THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

IN THE MATTER OF THE *LEGAL PROFESSION ACT*,
AND IN THE MATTER OF A HEARING
REGARDING THE CONDUCT OF CLARENCE EWASIUK
A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING REPORT

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HEARING REPORT

A. QUORUM

The Hearing Committee commenced and continued throughout the hearing with three Benchers.

B. REPRESENTATION

The Law Society was represented by Janet Dixon, Q.C. until the conclusion of the evidence portion of the hearing. Janet Dixon, Q.C. subsequently retired as counsel for the Law Society of Alberta. On September 13, 2011, when the hearing reconvened to hear submissions, Lindsay MacDonald, Q.C. represented the Law Society of Alberta (both counsel hereafter collectively referred to as "LSA Counsel"). Throughout, Clarence Ewasiuk ("Member") was represented by Brian Beresh, Q.C., as assisted by Jonathan Kerber, student-at-law (hereafter "Member's Counsel").

C. JURISDICTION

Letter of Appointment

Exhibit 1 establishes that a Panel comprised of Frederica Schutz, Q.C. (Chair), James Glass, Q.C. and Larry Ackerl, Q.C. was appointed to hear these proceedings.

LSA Counsel tendered Exhibits 1 through 4 and requested that the Hearing Committee accept its jurisdiction to determine the citations set out in the Notice to Solicitor.

Member's Counsel indicated no objection to the composition of the Panel by reason of bias or for any other reason.

Notice to Solicitor

LSA Counsel confirmed that Exhibits 2 and 3, being the Notice to Solicitor and Notice to Attend, respectively, were provided to Member's Counsel the day prior to commencement of the hearing and Member's Counsel formally acknowledged service of these documents on behalf of the Member.

Exhibit 2 establishes that notice was given to the Member that a Hearing Committee had been appointed pursuant to s. 56 of the Legal Profession Act. This notice contains 33 citations.

Notice to Attend

Exhibit 3 establishes that a Notice to Attend and Private Hearing Application Notice were issued.

Certificate of Standing

Exhibit 4 is the Member's Certificate of Standing dated May 11, 2010, which certifies that on that date the Member was on the Suspended List of the Law Society of Alberta.

Certificate of Exercise of Discretion

Exhibit 5 is a Certificate dated October 28, 2010 and establishes that the Director of Lawyer Conduct exercised his discretion pursuant to Rule 96(2)(b) and determined that no one was to be served with a private hearing application notice.

The Hearing Committee accepts its jurisdiction to hear the matters in issue.

D. OPEN HEARING

The hearing was open to the public.

E. CHRONOLOGY OF HEARING

This hearing commenced on March 23, 2011 and continued through March 24, 2011. The hearing resumed May 30, 2011 and continued through June 1, 2011. On these dates evidence was called and exhibits were entered.

At the outset, LSA Counsel indicated that the Law Society of Alberta intended to call witnesses and asked the Hearing Committee to make an order directing exclusion of witnesses. Member's Counsel agreed that witnesses ought to be excluded. The Hearing Committee, having heard Counsel, so ordered.

LSA Counsel also advised that as a result of significant cooperation by Member's Counsel and the Member, certain facts had been agreed upon and that the Member's admission of those facts was expected to significantly expedite the hearing.

Some discussion ensued about entering these agreed facts at the outset; ultimately, the specific admissions made by the Member were finalized, the Member endorsed his signature upon the ninth page of the nine page document and this document was entered as Exhibit 303. Exhibit 303 ("Formal Admissions") shall be referred to in this decision either by its exhibit number or by the description just given, or both.

LSA Counsel stated that the Law Society of Alberta would be calling no evidence pertaining to Citations 31, 32 and 33. Exhibits 225-269 were removed from the Exhibit book prior to its distribution to the Hearing Committee.

On September 13, 2011, closing arguments were delivered.

On that date, LSA Counsel invited the Hearing Committee to dismiss the following citations: 7, 8, 11, 14, 18, 25, 31, 32 and 33.

LSA Counsel also noted that there was one change in respect of the citations if proven in relation to the "phony settlements", as LSA Counsel characterized these citations [21, 22 and 26, 27, 28]. Although the Law Society of Alberta previously stated its intention to refer these matters to the Attorney-General, the Law Society of Alberta elected not to maintain the assertion that a finding of guilt in respect of these citations would require a referral to the Attorney-General.

At the conclusion of Counsel submissions, the Hearing Committee adjourned this hearing, without objection, to deliberate and make its finding on guilt, after which Counsel was to be permitted to make submissions regarding sanction, if any, costs and any outstanding collateral matters.

F. SUMMARY OF DECISIONS

Formal Admissions made by the Member will be referred to throughout these written reasons.

Member's Counsel characterized several citations as being in a category wherein the evidence did not support a finding of guilt: Citations 5, 6, 9, 10, 12, 13, 15, 23, 24, 29 and 30.

Member's Counsel characterized another set of citations as involving conduct by the Member that arose by reason of mental disorder: Citations 21, 22, 26, 27 and 28.

Member's Counsel categorized a final group of citations as having involved dealings with the Law Society of Alberta, including reporting to the Law Society, filing forms and attending to administrative matters: Citations 1, 2, 3, 16, 17, 19 and 20.

LSA Counsel invited the Hearing Committee to dismiss or not find the Member guilty of nine citations, namely 7, 8, 11, 14, 18, 25, 31, 32 and 33. Having considered the evidentiary standard and burden of proof, the Hearing Committee accepts the submissions of LSA Counsel in each instance. Accordingly, Citations 7, 8, 11, 14, 18, 25, 31, 32 and 33 are hereby dismissed.

LSA Counsel confirmed that the Member had been provided with notice that the Law Society of Alberta was seeking disbarment.

This Hearing Committee finds the Member guilty and that the Member's conduct is conduct deserving of sanction in respect of the following Citations:

- Citations 1, 2 and 3 – These citations relate to a failure by the Member to respond on a timely basis to the Law Society, a failure to cooperate with the Law Society in his involvement in the Practice Review process where that process contemplated a reply, or cooperation and that the Member acted in an ungovernable fashion. The Hearing Committee's finding is that the Member failed to respond in a timely basis to the Law Society of Alberta, the Member failed to cooperate with the Law Society of Alberta in his involvement with the Practice Review process and that the Member acted in an ungovernable fashion. The Member is guilty of these citations and the Member's conduct is conduct deserving of sanction.

- Citations 4, 5 and 6 allege a failure by the Member to serve his client J.W. in a conscientious, diligent and efficient manner, the Member failed to respond to communications from the client that contemplated a reply and that the Member failed to respond to communications from another lawyer that contemplated a reply. The Hearing Committee finds the Member guilty of these citations and finds that the Member's conduct is conduct deserving of sanction.

- The Hearing Committee finds the Member guilty and that the Member's conduct is conduct deserving of sanction in respect of Citation 9, which alleges the Member breached an Order of the Court of Queen's Bench of Alberta in relation to funds paid by N.V. in the client S.V. matter, which funds the Member was ordered to hold in trust.

- Citation 10 is subsumed in Citation 9. Citation 10 is consolidated with Citation 9 (the latter being a particular only) and the Hearing Committee finds the Member guilty of conduct deserving of sanction in respect of Citation 9.

- Citation 12 alleges that in the S.V. matter, the Member failed to respond to opposing counsel. This Hearing Committee finds the Member guilty and that the Member's conduct is conduct deserving of sanction in failing to respond to opposing counsel in a timely or sufficient manner.

- Citation 15 alleges that the Member failed to provide S.V. with the client file on a timely basis. The Hearing Committee finds the Member guilty of such conduct and that the Member's conduct is conduct deserving of sanction.

- Citations 16 and 17 allege untimely responses by the Member to communications from the Law Society of Alberta and its investigators and a failure to cooperate with the Law Society of Alberta investigators. The Hearing Committee finds that the Member is guilty and that the Member's conduct is deserving of sanction in respect of each of Citations 16 and 17.

- Citations 19 and 20 relate to audit functions undertaken by the Law Society of Alberta and allege a failure by the Member to follow accounting rules and a failure to respond in a timely basis and in a complete and appropriate manner to communications from the Law Society that contemplated a reply in relation to a Rule 130 audit and related matters.

In respect of Citations 19 and 20, this Hearing Committee finds that the Member is guilty and that the Member's conduct is conduct deserving of sanction.

- Citations 21 and 22 involve a client L.M. The Member is alleged to have failed to serve his client by failing to serve a Statement of Claim within the prescribed limitation period and, further, it is alleged that the Member lied to his client L.M. and misled the client into believing that the Member had settled the client's personal injury claim with the insurance company when the Member had not done so, and that the conduct described in these citations is conduct deserving of sanction. The Hearing Committee finds the Member guilty of Citations 21 and 22 and that such conduct is conduct deserving of sanction.

- Citations 23 and 24 relate to the Member's solicitor's undertaking to discharge from a Certificate of Title certain specific non-permitted encumbrances, the Member's undertaking having been given in June of 2005 and satisfied in June of 2006 and a failure to respond to opposing counsel. Having regard to the evidence tendered and the Member's Formal Admissions, this Hearing Committee finds the Member guilty of Citations 23 and 24 and that such conduct is conduct deserving of sanction.

- Citations 26 and 27 relate to allegations that the Member failed to serve his client P.H. by failing to serve this client's personal injury Statement of Claim within the prescribed period and that the Member misled his client P.H. into believing that he had settled the claim with the insurance company. The Hearing Committee finds the Member guilty in respect of Citations 26 and 27 and that the Member's conduct is conduct deserving of sanction.

- Finally, in respect of Citation 30, involving a claim by purchasers of a single family dwelling that water leakage and consequent damage was well known to the vendors at the time of the sale, it is alleged that the Member failed to respond in a timely manner to communications from his clients M.G. and D.V. that contemplated a reply. The Hearing Committee finds the Member guilty and that the Member's conduct is conduct deserving of sanction in relation to Citation 30.

G. TABLE OF CITATIONS/DECISIONS/EXHIBITS

Citation	Decision	Exhibits
1 IT IS ALLEGED that you failed to respond on a timely basis and in a complete and appropriate manner to communications from the Law Society, related to the Practice Review process that contemplated a reply, and that such conduct is conduct deserving of sanction.	Guilty	271 through 279

Citation	Decision	Exhibits
2 IT IS ALLEGED that you failed to cooperate with the Practice Review Committee as required by s.58(3) of the *Legal Profession Act*, and that such conduct is conduct deserving of sanction.	Guilty	271 through 279
3 IT IS ALLEGED that you have acted in an ungovernable fashion regarding your involvement with Practice Review, and that such conduct is conduct deserving of sanction.	Guilty	271 through 279
4 IT IS ALLEGED that you failed to serve your client J.W. in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.	Guilty	6 through 21
5 IT IS ALLEGED that you failed to respond in a timely manner to communications from your client J.W. that contemplated a reply, and that such conduct is conduct deserving of sanction.	Guilty	6 through 21
6 IT IS ALLEGED that you failed to respond in a timely manner to communications from another lawyer related to the file of J.W. that contemplated a reply, and that such conduct is conduct deserving of sanction.	Guilty	6 through 21
7 IT IS ALLEGED that you failed to be candid with your client S.V. regarding an Order made by Justice Sulyma on June 15, 2004, and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	

Citation	Decision	Exhibits
8 IT IS ALLEGED that you agreed with opposing counsel to a particular attributed income for your client S.V. without instructions from S.V., and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	
9 IT IS ALLEGED that you breached the September 23, 2003 Court Order of Justice Bielby in relation to the funds you were to hold in trust, and that such conduct is conduct deserving of sanction.	Consolidated – guilty	29 – 52
10 IT IS ALLEGED that you breached your undertaking to opposing counsel in relation to holding in trust certain funds being paid into his trust account by N.V. and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	29 – 52
11 IT IS ALLEGED that you misappropriated trust funds you were provided in relation to the matters of S.V., and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	
12 IT IS ALLEGED that you failed to respond to opposing counsel in relation to the matters of S.V. in a timely manner, and that such conduct is conduct deserving of sanction.	Guilty	29 – 52
13 IT IS ALLEGED that you instructed your client S.V. to sign a document in blank which you intended to use for court purposes, and that you held out to be a properly sworn affidavit, and that such conduct is conduct deserving of sanction.	Not guilty	29 – 52

Citation	Decision	Exhibits
14 IT IS ALLEGED that you failed to respond to the Law Society on a timely basis related to inquiries regarding the complaint of S.V., and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	29 – 52
15 IT IS ALLEGED that you failed to provide S.V. with her client file on a timely basis, and that such conduct is conduct deserving of sanction.	Guilty	29 – 52
16 IT IS ALLEGED that you failed to respond in a timely manner to communications from the Law Society that contemplated a reply in relation to an investigation order, and that such conduct is conduct deserving of sanction.	Guilty	283 – 297
17 IT IS ALLEGED that you failed to cooperate with Law Society investigators, and that such conduct is conduct deserving of sanction.	Guilty	283 – 297
18 IT IS ALLEGED that you placed yourself in a potential conflict of interest in representing W.N. while you were engaged in a personal relationship with her, and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	55 – 94
19 IT IS ALLEGED that you failed to follow accounting rules of the Law Society of Alberta, and that such conduct is conduct deserving of sanction.	Guilty	298 – 301 [Exhibit 302 is in dispute]

Citation	Decision	Exhibits
20 IT IS ALLEGED that you failed to respond in a timely basis and in a complete and appropriate manner to any communications from the Law Society that contemplated a reply in relation to a Rule 130 audit and related matters, and that such conduct is conduct deserving of sanction.	Guilty	298 – 301 [Exhibit 302 is in dispute]
21 IT IS ALLEGED that you failed to serve your client L.M. by failing to serve the Statement of Claim within the limitation period, and that such conduct is conduct deserving of sanction.	Guilty	95 – 120
22 IT IS ALLEGED that you lied to your client L.M. and misled her into believing you had settled her claim with the insurance company, and that such conduct is conduct deserving of sanction.	Guilty	95 – 120
23 IT IS ALLEGED that you failed to respond to opposing counsel on the K. sale and the civil litigation file, and that such conduct is conduct deserving of sanction.	Guilty	121 – 156
24 IT IS ALLEGED that you failed to comply with undertakings, and that such conduct is conduct deserving of sanction.	Guilty	121 – 156
25 IT IS ALLEGED that you failed to properly supervise your staff, and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	121 – 156

Citation	Decision	Exhibits
26 IT IS ALLEGED that you failed to serve your client P.H. by failing to serve the Statement of Claim within the limitation period, and that such conduct is conduct deserving of sanction.	Guilty	158 – 182
27 IT IS ALLEGED that you misled your client P.H. into believing you had settled her claim with the insurance company, and that such conduct is conduct deserving of sanction.	Guilty	158 – 182
28 IT IS ALLEGED that you failed to respond to communications from the insurance company that contemplated a reply, and that such conduct is conduct deserving of sanction.	Not guilty	158 – 182
29 IT IS ALLEGED that you failed to serve your clients M.G. and D.V. in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.	Not guilty	183 – 224
30 IT IS ALLEGED that you failed to respond in a timely manner to communications from your clients M.G. and D.V. that contemplated a reply, and that such conduct is conduct deserving of sanction.	Guilty	183 – 224
31 IT IS ALLEGED that you failed to respond in a timely manner to communications from another lawyer that contemplated a reply, and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	183 – 224

Citation	Decision	Exhibits
32 IT IS ALLEGED that you failed to respond to D.D., a beneficiary of the W.D. Estate, and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	225 – 269 [Removed prior to commencement of hearing]
33 IT IS ALLEGED that you failed to serve the W.D. Estate in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.	Dismissed at invitation of Law Society of Alberta	225 – 269 [Removed prior to commencement of hearing]

H. BURDEN AND STANDARD OF PROOF/ASSESSING CREDIBILITY

Throughout, this Hearing Committee has applied the standard of proof required of this tribunal; that is, proof on a balance of probabilities and has imposed upon the Law Society of Alberta the burden of proving these allegations by "clear and convincing proof based upon cogent evidence", sometimes called the "Bernstein" standard.

This standard relates to the quality of the evidence required but it is still the civil standard of proof on the balance of probabilities: Orkin, M. Legal Ethics (2nd ed.) 2011:Canada Law Book, at page 204, referring to Bernstein v. College of Physicians and Surgeons of Ontario, (1977), 76 D.L.R. (4th) 281 (S.C.J. Div. Ct.), at para. 41 and Law Society of Upper Canada v. Evans (2008), 295 D.L.R. (4th) 281 (S.C.J. Div. Ct., at para 41.

In Ringrose v. College of Physicians and Surgeons of Alberta [1978] 2 W.W.R. 534 (Alta. C.A.) Clement J.A. delivers judgment for the Court and says, at pages 549-551:

> "The circumstances in the case at bar include the power given to the council to strike the name of a registered practitioner off of the register, which is indeed a serious penalty. Having this in mind, I think it is well to refer to the judgment of Martin J.A. in Reed v. Lincoln (1974), 6 O.R. (2d) 391 at 401-402, 53 D.L.R. (3d) 14:
>
> > 'The cogency of the evidence required to satisfy the burden of proof by a preponderance of probability may vary, however, according to the nature of the issue with respect to which that burden must be met.'
>
> In Hanes v. Wawanesa [supra], Ritchie, J., delivering the majority judgment of the Supreme Court of Canada at pp. 160-1 S.C.R., p. 733 D.L.R., quoted with approval what Lord Denning said in Bater v. Bater, [1951] P. 35, [1950] 2 All E.R. 458 at 459 (C.A.):

> 'The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.'

… In Re Dellow's Will Trusts; Lloyds Bank v. Institute of Cancer Research, [1964] 1 W.L.R. 451, [1964] 1 All E.R., 771, Ungoed-Thomas, J., said at pp. 454-5:

> 'It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but, as Morris L.J. says, the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged. The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'

The conclusion to be derived from the foregoing cases is clearly and, in my view, correctly stated by Professor Cross in his well-known work on evidence, 3rd ed. (1967), at p. 92:

> 'These words must be not be taken to mean that there is an infinite variety of standards of proof according to the subject-matter with which the court is concerned, but rather that this latter factor may cause variations in the amount of evidence required to tilt the balance of probability or to establish a condition of satisfaction beyond reasonable doubt. As certain things are inherently improbable, prosecutors on the more serious criminal charges and plaintiffs in certain civil cases have more hurdles to surmount than those concerned with other allegations.'

To this I would add the words of Cartwright, J. (as he then was) in Smith v. Smith, [1952] 2 S.C.R. 312 at 331-32, [1952] 3 D.L.R. 449:

> 'It is usual to say that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.'

This passage was adopted by Laskin J.A. (now C.J.C.) in Re Glassman, supra, in the course of a discussion of authorities. It is apparent that the outcome in each case is dependent on a fair and impartial judgment on the totality of the circumstances.

I respectfully accept the conclusion reached by Martin J.A. as enunciating the right approach to the burden of proof in the present case."

In a more recent review of Ringrose, supra, in K.V. v. College of Physicians and Surgeons (1999), 237 A.R. 49 (C.A.) paras. 26-41, at paragraphs 40 and 41, the Court of Appeal says:

"[40] The essence of the argument of counsel for Dr. V. which remains is contained in paragraph 63 of his factum. It reads as follows:

> '63. It is respectfully submitted that this Honourable Court in Law Society (Alberta) v. Estrin … and Ringrose v. College of Physicians and Surgeons of the Province of Alberta … has recognized in principle that an accused person should benefit from a higher standard of proof when allegations have serious consequences. However, the decision in Ringrose v. College of Physicians and Surgeons of the Province of Alberta fails to describe or identify this higher standard of proof, or provide indication as to when or if it becomes mandatory … '

The citation for Law Society of Alberta v. Estrin (1992), 4 Alta. L.R. (3d) 373 (C.A.).

[41] It is therefore necessary to look again at the standard set out in Ringrose. I have set out above the principles which Mr. Justice Clement accepted. I

will repeat only the last sentence which he quoted (at p. 132) from the reasons of Mr. Justice Cartwright in Smith v. Smith & Smedman, supra, at p. 331:

> 'I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.' [Emphasis added]

In view of the infinite variety of possible circumstances, I do not think it is either possible or desirable to expand upon this statement."

A similar conclusion is reached by the Ontario Divisional Court in Law Society of Upper Canada v. Neinstein (2007), 280 D.L.R. (4th) 263, at para. 54, affirming that hearings before the Ontario counterpart to this Hearing Committee are not criminal and the panel is not required to assess the guilt or innocence of the lawyer based on the criminal standard of proof, namely, beyond a reasonable doubt.

More recently, the Supreme Court of Canada has reaffirmed that in "civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred." C. (R.) v. McDougall, [2008] 3 S.C. R. 41, at paras. 31 and 49:

> "[31] In Ontario Professional Discipline cases, the balance of probabilities requires that proof be "clear and convincing and based upon cogent evidence" (see Heath v. College of Physicians & Surgeons (Ontario) (1997), 6 Admin. L.R. (3d) 304 (Ont. Ct. (Gen. Div.)), at para. 53).
>
> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

The burden of proof upon the Law Society of Alberta is to establish the guilt charged against the Member by a fair and reasonable preponderance of credible testimony, the tribunal – the trier of fact and law – being entitled to act upon a balance of probabilities. The cogency of the evidence required to satisfy the burden of proof by a preponderance of probability may vary, however, according to the nature of the charge against which that burden must be met.

In assessing the credibility of witnesses, the Hearing Committee is not required to follow the test set out by the Supreme Court of Canada in R. v. W.(D) [1991] 1 S.C.R. 742 since these proceedings are not criminal: LSUC v. Neinstein, *supra*, at paras. 52-54; also see, Legal Ethics, *supra*, at page 204.

In re Brethour v. Law Society of B.C. (1951) 1 W.W.R. (NS) 34, at 38-39 the Court says that in considering testimony judges ought to be very mindful that the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the times.

In discussing credibility, the British Columbia Court of Appeal in Faryna v. Chorny, 4 W.W.R. (N.S.) 171 expands on this proposition and says at pages 174-175:

> "If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, see Raymond v. Bosanquet Tp. (1919) 59 S.C.R. 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion.

> The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case."

This Hearing Committee is mindful of the fact that it is a matter of grave seriousness to invoke disciplinary action against a lawyer.

The *Legal Profession Act* sets out a general definition of 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."

The interpretation section of the *Alberta Code of Professional Conduct* (section 3(a)) for lawyers, states:

> "Conduct deserving of sanction. Under the Legal Profession Act, the Law Society has broad powers to declare conduct to be conduct deserving of sanction and is not limited to disciplining violations that are expressly or impliedly referred to in this Code."

Finally, in Pearlman v. The Manitoba Law Society Judicial Committee, (1991) 84 D.L.R. (4th) 105, Iacobucci, J., speaking for the Supreme Court of Canada says, commencing at page 120:

> "The general public has a vested interest in the ethical integrity of the legal profession: see, for example, the remarks of Estey J. in A.-G. Can. V. Law Society of B.C., *supra*. As already mentioned, the provincial legislature has entrusted the protection of this interest to the considered judgment of the members of the legal profession itself.
>
> To my mind, a large part of effective self-governance depends upon the concept of peer review. If an autonomous Law Society is to enforce a code of conduct among its members, as indeed is required by the public interest, a power to discipline its members is essential. It is entirely appropriate that an individual whose

conduct is to be judged should be assessed by a group of his or her peers who are themselves subject to the rules and standards that are being enforced. As Monnin C.J.M. recognized in Re Law Society of Manitoba and Savino, *supra* (at pp. 292-3):

> 'Our Legislature has given the benchers the right to pass rules and regulations as well as the right to enforce them. It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional misconduct. Professional misconduct is a wide and general term. "It is conduct which would be reasonably regarded as disgraceful, dishonorable, or unbecoming of a member of the profession by his well respected brethren in the group – persons of integrity and good reputation amongst the membership.
>
> No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.'" [Emphasis added]

This Hearing Committee is comprised of a group of practising barristers who are subject to the rules established by its governing body, the Law Society of Alberta. We now turn to the evidence and consideration of the specific citations.

