

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
Kevin Anderson, a Member of the Law Society of Alberta

INTRODUCTION

- [1] On February 15, 2012, a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Edmonton to inquire into the conduct of Kevin Anderson, a Member of the LSA. The Committee was comprised of Anthony G. Young, Q.C. Chair, Rose Carter Q.C., Bencher and Robert Harvie, Q.C. Bencher. The LSA was represented by Brian G. Gifford. The Member attended the Hearing by teleconference. Also present at the Hearing was a Court Reporter to transcribe the Hearing.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

- [2] 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.
- [3] 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.
- [4] 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.
- [5] Exhibits 1 through 13 contained in the Exhibit Book provided to the Committee were entered into evidence in the Hearing with the consent of the parties. An Agreed Statement of Facts signed by the Member on January 31, 2012 was identified as Exhibit 13.

- [6] At the commencement of the Hearing, Counsel for the LSA presented the Committee with a copy of a letter from the Member dated February 7, 2012. The Chair advised that he had heard and granted the application for the Member to attend the hearing by telephone participation on February 7, 2012. With the Consent of the parties, the letter confirming the application was entered as Exhibit 14.
- [7] Subsequently, a statement from the Director, Lawyer Conduct, was entered as Exhibit 15 certifying that as at the date of hearing the Member had no discipline record.
- [8] Finally, an estimated Statement of costs was entered as Exhibit 16.

CITATIONS

- [9] The Member faced the following Citations:
- (1) IT IS ALLEGED THAT you failed to properly accept personal responsibility for payment of the Complainant's account incurred by you on behalf of your client, and that such conduct is conduct deserving of sanction.
 - (2) IT IS ALLEGED THAT you failed to respond candidly to the Law Society, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

- [10] The Member admitted that he was guilty of Citations 1 and 2 and that the conduct complained of pursuant to those citations was conduct deserving of sanction.
- [11] After hearing the evidence and arguments, the Committee suggested 2 changes to the Citations. The first change was to remove the word "properly" from Citation 1. Secondly, it was suggested that the word "candidly" be removed from Citation 2. The Citations were amended to read:
- (1) IT IS ALLEGED THAT you failed to accept personal responsibility for payment of the Complainant's account incurred by you on behalf of your client, and that such conduct is conduct deserving of sanction.
 - (2) IT IS ALLEGED THAT you failed to respond to the Law Society, and that such conduct is conduct deserving of sanction.

There was no objection by Law Society counsel or from the Member regarding the amendments. As such, the Committee accepted the Agreed Statement of Facts

and the admission of guilt to the amended citations and found that the conduct of the Member was deserving of sanction.

There was a submission by counsel for the Law Society that the matter be dealt with by way of a reprimand. The Committee found that a reprimand was an appropriate sanction in the circumstances. The Chair administered the reprimand. Counsel for the Law Society and the Member agreed that the costs of the proceedings would be set at \$2,000. The Committee agreed with this submission.

AGREED STATEMENT OF FACTS

[12] The Agreed Statement of Facts is as follows:

INTRODUCTION

- (1) The Member was admitted to the Bar on July 18, 1980 and practiced in Edmonton, Alberta until his suspension for non-payment of the 2010 annual member fee payment pursuant to section 165 of the Rules of the Law Society of Alberta.
- (2) The Member's primary area of practice at the time of his suspension was real estate law.

CITATIONS

- (3) On October 18, 2011, the Conduct Committee referred the following conduct to hearing:
 1. IT IS ALLEGED THAT you failed to properly accept personal responsibility for payment of the Complainant's account incurred by you on behalf of your client, and that such conduct is conduct deserving of sanction.
 2. IT IS ALLEGED THAT you failed to respond candidly to the Law Society, and that such conduct is deserving of sanction.

FACTS

Citation 1

- (4) Member Todd Kirkpatrick ("Complainant") wrote a letter dated March 15, 2010 to the Law Society of Alberta, indicating concerns about the failure of Kevin Anderson ("Member") to pay an account for agency services rendered July 10, 2009 (Exhibit 1).
 - 4.1 The Member represented clients TS and YS on the purchase of a real estate property. For the clients' convenience, the conveyance documents were forwarded to the firm Politeski Strilchuk & Milen by letter dated

July 9, 2009 (Exhibit 1, Tab 1). The letter requested the other firm to have the clients execute the documents and return to the Laurier Law Office. The letter did not contain any comment about payment for the requested service. The letter was indicated to be signed for the Member under the name of Laurier Law Office and the Member.

