the *Legal Profession Act*, R.S.A. 2000, c.L-8, as amended:

> It is alleged that you paid yourself from funds you were holding in trust on behalf of your former client, H.R. also known as H.D., without a court order or agreement of counsel for F.D., and that such conduct is conduct deserving of sanction.

3. The hearing was held at Calgary, Alberta on May 7, 2012. After reviewing the evidence and hearing submissions, the Hearing Committee delivered brief oral reasons and dismissed the citation. The Hearing Committee indicated that it would provide additional detail in its written report in due course.

II. JURISDICTION and PRELIMINARY MATTERS

4. Jurisdiction was established through Exhibits 1 to 5.

5. The Hearing Committee was mindful that Exhibit 5 indicated that the Director, Lawyer Conduct exercised his discretion pursuant to Rule 96(2)(b) and determined that I.D. and H.R. were to be served with a private hearing application notice. Counsel for the Law Society confirmed that I.D. received the notice, but that the Law Society was unable to locate H.R. to provide her with the notice.

6. Counsel for the Law Society and the Member were advised that two members of the Hearing Committee participated in another Law Society process concerning the Member on an unrelated matter. Counsel for both sides were invited to advise the Hearing Committee whether there was any objection to any of the members of the Hearing Committee on the basis of bias, reasonable apprehension of bias, or other matter. Counsel for both sides confirmed that there was no objection to the constitution of the Hearing Committee.

7. The Hearing Committee determined that it had jurisdiction.

8. The fact that H.R. was not served with the private hearing application notice is not a matter that goes to the jurisdiction of the Hearing Committee.

9. The chairperson of the Hearing Committee inquired, as the Rules require, whether there was any application for all or any part of the hearing to be held in private, recognizing that separate directions would be made concerning publication of Exhibits in due course. No applications were forthcoming. The Hearing Committee recognized that H.R. would not be in a position to apply as she did not have notice, but the Hearing Committee was aware of the thrust of the evidence and was not concerned that her private affairs were at any material risk of disclosure that could not be managed through redaction of transcripts and exhibits.

10. The entire hearing was held in public.

III. THE RECORD

11. The citation, which was directed against the Member in 2009, was heard by another hearing committee in May 2010. A potential conflict was discovered after the evidence was heard and the hearing was declared a nullity. Counsel for the Member and the Law Society agreed to proceed before the Hearing Committee based on the evidence before the 2010 Hearing Committee.

12. The record before the Hearing Committee was the following:

EXHIBIT 1. Letter of Appointment

EXHIBIT 2. Notice to Solicitor

EXHIBIT 3. Notice to Attend

EXHIBIT 4. Certificate of Member's Status

EXHIBIT 5. Certificate of Exercise of Discretion re Private Hearing Application Notices

EXHIBIT 6. April 5, 2004 Letter from Member to E.M.

EXHIBIT 7. April 2, 2004 Trust Statement

EXHIBIT 8. June 7, 2004 Order, Court of Queen's Bench of Alberta

EXHIBIT 9. February 10, 2005 E.M. Memo to File

EXHIBIT 10. February 23, 2005 E.M. Memo to File

EXHIBIT 11. December 1, 2005 E.M. Memo to File

EXHIBIT 12. December 5, 2005 Letter from E.M. to Member with fax confirmation

EXHIBIT 13. December 5, 2005 E.M. Memo to File

EXHIBIT 14. December 7, 2005 Letter from Member to E.M.

EXHIBIT 15. March 6, 2006 E.M. Memo to File

EXHIBIT 16. February 12, 2007 Record of telephone message from Member

EXHIBIT 17. March 5, 2007 Notice of Motion

EXHIBIT 18. March 5, 2007 Affidavit of I.D.

EXHIBIT 19. March 15, 2007 Order, Court of Queen's Bench of Alberta

EXHIBIT 20. April 19, 2007 E.M. Memo to File

EXHIBIT 21. May 1, 2007 Letter from Member to E.M.

EXHIBIT 22. May 2, 2007 E.M. Memo to File

EXHIBIT 23. May 2, 2007 Letter from E.M. to Member

EXHIBIT 24. May 14, 2007 Letter from Member to E.M.

EXHIBIT 25. May 18, 2007 Letter from Member to E.M.