I. CITATIONS

Re: Citations 1 to 3

1. The Member was obliged to participate in the Practice Review process and made significant admissions in connection with these citations: Formal Admissions, Exhibit 303, paras. 1-6.

2. On September 24, 2002, the Member was referred by a Law Society Conduct Committee to the Practice Review Committee. The Member first met with the Practice Review Committee on April 23, 2003 and subsequent meetings occurred on July 16, 2003, December 11, 2003, February 23, 2004 and October 18, 2004.

3. On November 23, 2004, Brian Peterson, Q.C., then Chair of the Practice Review Committee, wrote to suggest a further meeting for April/May, 2005, and requested that the Member provide an "updated, written practice snapshot."[Exhibit 271(1)]

4. When this snapshot was not received, the Law Society's Practice Review department followed up on February 10, 2005. [Exhibit 271(2)]

5. On April 4, 2005, a few weeks after the Member's separation from his wife, he telephoned the Practice Review department explaining he was having problems and sought more time to respond.

6. The April 4, 2005 Law Society of Alberta "Practice Review Memo" says: T/C from Clarence Ewasiuk. Personal problems. Wife left him. Made decision to continue w/family law but to only accept non-contested. Contact him in late May for June availability. DD: 24 May 05. [Exhibit 271(3)]

7. The Practice Review department sent follow-up letters on July 15, 2005 [Exhibit 271(4)], August 5, 2005 [Exhibit 271(5)], September 30, 2005 [Exhibit 271(6)] and October 24, 2005 [Exhibit 271(7)].

8. On November 14, 2005, Peter Michalyshyn, Q.C. (as he then was), in his capacity as Chair of the Practice Review Committee, wrote to the Member saying that failing receipt of a response, the matter would be referred to the Conduct Committee. [Exhibit 271(8)]

9. The Member did not respond and was referred to the Law Society's Conduct Committee on February 17, 2006.

10. On March 7, 2006, Katherine Whitburn, Manager, Complaints, sought the Member's response to this referral. [Exhibit 272]

11. The Manager, Complaints followed up on March 30, 2006, stating that the Law Society of Alberta's records indicate the Member received the last correspondence on March 8, 2005. [Exhibit 273]

12. The Manager, Complaints wrote again May 30, 2006, saying that in one telephone discussion subsequent to the March 30, 2006 letter, she and the Member discussed the Practice Review Section 58 Report and states: "It was my understanding that you would provide a written response to the report. You have failed to do so. I require your immediate response and require that same be provided to me no later than the close of business on June 12, 2006. If I do not receive your response, this matter will go to a Conduct Committee Panel without the benefit of your response. Also, be advised that there will be no further extensions of time granted." [Exhibit 274]

13. The Member responded by letter dated June 12, 2006 [Exhibit 275].

14. The Member's conduct was reviewed by a Conduct Committee Panel on June 5, 2007. The Panel initially considered directing citations but "was concerned with the lack of activity on the Law Society's file since … June 12, 2006." [Exhibit 277]

15. The Member's matter was referred back to the Practice Review department and the Member was informed of that by letter dated June 14, 2007. [Exhibit 278]

16. On June 18, 2007, the Practice Review department wrote to the Member, asking for an updated practice snapshot, stating: "As you were advised by Katherine Whitburn's letter to you dated June 14th, 2007, you have been referred back to the Practice Review Committee. As we have not been in contact with you since the referral to Conduct, an updated practice snapshot is required. I have enclosed information on the type of information your snapshot may include. Your written response is required on or before July 9, 2007. **If this date is not convenient, I would be pleased to discuss an alternate with you.**"[Exhibit 278][Emphasis in original]

17. The Member did not respond. [Formal Admissions, para. 6]

18. The Practice Review department wrote again on July 10, 2007, telling the Member that due to his failure to provide an updated practice snapshot and due to the Member's lack of contact requesting an extension of time, the Practice Review department was referring this matter to the Practice Review Panel. [Exhibit 279]

19. As a result of that referral on August 20, 2007, the Practice Review Panel referred the Member back to the Conduct Committee. [Excerpts from Formal Admissions, paras. 1-6]

20. Exhibits 271 through 279 confirm the chronology and communications germane to these citations.

21. The Member first met with the Practice Review Committee volunteers in April of 2003.

22. From shortly after November 23, 2004 [Exhibit 271(1)], the Member repeatedly failed to respond in a timely basis and in a complete and appropriate manner to communications from the Law Society of Alberta and failed to cooperate with the Practice Review Committee as required by s.58(3) of the *Legal Profession Act*.

23. In February of 2006, the Member was referred to the conduct process and we have the Manager, Complaints' correspondence in that regard of March 7, 2006, March 30, 2006 and May 30, 2006 [Exhibits 272, 273 and 274, respectively).

24. The Manager, Complaints expressly notes a requirement imposed upon the Member to provide a written response to the Practice Review department materials and her observation that the Member has failed to do so. The Manager, Complaints then imposes yet another deadline on the Member to do so by no later than June 12, 2006 and makes clear that if no response is received, the matter will go to a Conduct Committee Panel

without the benefit of the Member's response and indicates that no further extensions will be granted.

25. The issue of the Member's lack of response and cooperation did go to a Conduct Committee Panel on June 5, 2007 and that Panel considered directing citations but noted that it was concerned with the lack of activity on the Law Society's file since June 12, 2006 [Exhibit 275, the Member's letter to the Manger, Complaints].

26. By his letter dated June 12, 2006, being Exhibit 275, the Member begins by underlining that he and Ms. Whitburn had had one telephone conversation. The Member appears to reproach the Law Society for only once speaking to him by telephone. Without more, a reasonable reader could be misled into believing that it was but one phone call and one recent letter that the Member had received and already there was the threat of disciplinary action. The record of evidence plainly speaks to the contrary.

27. Aside from referencing the Manager, Complaints' letter of May 30, 2006, the Member does not make mention of the numerous other written and oral communications from the Practice Review department of the Law Society of Alberta, including: April 4, 2005, which was a telephone call referenced in Exhibit 271(4) (which is a letter dated July 15, 2005) and also referenced in Exhibit 271(5) (which is a letter dated August 5, 2005) and also referenced in Exhibit 271(6) (which is a letter dated September 30, 2005).

28. The Member's response does not mention Exhibit 271(7), which is a letter dated October 24, 2005, reminding the Member of all of the previous communications set out above and yet again requesting an updated practice snapshot. The Member's response does not reference the letter from the Chair of Practice Review [Exhibit 271(8)], dated November 14, 2005, requesting a response by no later than November 30, 2005 in advance of a meeting with the Practice Review Panel to be scheduled in January of 2006. This letter states: "If Ms. Rogers has not received your response by that date, we will be reporting to the Conduct Committee that you are no longer cooperating with the formal referral to Practice Review, pursuant to s. 58 of the *Legal Profession Act*."

29. Exhibit 272 is the Manager, Complaints' letter of March 7, 2006 which, pursuant to s. 53 of the *Legal Profession Act*, requests a written response to the materials from the Practice Review department and imposes a 14 day deadline for response. Exhibit 273, which is dated March 30, 2006, refers to this letter and states: "Please note that a failure to respond may result in both a hearing for failing to respond and an adverse inference being drawn against you on the complaint itself."

30. It is noted that the letter to which the Member makes mention, that of May 30, 2006 (Exhibit 274) states: "I wrote to you on March 7 and again on March 30, 2006. We had one subsequent telephone discussion wherein we discussed the Practice Review Section 58 report. It was my understanding that you would provide a written response to the report. You have failed to do so."

31. In his June 12, 2006 letter [Exhibit 275], the Member states that he is responding "… and I reluctantly do so as I am doing so as a responsible colleague, without the consultation of counsel."

32. This, when all the Practice Review department required is that the Member provide an updated snapshot of the Member's practice.

33. The Member states that he and his wife separated in March of 2005 and confirms that Ms. Whitburn invited him to "make note of the facts and situation I have found myself in since my separation of March of 2005 and provide you with a letter setting out these facts and that being the regrettable reason for not providing the Practice Review Committee with a "new" snapshot of my practice." [Emphasis added]

34. Further on, the Member states: "My failure to respond to the request from the Practice Review Committee has not been out of neglect or disrespect. I simply couldn't find the time to sit down and see exactly what I was doing in order to provide a picture."

35. [Material concerning private family health matters has been redacted].

36. From April to June 2005 inclusive the Member says there was scarcely a day that he got more than 3-4 hours sleep per day.

37. The Member then says: "Since that time, I have been attempting to care for my children which has been my primary concern."

38. The Member goes on to say that he is the sole financial support for his children, his wife commenced divorce proceedings and (he further states) he spends hours assembling lists of assets, responding to court applications and, generally, responding to requests from his own lawyer.

39. [Material concerning private family health matters has been redacted].

40. [Material concerning private family health matters has been redacted].

41. The behavior of the Member's wife is said to have caused much anxiety "over the last year" and there have been days, says the Member, where he couldn't even open a file or work on it effectively and: "Things have gotten much better but I continue to tire easily and there are days when I do not sleep much at all."

42. The member reports in June of 2006 that he now does little contested matrimonial litigation (consistent with his advice to Practice Review in April of 2005) and has hired a new conveyancer.

43. It is the finding of the Hearing Committee that the crux of his failure to respond is embedded in this comment [Exhibit 275]: "I was also of the view that much had been discussed and there was little to add other than to advise that my Real Estate Practice had increased from 10 deals a month to approximately 35. My staff increased by one conveyancer." [Emphasis added]

44. The Member then provides a snapshot indicating he does 20% uncontested matrimonial, 5% contested matrimonial, 50% conveyancing and mortgage work, 5% criminal, 10% will and estates and 10% miscellaneous (corporate/commercial – solicitor's work).

45. Accepting these statements of the Member to be true, it would have been a straightforward and uncomplicated task (in the face of repeated and increasingly persistent requests, including the threat of disciplinary proceedings), for the Member to have replied with this response.

46. At the same time, the Member could have addressed with the Practice Review his apparent concerns about exactitude - the Hearing Committee notes that he had been provided with information from the Practice Review department about the content required for the snapshot.

47. At the same time, the Member could have asked whether the Practice Review department required anything further of him.

48. The Member also could have expressed his apparent reluctance to respond to these repeated demands without his "consulting counsel." The Member tells the Manager, Complaints: "I had not felt that I was in a position with the Law Society to need counsel." [Emphasis added]

49. The Member makes clear that in his view, much had already been discussed and there is very little to add. The Member expressly impugns the propriety of the Law Society's demands upon him to provide yet more information - an updated practice snapshot. The Member complains that he is feeling disadvantaged or burdened and that he sent a response reluctantly without the consultation of counsel. Implicit in this complaint is that he had not been given sufficient time to consult with counsel, for whatever reason.

50. It is the Hearing Committee's finding that the Member's somewhat churlish expression of his viewpoint that the Practice Review department and the Manager, Complaints were imposing impossible demands and asking for what had already been provided - essentially badgering the Member by making improper demands - is what is actually behind the Member's decision not to respond.

51. The Member notes that he has been under personal stress but the Member also notes that he has been the "sole financial support for his children" since his wife left and is managing his parental duties.

52. While the Member now characterizes his failures to respond in a timely way as an inability to respond due to major depressive disorder, this Hearing Committee notes that the Member's practice was thriving with some 35 real estate deals per month plus other files. The Member says he has capable staff "who have stood by my side throughout", "the work got done and the clients properly served and reported". He also says: "All limitation dates were preserved…." (about which latter statement more will be said). [Emphasis added]

53. In his letter of June 12, 2006, he says "it was difficult to process this response without the aid of those that type much better than I". This statement is a groundless excuse given the self-reported superb staff at the Member's disposal during this time – November of 2004 to June of 2006.

54. It is the finding of this Hearing Committee that it was not by reason of any debilitating mental disorder that the Member was unable to respond and cooperate in a timely manner.

55. Rather, the Member chose not to reply to the requests of the Practice Review department.

56. The Hearing Committee will also discuss at this juncture the Member's Formal Admissions in respect of the L.M. allegations at Citations 21 and 22 and the Member's Formal Admissions in respect of the P.H. allegations, primarily Citations 26 and 27. These matters will be reviewed, here, in the context of the Practice Review process and later, in the context of a lawyer's duties to his client of fidelity, honesty, integrity and propriety.

57. The Member admits he missed the time limit for issuing his client L.M.'s statement of claim which expired on October 30, 2003 and told L.M. that settlement funds had been provided by the insurer and "this was not true". Exhibit 117 is the Member's May 11, 2004 letter to L.M., which encloses a General Release he had asked the client to sign [Exhibit 116] and which was signed, with the Member as witness, on May 11, 2004 There is also the Member's phony trust account Statement of Receipts and Disbursements [Exhibit 115], which on its face misrepresents the source of the funds the Member remitted to his client L.M.

58. The Member admits that he missed the time limit for service of his client P.H.'s statement of claim and paid out money "from my own funds" to the client.

59. This payment was made during a sophisticated charade of meeting with P.H. and faking an insurance settlement, telling the client P.H. that the money he paid was proceeds from settlement.

60. Exhibit 182 is the Member's February 19, 2003 letter to P.H., which encloses a General Release he had asked the client to sign [182(1)] and which was signed, with the Member as witness, on February 20, 2003. There is also the Member's phony trust account

Statement of Receipts and Disbursements [Exhibit 182(2)] - which on its face misrepresents the source of the funds the Member remitted to his client P.H.

61. The L.M. and P.H. incidents "concluded" in February of 2003 and May of 2004. These incidents pre-date (by 26 months and 10 months, respectively), the matrimonial separation that the Member reports as having occurred in March of 2005 [Material concerning private family health matters has been redacted].

62. Moreover, the Member signed the Discontinuance of Action in the P.H. case on February 12, 2002 [Exhibit 179(1)], a full year before he induced P.H. to sign the fake settlement document - the General Release – on February 19, 2003, the latter date being after the Member had been referred on September 24, 2002 to Practice Review and only 63 days before the Member had his first meeting with the Practice Review Committee on April 23, 2003. [Formal Admissions, Exhibit 303, para. 1]

63. In cross-examination, while the Member seemed unclear about whether lying to his client P.H. in these circumstances is a breach of his professional duty of fidelity, the Member did concede that he had lied. [transcript, page 470, lines 2-4.] The Member was not prepared to concede, necessarily, that his failing to serve the statement of claim was professional negligence or that the failure would have given rise to a claim in negligence against him or that his failure would have been a malpractice matter covered by his professional liability insurer. The Member's view was that what had occurred was a relatively simple administrative matter – the only difference between this and a bona fide settlement being the actual source of the money.

64. The Member never disclosed to his client P.H. that he had consented to discontinuing her claim and he never disclosed that he has missed a procedural limitation to serve pleadings and, therefore, had irrevocably and fatally prejudiced her claim.

65. For a full year after signing the client's rights away, the Member pretended that nothing had happened and maintained that pretense until the Law Society investigators unearthed his deceit.

66. The Member, under cross-examination states in connection with P.H. signing the phony Release: "I don't believe it was a fraud." [Exhibits 180, 181 and transcripts pages 479-485, in particular page 485, lines 7-10]

67. The Member says he had just returned from Toronto, where his wife had had a serious operation, "and I don't think I was thinking all that clearly at that time. It's something I shouldn't have done. I've admitted that to everyone." [transcript, page 487, lines 1-5]

68. In fact, the Member says that P.H. probably came to his office to sign documents on February 19, 2003. [transcript, page 482, line 27] According to the Member's own letter to P.H., sent in his absence by Ms. M., however, he was to be in Toronto December 2-16, 2002. [Exhibit 181] If this is correct, and there is no evidence to suggest it is not, this

means that the fake settlement meeting occurred several weeks after his wife's successful surgery – it had been more than two months since he had returned from Toronto.

69. L.M. signed the fake settlement document – the General Release – on May 11, 2004. That was 231 days after the Member had irretrievably lost, by his own negligence, his client's legal rights.

70. The Member never disclosed he had missed the limitation deadline to issue the claim and the Member never advised the client L.M. that L.M. should consult a lawyer to obtain independent legal advice concerning the Member's error. The Member pretended that nothing had happened and maintained that pretense until the Law Society investigators unearthed his deceit.

71. In cross-examination, the Member expresses the opinion that L.M.'s claim was "doomed" – "It was a doomed action in terms of any substantial recovery. It was a doomed action because my client refused and told me point-blank I will not attend discoveries and I will not go to trial." [transcript, page 498, lines 22-27]

72. The Member states that given L.M.'s unwillingness to be examined, he advised L.M. that the only option was to settle the claim. [transcript, page 501]

73. The Member admits that he failed to file his client L.M.'s statement of claim and, in the result, his client lost the legal right to sue. The Member acknowledged that he lied to L.M. The member said that what he did was dishonest. The Member did not acknowledge that he breached his fiduciary obligation to L.M., only that he lied to L.M.. The Member acknowledged in cross-examination (on May 31, 2011), that no matter how tired or discouraged one is, that there is no excuse for being dishonest.

74. The Member admits that a phony settlement package was prepared for L.M.. He hid this, and also the fact that P.H.'s settlement was a phony settlement, from his staff. In fact, his wife participated in creating the phony L.M. settlement package. [transcript, page 505, lines 12-23]

75. The Member says, at page 506, lines 9 to page 507, lines 1-19:

> A. My recollection is that these documents were done by my ex.
>
> Q. Is that Kelli?
>
> A. Kelli.
>
> Q. Okay. So Kelli helped you with this settlement?
>
> A. Yes.

Q. Okay. So I'm clear, Kelli didn't help you prepare the [P.H] settlement documents, did she?

A. No.

Q. [Ms. M] did those. Did you tell [Ms. M.] that you were creating or entering into that settlement with [P.H.] even though the insurance company hadn't paid the money?

A. I don't believe it was discussed.

Q. Okay. And in this case, did you consult with Kelli again before you paid this money from your own resources?

A. Yes, We had just done a refinancing of our home, and we had discussions about resolving this—

Q. Okay.

A. -- with the monies that we had just received.

Q. So however bad your relationship was with Kelli during this period, she was the person you turned to on both the [P.H.] and [L.M.] things to help you sort out the problem, right?

A. No. She never – she wasn't involved in the [P.H.] – in the [P.H.] matter.

Q. Okay, I thought you said that you consulted her about paying the money on the [P.H.] matter.

A. Yeah, but she didn't take part in the completing any of the documents.

Q. So you consulted her on the [P.H.] arrangement; and then on the [L.M.] arrangement, she actually helped you put the package together?

A. Well, I told – I told Kelli what had happened with respect to the [P.H.] matter. I don't know if there were any discussions with respect to that, but she was aware that I was resolving it in a certain fashion after discussions, yes."

76. At the time of the conclusion of each of these phony settlements, the Member was involved in Practice Review: September of 2002 to July of 2007 (thereafter, the Member was referred back to the Conduct Committee).

77. The Member also reports in his June 12, 2006 letter that he is coping well at this time but the last year has been challenging. He states that he does not consume alcohol or drugs and "my therapy is spending time with my children and friends." The Member apologizes for his lack of response to the Practice Review Committee and says: "I too have perhaps become depressed although not clinically." He says he attends all of his children's soccer games, takes them to and picks them up at piano lessons and dance lessons, drives his children to tournaments, makes breakfast for his children daily and some lunches. He also makes supper for his family, washes clothes, cleans and ensures the orderliness of his residence and pays for "their every need."

78. In the Member's report to Manager, Complaints, he says that the year since his wife had left - in March of 2005 – "had been challenging, to say the least." In his June 12, 2006 letter, the Member talks about that time, i.e. the last year:

> "There were days and weeks when I literally got little done at my office, however, I either ceased to act for some clients or finalized their matters as best I could. My practice suffered in terms of getting things done in a prompt and timely basis, but the work got done and the clients properly served and reported to. All limitation dates were preserved with much credit to my experienced staff who have stood by my side throughout." [Emphasis added]

79. The Member lies in his June 12, 2006 letter to the Law Society of Alberta. [Exhibit 275] By omitting to disclose his P.H. and L.M. errors, the Member engages in deceit by omission. The Member's representation that all limitations were preserved was a statement and assurance upon which he fully intended the Law Society of Alberta to rely. From the start of these schemes in 2002 to the date the Member was caught, the Member's conduct squarely and categorically brought into play the obligation of the Law Society of Alberta to protect the public.

80. The Member's wife was aware of the L.M. problem and participated in the 2004 preparation of phony settlement documents concerning the client L.M.. The Member had discussions with his wife about the problem [transcript, page 407, lines 15-18] with the suggestion that perhaps "…we should just give [L.M.] something". [transcript, *supra*] The Member says he felt very embarrassed to tell this client that "we" had missed the limitation period because L.M. was acquainted with the Member's son. The Member admits that he did up a statement of account and thinks that he even reduced his normal percentage fee, as well. [transcript, page 408, lines 16-18]. The Member says that while the phony settlement was "very stupid, very stupid, he "wasn't try to defraud anybody, he was trying to look after L.M.".][transcript, pages 408-409, line 27, lines 1-3]

81. In answer to a question from the Hearing Committee, the Member says he doesn't think he was thinking very clearly, he can't believe he did what he did and then says: "But I

was happy in terms of being able to provide her with a sum of money that she probably wouldn't have ever received". [transcript, page 409, lines 4-15].

82. During the period February 12, 2002 (consent to discontinuance of P.H.'s claim – Exhibit 179(1)]) to May 11, 2004 (date of L.M.'s phony release – Exhibit 116), the Member had seemingly very amiable discussions with his wife about the method by which resolution of these problems would be accomplished – by using their own money – and permitted his wife to assist him in preparing L.M.'s phony documents – all of which discussions and actions she had and did in an apparent bid to help the Member solve his professional problems. This is indicia of a supportive, loving wife, not one completely and bitterly estranged from her husband.

83. [Material concerning private family health matters has been redacted].

84. Indeed, later when the Member and his wife are nearing separation, Kelli threatens the Member with the "unemployment lines" and he says: "Kelli was the only one that knew what happened with L.M. and P.H. The only one other than myself." [transcript, page 376, lines 1-4]

85. It seems his ex-wife knew then – as did the Member – that what he was doing was wrong. She told the Member, later, that she might use that knowledge against him. Kelli was aware of the Member's state of mind prior to his concluding the fake settlements because she had discussed with the Member the problems that he had caused and discussed with the Member his plan to resolve these problem files.

86. The Member decided to create some official-looking documents to lend some reality to the charade and then effected the appearance of a bona fide settlement, complete with the Member's signature as witness. The Member made a deliberate and clear choice in resolving these problems in the manner he and Kelli had more generally discussed. It was his legal knowledge and experience that allowed him to create fake documents in support of the frauds.

87. The Member was acting very ably, albeit deceitfully. This is not incompetence.

88. And, it is apparent from the Member's testimony that the Member did not think it was really any big deal to finalize the files this way – there was just a different source of "settlement money." After all, he says, his clients got what they wanted.

89. [Material concerning private family health matters has been redacted]. The Member can point to no significant triggering events for depressive disorder immediately preceding either the P.H. or L.M. client meetings. The Member says that what he did was very stupid.

90. In the face of this other evidence, the Member's testimony that he "wasn't thinking clearly," does not have a substantial air of reality.

91. On June 14, 2007 [Exhibit 276], the Manager, Complaints wrote to the Member to advise that the Conduct Committee Panel reviewed his lack of responsiveness and initially considered directing citations against the Member but was concerned with the lack of activity on the Law Society's file since the Member's response of June 12, 2006.