4.2 A Statement of Account (Exhibit 1, Tab 2) for legal services rendered July 10, 2009 by the Complainant was sent to Laurier Law Office to the attention of the Member. The billing in the sum of \$230.47 was not paid by the Member or the firm.

4.3 A Complaints Resolution Officer unsuccessfully attempted to contact the Member by telephone and letter dated March 25, 2010 (Exhibit 2).

4.4 In response to the Complainant's inquiry about the outstanding account, the Member sent a fax note on August 7, 2009 stating the proper party to bill was the client. The Complainant was later informed that the Member no longer practiced with Laurier Law Office.

4.5 After being advised that the firm would not pay the Statement of Account, the Complainant subsequently sent a demand letter, dated January 15, 2010 (Exhibit 1, Tab 3) to the other members of the firm demanding payment and giving notice that failure to pay would result in a complaint to the Law Society and civil proceedings.

4.6 The Law Society's records (Exhibit 6) indicate that the Member's association with Laurier Law Office was terminated, effective August 19, 2009. The Member subsequently practiced in association with the firm Masuch Albert LLP from September 1, 2009 until December 31, 2009. The Member was administratively suspended for non-payment of fees, effective March 31, 2010.

(5) The matter was referred to the Manager, Complaints. A letter was sent to the Member on July 19, 2010 requesting the Member's formal written response to the complaint pursuant to section 53 of the *Legal Profession Act* (Exhibit 3). After the original letter was returned unclaimed, it was delivered by courier on August 16, 2010 to the Member's residential address.

(6) On December 13, 2010, the Law Society received an undated handwritten letter from the Member (Exhibit 4) which provided the following information:

6.1 The Member noted that he had been retained to assist the clients in the purchase of the property. He noted the matter involved a problem with out of province lenders and the clients asked if they could sign the documents at another law firm to accommodate their schedule. The Member informed the clients that would involve further legal fees and they would be responsible for any legal fees owed to the alternate law firm.

- 6.2 The Member acknowledged that he received the executed documents from the Complainant but he had never spoken to him. He noted that the clients apparently refused to pay the Complainant's account but he had no knowledge whether the Complainant requested payment.
- 6.3 The Member stated the fee account was to be paid by the clients. He suggested that the complaints process was being used as an attempt to collect an account.
- (7) By letter dated December 14, 2010, a copy of the Member's response was sent to the Complainant for comment. No comment was received.
- (8) In the course of a Law Society investigation, the Member was asked to provide further information about this complaint matter. The information provided to the investigator (Exhibit 5) included a facsimile correspondence dated August 7, 2009 in reply to the Complainant's August 6, 2009 letter indicating the account remained outstanding and requesting prompt payment (Exhibit 4, Tab 4). A handwritten note on the letter stated "Thank you for your invoice, the proper party to bill, T&YS". The Member also provided a copy of Statements of Account to the clients dated March 4 and May 7, 2009 indicating his address as 8623 – 149 Street, Edmonton [Laurier Law Office].
- (9) A copy of a further Statement of Account, dated October 15, 2009 (Exhibit 5, Tab 7) indicated his address at 5083 Windermere Blvd, Edmonton [Masuch Albert LLP]. The October 15, 2009 account noted that it was for professional services rendered in connection with the purchase and mortgage transactions, including "attending on execution of documents necessary to complete transaction". The Statement of Account did not include any disbursement or notation of the Complainant's July 10, 2009 account.
- (10) An excerpt from the March 10, 2011 investigation interview transcript (Exhibit 5, Tab 8) included the following information:
- 10.1 The Member commented that he had provided valuable service to the clients and disputed a note that they had paid another lawyer to right mistakes. He indicated the clients had retained a number of lawyers to complete the transaction. The Member stated that he had advised the clients that any fees related to having the documents signed at [the Complainant's] office had to be paid by them.
- 10.2 The Member indicated that on other occasions he had agency work done by the Complainant's firm for which they billed the client directly. The Member indicated that he had not previously received or billed an account as a disbursement because he never wanted to put himself on the hook for an obligation to another lawyer.