EXHIBIT 26. May 28, 2007 Letter from E.M. to Member

EXHIBIT 27. June 7, 2007 Letter from E.M. to Member with fax confirmation

EXHIBIT 28. June 18, 2007 Letter from E.M. to Member with fax confirmation

EXHIBIT 29. June 25, 2007 Letter from Member to E.M.

EXHIBIT 30. May 2, 2007 E.M. Memo to File

EXHIBIT 31. March 19, 2008 Letter from Member to LSA

EXHIBIT 32. Undated Memorandum prepared by E.M. in February 2008

EXHIBIT 33. May 1, 2007 Memo to File from E.M.

EXHIBIT A. Testimony of E.M. on May 20, 2010

EXHIBIT B. Testimony of Member on May 20, 2010

IV. EVIDENCE and FINDINGS OF FACT

13. Most of the evidence, consisting of correspondence between the Member and E.M. or most of E.M.'s memos to file, was uncontroversial. The Member and E.M. disagreed whether an agreement was reached on March 3, 2006 permitting the Member to pay himself from the trust funds, and the Law Society invited the Hearing Committee to reject the Member's evidence to the effect that he honestly believed there was an agreement. This part of the Report outlines the non-controversial events and the evidence of the Member and E.M. concerning those events.

14. The citation arises from a matrimonial property dispute, in which E.M. represented the Plaintiff husband and the Member represented the Defendant wife. The dispute included custody of the children of the marriage, child support, and distribution of matrimonial property.

15. During the proceedings, some of the matrimonial property was liquidated. The liquidation generated cash of $111,194.94 , and equal shares of $55,597.47 were held in

trust by each of E.M. and the Member. The terms of the trust are set forth in a letter dated April 5, 2004 from the Member to E.M.:

> I confirm our agreement that of these funds paid to you, $25,000.00 is releasable to your client, and the rest must remain in your trust account pending further order of the court or agreement between the parties.

Although the quoted statement applies to the funds held by E.M., it was agreed by counsel for the Member and counsel for the Law Society that the Member held his portion of the funds on the same trust terms.

16. The amount of the trust funds held by the Member was approximately $30,497.47 (the amount received less $25,000.00).

17. Pursuant to a consent corollary relief and matrimonial property judgment dated June 7, 2004, I.D. was awarded custody of the children; H.D. was ordered to pay child support; and the Court directed that "issues arising from the distribution of remaining matrimonial property shall be reserved to be dealt with at another time, subject to the issue of the Defendant's claim for exemptions being resolved either by agreement or court order".

18. Not much progress appears to have been made in resolving the matrimonial property claims following the order dated June 7, 2004. H.R. had taken the position that she was entitled to exemptions under the *Matrimonial Property Act*. I.D. did not claim exemptions under the *Matrimonial Property Act*. Therefore, it might be said that H.R.'s minimum expectation of recovery in the litigation would be her share of the trust funds in the hands of the Member. However, H.R. did not pay any of the child support ordered by the court under the June 7, 2004 order. Therefore, it might be said that a court could be persuaded to vary H.R.'s share of the trust funds to account for the non-payment of the child support. The Member took the position at the hearing that this was not possible, citing certain decisions of the Alberta Court of Appeal. (The Hearing Committee was not provided copies of these decisions). E.M. appeared to be of the view that the claim to vary the sharing of the trust funds having regard to H.R.'s failure to pay child support was at least arguable. The Hearing Committee accepts that each lawyer had a different view of the merits of such a claim during the events in question.

19. In December 2005, the Member proposed to E.M. that there be an agreement whereby the Member could access the trust funds held by him to pay his outstanding account for legal fees. The Member indicated that he was owed about $14,000.00 or $15,000.00. He inquired whether E.M. would agree to the Member being paid from the trust funds.

20. By letter dated December 5, 2005, E.M. responded to the Member's proposal. Among other things, E.M. stated that he was unable to agree to the proposal because it would leave the matrimonial property matters still unresolved. By December 2005 the Member no longer acted for H.R. and was unable to locate her in order to take any instructions, and therefore the matter could not be resolved on the basis suggested by E.M.