92. The Panel directed that the Member be referred to the Practice Review Committee for the purpose of carrying out a general review and assessment of the Member's practice with the recommendation that Peter Royal and Karim Mawani conduct a further Practice Assessment with the Member.

93. The Practice Review department asks the Member, on June 18, 2007, for an updated practice snapshot but the Member admits that he failed to respond.

94. The purpose of practice review is to ensure the protection of the public but, also, to assist the Member by having a peer review of the law office and file practice management. The purposes of Law Society disciplinary proceedings are not to punish offenders and exact retribution but rather to protect the public and maintain high professional standards so as to preserve public confidence in the legal profession.

95. When a Member refuses to participate in processes that would assist the Law Society in understanding whether there is a public protection issue, which would assist the Member in maintaining the highest professional standards and which process would preserve public confidence in the legal profession, that failure to respond on a timely basis and in a complete and appropriate manner is conduct deserving of sanction. In particular the Member admits that on June 18, 2007 the Practice Review department wrote to him asking again for the updated practice snapshot.

96. The Member admits that he failed to respond to this request. [Formal Admissions, para. 6.]

97. This is nearly one full year after the Member had, in June 2006 [Exhibit 275], written to the Law Society of Alberta Practice Review department advising that his practice was in order and the previous pressures arising from personal and family difficulties had dissipated.

98. The Law Society of Alberta's Practice Review department was not unreasonable, either in its requests or in the numerous extensions granted to the Member for time to respond.

99. The Member's Admissions and the exhibits demonstrate a serious and ongoing disregard for this particular process and, derivatively, the governance and regulatory authority and obligations of the Law Society of Alberta. While Practice Review processes are designed to assist the practitioner, the primary function of these processes is to protect the public by having a peer review of the law office and file practice management.

100. The Member's failure to respond and cooperate prevented and delayed that process from continuing for an unacceptable period of time, raising substantial concerns about the governability of this Member.

101. The Hearing Committee finds that the Member's non-responsiveness and failure to cooperate were not influenced by disability occasioned by mental disorder; rather, the failures to respond and lack of cooperation were deliberate and conscious choices of the Member to avoid involvement with Law Society of Alberta processes because the Member assessed these requests as being burdensome or intrusive or unnecessary.

102. This Hearing Committee finds that the Member chose not to respond to repeated requests, for the reason stated in his letter - he had already responded sufficiently, he had other more important things on his mind and there was, in his opinion, little to add.

103. This Hearing Committee also finds that the Member resisted any further review of his practice and files for fear that further Practice Review processes would detect the L.M. and P.H. phony settlements.

104. This Hearing Committee finds that the Member acted in an ungovernable fashion regarding his involvement with the Practice Review process, including failing to respond when a timely response was contemplated, failing to cooperate and by lying (or omitting to tell the truth) to the Manager, Complaints in his June 12, 2006 letter [Exhibit 275] and that such conduct is conduct deserving of sanction.

105. The Member is guilty of Citations 1, 2 and 3 and the Member's conduct is conduct deserving of sanction.

Citations 4 to 6

106. Citations 4, 5 and 6 arose out of the retainer of the Member by J.W. in 2004. J.W. retained the Member to obtain additional child support from her son's biological father.

107. In his Formal Admissions, the Member says that he received a $1,000.00 retainer from J.W. and began the legal proceedings by setting down an application for an order declaring paternity.

108. Matters proceeded with the father retaining his own counsel, Marie Gordon. On June 8, 2004 Ms. Gordon sent the Member a letter setting out her client's position and requesting a settlement proposal in response.

109. On June 25, 2004, the Member replied to Ms. Gordon indicating he would correspond with her "next week" once he had assembled a proposal. On July 8, August 6, August 27, September 15 and October 13, 2004, Ms. Gordon followed up requesting the settlement proposal.

110. The Member's admits that he never provided a settlement proposal. [Exhibit 303, paragraph 10]

111. The Member says that on October 28, 2004, his client J.W. told him that she had received further support cheques from the father and asked the Member when he would be sending a settlement proposal to Ms. Gordon.

112. The Member formally admits that J.W. followed up in writing on November 3, 2004 expressing her frustration that the Member seemed to be doing nothing. The Member indicates that J.W. subsequently left messages for him to call her, "some of which were returned."

113. The Member states that on November 17, 2004 his client J.W. advised that she would be seeking other counsel.

114. During the Member's testimony, he indicated that he had serious reservations about and was offended by J.W.'s suggestion that he approach the father of her child in a public forum when, in the Member's opinion, the client's objective was to publicly embarrass and vilify.

115. This Hearing Committee notes that the Member did not cease to act despite his consternation over such inappropriate suggestions.

116. The Member testifies that he did not initially respond to Marie Gordon as a "strategy" and says "he hoped to respond" to the second or third letter from this lawyer but was not going to get into what he thought was embarrassing someone, i.e. the father of J.W.'s child. Then, he says: "I lost interest in the file after that point because I –didn't feel I was hired to do that …." and "[i]t was very hard to cope with this client. Her views were certainly different than mine. I probably should have, in retrospect, told her I couldn't act for her any more. I should have probably done that sooner." [transcript page 381, lines 1-21]

117. The Member further states that he dealt with "fires" instead of this file and that, too, is a reason for not responding to Marie Gordon's letters. [transcript, page 383, lines 1-11].

118. The Member never told the client that he could no longer act. The Member never advised the client of the letters he had received from Marie Gordon. The Member never completed what he had promised. Eventually, the client fired the Member and retrieved the file.

119. The Hearing Committee finds that the Member's disgust at his client's suggestion that the Member engage in a public shaming of the father, obviously odious and unprofessional behaviour, had nothing to do with the Member's failure to diligently represent his client J.W. The Member continued with the retainer and continued to have communications

with opposing counsel, whose client – the father - was prepared to settle. Exhibits 6 through 21 provide important evidence in this regard.

120. Exhibit 6 is a letter from the Member to Marie Gordon dated June 25, 2004, in response to her letter of June 8, 2004. In that letter the Member states on behalf of J.W.: "We have received instructions from our client and shall correspond with you next week once we have assembled a proposal." [Emphasis added]

121. The Member's Formal Admissions - at paras. 7-12 - concede several follow-up attempts by Marie Gordon asking for the very proposal that had been promised. [Exhibits 17 to 21, inclusive, spanning the period July 8 to August 27, 2004.]

122. The exhibits show that on August 9, 2004 the client emailed asking for a progress report [Material which might identify the client has been redacted]. [Exhibit 6(5)]

123. On October 8, 2004, the client advises that the father has provided post-dated cheques for child support and asking when the Member will forward the proposal to Marie Gordon. [Exhibit 6(6)]

124. On November 3, 2004 the client writes again stating numerous attempts by phone, email and fax to get an update. The client says: "The last time I heard from you was August 11, 2004, you wrote: 'Proposal out soon so as to utilize timing'". [Exhibit 6(7)] [Emphasis added].

125. This Exhibit also has handwritten notations "Left message: please respond by Friday". The notes record calls made on Friday, Monday and Tuesday. (November 5, 8 and 9, 2004)

126. Exhibit 6(8) is the client's fax dated November 17, 2004. This communication confirms that J.W. has been unable to get a progress update or plan of action since August 11, 2004. At that point, the Member had failed to respond to the client's reasonable requests for an update, for a period of 98 days. It says: "The timing you promised to utilize has long since passed." [Emphasis added] The client says she will be seeking other counsel and wishes to pick up an accounting of everything the Member has done so far and wants the contents of her file by November 19, 2004.

127. By letter dated December 8, 2004, the Member encloses his account. [Exhibit 6(9)] The Member produces his statement of account [Exhibit 6(10)] within 21 days from the client's last communication.

128. Exhibit 6(11) is the client's January 5, 2007 letter questioning the account and the need for services described therein. She says: "I was not advised of the numerous attempts made by opposing counsel…"; "Upon hiring your services, you stated you would complete the application [material which might identify the client has been redacted];"

and "You did not meet this objective and you were not responding to requests for updates, which would have allowed myself to take alternative action." [Emphasis added]

129. The Member promptly responds to this client's request to provide an accounting for all services rendered. [Material which might identify the client has been redacted]. The Member's testimony that he was too morally offended to act is not credible and cannot withstand an examination of the actual content of the exhibits. Even if this was a factor in his failure to serve J.W., this reason is not exculpatory.

130. The Member did not do what he said he would do. The Member's testimony about losing interest because he was morally repulsed is inconsistent with the probabilities that surround this particular matter; that is, from the evidence we find that it was more probable than not that the real reason the Member failed to serve his client and failed to respond to his client and other counsel when responses were contemplated, is because the Member disliked this client, thought she was pushy, was irritated by her constant phone calls, email and faxes and, in the result, chose not to attend to her legal interests because he did not want to.

131. Toward the end of the Member's testimony he says he "wasn't up to responding." We do not accept this as a clear and cogent explanation for his behavior over a sustained period of time because it is wholly inconsistent with the statements made by the Member to his client and other counsel during the currency of his retainer.

132. To blame his non-responsiveness by saying he was not up to responding also is not credible because when it was time to render his account, the Member promptly responded, a fact wholly inconsistent with an inability to respond by reason of mental disorder.

133. In summary, the Member was instructed by his client to make a settlement proposal as invited and expected by counsel opposite and the Member confirmed in writing his instructions and his promise to do so.

134. For at least five months the Member did nothing. Over a sustained period of time (August to November) he failed to respond to his client when a response was contemplated. Marie Gordon's repeated communications were left unanswered, all of which contemplated a timely response.

135. In his March 8, 2005 letter to the client explaining his account and the services rendered, the Member says: "Given the telephone messages left and your particular "bent" on how you wished this matter resolved caused some concern over the feasibility of making such a proposal." [Emphasis in original] The Member then goes on to say: "As it appeared that you perhaps did not wish the writer to continue on your file, the proposal was not finalized, reviewed with you or sent to the other side." [Material which might identify the client has been redacted]. [Exhibit 6(12)]

136. There is nothing on the record to suggest that the client did not wish the Member to continue on her file. This is a self-serving statement wholly inconsistent with the client's numerous communications. This is an example of the Member's tendency to deflect blame for his own professional misconduct onto others – in this instance, by saying that it was really the client's fault that he had done nothing. If there was an "appearance" of the client "perhaps" not wanting to continue, it was the Member's obligation to clarify his instructions, not abandon his client.

137. It is clear from the Member's testimony and written statements that he thought his client was difficult and very hard to cope with and he says he thought her views were certainly different than his.

138. Member's Counsel cautions this Hearing Committee not to apply unrealistic standards of practice or client service. The Hearing Committee agrees that it ought not to apply unrealistic standards or, to put it another way, we ought not apply "the counsel of perfection".

139. The Hearing Committee does, however, draw on its collective professional knowledge and experience to inform its deliberations. It is in part by reason of this collective knowledge and experience - of the average practitioner in like circumstances – that lawyers enjoy the privilege of self-regulation. There are no better judges of a Member's conduct in deciding if it was reasonably diligent, efficient and conscientious than other practising lawyers.

140. The Member is charged with failing to serve his client J.W. in a diligent, conscientious and efficient manner. The Member is charged with failing to respond in a timely manner to communications from his client J.W. that contemplated a reply.

141. The Member is charged with failing to respond in a timely manner to communications from another lawyer that contemplated at reply.

142. This Hearing Committee finds the Member guilty of Citations 4, 5 and 6 and finds that the Member's conduct is conduct deserving of sanction.

Citations 7 and 8

143. LSA Counsel indicated that no evidence is to be called in connection with these citations. There being insufficient evidence to prove these charges, these citations are dismissed.

Citations 9 and 10

144. It is alleged that the Member breached the September 23, 2003 Court Order of Justice Bielby [Exhibit 30] (which order required the Member to hold funds paid to the

Member by N.V. – not his client), by improperly using N.V.'s funds and that, by so doing, the Member also breached his undertaking to opposing counsel.

145. These two citations can be dealt with together.

146. The Formal Admissions, at paragraph 14, confirm that on September 23, 2003, Justice Bielby directed that periodic monthly payments be deposited into the Member's trust account pending determination of N.V.'s application or further order. The amount of $1,246.00 was placed into trust in compliance with the Order.

147. Paragraph 15 confirms that on June 15, 2004 Sulyma, J. granted an interim order which, among other matters, declared that S.V. had a guideline income of $25,000.00. Ms. S.V. was not in court when the order was made.

148. In paragraphs 16 and 17 of the Formal Admissions, the Member admits that N.V.'s money in the Member's trust account was erroneously used to partially pay an outstanding balance on an account rendered to his client S.V., on August 30, 2004 [Exhibit 33]. The Member admits this happened notwithstanding the $1,246.00 paid by N.V. was subject to Justice Bielby's Order. The Member also says: "I did not instruct the trust transfer."

149. The Member goes on to state that on two occasions opposing counsel requested that the Member forward the $1,246.00 to her.

150. These requests in fact occurred on at least three occasions: April 20, 2005 [Exhibit 40], August 11, 2005 [Exhibit 48] and September 22, 2005 [Exhibit 49].

151. The funds were sent by the Member to opposing counsel on September 29, 2005, some thirteen months after the erroneous transfer of trust funds.

152. When Ms. M., (the Member's senior assistant) was asked whether she waited until 2005 to tell the Member about the mistake her reply was: "No, no way". Ms. M. stated under oath that it was some time shortly after the August 2004 account was issued that she was called by the client S.V. and during that discussion the error was identified by S.V. Ms. M. was precise about her recollection and unequivocal in her testimony that she recalled S.V. phoning to point out the error as soon as S.V. received the account and then brought the erroneous transfer of trust funds to Ms. M.'s attention.

153. After reviewing Exhibit 37, which is a letter from the Member to S.V. and dated March 11, 2005, Ms. M. indicated that this letter did not refresh her memory as to when she became aware of the error; rather, when she looked at the date of this letter – March 11, 2005 - she said: "It seems a little wonky" because her recollection was, again, that the client S.V. called her and brought the error to her attention immediately after the account was rendered on August 30, 2004.

154. The Hearing Committee accepts Ms. M.'s recollection of this matter and finds her testimony to be highly credible. As an experienced and obviously loyal and honest assistant, Ms. M. was well aware of the gravity of the error, and told us this. Ms. M. did not try to cover up an error for which she accepted full responsibility. Her testimony had a substantial air of reality and was logically connected to her recollection of her telephone discussion with S.V. shortly after the account was sent out.

155. The Member admits that "it probably wasn't very long after he signed the account [August 30, 2004, Exhibit 33] that he made [Ms. M.] aware that "we had an error here". [transcript, page 392, lines 10-22]

156. We accept the evidence of Ms. M. and find that the Member was made aware of this trust account shortfall arising from the breach of Bielby, J.'s Order within days or, at most, a few weeks after August 30, 2004.

157. This Hearing Committee finds that as at the March 11, 2005 letter from the Member to S.V [Exhibit 37] the sum of $1,246.00 which had been erroneously removed from trust in breach of Justice Bielby's Order had not yet been returned to trust, notwithstanding that more than six months had elapsed between the time the error was brought to the Member's attention (again, shortly after August 30, 2004). His letter acknowledges that the "money was provided to our trust account by N.V and **should not** have been applied to your account". [Emphasis is original].

158. The Member goes on to state: "Please ensure that this account is paid forthwith as we must return the $1,246.00 back to our trust account as same is the basis of N.V.'s upcoming Court application for the return of monies in our trust account." [Emphasis added]

159. The Member's May 16, 2005 letter to S.V. is to like effect. [Exhibit 46]

160. Karin Schwab's writes the next letter on September 22, 2005 [Exhibit 49], saying: "this is the last request for the trust money".

161. The Member's September 29, 2005 letter to S.V. [Exhibit 50] is to like effect as the others.

162. On September 29, 2005, the Member remitted the trust money to counsel opposite. [Exhibit 51]

163. It is the finding of the Hearing Committee that it was not the client's obligation to replenish the shortfall in trust. Rather, it is the absolute obligation of a barrister and solicitor to ensure that trust monies are faithfully held in custody and properly accounted for at all times and whether or not the subject of a court order. This is a matter of *uberrimae fidei* for a lawyer.

164. The Member deflects personal responsibility for this problem by saying that he "did not instruct the trust transfer" and by saying that he told Ms. M. that "we have a problem here". The Member and Ms. M. both made clear in their testimony that the Member required Ms. M. to rectify this problem and that it was clearly understood by Ms. M. that this was her mistake, therefore her problem to rectify.

165. This is another example of the Member's lack of insight into his non-delegable responsibilities as a barrister and solicitor.

166. There is no evidence which might lead us to conclude that his loyal staff had acted insubordinately or contrary to his express instructions. It was a mistake, plain and simple.

167. That this was a mistake is obvious and is immaterial to the Member's obligations, which were triggered immediately upon his gaining knowledge of the mistake. This is not a "we" problem or a staff problem; rather, this is clearly the Member's problem. Attempting to deflect blame onto his staff and delaying restitution by expecting his staff to get the money back is unfair of the Member and regrettable; failing to take immediate steps to rectify the subsisting breach, however, renders the Member guilty as charged and his conduct is conduct deserving of sanction.

168. To be clear: immediately upon being informed or coming to the knowledge that there had been an improper transfer of trust funds, it was the absolute and immediate personal professional obligation of the Member to return this money to trust - no exceptions, no qualifications, no excuses. It is totally unacceptable for a lawyer to allow a breach of an express court order to remain unremedied for any period of time much less the excessive and inexcusable period of time during which the Member had knowledge of the breach, a time period of not less than seven or eight months, perhaps longer.

169. By his conduct, the Member breached two solemn duties that go to the very core of professional integrity: the duty to assiduously obey court orders and the duty to be vigilant in taking custody of, and accounting for, monies entrusted to the lawyer in his capacity as a barrister and solicitor. These are personal duties that cannot be delegated, deflected, or denied. These are duties that come with the privilege of being a barrister and solicitor.

170. It is a cardinal element of a lawyer's relations with the court that counsel shall never under any circumstances betray the confidence of the court or undermine the solemn obligations of utmost good faith and obedience to the court's authority through its orders. To fail to correct a breach of a court order – to allow the breach to persist – is to lie to the directing Court and is the gravest form of disrespect for the administration of justice. It matters not at all that the breach was inadvertent or that the lawyer did not instruct it.

171. Perhaps the most prized attribute of the practising bar is integrity and, in its unwavering fulfillment, the certain knowledge that the courts and clients trust lawyers because that

right has been hard-earned. Self-regulation depends on the integrity of members of the legal profession, as do the administration of justice and the rule of law.

172. It is a profound diminution of this sacred trust to fail to take steps to remedy a known and subsisting breach of a court order. It must be said that it was only within the Member's knowledge that there had been a breach, not within the knowledge of the Court and not within the knowledge of opposing counsel.

173. Lawyers are entitled to assume that other lawyers are conducting themselves honestly and with the strictest integrity. A lawyer is ethically bound to conduct his business with fellow members of the bar with absolute propriety at all times. The Member did not and breached his implied undertaking to counsel opposite.

174. The Member's failure to remit – over an inexcusably long period of time – trust money belonging to a citizen, in the face of pointed and unambiguous requests by that citizen's lawyer, also severely injures the reputation of the profession, is demonstrative of a profound lack of professional integrity and is evidence of a lack of professional propriety.

175. Integrity by compulsion – acting only after another lawyer's threat of a formal complaint to the regulator – is not an acceptable standard of professional conduct. [Exhibit 49]

176. Based upon the evidence and the Member's Formal Admissions, the Hearing Committee finds that the Member is guilty of breaching the court order (and breaching the concomitant implied undertaking to counsel opposite to ensure proper custody of the money) and finds that the Member's conduct is conduct deserving of sanction.

177. We accept the submissions of LSA Counsel that Citation 10 is superfluous.

178. Therefore, as Citation 10 is effectively subsumed into Citation 9, we find the Member guilty of conduct deserving of sanction by reason of his continuing to knowingly breach the Order of the Honourable Madam Justice M. Bielby.

Citation 11

179. The Law Society of Alberta called no evidence in respect of this citation. There being insufficient proof of guilt, this citation is dismissed.

Citation 12

180. Citation 12 alleges that the Member failed to respond to opposing counsel in relation to the matters of S.V. in a timely manner. The material evidence relating to this citation is:

- Exhibit 41 – April 20, 2005 letter from Karin Schwab enclosing for the Member's approval the Order of Justice Greckol, pronounced April 12, 2005. Karin Schwab also asks for receipt of the funds held in the Member's trust account together with

a trust reconciliation "at your earliest convenience." she notes: "As the Order suspends enforcement of declared arrears, I believe it would be (sic) your client's best interest to finalize this Order sooner as opposed to later." [Emphasis added]

- Exhibit 44 – Letter dated May 13, 2005 from Karin Schwab to the Member asking that he provide the Order of Justice Greckol with his approval endorsed "or advise of your concerns with the draft".

- Exhibit 47 – June 6, 2005 letter from Karin Schwab to the Member indicating that unless she hears from the Member by June 13, 2005 regarding the draft Order of Madam Justice Greckol which was forwarded for approval on April 20, 2005, Ms. Schwab intends to forward the Order directly to Justice Greckol for her review and signature.

- Exhibit 48(1) – The Order of Justice Greckol is entered on the court record on August 10, 2005, with the signature line for the presiding justice completed. The signature line for the Member's approval as to the form and content of the order made is blank.

- Exhibit 48 – August 11, 2005 letter from Ms. Schwab to the Member enclosing for service upon him the filed copy of the Order.

- Exhibit 49 – Letter dated September 22, 2005 from Karin Schwab to the Member advising that this is the last request for transmittal of trust monies and stating: "The next letter will be directed to the Law Society of Alberta unless the funds are in our office by the close of business Friday, September 30, 2005."

- Exhibit 51 – Letter dated September 29, 2005 from the Member to Ms. Schwab enclosing a firm trust cheque in the sum of $1,246.00.

181. The Hearing Committee finds that it is the obligation of the lawyer, not the client, to endorse approval as to form and content on a form of order prepared by opposing counsel. The clients' approval as to content is not required. If the Member had any difficulty with the form of Order prepared by Ms. Schwab, it was incumbent upon the Member to bring those concerns to Ms. Schwab's attention within a reasonable period of time. Opposing counsel expressly outlined this option to the Member in an early communication.

182. Or, if the Member had difficulties with the content the Member could have taken out a formal motion to have the minutes of the Order settled.

183. Or, the Member could have suggested to other counsel that they arrange a conference call or a court appearance before Justice Greckol in order to confirm the Court's directions.

184. The Member did none of these things. The Member failed to respond to Karin Schwab's numerous communications – all of which required timely response. Despite repeated requests of counsel, the Member failed in his obligation to approve the form of order in a timely manner. The Member's behaviour was both disrespectful of court process and discourteous to a fellow member of the bar.

185. This Hearing Committee finds that it is more likely than not that the Member's dilatory and inexcusable delay in dealing with Justice Greckol's Order was due, at least in part, to the fact that the Member had breached the Court's previous order requiring him to retain Ms. Schwab's client's money in trust, his trust account did not contain the funds required to be held in the Member's trust account and the Member had failed to replace this trust money. Responding – but only partially – by returning Justice Greckol's order approved as to form and content may well have raised a fear in the Member that this would trigger the other lawyer's suspicion about the safety of her client's money in the Member's trust account.

186. The funds mistakenly taken from the trust account on August 30, 2004 were not forwarded to Ms. Schwab until September 29, 2005 under threat of a formal complaint. This fact, combined with the non-responsiveness to Ms. Schwab's reasonable requests for return of the Greckol, J. order and to send the money in trust, is sufficient on clear and cogent evidence to find the Member guilty. The Member's conduct is conduct deserving of sanction.