Citation 2

- (11) On February 23, 2010, a memo was provided by Membership Services to the Manager, Complaints (Exhibit 7) advising that the Law Society had received information that the Member's employment with Masuch Albert & Neal had been terminated. On January 5, 2010, a letter was received from Masuch Albert & Neal confirming the Member's employment had ended effective December 31, 2009. Numerous attempts were made to contact the Member at the telephone number provided by his previous employer as well other numbers provided by the Member to the Law Society, however the calls went unanswered. A letter was then sent to the Member on January 14, 2010 requesting he contact the Law Society to provide contact information no later than January 29, 2010. The Member did not respond and states that he did not receive the letter of January 14, 2010.
- (12) On February 24, 2010, a letter was sent to the Member by registered mail requesting his response pursuant to Section 53 of the *Legal Profession Act* (Exhibit 8) to the allegation of his failure to respond to the Law Society however the letter was returned marked "unclaimed".
- (13) On March 30, 2010, the letter was couriered to the Member and delivery was confirmed on March 31, 2010 (Exhibit 9). The Member did not respond and states that he does not recall receiving the letter of March 30, 2010.
- (14) On April 1, 2010, an email was received from the Membership Services (Exhibit 10) advising that the Member had been suspended effective March 31, 2010 for non-payment of his 2010 Annual Member fee.
- (15) An Investigation Order was issued on April 9, 2010 (Exhibit 11) requesting an investigation regarding the Member's lack of response and apparent failure to comply with Rule 42 requiring him to provide a residential address and telephone number to the Law Society.
- (16) The investigation conducted his investigation and a report was issued on May 20, 2010 (Exhibit 12). The findings of that report may be summarized as follows:
- 16.1 The investigator attempted to contact the Member on May 10, 2010 at the last known address for him but was unsuccessful. The following was noted during the visit to the address:
- The mailbox appeared full and protruding from it was an envelope addressed to the Member;
 - A delivery notice card with an unreadable date from Canada Post was found in a planter which was a final notice to the Member to pick up a package being held;
 - Numerous real estate agent business cards as well as what appeared to be a "Final Notice" from Shaw Communications had been left between the door sill and inner solid door. Although the

exterior screen door was operational, it appeared that the door knob had been removed from the inner door;

- A portion of the interior of the home was viewable through the front door and several wine bottles were noted on the floor of what was thought to be the kitchen;
- A vehicle was parked outside the Member's home and a broken wine bottle in a paper bag was located near the rear driver's side of the vehicle together with what appeared to be wine stains on the vehicle itself.

16.2 The investigator spoke with a neighbor of the Member who advised that although the Member was likely home, he was "reclusive". The investigator left his business card at the Member's residence as well as a message on the Member's purported cell phone requesting that he contact the investigator, however, the Member did not respond.

16.3 On May 11, 2010, the investigator attended the Member's residence again and noted that the vehicle previously seen appeared to have been moved and the broken wine bottle cleaned up however the business card remained in the door. Upon ringing the doorbell, an individual answered the door and confirmed that he was in fact the Member. He agreed to speak to the investigator but requested that he use the back door as the front door was not operational.

16.4 The investigator identified himself and provided his business card. He did not enter the Member's residence but instead, from the outside in front of the screen door, questioned the Member regarding his current situation and practice.

16.5 The Member advised the investigator that he had not practiced since December 2009 and did not currently have a trust account. He also said that he had not been aware of the Law Society's attempts to contact him nor did he recall receiving mail or telephone messages but he advised that he would contact the Law Society. The investigator noted that no further contact with the Member had been made since this conversation with the Member.

ADMISSION OF FACTS AND GUILT

(17) The Member admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings. The Member admits that all correspondence sent to him was received by him on or about the dates indicated, unless otherwise stated.

(18) For the purposes of Section 60 of the *Legal Profession Act* the Member admits his guild to Citations 1 and 2 as particulars of conduct incompatible with the best interest of the public and conduct which tends to harm the standing of the legal profession generally.

- (19) This Agreed Statement of Facts is not exhaustive and the Member may lead additional evidence not inconsistent with the stated facts herein. The Member acknowledges that the Law Society is not bound by this statement of facts and that it may cross-examine the Member, adduce additional evidence, or otherwise challenge any point of fact it may dispute in this statement.

THE MEMBER'S EVIDENCE

- [13] The Member was satisfied with the Agreed Statement of Facts as submitted.

SUBMISSIONS OF COUNSEL FOR THE LSA

- [14] Counsel for the Law Society submitted that the Agreed Statement of Facts should be accepted by the Committee as evidence of conduct deserving of sanction.

DECISION

- [15] This matter arose through a complaint made by one lawyer against another. It is indeed an unfortunate case.