21. On March 3, 2006, the Member again contacted E.M. about payment of his fees. According to E.M.'s memorandum to file dated March 6, 2006:

> [The Member] phoned and he is going to be getting off the record, he said he is going to take $15,000.00 to pay himself and then send over the balance. I advised him that was between himself and his client, that we would accept the balance and retain the balance in trust. He said he would file and serve a Notice of Ceasing to Act. He said he could not contact his client to get any instructions.

22. E.M. had no independent recollection of the discussion of March 3, 2006.

23. E.M. noted that the Member must have been mistaken in saying he would file and serve a Notice of Ceasing to Act, because the Member had previously served E.M.'s office with a Notice of Ceasing to Act in the matter.

24. In December 2005, E.M.'s view was that I.D. would not be claiming more than 50% of the trust funds and would not be excepted to receive more than 50%. However, he recognized at that point that I.D. had to financially support the children and H.R. was not paying support. E.M. saw some prospect of trying to persuade a judge that after the exemption issue was dealt with, some consideration be given to the fact that E.R. did not pay any of her child support obligations. There is no evidence to indicate he changed this view by March, 2006. There was no evidence whether E.M. shared that view with the Member.

25. E.M. testified that no agreement was reached in the March, 2006 call.

26. E.M. testified that the reference to "balance" in line 4 of the memorandum dated March 6, 2006 had a different meaning than the word "balance" in line 2. He said the second reference to the word "balance" means the entire balance of the trust account, not any balance remaining after legal fees were deducted by the Member.

27. The Member testified that he telephoned E.M. on March 3, 2006 and indicated that he wanted to "pay my legal fees out of trust". His recollection of that conversation was that the worst his client would ever experience by way of matrimonial property distribution was that she would get at least 50% of the proceeds of the sale of the houses, and perhaps more if her claim for an exemption was accepted, but at the very worst she would get 50%. The Member testified that he asked if he could pay the monies out of trust and pay his account, and that E.M. responded that was between himself and his client.

28. There is no evidence contrary to the Member's evidence that he expressed his view of the merits of his client's claim to E.M. in the March 3, 2006 call. While it is true that the Member did not mention this aspect of the matter in his response to the Law Society, he also did not state that E.M.'s memorandum was a complete description of the discussion, and the Member's correspondence dated May 18, 2007 stated that the matter had been discussed earlier. The Hearing Committee was not prepared to find that the Member concocted this after the complaint, and accepted that it formed part of the discussion on March 3, 2006.

29. The Member testified that the critical component of the conversation to him was the reference to the fees being between the Member and his client, which the Member took to mean that E.M. had no problem with it, that he was fine with the Member paying himself out of trust. The Member had an irrevocable assignment and direction to pay from his client. He therefore considered that the conversation gave him "a clear path to run on upon which to pay my account".

30. The Member paid his account on March 3, 2006. The amount paid was $16,966.10.

31. The Member testified that he would not have transferred those funds from his trust account to his general account without first receiving E.M.'s approval. He said that he absolutely took E.M.'s statements to him as being an agreement that he could transfer the funds. The Member testified that he had oral consent over the telephone on March 3, 2006 to pay his accounts, but he had no contemporaneous notes, and he did not confirm that understanding in writing. At various points in the transcript, the Member indicated that the conversation with E.M. was that he could pay his fees (Transcript, pages 100-101, 174, 175). He did not mention the amount of the fees, and was not cross-examined on the difference between the statement in the memorandum that he would pay $15,000 and the actual amount paid.

32. The Member further testified that he did not agree with E.M.'s evidence that there was any connection between matrimonial property and support. The Member testified that in March 2006 as he understood the facts, there were no facts that would satisfy the test under the jurisprudence that would have enabled I.D. to collect the unpaid child support from the funds in trust. He did not see a risk that there could have been such a claim against those monies. As stated above, the Hearing Committee accepts that each lawyer held different views on that issue in March 2006. There is no evidence that E.M. shared his different view with the Member.

33. The next thing that occurred was contact from the Member to E.M. on February 12, 2007. The note of the call indicates the potential for a motion to compel the trust funds held by the Member to be made to the court.