Citation 13

187. LSA Counsel advised the Hearing Committee that having reviewed the evidence in respect of this citation and having regard to the standard of proof – which is a balance of probabilities – this citation is not made out. Ms. M., the Member's assistant, testified emphatically that the Affidavit was not blank when sworn by the client S.V. The client, S.V., contradicts this testimony by stating that the Affidavit was blank when she affixed her signature to the Affidavit, which was then purportedly sworn.

188. We agree with the submissions of LSA Counsel that it would be dangerous to convict the Member given the fundamental and irreconcilable conflict in the evidence.

Citation 14

189. LSA Counsel has called no evidence in respect of this citation. There being insufficient evidence upon which to convict the Member, this citation is dismissed.

Citation 15

190. This citation alleges that the Member failed to provide S.V. with her client file on a timely basis.

191. The exchange between Member's Counsel and S.V. relating to return of the file, is as follows:

> Q. Ms. [S.V.], you know that you had a bill outstanding to Mr. Ewasiuk when you discharged him?
>
> A. I knew I had a bill outstanding when I discharged him.
>
> Q. He told you that he was claiming a solicitor's lien on the file until the bill was paid?
>
> A. He did, sir.
>
> Q. Okay.
>
> A. He also agreed to pay me a settlement.
>
> Q. And the bill was not paid?
>
> A. It was paid. It was settled.
>
> Q. Sorry. Before you got the file, the bill was not paid in full, isn't that right?
>
> A. Yes. It was paid in full when I got my file back.
>
> Q. How much did you pay?
>
> A. He paid me $4,000.00, approximately.
>
> Q. How much did you pay on the bill?
>
> A. The balance. We settled. The balance was he owes me. I didn't get my file until the Law Society - - the Law Society. Sorry. The Law Society called me up and said we have your file.
>
> Q. So - -
>
> A. Clarence never gave me my file. [transcript, page 226, lines 2-25]

192. The Formal Admissions of the Member say nothing about this citation.

193. Exhibit 52 is a letter dated October 11, 2005 from the Member to S.V. enclosing a final statement of account and requesting payment of that account and the previous amended statement of account, from August of 2004. Exhibit 52(1) is the October 11, 2005 account.

194. In answer to the Investigator's Order of November 30, 2006 [Exhibit 284] to deliver up the S.V. file, the Member replies [Exhibit 286] that he needs the S.V. (and another file) "… given ongoing proceedings on each file requiring my attention for the next several weeks".

195. Exhibit 289, dated April 13, 2007 is the Member's letter which says: "S.V. has deemed it just to sue me. I require the file to defend her action for the next 30 days; there is a Solicitor's Lien on that file re: Non Payment of Fees and disbursements".

196. The S.V. file is provided by the Member on April 27, 2007, it is copied by the Law Society of Alberta and returned to the Member on May 4, 2007. [Exhibits 291 and 292]

197. The Hearing Committee accepts the evidence of S.V. that it was the Law Society of Alberta that informed S.V. that the Law Society of Alberta now had custody of the file. The Hearing Committee also accepts the evidence of S.V. that the Member never gave S.V. the file and that, in the final result, the Member paid S.V. approximately $4,000.00.

198. The Hearing Committee also accepts S.V.'s evidence that it was the Law Society of Alberta that took custody of the file in April of 2007 - eighteen months after the Member rendered his final account - and that S.V. retrieved the file from the Law Society of Alberta.

199. The Hearing Committee finds that it is an absolute obligation of a lawyer to return a client's file within a reasonable period of time after the request is made by the client. The Member says nothing about why the client file was not returned to S.V. in a timely fashion, or at all, other to say that he had been sued by S.V. (If anything, that would oblige a lawyer to return the file even more promptly so the client can obtain independent legal advice.)

200. In the absence of any other evidence, this Hearing Committee finds that the evidence supports a finding of guilt because the Member, without adequate excuse, failed to meet his professional obligation to his client to return the file with the result that the Law Society of Alberta eventually returned S.V.'s file to her. We find the Member's conduct to be conduct deserving of sanction. Regarding the claim by the Member for a solicitor's lien, it is noted that the only evidence on this point - from S.V. - is that the Member owed the client money, not the reverse.

Citations 16 and 17

201. These two citations relate to allegations that the Member failed to respond in a timely manner to communications from the Law Society that contemplated a reply in relation to an investigation Order and that the Member failed to cooperate with the Law Society investigators.

202. Exhibits 283 to 297 are the exhibits relating to these citations.

203. At paragraph 18 of his Formal Admissions, the Member admits that on October 13, 2006 two investigators were appointed by the Law Society of Alberta to perform an investigation into the Member's conduct arising from client complaints. Pursuant to that appointment, Robert Ellergodt and Chuck Dechene visited the Member's office on November 23, 2006. The Member states that the investigation concerned three files in total.

204. At paragraph 19 of his Formal Admissions, the Member says that he agrees that Exhibits 284 to 297 accurately depict the exchange of correspondence and conversations between the Member and the representatives of the Law Society of Alberta germane to these citations.

205. In summary, Exhibits 284 to 297 reveal that commencing November 30, 2006 [Exhibit 284], the investigators requested that ten separate client files be forwarded to the Law Society offices for copying and promised their timely return. Included in the files requested were the client files of P.H. and L.M. – the two clients about which Citations 21, 22 and 26 to 28 relate, which have been referred to by LSA Counsel as the "phony settlement" files.

206. The initial demand for transmittal of these files required their delivery by no later than January 15, 2007, a period of six weeks between the demand and the required delivery date.

207. On January 17, 2007, one of the investigators again wrote to the Member indicating that no files had been received and no explanation had been provided concerning a delay in receiving same. The investigator extended the deadline for compliance to January 31, 2007. This was contingent upon the Member acknowledging the new deadline, which written acknowledgement was to be returned to the Law Society offices by fax prior to January 18, 2007. [Exhibit 285]

208. An undated letter is then sent by the Member to one of the investigators (Robert A. Ellergodt) and refers to a recent telephone discussion in which the Member advises that he has been ill during the month of December and is presently under doctor's care. [Exhibit 286]

209. The Member states that notwithstanding that and given the writer's workload and commitments for the months of January and February, "I have attempted to provide some of the files that you have requested to view. As you can appreciate and as indicated to you, I am consumed with my extensive clientele." [Emphasis added]

210. The Member encloses five client files, not including the client files of P.H. and L.M. (the "phony settlement" files) and states that he will attempt to provide the balance of the files requested in the near future.

211. The Member states that he is holding two other client files given ongoing proceedings and believes that the remaining files, including those of P.H. and L.M. "are closed and in storage." He states: "I will locate same and provide accounting records in the near future."

212. On January 26, 2007 Mr. Ellergodt acknowledges receipt of five files and states that in relation to the files of P.H. and L.M. that they will be required for copying prior to February 28, 2007. The Law Society office offers copying services and courier services so as to cause the Member the minimum amount of inconvenience. [Exhibit 287]

213. On March 29, 2007 [Exhibit 288], Mr. Ellergodt sends to the Member a three page letter setting out the chronology of requests including a notation that on January 18, 2007 the Member left a voicemail about the Member's intention to seek legal counsel and questioning the confidentiality of the Member's files. In this January 18, 2007 voicemail, Mr. Ellergodt records that the Member advised that the Member was somewhat confused about the investigation process and explained that his daughter's health issues were obstructing his ability to meet with counsel.

214. Exhibit 288 also records that on January 19, 2007 Mr. Ellergodt and the Member spoke and a decision was made to turn over some of the requested files the following week.

215. From January 26, 2007 to March 13, 2007 further efforts are made to have the Member provide the remaining files, including the P.H. and L.M. files.

216. At page 2 of Exhibit 288 which is dated March 29, 2007, Mr. Ellergodt says: "The remaining files that are required immediately by our office are [L.M.], [P.H.] and [S.V.]. As LSA rules establish that files must be retained for ten (10) years, therefore, there is no reason that any of these should have been destroyed. It is my understanding that you do not represent [S.V.] any longer, therefore there should be no reason to withhold her file any longer. I expect you will have no difficulty in turning these files over to our Edmonton office no later than the 13th of April, 2007, at day's end. You may contact [Mr. Ellergodt's Law Society of Alberta assistant] to make courier arrangements."

217. Exhibit 289 is a three page letter dated April 13, 2007 from the Member. In that communication, the Member says:

- His practice is extremely busy;
- His assistant for 15 years left his employ in October of 2006;
- [Material concerning private family health matters has been redacted].

- The Member has entered into a new relationship and in the past eight weeks his fiancée's father has been hospitalized with cancer and his fiancée's mother has also been hospitalized and had to move out of the matrimonial home;

- The constant requests from the Law Society offices have not helped the Member's stress situation;

- To attempt to locate and review all files requested has been very time consuming and given that some are ongoing litigation files the Member is unable to set aside time to address the investigators' requests on "your time schedule";

- It is unrealistic for the Law Society to demand an appointed time for these matters to be addressed without "fair leeway for any lawyer to complete the requests."

218. In Exhibit 289, the Member goes on to state: "I find your Societies (sic) requests and the time constraints placed on me and my staff totally unreasonable. When I am not in Court I field telephone calls and perform daily activities, prepare Affidavits and negotiate with other Counsel. Your constant harassment causes delays and continuity of my practice and work assignments." [emphasis added]

219. This April 13, 2007 communication from the Member advises that in respect of P.H., two files had been closed but had been located. The Member asks which file the Law Society wants. In respect of L.M., the Member states that he is unable to locate the file and it was closed in 2004.

220. In respect of the S.V. matter the Member states: "It would be appropriate for the Law Society to assist this competent Counsel instead of constantly harassing and badgering because of clients who haven't paid their accounts."

221. The Member's letter to the Law Society of Alberta closes with this statement: "Given your latest request, it seems that I do require legal representation given your request for yet more files. When does it end?" [Emphasis added]

222. On April 19, 2007 Maurice Dumont Q.C., who is Manager, Complaints Edmonton, responds to the Member's letter. Mr. Dumont notes that the Member has been repeatedly asked for these files commencing November 30, 2006 when Mr. Ellergodt asked for ten files.

223. A period of more than four and a half months had elapsed without completing a request to produce ten files.

224. Mr. Dumont concludes his letter by indicating that unless the Member provides the files in question and complies with the requests of the investigators on or before the close of business April 27, 2007, the Law Society of Alberta will take whatever steps it deems necessary without further demands.

225. Exhibit 291 is a letter dated April 27, 2007 from the Member which encloses five files including the P.H. and L.M. personal injury files.

226. On May 4, 2007 the Law Society returned those files after having copied them.

227. Exhibits 293, 294 and 295 reflect additional attempts by the investigators to obtain further information about specific files. Exhibit 295 is a letter to the Member dated October 30, 2007 - more than five months later - requiring various confirmations and information concerning the P.H. and L.M. matters. Exhibit 295 also confirms an interview will be undertaken on November 15 and 16, 2007 at the Law Society offices and will include questioning involving the P.H. and L.M. files.

228. Due to the Member's dilatory responses, these interviews are scheduled almost a full year after the investigators' initial request for ten files.

229. Exhibit 297 confirms the cancellation by the Member of the scheduled November interview dates and an agreement to re-schedule to December 6 and 7, 2007.

230. The Hearing Committee finds that the time it took the Member to fulfill his obligation to comply with the Law Society of Alberta's lawful request to produce files was inordinately and inexcusably long. Ten files is a modest number.

231. Exhibit 288, which the Member concedes is accurate, reveals that investigator Ellergodt is becoming very concerned about the persistent delays.

232. In late fall of 2006, the Law Society of Alberta asked for ten files. A significant amount of time and effort and the threat of further proceedings without further demand preceded delivery of the L.M. and P.H. files.

233. The Hearing Committee finds that it was not until the investigators reviewed the L.M. and P.H. files that the Law Society learned what the Member had done – use of his professional knowledge to orchestrate a scenario by which his clients L.M. and P.H. were falsely led to believe that the Member had properly settled their respective personal injury claims, when in fact the Member had missed the limitation dates in each case, irrevocably prejudicing his clients' legal interests and entitling his clients to negligence and breach of contract lawsuits against the Member.

234. The Member's April 2007 communication to the Law Society of Alberta [Exhibit 289] is highly discourteous, totally inappropriate and, given what is known about the L.M. and P.H. files, raises substantial governability concerns.

235. The regulatory objective of formal investigations is to ensure the protection of the public.

236. When a member creates obstacles to that process, as was done in this case, it is the public's perception of and confidence in the legal profession that irreversibly suffers. To thwart a lawful investigation is improper and is, once again, indicative of this Member's lack of insight into his responsibilities as a lawyer - to his governing body, to the legal profession and to the public.

237. More will be said later about the evidence and decisions regarding the specific citations relating to the P.H. and L.M. phony settlement files. For now, the Hearing Committee finds that the Member by reason of his deliberate inaction caused the investigation by the Law Society of Alberta investigators to be inordinately and inexcusably delayed and that the Member failed to communicate with the Law Society of Alberta in a timely manner when a reply by the Member was contemplated in relation to an investigation Order. Further, the Hearing Committee finds that the Member failed to cooperate with the Law Society of Alberta investigators over a substantial period of time. Accordingly, this Hearing Committee finds the Member guilty of Citations 16 and 17 and finds that the Member's conduct is deserving of sanction.

Citation 18

238. This citation alleges that the Member placed himself in a potential conflict of interest in representing W.N. while the Member was engaged in a personal relationship with W.N.

239. Law Society Counsel indicated that this citation ought to be dismissed. There being insufficient evidence to prove guilt, this Hearing Committee dismisses this citation.

Citations 19 and 20

240. Citations 19 and 20 allege a failure on the part of the Member to follow accounting rules of the Law Society of Alberta and a failure to respond in a timely, complete and appropriate manner to communications from the Law Society that contemplated a reply in relation to a Rule 130 audit and related matters.

241. Exhibits 298 to 301, inclusive, relate to these citations.

242. The Member's Formal Admissions admit certain facts, including that Form Ts were late for 2006 and 2007. [Formal Admissions, paras. 20-23]

243. On February 11, 2008 Glen Arnston, CA, who is the Manager, Audit and Investigations, reported to Maurice Dumont, Q.C., who is the Manager, Complaints Edmonton, that a Rule 130 audit of the Member's Edmonton law firm was commenced and concluded on October 3, 2006.

244. The audit investigation report recommends that consideration be given to charging the Member with failing to respond to the Law Society and with not submitting his late Form Ts.

245. Tabs 1, 2 and 3 of Exhibit 298 reflect the communications made to the Member concerning submission of the Form Ts and these communications are dated November 16, 2007 and November 30, 2007 and January 21, 2008.

246. One letter to the Member states that the Member is late in submitting his Form Ts for 2006 and 2007; and, in the case of the 2006 Form T the Member is some 357 days late. [Exhibit 297(3)]

247. Despite these written communications, the audit report indicates that no contact had been made with the Audit Department regarding the Member's late forms.

248. On February 15, 2008 the Manager, Complaints Edmonton wrote to the Member asking for a response to the audit report and reminds the Member that pursuant to the Code of Professional Conduct, the Member's response must be complete, fair, accurate, courteous and appropriate and requests a delivery of a response within 14 days of receipt of the letter.

249. Exhibit 300 reflects that on March 11, 2008 Maurice Dumont wrote to the Member confirming that no response had been received to the previous letter of February 15, 2008.

250. On April 7, 2008 (Exhibit 301), the Manager, Complaints Edmonton again wrote to the Member confirming that he had yet to receive any response to his letters of February 15, 2008 and March 11, 2008.

251. The Hearing Committee finds that from at least November 16, 2007 to April 7, 2008, the Member was not in compliance with the Law Society of Alberta audit rules and was not responsive to requests for a response to the audit report.

252. The Form T is due 90 days after the year end as designated by the law firm. The Form T is a filing prepared by an independent accountant who must belong to one of the three professional accounting bodies, that reports on the results of specific procedures performed. These procedures include (but are not limited to) reviewing the monthly trust reconciliations to ensure that they have been completed and that trust assets equal trust liabilities and reviewing the monthly trust bank statements for any overdraft or NSF trust cheques.

253. The Hearing Committee notes that in the opinion of the Manager, Audit and Investigations, Form T serves: "…. as a useful tool in determining if there are problems with a law firm's trust accounting records."

254. At paragraph 23 of the Member's Formal Admissions, the Member admits that he did not respond to Maurice Dumont's initial letter of February 15, 2008 and he did not respond to the follow up letters sent by Mr. Dumont dated March 11, 2008 and April 7, 2008.

255. The *Legal Profession Act* sets out the definition of conduct deserving of sanction as follows:

> "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 with 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."

256. In Wilson v. Law Society of British Columbia (1986) 33 D.L.R. (4th) 572, the British Columbia Court of Appeal upheld a finding of misconduct for violating a Rule of the Law Society: "What is and what is not professional misconduct is a matter for the Benchers to determine, and the Court must be very careful not to interfere with the decision of the Benchers for their decision is, in theory, based on a professional standard which only they, being members of the profession, can properly apply …"

257. In respect of these two citations, this Hearing Committee rules that a finding of guilt due to conduct deserving of sanction is just and appropriate because a failure to provide a timely and complete response to an audit request is inimical to the best interests of the public and is a violation of a rule which is specifically designed to protect the public interest by ensuring complete and timely reviews by an independent accountant of a lawyer's trust accounts.

258. It is the finding of the Hearing Committee that the Member's admission that he failed to respond to pointed and repeated requests for a response that would address his failure to comply with audit rules and his failure to respond to the audit report is an admission of a breach which is incompatible with the public interest. Accordingly, with respect to Citations 19 and 20, the Member is guilty and the Member's conduct is deserving of sanction.

Citations 21 and 22 and Citations 26 and 27

259. The first group of these citations – 21 and 22, alleges a failure to serve client L.M. by failing to issue a Statement of Claim within the statutory limitation period and that the Member lied to his client L.M. and misled his client into believing that the Member had settled her claim with the insurance company.

260. Exhibits 95 to 120 are germane to these allegations, as are the Member's Formal Admissions at paras. 24-27.

261. The evidence and events pertaining to the L.M. client have been reviewed and discussed in relation to Citations 1, 2 and 3.

262. Citations 26 and 27 allege a failure to serve client P.H. by failing to serve a statement of claim within the procedural time limit for so doing and that the Member misled client P.H. into believing the Member had settled her claim with the insurance company.

263. First to the L.M. matter: The Member admits that he acted as lawyer for L.M. concerning a personal injury claim, and that he represented to the client L.M. that settlement funds he gave the client were "as provided by the insurer." The Member also admits: "This was not true."

264. It is important to review exactly what the Member has said about these client matters. In respect of Citations 21 and 22 involving L.M. it is agreed that this claim involved a motor vehicle accident and the Member's representation of L.M.

265. In describing L.M.'s claim to Member's Counsel, the Member says commencing at page 401, line 21:

> Q. Okay. Tell us very briefly about the nature of the injuries that [L.M.] had suffered as reported to you.
>
> A. [L.M.], I believe, suffered a very minor whiplash type injury. [L.M.] was involved in - - I believe in a rear-end collision. Someone struck [L.M.] from behind.
>
> Q. Okay. Do you recall whether there was any major property damage at all?
>
> A. No. The property - - any property damage had been resolved before [L.M.] had come in.
>
> Q. Okay. So it was not a major problem?
>
> A. No.
> Q. Okay. And [L.M.]'s specific complaint to you in terms of personal injury was what?
>
> A. It was a whiplash type injury. It was a sore neck for a short period of time. I believe there may have been a couple of other small aches and pains, but nothing that would amount to a lot.

Q. Okay. So this was 2001 when [L.M.] came to see you. The accident was October of 2001.

A. Yes.

Q. Okay. In 2003 you were moving toward settlement or discussing settlement?

A. Yes.

Q. Okay. So by that time - - and let me just ask this question, if I can. By that time - - 2002, 2003 - - you'd done about how many motor vehicle cases within the relatively minor range?

A. Oh, many.

Q. What does "many" mean?

A. 50.

Q. Okay. And so in the scale, I put it in the minor category. I take it you agree with that?

A. Yes.

Q. In the minor category, where was it? Let's say ten being at the top of the minor scale; one being at the very bottom.

A. If [L.M.] was believed - - if [L.M.] was believed and the medical chart was read in such a way that it - - that one could determine that [L.M.] had a few other little problems with respect to that, $7,500.00 to $10,000.00 total.

Q. Okay.

A. I mean, it was just - - there's just no way that it would have been anything more than that. We were hooked up to a Quick Law database in our office if you need to research it because this was just one of the - - one of those, if you will. It was just a common whiplash type accident when a person comes in and says well, what do you think? Do you think I can get some money out of this? You know, that's what they're looking for. They don't come in and say gee, I wish I could get better because they generally aren't hurt that bad. I think we've all seen that.

Q. And so from the research you had either done generally or specifically, was that the amount you thought would be a reasonable settlement?

A. As I've said, if [L.M.] could be believed, no more than that. Absolutely no more than that. And that was brought home to [L.M.]. That was discussed with [L.M.]. [L.M.] indicated to me that [L.M.]'s friend had been involved in a motor vehicle accident and had had a whiplash type injury for quite some time and she got $10,000.00. So that's what - - that's what was on [L.M.]'s mind when [L.M.] came in. I can tell you that [L.M.] advised me that [L.M.] came in because [L.M.] was a good friend of my son; that [L.M.] had discussed this with him and wasn't doing anything about it. And I can tell you that [L.M.] advised me that [L.M.] only came in because he suggested that [L.M.] come in; that I could probably get [L.M.] something in terms of some money for what had happened.

Q. And did [L.M.] have any outward appearance of any long-term injury at all?

A. Absolutely not. [L.M.] - - [L.M.] was just fine when [L.M.] came in to see me in terms of appearance.

Q. Okay. So take us through the file, please.

A. Okay. As I recall - - well, we had the initial discussions. I requested [L.M.]'s chart from [L.M.]'s doctor; got that; reviewed it. That opened my eyes a little bit because there was a - - [L.M.] was - - [L.M.] was suggesting that [L.M.] was depressed because of the accident; and lo and behold, we find out that [L.M.] had made complaints about being depressed and it was [L.M.]'s boyfriend or [L.M.]'s previous boyfriend that [L.M.] had been depressed as a result of a breakup. I said it wasn't - - it was right in there and we weren't going to be able to get rid of it.

Q. So how did that fact affect the evolution of your thoughts about the file?

A. Well, it certainly was going to have to be settled because [L.M.] absolutely refused to go to discovery. So if it ever went that route, [L.M.] wasn't going; [L.M.] wasn't coming. And [L.M.] would not attend trial, and [L.M.] advised me of that.

Q. [L.M.] told you that?

A. Absolutely.

Q. Did [L.M.] give you a reason why [L.M.] wouldn't attend either the discovery or trial?

A. No. [L.M.] just said [L.M.] wouldn't.

Q. Okay.

A. [L.M.] said [L.M.] will not go to examinations for discovery. I told [L.M.] that if [L.M.] didn't go to at least examinations for discovery if this was contested, that [L.M.]'s out of Court and [L.M.] gets nothing.

Q. And did you or did you not form an opinion about the potential legitimacy of [L.M.]'s claim when [L.M.] said [L.M.] wouldn't pursue it to those stages?

A. Well, if you're not going to go to discoveries and you ultimately aren't going to go to trial, you're out of Court so [L.M.]'s claim is worth zero. That's the long and the short of it. And that was certainly brought home to [L.M.].

Q. What happened as the file progressed then, please?

A. Well, as the file - - as the file progressed and we had some correspondence with the insurers, they had suggested, I think, that we attend one of their semi-annual settlement meetings and - - with or without the client and getting - - we could perhaps settle this thing. [L.M.] didn't want to proceed with that either.

Q. By that meaning did [L.M.] attend?

A. Oh, no. [L.M.] did not want to attend anything like that. [L.M.] simply wanted to use me as a tool to get [L.M.] some money. That's basically what we were in there for. We weren't trying to get better because, in my view, [L.M.] was better. It had been suggested to [L.M.] that we could secure some funds for [L.M.], and that's why [L.M.] was there.