- [16] The Member chose not to present evidence with respect to his mental state throughout this ordeal. This lack of evidence, in some way, has tied the hands of the Hearing Committee in the finding of guilt. It is obvious that the Member was suffering from many challenges in his life during the material time. The Member's physical surroundings, described in some detail at paragraph 16 of the Agreed Statement of Facts, give only a glimpse of insight to the state of the Member's life and affairs.

Citation No.1

- [17] The Complainant wrote a letter to the Law Society of Alberta on March 15, 2010 complaining about the Member's failure to pay an account for services. The amount of the account was \$230.27.

- [18] The Member stated that his clients understood that they would be required to pay the Complainant. When speaking to the Law Society Investigator that Member stated at Exhibit 5 page 44 that:

“I said, you've got two options. You can come into Edmonton and I'll meet with you on the weekend, if you come in on the weekend, and we can get this resolved and get all the documents signed, or I can send them to another office, you go to that office and get them signed there, but, any fees related to that process have to be paid by you.”

- [19] The Member during the same investigation stated that on other occasions he had agency work completed in Lloydminster and on those occasions “they just billed the client directly.” (Exhibit 5, page 45)

- [20] On July 9, 2009 the Member had forwarded documents to the Complainant for execution by his clients. It is noted that the letter did not contain any statement regarding payment for the Complainant's services.
- [21] The Complainant rendered an account to the Member on July 10, 2009.
- [22] The date stamp indicates that the invoice (Exhibit 5 tab 3) was received (presumably by the Member's office on July 13, 2009). There is no evidence that the Member took immediate steps to rectify the Complainant's understanding of who should be responsible for the account at the time the account was received by the Member.
- [23] The Complainant forwarded a copy of the original invoice together with a reminder letter to the Member that invoice remained outstanding on August 6, 2009.
- [24] The Member replied with a hand written note on August 7, 2009 stating:
- “thank you for your invoice the proper party to bill T. S. & Y. S.”
- [25] This is the first time the Member had made any direct communication to the Complainant that indicated someone other than the Member was responsible for the invoice.
- [26] The Member's association with Laurier Law Office was terminated, effective August 19, 2009.
- [27] On January 15, 2010, after being advised that the Laurier Law Office would not pay the account, the Complainant forwarded a letter to the Laurier Law Office to the attention of the 3 remaining members stating:
- “Further to your January 13, 2010 response to my inquiry regarding payment of my firm's invoice, I refer you to Rule 2 of Chapter 8 of the Alberta Code of Professional Conduct.
- Accordingly, unless payment in full is remitted by your firm I will have no choice but to complain to the Law Society of Alberta and to initiate Court Action in order to recover payment in full.”
- [28] On March 15, 2010 the Complainant forwarded a letter to the Law Society of Alberta complaining against the Member and the 3 remaining lawyers from the Laurier Law Office.
- [29] It is apparent that the Member assumed that the arrangement that he had enjoyed in the past with the Complainant's firm would continue. In short, he assumed that the Complainant would bill the client directly. On the other hand, the Complainant had no reason to believe that he was to invoice the client's directly. He had never dealt with the Member before. The initial communication from the

Member to the Complainant made no mention of who was to be invoiced. As such, the Complainant assumed that the Member would be responsible for his fees. Each lawyer misunderstood what the other's thinking and intentions were.

[30] It is noted that the Code of Conduct presently in force is quite clear with respect to where the onus lies. It clearly lies with the party making the request for services. Rule 6.01 (2) states:

“A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.”

[31] The Commentary to the Rule states, in part:

“In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, **unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.**” (our emphasis added)

[32] It would have been a simple matter for the Member to state in his initial letter to the Complainant that his clients were to be invoiced directly for the service rendered by the Complainant. The Complainant could then have communicated this fact to the client and either made a satisfactory arrangement for payment or, if payment was not forthcoming, refuse to accept the retainer. The Member had an obligation to make the arrangements clear and the absence of clarity the Member undertook to pay for the services requested from the Complainant.

[33] Notwithstanding that the Member had the obligation to pay for the services requested from the Complainant, there remained ample opportunities to clear up the misunderstanding and avoid the proceedings which have eventually resulted.

[34] The Member could have immediately contacted the Complainant upon receiving his invoice and attempted to resolve the misunderstanding. This did not happen. The opportunity for the client to receive the invoice at the peak of the “satisfaction curve” was lost. Waiting to resolve the misunderstanding lead invariably to a series of events that resulted in this complaint.