34. On March 5, 2007, E.M. served the Member with a notice of motion and supporting affidavit. The motion requested that the funds being held in trust by the Member be paid into court in trust and held until further direction, and that the Member provide the Plaintiff with an accounting of the trust funds. The affidavit, which was sworn by I.D. on March 5, 2007, was drafted by E.M. The affidavit included a statement that by earlier agreement, the funds arising from the matrimonial property were divided equally between the parties' legal counsel and held in a trust account by each counsel; that there was a subsequent mutual agreement that the sum of $25,000.00 of each of these funds were to be released, leaving just over $30,000.00 in each trust account; and, that these funds remain in trust and the matrimonial property issue is not yet resolved.

35. The Member did not appear in court on the return date of the motion. E.M. and the Member spoke by telephone on the day of the application. According to E.M., the

Member did not take issue with the content of the affidavit which had been served on him, including the statement as to the balance in the trust account.

36. The court granted an order dated March 15, 2007. The order directs the Member to "forward all trust funds and interest earned, which he continues to hold in these proceedings…" to I.D.'s counsel, where these funds would be retained in trust until further order.

37. E.M. testified that the wording of the order was settled between him and the Member during the course of a telephone call on the return date of the motion. E.M. was confident, based on his normal practice, that he reviewed the wording of the order with the Member, but he did not have an actual recollection of the discussion.

38. E.M. testified that when he drafted the order, he understood the Member was holding more than $30,000.00 in his trust account.

39. The Member testified that he was served with the notice of motion and the affidavit. He recalls being contacted by E.M. by telephone, discussing the order with E.M. and providing his consent to the order as he understood it to be. The Member testified that he would not have agreed to an order that would have put him off side having already paid his account, so he agreed to an order that would compel him to pay the remaining monies which he continued to hold in trust in his trust account.

40. The Member testified that he was unsure that he would have read the affidavit which accompanied the notice of motion. He indicated that he did not believe that he looked at the affidavit, but operated on the basis of discussions with E.M.

41. The order was served on the Member. He did not make any objection or take any issue with the order.

42. Following service of the order, the Member and E.M. spoke on April 19, 2007 and the Member indicated he was sending some cash in the next day or two. On May 1, 2007, the Member forwarded the sum of $13,531.37. E.M. testified that when he saw this amount, he was "horrified" because it indicated that the Member must have removed money from the trust account earlier. E.M. returned the cheque to the Member. Telephone communications followed between the Member and E.M.. According to a notation by E.M., the Member told E.M. that he was not aware of correspondence that E.M. had sent as to the non-release of trust funds and the Member asked for a copy. E.M. forwarded a copy of the December 2005 correspondence to the Member on May 2, 2007, and observed that counsel spoke in early December 2005, and at that time E.M. forwarded the Member correspondence confirming E.M. could not agree funds be released outside of a complete settlement of the matrimonial property matter. He requested that the Member review his accounting and send his cheque in the amount of $30,497.47 forthwith.

43. By letter dated May 14, 2007 the Member stated that he would have a cheque couriered to E.M. by the end of business on May 15, 2007, and stated "all further communications with you will be in writing".

44. On May 18, 2007, the Member forwarded E.M. the same trust cheque that E.M had previously rejected. He stated that this cheque conformed with the order as well as E.M.'s knowledge of the facts at the time the order was granted. The Member observed, "as earlier pointed out, [H.R.] upon final resolution of the matrimonial property issue will be entitled to at least 50%, if not more, of the total monies available."

45. By letter dated May 28, 2007 from E.M. to the Member, E.M. requested a copy of the trust accounting and again returned the trust cheque. The letter further states:

> Please provide me your authority for paying your fees since you have not been [H.R.'s] solicitor of record from June 2004 nor do you know where to locate her.

and

> We look forward to receiving all of those trust funds which you hold, minimally $30,497.47.

46. The Member did not respond further, notwithstanding further requests from E.M.

47. A complaint from E.M. to the Law Society ensued, on or about February 4, 2008.

48. The Member responded to the complaint by letter dated March 19, 2008. Among other things, the Member indicated that he did not take issue with the substance of E.M.'s memorandum dated March 6, 2006. The Member further represented that he specifically recalled that he agreed to the content of the order made March 15, 2007 as written, the operative wording being "which he continues to hold", E.M. having been earlier advised that the Member had paid his account from trust. The Member indicated that his consent to the order was based on E.M.'s earlier stated position that he would accept the balance and retain the balance of the trust funds held by the Member after the Member deducted his fees.