Q. Did you attend the settlement conference?

A. No. I didn't go to the settlement conference.

Q. Okay. Was there ever a proposal for settlement by the insurer?

A. No.

Q. Okay. What happened, please?

A. I happened to have had the file diarized for review. I believe we had done a draft Statement of Claim that didn't get filed. We missed the limitation period. And so it was time to do the usual reporting, I suppose, to the insurers and get on with it. [Emphasis added], [transcript, page 407, lines 1-6]

266. In describing why the Statement of Claim was not issued, the Member said:

A. It's very confusing. This is a good friend of my son's. I'm embarrassed as all heck about what's happened here. Any opportunity [L.M.] might have had to convince an insurance company to give [L.M.] some money is out the window. I had discussions with my ex-wife at that time with respect to it, and the suggestion was that perhaps we should just give [L.M.] something. My thinking at that point in time was not good.

Q. Why was that?

A. Well, I had a lot of things on my plate at that point in time. I felt very embarrassed to tell this client that we had missed the limitation period. In retrospect I suppose if I had told [L.M.] that, [L.M.] probably would have walked and said nothing about it. I felt an obligation because of the nature of the relationship with my son and myself; my son and this individual that I should compensate [L.M.]. I spoke with my ex about that, and she felt it was a good idea. We had just refinanced our home and there was some money sitting there with which to pay it. And I completed - - I completed a letter to [L.M.]. I think the settlement figure that I dialed in was about ten five. $10,500.00, to my recollection. I wanted to put [L.M.] in the same position that [L.M.] would have been in had the insurance company paid [L.M.] that sum which was unlikely, but still. And so I did up a Statement of Account for [L.M.]. I think I even - - I reduced our normal percentage as well. Kicked it up from ten to ten five so the numbers would work out a little better for [L.M.] and indicated to [L.M.] that a settlement had been arrived at in that amount and the net amount of [L.M.] account which put [L.M.], I was thinking at that time - - would put [L.M.] in the same position that [L.M.] would have been in had the insurance paid that out and [L.M.] would be in much the same position as [L.M.]'s dear friend who had settled. Very stupid. Very stupid.

Q. And - -

A. I wasn't trying to defraud anybody. I was trying to look after [L.M.].

Q. What was your state of mind around that time, please?

A. Oh, boy.

MR. ACKERL: I'm sorry. I didn't hear your answer, Mr. Ewasiuk.

A. Oh, I didn't say anything.

MR. ACKERL: My apologies.

A. I don't think I was thinking very clearly. When I reflect, I can't believe I did what I did. But I was happy in terms of being able to provide [L.M.] with a sum that [L.M.] probably wouldn't have ever received. I - -

Q. MR. BERESH: Do you recall around that specific time - - that's early May of '04 - - were there events happening in your life that now stick out?

A. [Material concerning private family health matters has been redacted]. Yeah. There were a lot of - - there were a lot of things happening and I was making decisions in a very quick fashion back then. I didn't need anymore problems. I just couldn't handle anymore turmoil in my life. And it seemed to me that telling [L.M.] this and looking like an idiot after my son recommends that [L.M.] come to see me and I go and do something like that or not do something like that - - I was totally embarrassed; totally - - [Emphasis added]

Q. So - -

A. I just wanted to ensure that [L.M.] got something. I don't have any other explanation for that. If that were to happen today - - well, it would never happen. But I don't have - - I don't have a lot of answers for you - -

Q. Okay.

A. - - in terms of that. I just - - I had so much stuff on my plate I was going from one thing to another to another, and it seemed to me

that this was the best way of resolving it in a timely fashion for [L.M.].

Q. And the amount that [L.M.] received, did you or did you not believe it was a reasonable settlement had it been litigated given the nature of the injuries?

A. It was certainly a reasonable amount. I don't think [L.M.] would have ever achieved that. On looking at my research and prior matters that I had dealt with as well, [L.M.] was really stretching it to get $10,000.00 for the injury that [L.M.] had, if any.

Q. And I take it, just so it's clear, the failure to file the Statement of Claim - - you accept responsibility for that?

A. Absolutely.

Q. Okay.

A. And it was in our diary which is amazing.

Q. And around the time when the Statement of Claim should have been filed, what was your state of mind?

A. Well, about the same. I just wasn't thinking very clearly in 2003, '04, and thereafter. It's not something that I would normally have done. There were a couple of incidents there that - -

267. The Member justifies and deflects responsibility for deceiving his client by explaining that had the case been litigated, he believed that a reasonable settlement would have been between $7,000.00 to $10,000.00 gross, if L.M. had cooperated in the litigation process.

268. The Member goes on to state that L.M. "has never complained to anyone about being unhappy with the amount of settlement."

269. This commentary is indicative of the Member's failure to appreciate the content of and basis for his professional responsibilities.

270. In cross-examination by LSA Counsel, the Member explains his involvement in the claim with [L.M.], starting at page 490, line 23:

Q. Do you have a letter dated November 1st, 2001 from Meloche Monnex to [L.M.]?

A. Yes.

Q. And, sir, you've admitted in Exhibit 303 that [L.M.] was involved in a motor vehicle accident in October 2001 and shortly after that retained you to sue for compensation for [L.M.]'s injuries?

A. Yes.

Q. Now, let's - - we see that by Exhibit 98, on November 22nd you have written to the insurance company to advise them you're counsel of record?

A. Yes.

Q. Now, sir, if I can refer you to Exhibit 103, you see in this case you wrote to Alberta Health Care for an Alberta Health Care Statement of Benefits Paid?

A. Yes.

Q. And is this the case, sir, that you sought that statement because Alberta Health Care may have had a subrogated claim for hospital - - or for benefits paid in the injury settlement?

A. Yes.

Q. Okay. And just so the Hearing Committee understands, that means that before you settle a matter, you need to get the consent of Alberta Health Care because they're entitled - - they have a subrogated claim to a share of the portion of the settlement that relates to out-of-pocket expenses for in-patient care, right?

A. If she was hospitalized as a result of the accident, yes.

Q. Okay. And in this case, I take it you requested the Alberta Health Care Statement of Benefits Paid because there was a claim for Alberta Health Care?

A. Standard procedure in our office with a motor vehicle accident we do that. We get a Statement of Benefits because it's generally requested if there are discoveries. It's generally requested the whole history be provided to them.

Q. Now, we didn't see that same standard letter in the [P.H.] file material, did we?

A. [P.H.] wasn't hospitalized and there was no subrogated claim.

Q. Right. So it's a standard procedure - -

A. We knew that.

Q. - - you used if there's hospitalization or a potential - -

A. Yes.

Q. - - subrogated claim? So in this case [L.M.] was hospitalized or had a potential subrogated claim, so you ordered the Alberta Health Care Statement of Benefits Paid?

A. I don't believe [L.M.] was.

Q. You don't believe [L.M.] was, but you can't explain to the Hearing Committee why you sent Exhibit 103?

A. This was done - - this was done in anticipation of an examination for discovery so that we had it if that occurred.

Q. Right.

A. Because it also identified whether [L.M.] - - whether [L.M.] had spent some time at the hospital.

Q. In any event, Mr. Ewasiuk, you would agree that there's a potential claim by Alberta Health Care to any settlement entered into between [L.M.] and the insurer, correct?

A. If [L.M.] had attended the hospital, yeah.

Q. And if [L.M.] had attended the hospital, one of your obligations under the Act is to get the consent of Alberta Health Care to any settlement, right?

A. Yes.

Q. Pardon?

A. Yes.

Q. You see at Exhibit 105 you provided the Alberta Health Care Statement of Benefits Paid to the insurance company. Do you see that?

A. Yes.

Q. And I take it you'd provide that statement to the insurance company when there's a claim that they'd have to pay, right?

A. No. I provided it in anticipation of the matter being either settled or in anticipation of there being a discovery.

Q. And if there were no benefits paid on the statement, you don't have to provide it to the insurer, do you? If it said nil, then you wouldn't provide it?

A. No. We still - - we would still provide it.

Q. Okay. Except in the case of [L.M.] - -

A. Because they request - - sometimes they request it. The majority of time they request it and we provide it.

Q. In the case of [L.M.] you didn't do it because there wasn't a claim, you said.

A. Well, we knew there wasn't a claim on that one.

Q. But in this case on [L.M.] - -

A. I didn't know on this one.

Q. Sorry?

A. I didn't know on this one.

Q. And you don't know today?

A. Is that your evidence?

Q. No. I'm asking.

A. Is that a question?

Q. Yes. It is a question, sir.

A. I do know.

Q. What do you know today?

A. I know that there was no Alberta Health Care claim.

Q. How do you recall that without looking at the statement? On what basis do you say that, sir?

A. Well, I just know that there wasn't. I put my mind to this one as well.

Q. Do you agree that the physiotherapy appointments could be the basis of a claim in 2002?

A. Only if it was paid out by Alberta Health Care.

Q. Right. And when we review the doctor's report, we see that [L.M.] attended physiotherapy?

A. She did.

Q. And do you remember today that it was not paid by Alberta Health Care?

A. [L.M.] attended physiotherapy for reasons other than the accident.

Q. Well, you did make some comment about a boyfriend, sir, but I'm looking at the physician's letter at Exhibit 106 and the physician is linking the physiotherapy, as I read it on Paragraph 3 of Page 2, to the accident.

A. Sorry. Which paragraph are you referring to?

Q. 3. Physiotherapy was discontinued - - So if you look at the top, the first paragraph on Page 2:

> Physiotherapy with the use of Robaxacet and Advil for analgesia was recommended.

And that's the doctor recommending the treatment for the accident. Agreed?

A. Well, that's what it says.

Q. Right. And then we see in Paragraph 4 that:

> Physiotherapy was discontinued with recommendation for therapeutic massage therapy.

On December 27th, 2001. Do you agree that's what it says?

A. It speaks for itself.

Q. Right. And today, sir, do you acknowledge that you don't have any recollection of whether that physiotherapy treatment was paid through Alberta Health Care or some other source?

A. It was not.

Q. It was not what?

A. It was not paid by Alberta Health Care.

Q. You specifically recall that?

A. Yes.

Q. Who paid for it?

A. It wasn't related to the accident, so they didn't have a - -

Q. Would you agree, sir, that your view that you're expressing today is in contrast to the attending physician's view in Exhibit 107?

A. That's a medical legal report prepared for - - for our purposes.

Q. And that's the doctor who treated [L.M.], correct?

A. Yes.

Q. And that's the doctor who prescribed physiotherapy, correct?

A. Yes.

Q. And that letter says the physiotherapy was part of the treatment protocol for the motor vehicle accident, correct?

A. That's what it says.

Q. Right. And that's the basis the health system would deal with the physiotherapy referral from the physician, correct?

A. No. I think - - I think that's a different matter. I think if the doctor bills Alberta Health Care or she goes to physiotherapy and it's

billed through as a result of that, yes. But that wasn't the case here.

Q. So did you misrepresent to the insurance company the basis of the physiotherapy treatments to [L.M.]? I want to be clear, Mr. Ewasiuk. Are you saying that Exhibit 106 misleads a reader as to the relationship of physiotherapy to the injury?

A. I'm saying the discussions that we had with - - that I had with [L.M.] and the content of this medical legal report differ in some respects. And I appreciate that Dr. S.'s attempting to help this person out in terms of [L.M.]'s motor vehicle accident, but my discussions with [L.M.] were somewhat different.

Q. Did you provide the insurance company with the physician's report that you obtained for [L.M.]?

A. I probably did.

Q. And in providing it to them, did you correct for them the impression that the physiotherapy was the result of the car accident?

A. I didn't make any representations in that regard.

Q. Did you contact Alberta Health Care and tell them not to bill the physician-referred physio to Alberta Health Care because it wasn't related to the car accident?

A. No. It's not my responsibility.

Q. And so today you can't say for sure what was on that statement of Alberta Health Care Benefits Paid, can you?

A. I can't say for sure today what was on that, no. Not without it being in front of me.

Q. Okay.

A. There's also a chart that was provided which was the downfall of this entire action which is worth a lot more than a medical legal report.

Q. So is this a doomed action in your mind then?

A. It was a doomed - - it was a doomed action in terms of any substantial recovery. It was a doomed action because my client refused and told me quite point-blank I will not attend discoveries and I will not go to trial.

Q. And did you - -

A. And at one point suggested that we not - - that we not proceed with it.

Q. Did you know that before - - let's refer to Exhibit 111, please. This is a letter you discussed with Mr. Beresh about a mini-settlement conference. Do you remember talking to Mr. Beresh about that yesterday? You talked about this letter or about these conferences?

A. Yes.

Q. Have you ever been to these mini-settlement conferences?

A. I don't attend these mini-settlement conferences because I don't believe they do much.

Q. Have you ever been to one?

A. That's not the way - - no. That's not the way I settle matters.

Q. Okay. You've never been to one?

A. Some years ago probably, but I don't recall.

Q. Do you recall how it was set up the time you went some years ago?

A. Not precisely, no.

Q. Do you recall that it's not necessary for clients to attend?

A. It's not necessary for clients to attend, but they may.

Q. Right. You agree clients don't have to attend?

A. Right.

Q. You agree that it's an occasion where an insurance company or several insurance companies rent some hotel rooms and invite plaintiffs' lawyers up and try to settle claims, right?

A. They do.

Q. And do you acknowledge that special arrangements are made at those settlement conferences to have managers in authority to approve settlements so that settlement cheques can be written on the spot?

A. I'm not aware of what they do.

Q. So the time you did attend, you didn't - - you didn't understand that was sort of the structure of the mini-settlement conference?

A. It certainly wasn't on my mind. I don't attend these settlement conferences.

Q. Okay. Instead of attending the settlement conference you were invited to at Exhibit 111, did you make a proposal for settlement on behalf of [L.M.]?

A. I don't believe we did.

Q. Did you sit down with [L.M.] and say your action's doomed and is unlikely to be successful?

A. [L.M.] was told that [L.M.] was out of Court if [L.M.]'s position continued to be that [L.M.] didn't want to go to examinations for discovery or trial, yes. [L.M.]'s action was doomed.

Q. Okay. So you told [L.M.] [L.M.]'s only option was to settle it?

A. Yes.

Q. Did you tell [L.M.] you'd been invited to a settlement conference and declined to go?

A. Yes. I also told [L.M.] I didn't attend.

Q. And did you tell [L.M.] that you would make efforts to settle this claim on [L.M.]'s behalf?

A. Well, that's what I was hired to do.

Q. And did you tell [L.M.] that?

A. Did I tell [L.M.] what?

Q. Did you tell [L.M.] you were making efforts - - continuing efforts to settle it?

A. I think [L.M.] felt that I was.

Q. Now, sir, you have admitted in Exhibit 303, Paragraph 27 that the limitation period to file a Statement of Claim in this matter expired October 30th, 2003, right?

A. Sorry. Where are we?

Q. Exhibit 303 - - your admission - - at Paragraph 27 on Page 6.

MR. BERESH: No. The Agreed Statement of Facts. I don't know if it's in the binder.

MS. DIXON: Yeah, it is. Well, I think it is.

MR. BERESH: At 303?

MS. DIXON: You're at 302. Okay. Let me get it.

THE CHAIR: Paragraph 27.

MS. DIXON: I'm sorry. If I could have a moment, I'll just make a copy for Mr. Ewasiuk. I'm sorry. I misunderstood from his prior answer that he had one.

THE CHAIR: That's fine. Five minutes.

(ADJOURNMENT)

MS. DIXON: Thank you.

Q. MS. DIXON: Mr. Ewasiuk, before the break, I was referring you to Exhibit 303. You now have a copy before you which is the Statement of Facts you admitted, and I'm referring you to Paragraph 27.

A. Yes.

Q. Do you see there you admitted that:

> The limitation period concerning [L.M.]'s claim had expired on October 30, 2003 and I had failed to issue a Statement of Claim.

So you admit that you failed to file a Statement of claim October 30th, 2003 for [L.M.] and, as a result, [L.M.] lost [L.M.]'s cause of action, right?

A. I failed to file the Statement of Claim.

Q. And do you acknowledge, sir, that when you don't file a Statement of Claim within the time limits that the plaintiff loses the cause of action?

A. In this case, yes.

Q. In every case. If you don't meet the time limit, you lose your cause of action, right?

A. Yes.

Q. And so your failure resulted in your client losing a right, correct?

A. Yes.

Q. Now, you didn't tell your client that?

A. No.

Q. I'm looking at the binder, sir, and I see that at Exhibit 113 you were continuing to gather information regarding the claim from Dr. S. in January of 2004. Can you say when you became aware at your firm that you'd missed the limitation date?

A. No, I can't.

Q. Okay. Would you agree it's likely you didn't know that January 7th, 2004?

A. Perhaps.

Q. Would you have continued to seek medical evidence on the claim if you knew you'd lost the action through negligence?

A. No. I wouldn't think so.

Q. Now, if you turn to Exhibit 114, it appears you were contacted March 2nd to participate in another settlement conference; and you've already told us that you don't participate in those, right?

A. That's correct.

Q. Okay. And it's clear from the file you took no other steps to pursue settlement in response to that letter, right?

A. That's correct.

Q. Do you have an independent recollection today, Mr. Ewasiuk, when you became aware that you had lost the cause of action for [L.M.]?

A. No.

Q. Okay. If you could turn then to Exhibit 117? We see on May 11th, 2004, you did another settlement package up here similar to the [P.H.] settlement package, right?

A. Yes.

Q. Okay. And I take it you'd acknowledge, sir, that at the time you prepared this package, you knew that [L.M.] no longer had an action against [A.S.] and the other defendants because the Statement of Claim wasn't filed, right?

A. That's correct.

Q. And you acknowledge that at no time did you ever tell [L.M.] that your negligence had lost [L.M.]'s action, right?

A. I don't believe I told [L.M.] that we had failed to file a Statement of Claim.

Q. Okay. And nor did you tell [L.M.] that you'd done something which may give [L.M.] a cause of action against you and [L.M.] could get independent legal advice?

A. No.

Q. You didn't tell [L.M.] that either?

A. It wasn't discussed.

Q. And you recognize today, sir, you had a duty to do that, right?

A. Yes.

Q. And you acknowledge you breached that duty?

A. Yes.

Q. Now, when you prepared - - let's look at Exhibit 16. Or 116. I'm sorry. When you prepared this general release or when you instructed it to be prepared, you told your staff to prepare it as if this was a settlement from the insurance company, right?

A. I don't believe my staff was involved in this.

Q. So when you say that, do you mean that your staff didn't know?

A. That's correct.

Q. So you hid this from your staff?

A. Yes.

Q. So when you instructed these documents to be prepared, you led your staff to believe it was a proper insurance settlement?

A. I think I may have done this myself.

Q. Looking to Exhibit 117, we have a letter there to [L.M.] and the initials at the bottom are CHE - - which I take it are your initials - - /la. Can you tell the Hearing Committee who "la" is?

A. You know, I don't know who that is. I don't - - I don't know - - I just had a look at that, and I can't recall an assistant that we had at that time with the initials LA. My recollection is that these documents were done by my ex.

Q. Is that Kelli?

A. Kelli.

Q. Okay. So Kelli helped you with this settlement?

A. Yes.

Q. Okay. So I'm clear, Kelli didn't help you prepare the [P.H.] settlement documents, did she?

A. No.

Q. Ms. M. did those. Did you tell Ms. M. that you were creating or entering into that settlement with [P.H.] even though the insurance company hadn't paid the money?

A. I don't believe it was discussed.

Q. Okay. And in this case, did you consult with Kelli again before you paid this money from your personal resources?

A. Yes. We had just done a refinancing of our home, and we had discussions about resolving this - -

Q. Okay.

A. - - with the monies that we had just received.

Q. So however bad your relationship was with Kelli during this period, she was a person you turned to on both the [P.H.] and the [L.M.] things to help you sort out the problem, right?

A. No. She never - - she wasn't involved in the [P.H.] - - in the [P.H.] matter.

Q. Okay. I thought you said you consulted her about paying the money on the [P.H.] matter.

A. Yeah, but she didn't take part in completing any of the documents.

Q. So you consulted her on the [P.H.] arrangement; and then on the [L.M.] arrangement, she actually helped you put the package together?

A. Well, I told - - I told Kelli what had happened with respect to the [P.H.] matter. I don't know if there were any discussions with respect to that, but she was aware that I was resolving it in a certain fashion after discussions, yes.

Q. Now, with respect to the [L.M.] matter, as I recall, [L.M.] is the friend of your son, right?

A. Yes.

Q. And this is the son by your first marriage?

A. Yes.

Q. And you again recognized that by failing to file the Statement of Claim, you had made an error that was covered by insurance, right?

A. It may have been.

Q. Did you have any doubt that your insurance policy would cover this kind of negligence?

A. No, but I can't say positively that they would have covered it. That's why I say "may".

Q. Did you ask them?

A. No.

Q. Why not?

A. I - - I can't answer that.

Q. So you didn't tell ALIA about the claim, right?

A. That's correct.

Q. You didn't tell your staff about the claim, right?

A. No.

Q. You hid - - you lied to [L.M.] about how the money was received?

A. Yes.

Q. The only person you trusted to discuss this was Kelli?

A. Yes.

Q. And today, sir, do you acknowledge that you breached your fiduciary obligation to [L.M.] by lying to [L.M.] about the settlement?

A. I lied to [L.M.] about where the settlement funds came from, yes.

Q. That what you did was dishonest?

A. Yes.

Q. And would you accept, sir, that no matter how tired or discouraged you are, that's no excuse for being dishonest?

A. I would acknowledge that here today, yes. [transcript, pages 490-509 to line 5]

271. Whether the Member believed this phony settlement was in the ballpark of a reasonable settlement (or whether the money paid was wholly inadequate or wildly inflated) is completely beside the point.

272. The Member paid L.M. because he said he was totally embarrassed and he did not want to tell L.M. because he would look like an idiot; and, he did not need any more problems, any more turmoil, in his life. [see page 57]

273. Exhibit 116 is a General Release signed by L.M. on May 11, 2004, after having been lied to by the Member.

274. Turning to the P.M. matter, paragraphs 34-37 of the Member's Formal Admissions relate to the P.H. client circumstances. The evidence and timing of events pertaining to the client P.H. have been reviewed and discussed previously, in relation to Citations 1, 2 and 3.

275. Exhibits 157 to 182, inclusive, also pertain to this charge and have been reviewed and discussed in relation to Citations 1, 2 and 3.

276. The Member admits that he paid money to P.H. from his own funds and admits saying that this amount was settlement proceeds.

277. Once again, it is important to understand what the Member says about the P.H. matter.

278. On questioning by Member's Counsel, starting at page 416, line 23 the following exchange occurs:

Q. Okay. Let's turn if we can, please to the [P.H.] citations - - 26 through 28 inclusive. This, we know, is a motor vehicle file.

A. Yes.

Q. Help us, first of all, by giving us your assessment of the nature of the injuries suffered by the client in the accident.

A. Very minor. Again, a whiplash type injury. [P.H.] was struck from behind. At the time of the accident, [P.H.]'s son was sitting in the car as well.

Q. Any property damage you recall?

A. Yes, but it was resolved by the insurers.

Q. And what did you observe about the file as you worked on it in terms of the injury?

A. [P.H.] was a former client of mine - - I had done a divorce for [P.H.] - - and I'd like to think that [P.H.] was a friend. [P.H.] came back to see me after [P.H.] had this accident and wanted to know whether [P.H.] could make a claim. I indicated that [P.H.] could. Said that [P.H.] had been involved in this accident and felt a little - - a little sore between three days and a week later, I suppose, but it wasn't anything that was debilitating. [P.H.] lost no time at work, as I recall. As the file progressed - - and we delayed it quite some time because, I said, these things sometimes like to, you know, rear - - even though [P.H.] felt fine, they rear their ugly heads and we have to be able to accommodate that. But as time went by, I thought we had done everything correctly. We settled [P.H.]'s son's accident, I believe, for $1,500.00. The accident occurred in 2000 or somewhere in that nature.