[35] 24 days after receiving the invoice and only upon receiving a reminder from the Complainant did the Member attempt to clarify the misunderstanding. He wrote a note on the invoice and returned it to the Complainant. This action did not relieve the Member from his responsibility for payment of the invoice.

[36] Some 159 days later the Complainant sent a demand to the Laurier Law Firm. By then, the Member was no longer there. The Complainant took the position that the remaining members of the Laurier Law Firm were “in breach of their duties contained within the Professional Code of Conduct in failing to remit payment for an obligation incurred by a firm member to a third party.”

- [37] The Complainant sent a complaint to the Law Society implicating all members of the Laurier Law Firm some 60 days later.
- [38] The Law Society of Alberta, as regulator, had an obligation to contact the Member. They did so. However, by the time the Member was contacted the matter had deteriorated beyond a resolvable complaint in the informal process.
- [39] The Hearing Committee determined that the Agreed Statement of Facts and Admission of Guilt concerning Citations 1 was in a form acceptable to it, and held that the Member engaged in conduct deserving of sanction in so far as that citation was concerned.

Citation No. 2

- [40] The facts set out in paragraphs 11 through 15 substantiate Citation No. 2. The Member has admitted his guilt with respect to this citation and the Hearing Committee found that Agreed Statement of Facts and Admission of Guilt concerning Citation 2 was in a form acceptable to it. It was held that the Member engaged in conduct deserving of sanction in so far as Citation No. 2 was concerned.

SANCTION AND ANCILLARY MATTERS

- [41] There was a submission from counsel for the Law Society that this matter be dealt with by way of reprimand. Further there was agreement between the Member and counsel for the Law Society that the costs of these proceedings be set at \$2,000.
- [42] The Hearing Committee gave deference to the representations and agreement of the Law Society and the Member as such the Member was reprimanded. A copy of the reprimand is attached hereto as Schedule "A".
- [43] Costs were ordered payable in the amount of \$2,000 with 30 days to pay.
- [44] There shall be no referral to the Attorney General.

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

Dated this 3rd day of April, 2012.

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

Rose M. Carter, Q.C. (Bencher)

Rob G. Harvie, Q.C. (Bencher)

Schedule "A"

Reprimand Delivered February 15, 2012

(Paraphrased)

In this situation, it's obvious to the Panel that there was a necessity for clarification of the terms of retainer. Your letter of July 9th that was sent to Politeski Strilchuk requested that certain documents be executed by your clients TS and YS. You also asked that those executed documents be returned to your office. You have stated in your Facts and in your reply that you had dealt with the office of Politeski Strilchuk before and that the charges for executing documents were charged directly to the client.

The fact though is, in this case, Mr. Kirkpatrick sent you a Statement of Account. That Statement of Account was dated July 10th, 2009 and it was sent to your attention at Laurier Law Office. The account was rendered one day after the date that you delivered the letter to the Complainant.

The retainer arrangement should have been clarified. What happened here is that you assumed the responsibility for the payment of the account by not clarifying you're your retainer arrangements were. If the clients were to pay a simple statement in your letter to Politeski could have said that. It could have stated that the expectation is that the Complainant collect his fees directly from TS and YS.

This is an unfortunate series of events. What has happened is that you undertook personal responsibility for the account because the issue of fee responsibility was not clarified.

There are a number of things that could have gone differently here, but they did not. In the result, you have ended up being responsible for the bill. When that happens and the bill is not paid you have something that breaches the Code.

With respect to not responding to the Law Society, you have understanding from this Panel with respect to the perils and the challenges of depression.

Notwithstanding that, if you have some idea that you may be susceptible to an ailment, alternate arrangements, if at all possible, should be made to ensure that there are responsive replies to all correspondence.

The Law Society has to govern its members. When members do not respond it is left with little remedy but to do what has happened in this case.

So although there is understanding from the Panel, this matter is one of governance and it just simply cannot happen again.

You must make appropriate arrangements to ensure that what happened in this matter does not happen again. One of those things could be ensuring that you have appropriate support in place to help you in times of need.

I understand that it may sound like a simple thing for me to say, and I understand that it is not that simple. The fact is that you need to understand that the Law Society must be able to govern its members. In order to do that, the Law Society needs to be able to communicate with you. It would be a lot better for everyone concerned if an investigator was not necessary and a simple reply to the Law Society was given when requested.

I want you to understand that this Panel has deep sympathy for you. We understand the perils of depression; and we want, at this point, now that the reprimand is finished, only to wish you the best.