49. The Member further advised the Law Society that he was prepared to deposit the funds in dispute in a separate account until the Member could procure a court order on notice to E.M. allowing him to retrieve the funds, or provide the same amount to E.M. on his undertaking to provide 30 days notice to the Member of any motion to have the funds released to E.M.'s client, thus permitting the Member to take the necessary steps to retrieve the funds via a court order.

50. After the complaint was made to the Law Society, E.M. did not have any further involvement with the Member as to the disposition of the monies that were held in trust.

51. E.M. said that he did not consider accepting either proposal by the Member because no one from the Law Society followed up with him on it, and he was relying on the Law Society to move the matter forward. The Member said he did not want to be seen as interfering in the complaint and so he did not discuss the matter further with E.M.

52. In cross-examination, counsel for the Law Society challenged the Member on his position that he obtained consent on March 3, 2006. The suggestion was made that he did not include more details of the March 3, 2006 conversation in his response to the Law Society, he did not outline his recollection in total of the March 3rd discussion in his response to the Law Society, and that the position was concocted following disclosure of the March 6, 2006 memorandum from E.M.'s file. The Member disagreed.

53. It was also suggested to the Member under cross-examination that there was no occasion where he ever suggested that E.M. gave him verbal consent on March 3, 2006 to take the money out of trust. The Member took issue with that, observing that his letter to E.M. dated May 18, 2007 stated that the cheque conformed with the order as well as E.M.'s knowledge of the facts at the time the order was granted. The Member absolutely disagreed with the suggestion that the notion there was authority to take the funds from trust did not come to the Member until he saw E.M.'s complaint to the Law Society where he included the March 6, 2006 memo, and denied that he was trying to rationalize his conduct after the fact by trying to piece together what would have happened because he did not have any specific recollection.

V. WHETHER THE CONDUCT WAS DESERVING OF SANCTION

(a) Issues and submissions

54. The issues in this case are:

(a) Whether there was an agreement permitting the Member to pay his fees from trust, whether generally or any specified amount;

(b) If there was not an agreement covering the trust withdrawal, whether the Member's conduct rose to the level of conduct deserving of sanction.

55. Counsel for the Law Society pointed out subsequent conduct of the Member in support of her position that there was no agreement permitting the Member to remove the funds from trust to pay his account. Similarly, the Member's counsel pointed out subsequent conduct of E.M. in support of his position that there was an agreement.

56. Counsel for the Law Society submitted the Member never asked for permission or an agreement; rather, the March 6, 2006 memo and the Member's response to the Law Society recorded the Member as stating that he would pay himself, not inquiring whether he could have permission to pay himself.

57. Counsel for the Law Society referred to numerous instances in the Member's transcript, correspondence with E.M., and correspondence with the Law Society which in her view demonstrated that the Member did not allege the existence of an agreement either during the events in question or after the issue had been raised with the Law Society. She noted that the Member had no notes of the March 3, 2006 conversation and did not follow up with any confirming communication in writing about the agreement. She submitted the Member's testimony was actually to the effect that the Member did not claim an agreement that he could pay his fees out of trust funds in March 2006. She noted that the

word "agreement" was not used by the Member until asked a leading question by his then counsel. Among other things, counsel for the Law Society noted that the Member did not take issue with the statements in the affidavit concerning the lack of an agreement or the balance of the trust funds, and did not explicitly allege an agreement in the correspondence and communications between the Member and E.M. concerning the trust funds in 2007.

58. Counsel for the Law Society also submitted that in contrast, the actions and words of E.M. during the events of 2006 and 2007 supported that there was no agreement in March, 2006.

59. Counsel for the Member argued that the Queen's Bench order recognizing the exemption claim provided a context in which counsel had their subsequent discussions. He submitted that the March 6, 2006 memorandum represented E.M.'s best and only recollection of the conversation. In contrast, the Member testified that he had some specific and general recollections of the conversations, including a recollection that he advised E.M. in that conversation that his client would receive at least 50% of the trust funds. In contrast, he noted that E.M.'s evidence was that the best position of his client was 50% (although E.M. also contemplated in his evidence the possibility of asking for more than 50% because the wife had not paid her child support obligations). Counsel for the Member noted that the Member held an irrevocable assignment and agreement to pay so that he did not need further instructions from H.R. to pay his account from the funds.