Q. And how did [P.H.]'s son's injuries compare to [P.H.]'s?

A. Well, I think they paid [P.H.]'s son's claim out as a nuisance value because there wasn't really anything there. He didn't even see a doctor, as I recall. And [P.H.]'s was very minor. [P.H.] had seen her doctor and reported that [P.H.] had been in an accident. Ultimately there was an offer of $3,500.00 on [P.H.] for personal injuries, and we had discussed that. And at one point [P.H.] thought [P.H.] should probably accept that, but [P.H.] thought it was probably worth a little bit more than that. My research indicated it might be but then it might not. We gave it some time.

Q. Okay. So when you say your research, what did that include, please?

A. That would include our database again - - Quick Law - - researching a similar type accident and there are hundreds of them. There wasn't anything complicating any of this. It was simply a whiplash type injury. I did inquire as to what [P.H.] expected from this accident. [P.H.] had indicated [P.H.] would like to see

$7,000.00, and I told [P.H.] that's kind of what I was thinking too in terms of the max that [P.H.] might get on something like this but we would have to do discoveries and all sorts of things.

Q. And did you come to learn the basis for [P.H.]'s estimation of $7,000.00?

A. No. It was just something that [P.H.] had said. They had offered [P.H.] 35, and [P.H.] thought $7,000.00 would make it work. And as the file progressed, we received notification from the lawyers that had been then appointed and they wanted to see our Affidavit of Service. So I asked my legal assistant to forward that to them and, unfortunately, she didn't have this man personally served - - the at-fault party. She had - - I can't remember at this point whether she had served him by double-registered mail or just exactly what happened there, but it wasn't done properly after all that time. And they wanted a discontinuance of the action, and I think they may have even suggested a Court application or maybe even brought one. I discontinued the action and advised my staff to cut [P.H.] a cheque for that less what my account might have been so that [P.H.] would have been in the same position [P.H.] would have been had the insurance company paid out. [Emphasis added]

Q. And what was your state of mind at the time you made that decision?

A. Again, wanting to get this resolved; feeling tired and sometimes exhausted. It seemed an easy - - it seemed an easy way to do it at that point in time with a client that I knew personally. And we paid [P.H.] what [P.H.] wanted. [Emphasis added]

Q. What was happening with your life around that time?

A. I think this was a little bit before the other.

Q. Mid-February of '03.

A. This is between - - this is between - - this would have been when Kelli was recovering, I believe. Not being at the office a lot; being so concerned about what was happening at the home. I don't really have an answer for you. I was just not in a very good state of mind for a number of years there. And I don't offer any excuses. I know the conduct was wrong. Had I - - had I had that happen to me today, it wouldn't have happened. It would simply have got reported. And it was a trying time for me. I didn't need

the involvement of our insurers. I made a decision. It was the wrong one. Certainly my decision at that time was affected by the tiredness; the difficulties that I had - - [Emphasis added]

Q. Just keep your voice raised.

A. - - in my personal life.

Q. Keep your voice raised. You're competing with the air conditioning.

A. Okay.

Q. I missed the last part. There were difficulties with your life?

A. Difficulties with my personal life, yes. With my family.

Q. And - -

A. I thought I was providing my client with what [P.H.] wanted. It was certainly fair, in my estimation, in terms of an amount. It just didn't come from the insurance company, and that is the only difference between what [P.H.] got and what [P.H.] would have got had [P.H.] got it from the insurance company. The accounts were done; everything was done. A very stupid thing to do. [Emphasis added]

Q. And was there any discussion with [P.H.] about whether [P.H.] was prepared to go to discoveries or go to trial?

A. No. [P.H.] was concerned about if it went to discoveries and trial what that would cost, and we did - - sort of did a cost benefit discussion one day. So it was much beneficial if it was settled - - more beneficial to [P.H.] if it was settled. This client - - I mean, I certainly wasn't attempting to - - to take anything away from this client. I felt I was being more than generous with respect to [P.H.]'s injury based on my research.

Q. Any reason why you didn't respond to communications from the insurance company?

A. I - - I don't have any - - anything to say about that.

Q. Anything else about [P.H.]'s file?

A. I have nothing else to say. I do know that [P.H.] was happy with the settlement that [P.H.] received. [transcript, pages 416-422, line 11, inclusive]

279. In an apparent attempt to justify his conduct or deflect responsibility for deceiving his client, the Member says that the amount he paid was what the insurance company would have paid and P.H. was happy with the money received.

280. That the client never complained is utterly beside the point.

281. This assertion is indicative of the Member's failure to appreciate the content of and basis for his professional responsibilities.

282. In fully understanding the Member's position in respect of the [P.H.] phony settlement, it is also important to understand what the Member said when he was cross-examined by LSA Counsel, commencing at page 467, line 9:

Q. Did [P.H.] become a friend of yours after the divorce and before [P.H.] retained you to do the motor vehicle accident?

A. I regarded [P.H.] as a friend.

Q. Okay. Did you see [P.H.] at any time other than doing [P.H.]'s divorce?

A. No.

Q. So a former divorce client came to you to do a motor vehicle accident claim for [P.H.], is that the case?

A. That's correct.

Q. You accepted the retainer to pursue [P.H.]'s claim for damages?

A. I accepted - - I received [P.H.]'s instructions. It was a contingency matter.

Q. Were you retained by [P.H.]?

A. Yes.

Q. Other than having done [P.H.]'s divorce, you'd had no other contact with [P.H.] before this motor vehicle accident retainer, is that correct?

A. I think I had discussions with [P.H.] from time to time with respect to maintenance and discussions with respect to [P.H.]'s children after the divorce.

Q. Now, Mr. Ewasiuk, you're a lawyer at that point when [P.H.] calls you, correct?

A. Yes.

Q. And [P.H.]'s seeking legal advice from you about [P.H.]'s ongoing matrimonial issues, is that correct?

A. When?

Q. When [P.H.] phoned you to speak about maintenance and child access.

A. [P.H.] used to phone me from time to time simply to discuss a certain matter that might have happened between [P.H.] and [P.H.]'s ex-husband. Those were not retained matters, nor was the advice. It was [P.H.] just felt that [P.H.] could call me from time to time.

Q. And when [P.H.] called, you understood [P.H.] was seeking legal advice from you?

A. I understood that [P.H.] wanted - - no. [P.H.] wasn't in - - not in the context of doing something legal. [P.H.] simply would ask me questions relating to the maintenance and the custody issues that [P.H.] might have with [P.H.]'s former husband.

Q. And you understood, when [P.H.] asked you questions about maintenance and custody issues, that [P.H.] was calling you because of your expertise as a lawyer, correct?

A. Well, [P.H.] knew I was a lawyer, but I think [P.H.] was calling me as a friend. [P.H.] was never billed for any of that. My clients could do that.

Q. Do you understand, sir, that you have a duty to people when you give legal advice - - a professional duty - - whether or not they've retained you?

A. I understand that, yes.

Q. Okay. You understood, when [P.H.] retained you to pursue [P.H.]'s motor vehicle accident, that you had professional obligations to [P.H.]?

A. Absolutely.

Q. You had an obligation to be honest, correct?

A. Yes.

Q. You had an obligation of utmost fidelity to your client, correct?

A. Yes.

Q. You breached that obligation, right?

A. I don't believe I did.

Q. You lied to [P.H.] about the settlement, correct?

A. Specifically?

Q. Did you lie to [P.H.] about reaching a settlement on [P.H.]'s motor vehicle injury claim?

A. With the insurance company, yes.

Q. You lied to [P.H.]. You admit that?

A. I think we've established that.

Q. And you're saying today that you can lie to your client and not breach your professional duty to them? Is that your position?

A. No. That's not my position.

Q. Okay. Then you also acknowledge you breached your professional obligation of honesty to [P.H.], correct?

A. At the time I don't believe that I felt that way, no.

Q. Well, how do you feel today, sir? I'm asking you today. Do you acknowledge today that you lied to [P.H.] when you misrepresented the settlement to [P.H.] and you breached your professional obligations? Can you admit that today?

A. Looking back from today, I could say - - I could say yes. I probably did.

Q. Maybe you didn't? You're taking some time to answer my question, Mr. Ewasiuk. Do you find this a gray area? Sometimes it might be justified to lie to a client?

A. I don't think it's justified to lie to a client. I don't think it's justified to do what I did.

Q. So you know it's not justified. Is it never justified to do that?

A. No. It's never justified to do that.

Q. Can you explain to me why you're having so much trouble then today admitting what you did was dishonest?

A. Well, I'm not having trouble. I know that I properly represented [P.H.]. I know - - I know what happened in terms of missing a service on the defendant in this matter. But I also know that I looked after my client.

Q. Mr. Ewasiuk - -

A. And no. I shouldn't have done that. I acknowledge that. And if it happened today, it certainly wouldn't have been done that way today.

Q. So you acknowledge you were negligent in failing to serve the Statement of Claim properly?

A. Our office had failed to - - failed to serve that Statement of Claim personally, yes.

Q. Is that - - your office. Who's that? Is that Connie or Val?

A. That's me.

Q. Okay. So you were negligent?

A. I failed - - I failed to - - to serve this client properly.

Q. Do you have difficulty - -

A. Or defendant properly.

Q. Do you have difficulty admitting that's negligence?

A. Yes.

Q. Okay. You don't think that's negligence?

A. Perhaps it is, but I think that's a matter of law.

Q. So we won't fight about whether failing to serve a client's Statement of Claim and depriving them of an action is negligence. [transcript, pages 467-472, inclusive to line 7]

283. The cross-examination continued at page 474, line 7 as follows:

Q. MS. DIXON: Mr. Ewasiuk, yesterday you told the Panel you thought the settlement that you misrepresented to [P.H.] was fair. Did I hear you right?

A. You did.

Q. And the amount you misrepresented to [P.H.] was the amount of the settlement was $7,000.00, correct?

A. That's correct.

Q. And you remember today that that's the amount that you represented to [P.H.] as a fair settlement?

A. I recall indicating to the Committee that [P.H.] suggested to me that [P.H.] receive a settlement of $7,000.00.

Q. Okay. Well, that's not - - so tell me on what legal basis - - sorry. Let me change that. Yesterday you said that was your opinion after research as well, is that correct?

A. A maximum, yes.

Q. And on what documents did you refresh your memory to give that evidence yesterday? What did you review before you told the Hearing Committee that under oath yesterday?

A. I didn't review anything. I remember that clearly.

Q. And you remember it clearly because this is an exceptional case for you, is that right?

A. No. I remember it clearly because I remember it clearly.

Q. Tell me other cases from 2002 that you remember that clearly, Mr. Ewasiuk, other than [L.M.] and [P.H.]. Can you tell me another motor vehicle accident matter you settled that you have that precision of memory?

A. No, I can't.

Q. Okay. What's exceptional about this case that you have such a clear memory?

A. It's before this Committee.

Q. You've focused on these numbers in preparation for this hearing?

A. I have attempted to recall what happened, yes.

Q. And you've tried to justify to yourself why you settled this - - pretended to settle this matter for $7,000.00 to [P.H.]?

A. I don't have to justify it, Ms. Dixon.

Q. Do you remember the cases you relied on?

A. No.

Q. Did you review the medical report?

A. Yes.

Q. Before this hearing? Before this - -

A. No.

Q. Okay.

A. I reviewed it before the matter was resolved.

Q. Since 2002, have you done anything to reconsider or reassess the settlement of $7,000.00 that you pretended to [P.H.]?

A. No.

Q. And you accept today that you may have told Ms. Timbres that the settlement you were proposing was $12,000.00 to $15,000.00, but

you don't think - - that's not your recollection, but you may have said that, is that correct?

A. I may have inflated what my offer to them would have been because I think that's what the conversation was about. And I don't believe I had the file in front of me when I spoke to her, but I thought it was in the area of and it could have been 12 to 15.

Q. If I could refer you to Exhibit 175, sir?

A. Yes.

Q. Do you have any recollection of receiving the Notice of Motion and supporting affidavit to strike out the Statement of Claim from Ms. Timbres in January of 2002?

A. I do.

Q. Okay. And by then I take it you had confirmed that your office had acted improperly in failing to serve the Statement of Claim?

A. Our office failed to properly serve the Statement of Claim.

Q. And you confirmed it by then?

A. Yes. I had an opportunity of reviewing the - - we had an Affidavit of Service, I believe, for double-registered mail that said to be personally served, and it wasn't done.

Q. Whatever you did do, you acknowledge you didn't do the right thing?

A. Correct.

Q. Okay. And you'd confirmed it by the time you got this Notice of Motion from Ms. Timbres?

A. I had an opportunity of reviewing the file with my assistant.

Q. And you had confirmed the error by January 17th, 2002?

A. I don't know when it was. We did make the error.

Q. If you refer to Exhibit 176, sir, you can refresh your memory, please, on the telephone notes that Ms. Timbres took of your January 29th, 2002 phone call.

A. I don't recall the conversation.

Q. Okay. Sir, you'll note that the note made by Ms. Timbres second from the bottom was that you requested an adjournment of two weeks and would send a discontinuance before then with instructions from ALIA. Do you see that note?

A. I see that.

Q. Okay. And, sir, you know that ALIA is the lawyer insurance company for Alberta lawyers?

A. Yes.

Q. And you know how to report a claim to ALIA?

A. Yes.

Q. And you recognize that the error that was made in this case was the kind of error that triggers insurance coverage?

A. Could be, yes.

Q. Do you accept you may have said those things to Ms. Timbres?

A. No. I don't recall this at all.

Q. Do you accept you may have said - - I didn't ask if you recalled it. I asked you if you accept you may have said those things to Ms. Timbres.

A. No.

Q. You don't? You deny that you said that?

A. I don't recall.

Q. Okay. Do you see the paragraph - - I'm sorry. Now, sir, you'll acknowledge that you did not report this claim to ALIA, did you?

A. No, I did not.

Q. So I understand that you admit by January 2002 you recognized that you'd made an error that was covered by the insurance policy, is that right?

A. It may have been.

Q. Well, when did you recognize the error, sir? Was it January 2002 or later?

A. I don't know.

Q. Do you recognize it today? Do you recognize today this is an error that would be covered by ALIA?

A. It may have been covered by them.

Q. Sir, do you acknowledge that you realized that failing to serve a Statement of Claim and having it struck and thereby depriving your client of a cause of action against the motor vehicle driver and giving [P.H.] a cause of action against you was the kind of error that your insurance is intended to cover?

A. Yes.

Q. Okay. If you could refer to Exhibit 179?

A. Yes.

Q. Do you acknowledge, sir, that on February 13th - - sorry. On February 12th, 2002 at Tab 1 of Exhibit 179, you signed a discontinuance of the action of [P.H.] against the defendants for [P.H.]'s claim?

A. Yes.

Q. And you admit, sir, you did that without any instructions from [P.H.]?

A. Yes.

Q. And you admit you did that without consulting [P.H.]?

A. Yes.

Q. And you admit you did that without reporting to [P.H.] that you had made an error that caused [P.H.] to lose [P.H.]'s action against the drivers of the car?

A. Yes.

Q. And, sir, do you acknowledge that after you signed the Discontinuance of Action; filed the Discontinuance of Action; and sent it to McLennan Ross February 13th, 2002, you took no positive step to tell [P.H.] that you'd lost [P.H.]'s action or discontinued [P.H.]'s action, did you?

A. I did not tell [P.H.] that, no.

Q. You never told [P.H.] that?

A. That's what I said.

Q. Okay. If you can refer to Exhibit 180? You see on December 4th, 2002, [P.H.] wrote you and asked you how the file was coming. [P.H.] said:

> Please write me back or call me as quickly as possible, as the money could sure come in handy right now. Thanks for your help, Clarence.

And, sir, do you acknowledge that in response to Exhibit 180, you did not tell [P.H.] that you had lost [P.H.]'s action; that you had discontinued [P.H.]'s action?

A. I think I've already answered that question.

Q. I hadn't asked it before, sir.

THE CHAIR: I'm sorry. I didn't hear the answer.

A. A. I think I've already answered that question. I did not tell [P.H.] we had lost [P.H.]'s action.

Q. MS. DIXON: You didn't tell [P.H.] on your own initiative, right? Sir, my question is in response to Exhibit 180, did you tell [P.H.] you had discontinued [P.H.]'s action without instruction?

A. No.

Q. At Exhibit 181 we see a letter that was prepared by your office. Do you recognize the signature on that letter?

A. Yes.

Q. Whose signature is that?

A. It appears to be my legal assistant, Ms. M.

Q. And do you recall discussing the letter from [P.H.] with Ms. M.?

A. No.

Q. Sir, if you can refer to Exhibit 182 - -

A. Yes.

Q. - - you acknowledge this letter dated February 19th, 2003 was prepared under your instructions?

A. Yes.

Q. And if we turn to Tab 1, we see there's a general release that appears to be dated February 20th, 2003. Can you explain the difference in dates between the letter of February 19th, 2003 and the release of February 20th, 2003?

A. Sorry. Could you repeat that?

Q. Sir, you'll see the letter - -

A. Yes.

Q. - - at Exhibit 182 is dated February 19th, 2003.

A. Yes.

Q. If you turn to Tab 1, you'll see the release is dated February 20th, 2003.

A. Yes.

Q. Can you explain the difference in dates?

A. Certainly. [P.H.] probably didn't come in till the 20th.

Q. So it's your conclusion from reviewing these documents that [P.H.] came to your office on February 20th?

A. I believe so.

Q. And when we see on the letter February 19th that it says "Enclosed herewith is a copy of a release executed by yourself", I take it you assume these documents were held to be handed to [P.H.] when [P.H.] signed the release because you obviously couldn't send it to [P.H.] the day before [P.H.] signed it.

A. [P.H.] was probably going to be coming in on the 19th when this was done. All the documents were prepared at the same time.

Q. Right. So do you recall whether you spoke to [P.H.] to have [P.H.] come in or whether you asked someone else to do that?

A. I don't recall. My - - my assistants usually handle the booking of appointments.

Q. And so you instructed someone to arrange for [P.H.] to come in to go through a mock settlement process with you, is that right?

A. Well, I don't know if it was a mock settlement process.

Q. Well, it wasn't a real one because there was no - -

A. Well, it was a real one.

Q. It was a real one? Okay.

A. The money didn't come from the insurance company. That is the only difference. [Emphasis added]

Q. Well, let's talk about that, Mr. Ewasiuk. Let's turn to Exhibit 182, Tab 1. Now, do you admit that once you discontinued the action of [P.H.] without instruction from [P.H.], that [P.H.] lost any action against [A.L.]?

A. Yes.

Q. And that any action [P.H.] had was now against Clarence Ewasiuk?

A. If [P.H.] wanted to take those steps, yes.

Q. Well, you're a lawyer. That's the action [P.H.] had, right?

A. [P.H.] would have had that available to [P.H.], yes.

Q. If you'd told [P.H.]. If you'd told [P.H.] you'd discontinued [P.H.]'s action without instructions, then [P.H.] had the remedy of going to another lawyer and suing you, right?

A. [P.H.] could have.

Q. Right. You didn't tell [P.H.]?

A. No.

Q. And you then presented Exhibit 182, Tab 2 for [P.H.]'s signature on February 20th, 2003, right?

A. Right.

Q. And the representation you were making to [P.H.] is that [P.H.] still had a live action with [A.L.], right?

A. I don't think I made that representation to [P.H.], no.

Q. Look at the document, sir. This is a document releasing her action against [A.L.]?

A. Yes.

Q. You're the only one in the room who knows [P.H.] doesn't have one anymore.

A. That's correct.

Q. By asking [P.H.] to sign this document, you are misrepresenting the true circumstances to [P.H.], correct?

A. Correct.

Q. You lied to her by asking her to sign this document?

A. Correct.

Q. And you intended [P.H.] to understand or believe that [P.H.] still had a live action, right?

A. No.

Q. Well, then why did [P.H.] have to sign this document? This is a complete fraud. Nobody needs this document except you, right?

A. I don't believe it was a fraud.

Q. The only purpose of this general release, Mr. Ewasiuk, was to mislead [P.H.] into believing [P.H.] still had a live action, correct?

A. I certainly didn't look at it that way at that time.

Q. Do you agree now that that's the impact of this document on [P.H.]?

A. A release generally, yes.

Q. That, in fact, when you look at Exhibit 182 today, sir, and you see that letter, do you admit that the impact of that letter was to mislead your client to believe that [P.H.]'s action was still live until [P.H.] released it?

A. The impact of signing a release and accepting money - - the impact of that, yes, is to - - is to finalize the matter.

Q. And to mislead [P.H.] into believing that you'd received the money from State Farm and that this settlement was actually with [A.L.], right?

A. Yes.

Q. When, in fact, what you were trying to do was buy off a problem so that [P.H.] wouldn't sue you, right?

A. No.

Q. You recognize today [P.H.] had a right of action against you?

A. [P.H.] may have.

Q. And you recognize that you induced [P.H.] into this settlement, and the impact of that was an effort to relieve your liability to [P.H.]?

A. No. [P.H.] wanted $7,000.00, and [P.H.] indicated that to me. It was certainly within the range of a minor whiplash that occurred in 1997. I did my research. I had done motor vehicle accidents before. [P.H.] had a minor sore neck for less than one week.

Q. Mr. Ewasiuk, accepting all that you say - - if we do - - the one part that still doesn't fit is why you wouldn't tell [P.H.] the truth and tell [P.H.] I made a mistake; I only think your claim's worth $7,000.00; and out of the goodness of my heart, I'm paying you this $5,500.00. Why didn't you just tell [P.H.] the truth?

A. Ms. Dixon, I had just returned from Toronto. My wife had a very serious operation, and I don't think I was thinking all that clearly at that time. It's something I shouldn't have done. I've admitted that to everyone.

Q. Sir - -

A. I'm sincerely sorry for what I have done. I know it wasn't right. But I know at the time that this happened, I was extremely confused and depressed. And I know that now.

Q. Mr. Ewasiuk, are you suggesting that your depression made you dishonest?

A. If that's what you want to call it. I've never looked at it that way.

Q. Right. You don't agree this was dishonest to [P.H.], do you?

A. I felt at the time that [P.H.] was getting what [P.H.] wanted. It was well within the parameters of what an accident such as that could have been worth. It is probably more than the insurance company would have paid [P.H.]. There was an offer of $3,500.00; [P.H.] wanted seven; and [P.H.] got what [P.H.] wanted. And I did not think that I was defrauding [P.H.] at that time or anything. These were simply administrative matters I was thinking at that time. [Emphasis added]

Q. Do you acknowledge today, sir, that you defrauded [P.H.]?

A. No.

Q. Okay. So you don't think you were defrauding [P.H.] then and you don't think you're defrauding [P.H.] now?

A. Well, it's a pretty strong term.

Q. I know it's a strong term. Sir, the point is if you don't think you're defrauding [P.H.] now, then this isn't an issue of depression, is it? This is an issue of judgment.

MR. BERESH: Well, I wonder, Madam Chair. I've listened to this go on. This is a debate about a law. I don't think it's fair, and I object to the question. It's not a matter of whether it's fraud or not. That's not - - that involves a very complicated legal question in this context.

THE CHAIR: What's complicated about it, Mr. Beresh?

MR. BERESH: Whether or not my client should be required to answer whether he thinks it's fraud now. We're here to deal with matters of dishonesty which is what the citation cites; not whether it's a matter of fraud or not. And I don't think he should be called upon to give a legal opinion about that action.

THE CHAIR: That's fine. Miss Dixon can continue with the line of questioning if she can perhaps just recast the questions a little.

MR. BERESH: Yes. Thank you.

MS. DIXON: I do take the position there's nothing improper about my line of questioning given Mr. Beresh's opening statement that he's indicating that Mr. Ewasiuk was under some disability at the time which relieves him from liability for his misconduct. I think it's quite appropriate for me to test whether that disability was at the time or continues today and whether it's a matter of illness or integrity which is exactly the issue the Panel's going to have to deal with. But I will certainly.

THE CHAIR: Mr. Ewasiuk answered the question by saying it was simply an administrative matter, and so that has been noted.

MS. DIXON: Thank you. [transcript, pages 474-489 to line 19 inclusive]

284. Member's Counsel submits that from the year 2000 onwards, there is documented evidence of impaired judgment due to the Member's life stressors.

285. The resolution as to whether the Member should be found guilty of lying to his clients or deceiving his clients by misleading them as to the true state of affairs is found, says Member's Counsel, in the testimony given by Dr. Rosie and the subtleties of this case; further, that it is not a "black and white" proposition.

286. Member's Counsel submits that it would be strange and unfair if a professional body concluded that someone suffering a disability should be held to the same standard as a healthy person. This is analogous, says Counsel, to criminal law – "if you cannot form intent you are criminally excused;" and, in the civil context: "but for" the mental

disorder, the behavior would not have occurred. Therefore, being blameless, it would follow that the Member ought to be found not guilty. On this reasoning, the Hearing Committee was invited to exculpate the Member notwithstanding the Member's admissions and the findings of this Hearing Committee.

287. Dr. Rosie was qualified by the Hearing Committee as an expert in DSM IV disorders. Dr. Rosie provided expert evidence that major depression has a life of its own and it can cause significant changes beyond the patient's control including depressed mood that the patient may be unaware of, loss of energy, loss of focus and motivation and impaired memory. Dr. Rosie said that the contribution of stress is the biggest factor in precipitating a major depressive incident and can happen at any time in a person's life. Further, the trigger for a second major depressive incident is slighter than a trigger for the first incident.

288. We were told by the Member that he had had some medical problems prior to 2000 and he states that these had an impact on his personal life. For his Type II diabetes, he took medication. He told Practice Review representatives (2003-4) that this was under control with medication and diet and that losing weight had helped. For his colitis, he wore an ostomy bag and although it was irritating he ignored it, but there was potential for embarrassment in his usage of the ostomy bag.

289. [Material concerning private family health matters has been redacted].

290. [Material concerning private family health matters has been redacted].

291. [Material concerning private family health matters has been redacted].

292. [Material concerning private family health matters has been redacted].

293. Other things also added to the Member's stress including his wife's disruptive telephone calls to the office, her threats to report him to the Law Society over the L.M. and P.H. matters, the March 18, 2005 departure of his wife from the matrimonial home, the subsequent divorce proceedings and the October of 2006 departure from employment of Ms. M., his long-serving, very experienced assistant. By the Member's account, this felt like "the final nail in the coffin."

294. Member's Counsel submits that many in this profession subscribe to the belief that one's professional skin should be tough enough to withstand personal pressures such as those visited upon the Member and that anything less is a sign of weakness. Member's Counsel said that this is exactly what the Member tried to do and that pride prevented the Member from getting help.

295. This Hearing Committee notes the Member's statement concerning a new relationship with a woman named W.N. who ultimately became his fiancée. The Member states that he met W.N. during the end of May of 2006 and during the period May to October of

2006, he had "coffee and the odd dinner with W.N, the relationship did not develop beyond that." [Exhibit 305]

296. The Member says that he continued to meet with W.N. after 2006 and then says: "The relationship became much stronger in 2007, and eventually in the late fall of 2007, they began to live together and resided together since that time."

297. The Member, in sworn testimony, describes his relationship with W.N.:

> "I'm a much happier person. Much happier person. I have a very fine lady at my side which helps me daily. It's just a refreshing situation to be in other than the situation I was in before with Kelli where there wasn't a day that went by that a threat didn't occur or an argument didn't ensue. It's just – my whole life has changed in the last couple of years."

298. The Hearing Committee notes that the Member met W.N. at the end of May of 2006 and it was on October 13, 2006 that the Director, Lawyer Conduct ordered an investigation into the Member's conduct including the Member's representation of P.H. and L.M. [Exhibit 283]

299. The Member's relationship with W.N. became much stronger in 2007.

300. In April of 2007, the Member delivered to the investigators the P.H. and L.M. files and thereafter the investigators continued to ask for more information about these files.

301. On August 20, 2007, Practice Review Panel referred the Member back to the Conduct Committee.

302. In late fall of 2007, the Member and W.N. moved in together and have lived together since then.

303. On November 19, 2007, interviews with the Law Society of Alberta investigators (previously cancelled by the Member) were re-scheduled for December of 2007. [Exhibit 297]

304. The Member's first consultation with Dr. Rosie occurred on September 4, 2008, 2 years and four months after he met W.N, and about one year after the Member began living with W.N.

305. It was in September of 2008 that Dr. Rosie diagnosed a major depressive disorder based upon the Member's self-reporting of severe and debilitating mental problems.

306. Member's Counsel says that if the Member's own evidence was the only evidence the Panel had, that could justifiably cause concerns. Here, however, there is corroboration from others to support the Member's self-reports of cognitive function problems.

307. For example, Member's Counsel submits that Ms. M., the Member's loyal and long term assistant, was a forthright, cooperative witness. With this assessment the Hearing Committee agrees as Ms. M. displayed not only a "conviction of truthfulness" but her factual evidence was in harmony with the documentary evidence.

308. Member's Counsel also says that it did not appear that Ms. M. was testifying to help the Member. Certainly, Ms. M. did not try to cover up the trust transfer error – she blamed it on herself. Ms. M. did not try to cover up the fact that she knew that the Member wanted the error rectified and she testified that he told her so. This is consistent with the Member's testimony that he did not instruct this erroneous trust transfer and that he told Ms. M. to rectify it. Ms. M.'s evidence is totally accepted on this point.

309. Ms. M. knew nothing of the phony settlements because she was never told about them. Accordingly, Ms. M. could not testify about these matters.

310. There is no evidence one way or the other as to whether Ms. M. was aware of the content of the volumes of communications arriving from the Law Society of Alberta and no one asked her about this, although the Member testified that he opened these letters in the privacy of his own office and kept them in his desk drawer.

311. To the extent that Ms. M. testified as to facts within her knowledge, this Hearing Committee finds that Ms. M.'s testimony was truthful and consistent with the preponderance of evidence.

312. The more difficult task arises when assessing Ms. M.'s <u>opinions</u> as to what she believed to be the effect upon the Member of the life stressors that he experienced with his family.

313. In answer to questions put to her by Member's Counsel and upon re-examination by LSA Counsel, Ms. M. said that she noted changes in the Member's behavior: deterioration in concentration, focus, ability to remember things and notes behavior that had not occurred in the timeframe before the Member experienced the significant personal events outlined above. This behavior included outbursts by the Member directed toward his staff.

314. This evidence could corroborate the Member's self-reports of what he now believes was major depressive disorder, the effects of which disabled him from knowing right from wrong and paralyzed and prevented him from dealing with the Law Society of Alberta departments promptly and appropriately.

315. Ms. M.'s agreement with Member's Counsel that the Member displayed cognitive dysfunctions in memory, focus and concentration is, on the face of it, consistent with the Member's self-reports of symptoms of depressive disorder and consistent with what he told Dr. Rosie.

316. But, that is not the end of it. Assessment of credibility in relation to the substance of Ms. M.'s opinions as to what her observations meant and whether the observed behavior was causally related to a mental illness due to major depressive disorder is a much more nuanced inquiry. It is axiomatic that a witness may testify as to what he or she sincerely believes to be true but may quite honestly be mistaken.

317. Member's Counsel argues that if we are to accept that the Member suffered major depressive disorder from approximately the year 2000 and accept that the stressors described had a cumulative effect as they successively occurred, then the Member cannot be found guilty of the citations and his conduct cannot be found to be conduct deserving of sanction because the conduct the Member engaged in was due to incompetence by reason of mental disorder, not deliberately wrong conscious intention.

318. LSA Counsel says that s. 49 of the *Legal Profession Act* [*supra*] expressly includes the category of incompetence and even if we were to decide that there was disability that caused or partially caused conduct that otherwise would be deserving of sanction, this Hearing Committee could still find that it is conduct deserving of sanction.

319. With this latter submission, we agree. Section 49 defines conduct deserving of sanction as conduct of a member arising from incompetence or otherwise, that is incompatible with the best interests of the public or of the members of the Society, or tends to harm the standing of the profession generally. Incompetence is expressly included; therefore, this Hearing Committee finds that regardless of whether the conduct arises by reason of mental illness, if that conduct if incompatible with the best interests of the public or tends to harm the standing of the legal profession, that conduct is conduct deserving of sanction.

320. To get to the crux of this issue, it is important to review the testimony of the Member to understand a chronology of his professional and personal life. References are to the transcript page and line numbers. The Member says:

- He graduated law school in 1979. [page 337, line 4]
- The Member was called to the Bar in 1980. [page 337, line 24]
- The Member married Kelli, his second marriage, in 1988. [page 34, lines 10-11]
- Kelli and the Member had two daughters between 1988 and 1990, who are now 22 and 21 respectively. [page 341, lines 19-24]
- The Member opened his own law firm with one associate in 1991, after having practised with others in partnerships from his call to the Bar till 1991. [page 339, lines 16-20]
- [Material concerning private family health matters has been redacted].

- The Member explains that it was difficult for Kelli to do the things that she had done before, that she had been active in sports and did a lot of running and she could not do that anymore. [page 342, lines 13-16]

- The Member says he took a lot of time away from his practice in assisting and actually doing things with his daughters who were actively involved in gymnastics, dance and soccer. [page 342, lines 18-23]

- The Member also says that he tried to keep his daughters involved but he found that he was the one that was having to do this because "their mother was having great difficulty." [pages 342-343, lines 26 and 27, lines 1-5]

- The Member says that he had another associate working with him but that associate took up partnership with a friend and the Member thought that would have been in 2001 or 2002. [page 340, lines 19-23]

- It was after 2001 that the Member knows that he practised alone. [page 340, lines 24-27]

- With his wife having difficulty, the Member says he: "… spent a lot of time at home and ended up going into the office on - - later on in the evening - - sometimes from 8:00 until midnight or what have you - - and going in on weekends to prepare for the following week." He says: "I was doing cooking; some of the cleaning; the laundry which I didn't mind." [page 343, lines 21-end]

- The Member said he became very tired and had difficulty getting his work done even as early as 2000. He says he was trying to run a full-time law practice and effectively running a full-time home and "I was doing it." [page 344, lines 1-5]

- The Member says he went with Kelli to Toronto and she had an operation on her trachea in December of 2002 and that he corresponded with his office through fax and telephone "for a period of two weeks." [pages 344-345, lines 24-27, 1-3]

- After Kelli came home from Toronto she had to have her dressings changed and the Member hired a nurse to come in and do that when he wasn't there. [page 345, lines 14-16]

- The Member says that his wife's moods changed and they started to argue about the silliest things and: "she was never the same after we came back from Toronto." [page 345, lines 17-25]

- The Member says that his wife complained about most things. She complained about what the Member was doing. The Member says he does not know how she felt at the time, but he could see that it was affecting her relationship with their

daughters that the Member was spending a lot of time with them. The Member thinks that bothered Kelli. [page 346, lines 1-4]

- [Material concerning private family health matters has been redacted].

- The Member says he became very sad. [page 346, line 26]

- The Member said that it was in 2002 that Kelli had her operation and they went on a vacation in December of 2003 because he thought that might help; unfortunately, that did not work out the way the Member thought it would [Material concerning private family health matters has been redacted]. [page 347, lines 4-15]

- [Material concerning private family health matters has been redacted]. [page 348, line 2]

- The Member also says that Kelli's physical condition was remedied by the operation in 2002 [page 348, lines 14-15], but there was a recovery period of approximately a year that would have taken the Member into late 2003. [page 348, lines 17-20]

- [Material concerning private family health matters has been redacted].

- The Member said that his daughter's hospitalization affected him because: "I would go to the hospital usually every day when I could. If I didn't have a Chambers application, I would go there in the morning. If I didn't have a lot of clients in the afternoon, I would go there in the afternoon. I would say good night to her." [page 350, lines 2-9]

- [Material concerning private family health matters has been redacted].

- [Material concerning private family health matters has been redacted].

- The Member says the marital relationship was very strenuously affected. [page 350, line 22]

- [Material concerning private family health matters has been redacted].

- [Material concerning private family health matters has been redacted].

- [Material concerning private family health matters has been redacted]. It just - - I became very very tired and sort of lackluster. I felt like I wasn't getting things done. I was certainly not getting things done as quickly as I could. A lot of times I would be away and there were a lot of messages - - certainly a lot of messages on my desk when I got back. I couldn't even return them all sometimes as

effectively as I - - as I wanted. I would leave a lot of that up to [Ms. M.] to either return phone calls or speak with clients and get the information I would normally glean from them if they came in. And we would work it that way, and it seemed to work out for awhile." [page 352, lines 1-25]

- [Material concerning private family health matters has been redacted].

- In 2001 or 2002, the Member had been diagnosed with diabetes and ended up going on a couple of medications for that and a diet. [page 353, lines 15-20]

- The Member also had ulcerative colitis for years and had an operation in 1987 to have his colon removed. He has had an ostomy and a pouch since that time. [pages 353 and 354, lines 15-end and line 1] The Member says it works very well and he is alive but he is constantly having to interrupt an interview or something because it decides to drain and he has to go and do something with it. And he has had to adjust to always being conscious of an odor. [page 354, lines 5-11]

- We are told that the ostomy bag causes constant irritation and there isn't a day that goes by that it doesn't bother the Member somewhat but he has sort of been able to ignore it because it is always there. [page 354, lines 13-16]

- [Material concerning private family health matters has been redacted].

- [Material concerning private family health matters has been redacted].

- [Material concerning private family health matters has been redacted].

- [Material concerning private family health matters has been redacted].

- When asked whether there had been any tension in the marriage before June of 2004 about children and custody, the Member said that throughout the marriage he was always threatened that if he didn't do this or he didn't do that, Kelli was taking the kids and he lived in constant fear of that happening. [page 358, lines 1-4]

- [Material concerning private family health matters has been redacted] he suffered a feeling of despair: "We've got all these other things going on. I got a practice I'm trying to run; I'm not there half the time. And now this? It was devastating. It was - - what could I do about it? I couldn't do anything about it. It was - - it was just a feeling of helplessness - - and sadness." [page 358, lines 9-17]

- The Member said he did not think of getting help for himself because he was "this proud pillar, and to think that I needed to have some sort of medication to assist me through life was just foreign to me. I watched my wife take medications and I saw what - - what that did." [page 358, lines 19-23]

- [Material concerning private family health matters has been redacted].

- The Member and his family moved to another home in August of 2004 and Kelli made clear that she did not like it. [page 361, lines 1-21]

- [Material concerning private family health matters has been redacted].

- On March 18, 2005, Kelli left the matrimonial home. [page 362, lines 14-15]

- When asked how Kelli's leaving affected the Member he said: "I had two children with this woman. I thought it was a forever thing. I placed all my trust in this woman. Very, very, very sad." [page 363, lines 23-25]

- The Member had his daughters with him at his home for most of the time and they were then approximately 15 and 16 years of age. [page 264, line 9]

- In terms of how it was to assume full-time responsibility for his teenaged daughters, the Member says: "I was home every day at 4:30, as I recall. I am a very good cook and the meals were always there. It was sort of like we all had to get the - - to pool together to get this done. And so for me doing their laundry - - I had some discussions with them and I thought that girls of their age should be doing their own. So we got them doing that. We would go out once a week for supper or we tried to continue doing whatever. And at that point in time, neither one of the girls would talk to their mother." [page 364, lines 17-end, page 365, line 1]

- The Member says that after his separation in March of 2005 from Kelli he would receive telephone calls telling him that he would be on the unemployment line soon and that the Law Society "knew everything about me." [page 365, lines 21-26]

- The Member also says: "Kelli was the only one that knew what happened with [L.M.] and [P.H.]. The only one other than myself. [page 367, lines 2-4]

- Ms. M. left in October of 2006 and "that just put the nail in my coffin." [page 368, lines 6-7]

- In discussing Ms. M. leaving, the Member says she was his "girl Friday" and after someone works for you for that long and you're used to them doing things for you, suddenly "when it's gone, you're either doing it yourself of replacing her. I couldn't replace her. I couldn't do that. I started doing things myself. I started typing affidavits myself with the hunt and peck thing. I actually had a friend do a couple of affidavits for me on one occasion. But I was – it was sort of like I was

out -- out of staff. I was out of gas. I was tired. So tired." [pages 368 and 369, lines16-end, lines 1-2]

321. It is the Member's position that he had no sanctionable intention to defraud his client L.M. on or about May 11, 2004 [Exhibit 117] or his client P.H. on or about February 19, 2003 [Exhibit 182]; rather, the Member asserts that he was trying to look after his clients and trying to make them whole.

322. The Member explains he had diabetes and colitis issues in and before the year 2000.

323. [Material concerning private family health matters has been redacted]. These problems and his assumption of far more responsibilities at home had an adverse effect on the Member emotionally and mentally, which he describes: "Well, suffice it to say I was very sad. I was just sad." [transcript, page 251, line 23-26]

324. [Material concerning private family health matters has been redacted]. The Member says of this incident: "It was devastating" [transcript page 358, lines 7-17] but the Member did not get help because: "I was always this proud pillar, and to think that I needed some sort of medication to assist me through life was just foreign to me. I watched my wife take medications, and I saw what—what that did." [transcript page 358, lines 13-24]

325. The Member says the family moved to a different home in August of 2004 and his wife did not like it and made very disparaging comments about the house. [transcript, page 361, lines 1-16]

326. On March 18, 2005, Kelli left the marriage and the matrimonial home. [transcript, page 362, line 14] and the children stayed with the Member in the home.

327. In October of 2006, Ms. M. left and "that just put the nail in my coffin". [transcript, page 368, line 6]

328. In answering questions from his lawyer relating to the period of time spanning eight years, from 2000-2008, commencing at page 370, line 14 the Member says:

> Q. Do you think now you were mentally ill?
>
> A. Perhaps.
>
> Q. Okay. When do you point – when you look back after over the past – and we're interested in that approximate decade or eight years from 2000 on. When do you think, if you look back now at how you felt; how you acted, when the onset of that was, please?
>
> A. I could take it right back to certainly 2000; certainly 2002.

> It seemed to be – it was a progression. Every time I thought that I had a handle on things, something else would happen, you know. And then you'd get a handle on that or you'd think you had a handle on that – never been there before, so I don't know.
>
> But in—you know, now I'm reflecting, I would have never done half the things that I've done the way that I did them had I known. I wish I'd been in Dr. Rosie's office then. I wish – I wish I could have had the counseling that he's given me. I wish I could have said you're not that big; you're not that – but here I am" [transcript, pages 370 and 371, lines 14-27 and lines 1 -9]

329. [Material concerning private family health matters has been redacted]. So I hung in there. You bet I hung in there. I tried, and I just kept getting sadder and sadder". [transcript, page 372, lines 1-9]

330. We have carefully reviewed the testimony and Formal Admissions of the Member and the chronology of the above events that have been characterized as being stressors triggering major depressive disorder.

331. We have also listened very carefully to what Ms. M. said about the Member's behavior.

332. We find that the Member's dishonesty and deceit in connection with the claims of P.H. and L.M. occurred before the Member's self-described spiral into a sadder and sadder emotional state exacerbated in June of 2004 by [material concerning private family health matters has been redacted].

333. The timeline for the phony settlements began October 24, 2001 [Exhibit 173] when demand was made by defence counsel for proof of service of the P.H. claim. [Material concerning private family health matters has been redacted].

334. The Member was informed on January 17, 2002 that an application to strike P.H.'s statement of claim for non-service would be scheduled. [Exhibit 175]. That court motion was filed and returnable January 31, 2002 [Exhibit 175(1)]. The Member's execution of the P.H. discontinuance occurred on February 12, 2002 [Exhibit 179(1)]. This signing date was fifteen months before Ms. M. left on maternity leave in June of 2003 [transcript page 115, line 11].

335. This signing date was about two years before the daughter's diagnosis in early 2004.

336. A full year later, having admitted none of this to P.H., the Member met with P.H. and witnessed her sign the phony settlement documents. He created a phony reporting letter and a phony account [Exhibits 180 and 181] to go with the phony General Release. [Exhibit 182(1)].

337. [Material concerning private family health matters has been redacted].

338. The L.M. phony settlement concluded last, with L.M. signing the General Release on May 11, 2004 [Exhibit 116]. [Material concerning private family health matters has been redacted].

339. L.M. signed the phony General Release in May of 2004, [material concerning private family health matters has been redacted] well before the marital separation in March of 2005.

340. [Material concerning private family health matters has been redacted].

341. The Member's Type II diabetes was controlled with medication and diet and the ostomy bag was an irritation the Member ignored.

342. Member's Counsel properly asks this Hearing Committee to pay attention to what Ms. M., the Member's long-serving assistant, has to say. We do.

343. Ms. M. acknowledges that she made the S.V. trust account error and she also acknowledges that the Member told her to rectify the error. [transcript, page 149, lines 15-18].

344. The upbeat mood in the office changed some time in 2000. [Material concerning private family health matters has been redacted].

345. When asked by Member's Counsel what effect she saw these events have on the Member, this exchange occurs, beginning at page 154. The reference to "it" refers to the aggregate of all the events described by the Member as being stressors in his life:

> Q. Is it correct that it started to affect his ability to concentrate?
>
> A. Absolutely.
>
> Q. Okay, and is it correct that it started to affect his ability to focus.
>
> A. Yes.
>
> Q. Okay. Is it correct that it affected his ability to remember things?
>
> A. Yes.
>
> Q. Which, before these events, he could remember, but he was having difficulty with some memory problems?
>
> A. Yes.

Q. [Material concerning private family health matters has been redacted].

A. [Material concerning private family health matters has been redacted].

Q. [Material concerning private family health matters has been redacted].

A. [Material concerning private family health matters has been redacted].

Q. [Material concerning private family health matters has been redacted].

A. [Material concerning private family health matters has been redacted].

Q. [Material concerning private family health matters has been redacted].

A. [Material concerning private family health matters has been redacted].

Q. [Material concerning private family health matters has been redacted].

A. [Material concerning private family health matters has been redacted].

Q. [Material concerning private family health matters has been redacted].

A. [Material concerning private family health matters has been redacted].

Q. [Material concerning private family health matters has been redacted].

A. [Material concerning private family health matters has been redacted].

Q. Okay. I understand that there were times when there might be outbursts toward you - -

A. Yes.

Q. - - by him which, before these problems, hadn't occurred?

A. That's correct.

Q. Okay. There were days, I understand, when he'd come to work and he wouldn't achieve anything?

A. That's absolutely right.

Q. Which, before these events, hadn't occurred?

A. Right.

Q. Okay. And then you became aware of the date when he and his wife separated in March of 2005?

A. Yes.

Q. And then you left the office in 2006, was it?

A. October, yes.

Q. Of 2006? Okay.

346. Ms. M. says she observed problems with the Member's ability to focus and concentrate and that he had difficulty with some memory. [transcript, page 154, lines 4-18]. [Material concerning private family health matters has been redacted]. She says the Member seemed to take a step back and lose interest in his practice. [transcript, page 155, lines 2-4]. Ms. M. reports that the Member had outbursts and some days in the office he wouldn't achieve anything. [transcript, page 155, lines 12-20].

347. LSA Counsel re-examined Ms. M. who recalls that she left on maternity leave in June of 2003 and most likely returned when her benefits ran out, a year later in June of 2004.

348. When asked whether she had seen some effect on the Member's ability to concentrate, to focus and remember things before she went on maternity leave, Ms. M. answered: "Some, but not nearly as bad as after I came back". [transcript, page 157, lines 6-13]

349. Ms. M. does not recall having any conversations with the Member about how the life events were affecting his ability to practise law as she could not imagine having such a conversation with her boss.