60. Counsel for the Member highlighted a passage of E.M.'s evidence, indicating "we had an agreement" referencing the March 6, 2006 memo (transcript, 89/17- 90/1). He asked the rhetorical question, was the Member really calling E.M. on March 3, 2006 to say, I am going to breach our trust conditions? He submitted that did not make any sense at all. He questioned why the Member would blow the whistle on himself if that was what he was doing. He submitted that this showed that the Member was seeking an agreement during the March 3, 2006 telephone call.

61. Counsel for the Member submitted that the Member's evidence about the March 3, 2006 conversation made more sense than E.M.'s evidence. E.M.'s version amounts, in his submission, to an acknowledgment that the Member could send E.M. all of the trust money and E.M.'s law firm would receive it. He noted that the Member could not make that agreement because he was not instructed by the client and both E.M. and the Member knew that.

62. Counsel for the Member also observed that if the Member took trust money, he would not telephone E.M. and invite him to apply for a court order compelling him to pay the trust funds to E.M.

63. Counsel for the Member also questioned E.M.'s evidence. E.M. testified that he was "horrified" when he learned that the Member had paid himself from the trust funds. He submitted the contemporaneous evidence did not bear out the degree of concern that horror implies. He noted that when E.M. received the cheque, he left a voice mail with the client saying he received a cheque. Nothing in the message to the client says that

there was a deficiency or a problem or that E.M. was upset. He noted that it was the client's wife who was suggesting there was not enough money, not I.D. or E.M. He noted that E.M.'s conversation with the client as recorded in the memorandum contains no reference to a breach of trust.

64. Counsel for the Member referred to E.M.'s evidence to the effect that the reference to the payment of fees being a matter between the Member and his client and that the balance of the funds that he would accept would be the entirety of the trust fund, did not make logical sense. If the money was not coming from trust, it was of no relevance to E.M.

65. An issue was also raised during submissions as to the statement in E.M.'s letter dated May 28, 2007 to the Member, requesting that he provide E.M. with the Member's authority to paying his fees since he had not been solicitor of record from June 2004. The question was asked why E.M. would request proof of such authority, unless he believed that the Member was otherwise justified in paying his fees from the trust account.

66. In turn, the Law Society's counsel responded. She invited the Hearing Committee to read E.M.'s evidence at page 89 in context, and observed E.M. may have left a word out, being the word "if", and that the evidence probably meant that if E.M. thought there was an agreement, the parties would have papered it. In her submission, the Member could not have reasonably believed in the existence of an agreement. Some documents indicated that he said he was going to take the money or was going to pay the fees, so he was not asking for an agreement. He also knew that E.M. was only interested in a deal which resolved all the matrimonial property issues. She again noted the absence of memos to file, notes, and confirming correspondence over this alleged agreement. If the Member reasonably believed in an agreement, why didn't the Member say so, when he had every opportunity to say so?

(b) Standard of proof

67. The Hearing Committee was mindful that as an administrative tribunal, it is not bound by the rules of evidence. It can accept and act on hearsay evidence, such as transcripts. It may look to the legal rules of evidence and the policies underlying them to assist it in assessing admissibility and weight of evidence. In any case, it is bound to behave in a transparent and rational fashion and conduct an effective process. Consequently, the Hearing Committee is not to speculate or guess about evidence, even if it is admitted with the consent of the parties.

68. In all cases, the evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. In applying the test, the Hearing Committee may consider inherent improbabilities and the seriousness of the allegations and consequences. ***F.H. v. McDougall***, 2008 SCC 53, paras. 45-48.

69. Particularly where the charge is based on breach of trust, the Hearing Committee should be careful to ensure that the finding is based on sufficiently reliable and cogent evidence.

70. The Law Society advised counsel for the Member that it is not relying on Section 67 of the *Legal Profession Act* and that the Law Society acknowledged that it had the burden of proof.

(c) Issue 1: Was there an agreement?

71. The Hearing Committee did not hear any oral testimony, and had the transcripts to read and attempt to interpret. The Hearing Committee raised at the outset of the hearing the problem of assessing credibility on the basis of the written transcripts, and counsel had an opportunity to deal with that issue and conduct their cases as they sought fit.

72. There is an obvious credibility issue between E.M. and the Member on the question whether there was an agreement. It was concerned about the credibility of the evidence both for and against the proposition that there was an agreement. The Hearing Committee was not prepared to find that either E.M. or the Member was not credible on the point. It had not seen either witness testify.

73. The Hearing Committee concluded that the subsequent conduct did not help resolve the credibility concerns as between the two witnesses. The conduct of both E.M. and the Member was, in some respects and with hindsight, ambiguous as to whether there was or was not an agreement. This is not to be taken as any criticism whatsoever of E.M. He justifiably trusted the Member just as the Member trusted him.

74. The Hearing Committee did not accept the Law Society's interpretation of the evidence that the Member conceded that there was no agreement. The Hearing Committee was of the opinion that the Member made it clear in his evidence that there was an agreement, and in his response to the Law Society that he thought he had E.M.'s permission to pay his fees from trust.

75. The Hearing Committee did not accept the Member's counsel interpretation of E.M.'s evidence that there was an agreement. The transcript passage is not clear. Either it was not accurately transcribed, or what the witness was saying was not clear.

76. The Hearing Committee was left with the words of the March 6, 2006 memorandum.

77. The Hearing Committee concluded that it might be possible to come to a conclusion on the record of testimony before it; however, it was not necessary to do so in light of its conclusions about issue 2.

(d) Issue 2: Was the conduct deserving of sanction?

78. The definition of conduct deserving of sanction is found in sub-section 49(1) of the *Legal Profession Act*. It provides:

> For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that

> (a) is incompatible with the best interest 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.

79. Conduct deserving of sanction need not be disgraceful or dishonourable.

80. In ***Stevens v. Law Society of Upper Canada*** (1979), 55 O.R. (2d) 405 (Div. Ct.), Mr. Justice Cory (as he then was) stated:

> What constitutes professional misconduct by a lawyer can and should be determined by the discipline committee. Its function in determining what may in each particular circumstance constitute professional misconduct ought not to be unduly restricted. No one but a fellow member of the profession can be more keenly aware of the problems and frustrations that confront a practitioner. The discipline committee is certainly in the best position to determine when a solicitor's conduct has crossed the permissible bounds and deteriorated into professional misconduct. Probably no one could approach a complaint against the lawyer with more understanding than a group composed primarily of members of his profession.

81. Whether conduct is deserving of sanction is a question or fact or degree in each case. In the ***Ter Hart*** case, the hearing committee provided the following factors, which are helpful in assessing whether the conduct has crossed the line:

(a) Was there a specific rule or duty which was breached?

(b) What conflicting duties was the member under and how evenly were they balanced?

(c) Was the member favouring his personal interests over his duties to his clients?

(d) Were the circumstances and duties such that it is appropriate to conclude that the member must have known at the time, or be taken to have known, at the time that the course of action chosen was wrong?

(e) Was it an isolated act?

(f) Was it planned?

(g) What opportunity did the member have to reflect on the act or the course of action?

(h) What opportunity did the member have to consult with others?

(i) What results flowed from the act or course of action taken?

(j) What subsequent steps could have been taken to correct the error or its consequences and were such steps taken?"

Law Society of Alberta v. Ter Hart, [2004] L.S.D.D. No. 25, para. 46.

82. Other relevant considerations include: Was the member acting dishonestly or in bad faith? Did the member act for personal gain? Was any effort made to conceal the actions? (See, for example, ***Law Society of Alberta v. Oshry***, [2008] L.S.D.D. No. 164.)

83. These factors also help inform the perception of the public in respect of the conduct in question, though they are not exhaustive.

84. The Hearing Committee concluded that while it was not in a position to reconcile the evidence between E.M. and the Member concerning the existence of an agreement, it is possible to come to a rational conclusion on the written evidence concerning the Member's belief as to the existence of an agreement.

85. In the Hearing Committee's view, the Member honestly believed that he had reached an agreement as to payment of fees of $15,000.00. While there are questions surrounding subsequent conduct, the key consideration is that the Member's evidence is significantly corroborated by the memorandum dated March 6, 2006. That memorandum not only corroborates the existence of the belief, but also bears out the reasonableness of the belief. The Hearing Committee was mindful that E.M. did not place the same meaning on the "balance" where it appeared in lines 2 and 4 of the memorandum. However, the test in contract law is not what a party subjectively intends to agree to, but rather what is the objective meaning of the words which were spoken. Having regard to Exhibit 15, the objective meaning was that there was an agreement that the Member could pay his legal fees in the amount of $15,000.00 from the funds in trust.

86. The Hearing Committee was concerned about the difference between the $15,000.00 and the amount which was actually taken from trust on account of the fees, $16,966.10. The difference between these amounts does not appear to have been an issue in the first hearing, so far as the Hearing Committee can discern from the transcript of the evidence. The Member was not cross-examined on the point.

87. The Law Society acknowledged that it bore the onus of proof and was not relying on Section 67 of the *Legal Profession Act*. The Hearing Committee has no basis to question that concession.

88. Having regard to the Member's evidence, the Hearing Committee concluded that the Member held an honest belief that he could pay his fees under the agreement. At two passages in his transcript, he refers to an agreement to pay his "fees". While he indicates in his response to the Law Society that he agrees with the content of the March 6, 2006 memorandum, he also indicates that he was of the view that he had permission to pay his fees pursuant to an agreement with E.M. The fact that the Member immediately paid his fees in the amount of $16,999.10 following the conversation, and invited opposing

counsel the following February to bring a court application with respect to the trust funds, corroborates the existence of the Member's belief. There was no separate cross-examination on the matter of the difference. In these circumstances the Hearing Committee concluded that it was neither fair to the Member, nor a transparent and rational interpretation of his evidence, to conclude that there was a distinction between $15,000.00 and $16,999.10 present in the Member's mind. Rather, the Member's intention was to seek permission to pay his fees, he provided E.M. with the basis for his request, and in his mind received permission to pay his account from trust.

89. The Hearing Committee was unable to discern an issue over the Member's integrity or governability. Further, there was no theft of trust funds or any intention to steal or expectation that the payment could be kept secret. The Member knew he needed permission. He thought he had it. At worst there was a misunderstanding between counsel.

90. The Hearing Committee must also consider that trust funds require a high standard of administration. This policy is reflected in Section 67 of the *Legal Profession Act,* which places the onus on lawyers to prove that money or other property received in trust as being "properly dealt with".

91. The functions of lawyers in the administration of justice includes to administer trust funds and handle clients' property, so that settlements and commercial transactions can be expeditiously completed. In order to do so, lawyers must be able to take other lawyers at their word and trust transactions need to be properly documented.

92. The Hearing Committee was very disappointed in the Member's conduct in permitting the money to be paid out without a confirming letter to E.M. or some other form of written documentation. These proceedings would have been unnecessary had the Member properly documented his position with E.M. Complaints such as this are costly to investigate and prosecute. The underlying dispute which was created may have contributed to delay between the parties in resolving their dispute concerning who owns the funds, though the Hearing Committee was also mindful that nothing really prevented E.M. from making a further application to the court to recover the funds from the Member. The Hearing Committee expects more from lawyers in dealing with trust funds.

93. On balance, the Hearing Committee could not find that the lack of documentation elevated the matter to the level of sanctionable conduct. Ironically, the matters giving rise to the complaint arose from the Member's expectation that he could rely on another lawyer's word. The Hearing Committee can only say that the Member seems to have overlooked the potential for disputes and misunderstandings among counsel. In all the circumstances, the Hearing Committee concluded that the conduct was not deserving of sanction.

94. The Hearing Committee expressed its sentiment that such oversight must not occur in the future.

95. The citation was dismissed.

96. The Hearing Committee reports that following its oral reasons, the Member assured the Hearing Committee that the failure to document agreements concerning disposition of trust funds will not occur in future.

VI. RECORD OF DECISION

97. The citation is dismissed.

98. Any portions of the Record shall not be accessible to the public, unless personally identifying information of any individual involved (other than the Member) is redacted. That would include action numbers of the law suit.

DATED at Calgary, Alberta, this 10th day of May, 2012.

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James Eamon, Q.C.

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Fred Fenwick, Q.C.

_____
James Glass, Q.C.