350. Ms. M. does not recall expressing concern about how the stress was affecting him but Ms. M. does say that when she quit in October of 2006 she recalls feeling a lot like his mother rather than his assistant, at the end. [transcript, page 158, lines 1-7]

351. Ms. M. did not have any actual conversations with the Member about what exactly was causing the Member's apparent impairments. Ms. M. knew about her boss' family troubles, presumably because he told her about them. Ms. M. rationally connects the

observed apparent adverse effects with the family issues. Relying on her opinion of this apparent causal connection, however, is dangerous.

352. It is dangerous because the Member never told her about his deceptions of P.H. and L.M. (although he believes Ms. M. prepared the phony L.M. documents in May of 2004). The Member never told her about the many letters from the Law Society asking for these specific files and more – the Member says he opened these letters, marked personal and confidential, in the privacy of his office and put them in his desk drawer. Ms. M. may have been generally aware that the Member had not complied with his undertaking to clear title but this was to have been dealt with by the real estate conveyancer. And, Ms. M. did not have the legal knowledge to have known the specific legal steps the Member could have and ought to have taken, but did not, to satisfy this undertaking. It is not clear what Ms. M. knew of the J.W. situation because there were numerous emails and telephone calls to the Member, not to her. Similarly, M.G. and D.V. phoned for the Member, not Ms. M., so she probably would not have known the frequency of their calls. Although Ms. M. did know about the S.V. trust account shortfall she was led to believe that this was her problem to rectify; thus, she would not have appreciated that ongoing default was, in fact, a serious problem that the Member was obliged to immediately rectify.

353. More reliable evidence is given by the Member, both in his testimony to the Hearing Committee and in the documentary exhibits, about how he was dealing with files, the regulators, the investigators and the Practice Review Department throughout this entire period of time from 2000 to 2008.

354. Member's Counsel deals with the complaints concerning lack of cooperation with the Law Society of Alberta in a global fashion. First, the Member concedes that he received letters from the Law Society. The Member relates that when he received letters they came in personal and confidential and he would open them in his office. One or two letters from the Law Society he supposes he would open as they came in. But during this period of time, the Member says he had some complaints and some requests from the Law Society for certain things. The Member says that at some point – albeit maybe 2004 or 2005 – a letter would come in from the Law Society addressed to him and he found it "impossible to get to it directly". He says he might open the letter a day or two afterwards. Then, in the period of time around 2006 to 2007, there were times that the Member says that he couldn't open these letters at all. [transcript, pages 447-448, lines 1-end, lines 1-9]

355. When asked what his state of mind was around this time the Member says: "Confused. Very tired. I hadn't - - I didn't sleep a lot. Afraid. [emphasis added] [transcript, page 448, lines 13-15]

356. The Member goes on to say in describing his state of mind around this time: "It just seemed like I'd just start, you know, getting into the throng of things with - - my conveyancers were doing a fair amount of real estate and I had been somewhat in the hole

in my general account and we had just started - - all the bills were paid and actually had a surplus in the general account. And then a letter would come and I just couldn't function. I could not function. I tried to describe this to Dr. Rosie. Towards - - towards the end and - - I just found it impossible to deal with anything that came from the Law Society. Even telephone calls. I found it very difficult to return them, and - - and I don't know why." [Emphasis added]

> Q. With hindsight, what's your insight into why you were frozen in response?
>
> A. Well in talking to Dr. Rosie, I can now appreciate that I can - - I find that I - - in my discussions with him and the medication that I'm on, I find that a phone call now - - I don't suddenly cringe when the telephone rings as I did then. I would have my staff filtering my calls. I simply couldn't take them and I wasn't functioning very well at all. I would go into the office and get absolutely nothing done some days. A lot of things that had to be done were performed by my staff members in attempting to assist - - all the while trying to be that tower of strength that I thought that I was; that my clients believed that I was. [transcript, pages 448-449, lines 16-end, lines 1-19]

357. In response to the citations concerning a failure to cooperate with the Practice Review Department, in particular in the period 2005-2006, in answer to the question as to why there wasn't some cooperation the Member says:

> A. Well, I felt that I had - - I felt that I had complied. I think what they're referring to is a letter - - they would - - they sent me letters wanting a snapshot of my practice, as I recall.
>
> Q. Yes?
>
> A. And I had given them that initially. About a year went by, and then they wanted another one. It hadn't changed much except they had suggested that perhaps I get myself away from the family law which I - - which I did for a period of time. They suggested a number of things to me in terms of my practice when I had meetings with them. And I attended them all. [transcript, page 450, lines 1-13] [Emphasis added]

358. When asked why the Member didn't follow up with requests for follow up the Member says:

> A. I don't - - I don't really - - I don't know. It was very confusing. It seemed every time I'd turn around, I was getting another letter and

> I was just totally unable to respond as quickly. I had asked for extensions of time; something else would come up. The matrimonial end of my practice was largely responsible for the time that I had to put into those files, and things just didn't get done. And I don't - - I don't have an answer for you albeit I just - - not spending enough time at the office; not being able to function; not being able to concentrate on my work and focus. That was the big one. Thinking that I could fix all these things myself. [transcript, page 450, lines 22-end and page 451, lines 1-12] [Emphasis added]

359. In answer to the concern of the Law Society that the Member may be ungovernable, the Member says:

> A. Well, I think that citation or that suggestion came from me not - - not responding; not cooperating, as they put it. I thought I - - I thought I was. It's hard to believe that I - - I would - - I would - - when I'd receive these letters, I would just turn into a - - like, there was a block in the road and I just couldn't get by it. [transcript, page 451, lines 24-end and page 452, lines 1-4] [Emphasis added]

360. The evidence concerning the client matters has been thoroughly reviewed, including the Member's testimony.

361. Ms. M. was a truthful witness who clearly described what she saw and heard.

362. While we accept that Ms. M. honestly believed that the cognitive problems being displayed by the Member were symptomatic of and had their root cause in disabling stress caused by family problems, it also must be said that based upon what Ms. M. knew and heard that was the only causal connection Ms. M. could have made. Had Ms. M. seen or heard about the regulatory and client service problems the Member was experiencing, had she known of the Member's deceit in relation to P.H. and L.M., her testimony may well have been markedly different. This is speculative.

363. Ms. M.'s opinion evidence about the causal connection between the Member's behavior and a major depressive disorder is rejected. We find that it is what Ms. M. did not see, or hear or know about (as set out above) that more probably than not was the root cause of the Member's observed distraction, lack of focus, irritability and outbursts and the primary and dominant cause of his fear, sleeplessness, exhaustion and feelings of despair.

364. The Member says that at this point in his life he is able to cope with everything and Dr. Rosie has helped a lot in that regard in terms of how to deal with things. The Member says that discussing things with family and friends and Dr. Rosie and getting it all out in the open has really helped him take a look at some of the things that he now

describes as being pretty stupid in retrospect. He says that he thinks differently now than he did then and explains, at page 453:

> A. I didn't think that way then. I don't know what I thought. But I came - - I just came to a complete impasse with respect to the constant hammering of these letters; letters that said you haven't done this and you haven't done that and I really had and I had made some phone calls and I thought that was enough. It's not what was required. [transcript, page 453, lines 2-9] [Emphasis added]

365. The Member then explains something else that caused him to fail to respond to the Law Society in an appropriate manner when asked if he is ungovernable. At page 453, the Member says:

> A. No, I'm certainly governable. One of the stressors in my practice was that I had taken on a lot of work. I had taken on much too much work. But I seemed to be a sucker for everybody that walked in the door that had a problem, and so the work continued to escalate. I could have taken five matrimonial files on a day in my practice. That's the number of calls that came in. My fees were low. I was compassionate. People liked coming to see me. The referrals were - - were great. But in reflection in 2011, I know I would never have taken on that many files. It's impossible to do. Responding to the Law Society now would be much much easier and much swifter. A lot of the stressors in my life are not there anymore. [transcript, page 453, lines 12-end and page 454, line 1]

366. Ms. M.'s testimony was that the Member seemed to have some memory and focus problems in 2003 but not nearly as bad as she observed in 2004. The Member hid the phony settlements from his staff and the L.M. phony settlement was concluding when Ms. M. returned from maternity leave.

367. The Member hid his deception from his employees. In one instance, the Member permitted his wife to participate in his deceit by actually preparing phony settlement documents. These client deceptions were discussed by the Member with his wife and he settled upon a method of resolution which unfolded over a substantial period of time.

368. This is not bizarre and strange public behavior. This is not behavior that is publicly and plainly self-harming and destructive, the acts so very odd and inexplicable, the lawyer involved seemingly indifferent to obloquy or to the certain terrible impact on professional reputation and entitlement to practice law. Not at all. These are calculated and cynical acts, planned and deliberate, designed and executed by the Member to hide the Member's fatal errors and professional negligence. The Member's behavior broadcasts to this

Hearing Committee a willful consciousness of wrongdoing and his ultimate objective - to avoid being caught.

369. It is the finding of the Hearing Committee that in respect of Citations 21, 22, 26 and 27, the Member deliberately and knowing it was wrong, lied to, consciously misled and deceived his clients P.H. and L.M. through his fraudulently concealed and undisclosed acts, unimpaired and unaffected by mental illness.

370. Neither this Hearing Committee nor the applicable law requires the Law Society to prove the criminal standard of *mens rea* before a finding of guilt is made out. We are satisfied by clear and cogent evidence that is in harmony with the preponderance of the probabilities - that a practical and informed person would readily recognize as reasonable - that these charges are made out.

371. Any influence life stressors or depressive mood had can be addressed in the sanctioning phase of this hearing.

372. Even though the Member's conduct, which is admitted and obvious, may have been influenced by poor judgment with a causal connection to some depressive disorder, that state of mind is very far from satisfying the "but for" test.

373. The Member's asserts that neither P.H. or L.M. ever complained about the amount of money he paid them, that he was helping them and that he made them whole (perhaps even better than if their cases had actually proceeded). The Member says that while he now knows that these incidents were "very stupid", he does not agree that his conduct was necessarily professionally negligent or that his actions seriously impugn his lawyerly integrity. The Member refers to these as administrative matters. This is most troubling and raises substantial concerns about the protection of the public and the Member's character and fitness to return to practice.

374. Conduct similar to that of the Member's conduct has been described as "honesty of compulsion" and, as is pointed out in the learned passage following, that is not the kind of honesty to which a Member pledges himself in his oath of office.

375. Boyd, C., in Hands v. Law Society of Upper Canada (1888), 16 O.R. 625 at 638, says:

> "The fact that the solicitor guilty of misconduct has made reparation to the client may satisfy that particular individual, but it does not deprive the general public of its claim for protection against an unsafe member of a privileged class, nor the Law Society of its claim to expel an unworthy member. The professional man who does what is right because he is in jeopardy of degradation has ceased to act uprightly. This honesty of compulsion is not the kind or honest demeanour to which the solicitor pledges himself in his oath of office. Mischief more or less must result to the good repute of the whole profession by the indulgence of mistaken

> lenity in cases where the payment of money, unjustly and dishonestly withheld by an officer of the law, is allowed to purchase immunity from wholesome discipline."

376. More than 120 years later, this remains the principled basis upon which lawyer conduct perforce must continue to be judged.

377. This Hearing Committee finds that the Member's consistent failure to respond to the Law Society's requests to deliver up these files for investigation was not inaction due to an inability to respond by reason of debilitating depression; rather, these delays were deliberate and knowing efforts to prevent the Law Society of Alberta from discovering his deceit.

378. This Hearing Committee finds that the Member failed to serve his client L.M. by failing to issue the client's statement of claim in time and is guilty of professional misconduct. The Hearing Committee finds that the Member misled his client L.M. and is guilty of professional misconduct. The Member is guilty of Citations 21 and 22 and his conduct, on both charges, is deserving of sanction.

379. This Hearing Committee also finds that the Member failed to serve his client P.H. by failing to serve the client's statement of claim in time and is guilty of professional misconduct. This Hearing Committee also finds that the Member misled his client P.H. and is guilty of professional misconduct. The Member is guilty of Citations 26 and 27 and his conduct, on both charges, is deserving of sanction.

380. This Hearing Committee finds the Member not guilty of the charge that he failed to respond to communications from the insurance company.

381. Major depressive order is not the reason for the Member's lying, deceit, fraudulent concealment and other misconduct. The reasons for his discreditable conduct are lack of integrity: favouring his own interests - by choosing to avoid professional degradation - over his clients' interests which he had sworn as a barrister and solicitor to protect, and ungovernability.

382. The Hearing Committee is satisfied of the correctness of its findings of guilt by considering and giving weight to the testimony of Dr. Rosie.

383. In direct questioning by Member's Counsel, Dr. Rosie says he observed in his first meeting with the Member on September 4, 2008, symptoms of a major depression "…that seemed to date for at least a year or two from the time of my initial examination" [transcript, pages 642 and 643, lines 1-end, lines 1-3]. Dr. Rosie says that the Member reported having problems with organization, with concentration, with short-term memory, energy, motivation, pleasure, sleep. Dr. Rosie says: "All these things were disturbed. He - - I thought he was quite depressed". [transcript, page 643, lines 5-10].

384. These observations were made during a talk with the Member during which Dr. Rosie tried to engage the Member and understand what had been going on with the Member. [transcript, page 643, lines 12-18]. The same approach was utilized in the next meeting of September 16, 2008. The two met again on October 9, 2008, where again Dr. Rosie allowed the Member to talk. From this, Dr. Rosie made a preliminary diagnosis of major depression and started the Member on an anti-depressant. [transcript, page 645, lines 6-17].

385. There was a change in prescription because the Member reported being bothered by the first drug and Dr. Rosie reports that in the October 9, 2008 meeting the Member "…reported improved mood. He was starting to smile. He said he was starting to make jokes. He was tolerating the medication well. He was still having some sleep problems. His memory was still a problem, and he talked more about the Law Society issue and – and he talked about possibly – probably, actually, resigning as a lawyer". [transcript, pages 646 and 647, lines 25-end, lines 1-5] [Emphasis added]

386. Then some appointments were missed by the Member and he and Dr. Rosie met again January 16, 2009. Although reporting mood not quite so obviously improved as the past October appointment, the Member was "…still feeling and functioning markedly better since starting the Celexa". [transcript, page 649, lines 7-23]

387. At the May 26, 2009 appointment, the Member reported that he can feel good quite a bit of the time but is still struggling with motivation and procrastination and with low energy. The Member reported low sex drive for several months – it's a common side effect of medication such as Celexa.

388. In the next meeting of January 5, 2010, all the symptoms had returned in the past few months (reported the Member) and Dr. Rosie says: "So—and he was worrying about the upcoming hearing from the Law Society". [transcript page 652, lines 10-20] [Emphasis added]

389. Dr. Rosie thinks this reported behavior is consistent with a relapse of the Member's major depression but Dr. Rosie is: "not sure that there was an actual precipitant this time. There was certainly the ongoing worry about his future as a lawyer. The uncertainty of that may have been a factor to trigger a return of symptoms. It's possible. I – he had a supportive relationship with his girlfriend which is protective really which was helpful to him in terms of his depression". [transcript, page 653, lines 9-17] [Emphasis added]

390. [Material concerning private family health matters has been redacted].

391. The Member and Dr. Rosie met three more times, the last appointment being May 24, 2011. Dr. Rosie said that they reviewed the symptoms of depression and when they started "… and it seemed like – it looked like the depression has been there a lot longer than initially I suspected and that he'd suspected". [transcript, page 661, lines 9-13]

392. This was Dr. Rosie's last contact with the Member and the Member was then on 112.5 milligrams of Effexor.

393. In terms of onset, Dr. Rosie says: "… from what I've read and what I've heard from Mr. Ewasiuk, [the onset of the depressive disorder] I think it likely goes back at least to 2003. Ms. M. went on maternity leave and she noted more dramatic changes when she returned to work "So, something seemed like was happening before she left. So I think it's likely it goes back to at least 2003 that something was changing in terms of his personal function; his ability to function because of the developing of a major depressive disorder. Whether it goes back to the [material concerning private family health matters has been redacted] in 2000 – I'm not sure. I'm not sure. It's possible". [transcript page 667, lines 2-end] [Emphasis added]

394. On this ultimate question – the likely date of onset of a major depressive disorder – Dr. Rosie's evidence is not persuasive because his initial diagnosis sets onset "at least a year or two from the time of my initial examination" and then after a series of meetings he says it is possible it dates back to 2000, but he is not sure. Dr. Rosie thinks something was changing in terms of the Member's personal function in 2003 because Ms. M. noted more dramatic changes when she returned to work.

395. Dr. Rosie says "altered or depressive state" could have affected the Member's ability to see the bigger picture; to think clearly through issues like that" [transcript, page 668, lines 1-15] Dr. Rosie says major depression has an effect on a person's ability to organize their thoughts; to get things together in a coherent way and put ideas into action". [transcript, supra, lines 13-18]

396. Again, on this ultimate question, Dr. Rosie's evidence is not persuasive because he says only that there could have been such an effect.

397. This Hearing Committee is entitled to come to its own conclusions on these critical issues because the expert evidence is unhelpful.

398. This Hearing Committee finds that the Member's abilities to organize his thoughts, get things together and put ideas into action, were not affected. In fact, the Member had a coherent plan (albeit deceitful), thought things through and put his plan – a sophisticated multi-step plan – into action.

399. We also are satisfied with the correctness of our findings because Dr. Rosie concedes that depression does not cause lying. Dr. Rosie clarifies that a tendency to blame others is not symptomatic of depression. Dr. Rosie concedes that from his few consultations with the Member he had made positive assumptions about the Member's character, although he had no previous baseline.

400. Dr. Rosie concedes that he made these assumptions and then reached the conclusion that the Member's behavior - as exhibited in the materials Dr. Rosie had received from Member's Counsel - was out of character.

401. Dr. Rosie's cross-examination by LSA Counsel begins at page 680 of the transcript:

> Q. Now, I understand that a major depressive disorder is called a mood disorder?
>
> A. Yes.
>
> Q. So I take it people who tell lies can get a mood disorder?
>
> A. Yes.
>
> Q. And people who tell the truth can get a mood disorder.
>
> A. Yes.
>
> Q. And so having a mood disorder doesn't affect your ability to know right from wrong?
>
> A. Having the mood disorder, no.
>
> Q. You know today that you've sworn an oath to tell the truth, and I appreciate that if - - what I understand your evidence to be is that if you had a major depressive illness, you might exercise poor judgment by lying under oath but you would still know you were lying?
>
> A. Yes.
>
> Q. It's a choice you would make influenced by your poor judgment?
>
> A. Yes.
>
> Q. But a person who has strong integrity and character could manage a concern without lying, right?
>
> A. Are you talking about strong integrity with a major depression?
>
> Q. Yes.
>
> A. Yeah.

Q. Okay. So that all the information you've given us today doesn't - - you don't intend the Panel to conclude that it would cause Mr. Ewasiuk to lie?

A. Right.

Q. Okay. That's not one of the symptoms of depression?

A. No.

Q. Now, let's try another hypothetical. If Mr. Ewasiuk - - let's assume that Mr. Ewasiuk did lie to a client knowing it was wrong, would that event then become a stressor?

A. To - - to Mr. Ewasiuk?

Q. To him, yes.

A. Yes.

Q. All right. So if someone who knows right from wrong lies, then that lie itself creates a stressor which might contribute to a depression?

A. Yes. It may aggravate a depression.

Q. Okay.

A. Yes.

Q. Now, let me put this hypothetical to you. Suppose that Mr. Ewasiuk learned that he made a mistake on a file; that he was negligent and failed to file a Statement of Claim.

A. M-hm.

Q. And I understand from your evidence that that would be a symptom of depression potentially?

A. It could be, yes.

Q. If it was out of character?

A. Yes.

Q. Now, let's talk about that for a bit because you did say at one point in your comments, sir, that – Mr. Beresh asked you if Mr. Ewasiuk failed to respond to the Law Society, would that be a result of his depression; and your answer was it's very likely because that is out of character.

A. Yes.

Q. All right. So I take it you are making some assumptions about Mr. Ewasiuk's character?

A. Yes.

Q. So you're assuming that all of the things that you read in the boxes that Mr. Beresh provided to you were out of character?

A. All the things in the boxes were out of character?

Q. The complaints about Mr. Ewasiuk's misconduct. Were you assuming those were out of character?

A. Yeah. I think the conduct, yeah, displayed in those boxes and those reports - - it seemed to me it was out of character.

Q. But you have no baseline because you didn't know Mr. Ewasiuk's prior character, did you?

A. That's true.

Q. So it's an assumption you're making in your assessment?

A. Yes.

Q. For instance, Mr. Ewasiuk told us that one of his symptoms was to filter phone calls that came from clients, and that would be consistent with your diagnosis of the depressive illness, right?

A. I'm not sure what you mean by filter phone calls.

Q. Filter. So as I understood his answer, he was saying he asked his staff to take messages when he was available because he couldn't deal with the client phone call.

A. Okay.

Q. And that would be symptomatic of a depression?

A. I think so.

Q. Later in cross-examination Mr. Ewasiuk said that that was a common practice of his before and after the depression.

A. Okay.

Q. Had Mr. Ewasiuk ever shared that with you - - that some of the things that he's accused of were actually a practice that pre-existed the depression?

A. No.

Q. Now, sir, Mr. Beresh asked you about concerns around Mr. Ewasiuk's supervising role and whether the depression contributed to that; and you said, I think it did - - these are my notes. I may be inaccurate.

> "I think it did. Essentially - - or he withdrew from all his responsibilities; a tendency to blame others is symptomatic".

Did I take those notes correctly?

A. I don't recall saying a tendency to blame others is symptomatic.

Q. Okay. Let me ask you about that then. Is it symptomatic in a depression for a patient to deflect responsibility for problems? To blame someone else for something going wrong?

A. Doesn't ring a bell with me. Not typically.

Q. No. So if a patient were not prepared to take responsibility for their conduct, that would be a matter of character rather than depression?

A. Yes.

Q. Now, when you were initially asked to review Mr. Ewasiuk by his family physician Dr. S., I understood that you concluded that Mr. Ewasiuk had a depression that had been present for at least a year or two?

A. Yes.

Q. And so September 8th, 2008, you concluded that the depression had been - - from your interview, it had been a year or two?

A. I said at least a year or two, yes.

Q. Right. And then I understand that after you'd received some information from Mr. Beresh and after you'd met with Mr. Beresh and his associate, it was only at your most recent interview with Mr. Ewasiuk on May 24th where Mr. Ewasiuk provided you with additional information that gave you the foundation to say it might even go back to 2003, is that right?

A. That's true. I think the - - the idea that it may have gone back earlier, in my mind, probably evolved over some time as I was continuing to meet with him over time.

Q. Now, if the Hearing Committee concludes that, in fact, there are character issues with Mr. Ewasiuk; that he lies to clients and that he doesn't take responsibility for his actions - - if you assumed that those are traits of Mr. Ewasiuk that - - I take it you don't assume that now in your diagnosis?

MR. BERESH: I object to the question. There was several in there "if the Panel concludes". Maybe we're going to have the question again, but I object to its present form.

THE CHAIR: Could you - -

MS. DIXON: I will restate it. I appreciate Dr. Rosie's had some significant hypotheticals put to him this morning, so I'll try to be more precise.

Q. You'll recall Mr. Beresh asked you a very long question with hypotheticals in it; and so what I'm trying to do is add some other factors and see if it changes your position. Let's say that Mr. Ewasiuk lies to clients to protect himself from liability for his own negligence. Let's assume he did that at least twice, and let's assume that he consulted with Kelli to plan to do it and that he hid it from his staff. Let's assume that Kelli worked with him to write up one set of documents to fool the client into thinking it was a legitimate settlement when, in fact, it was a deceitful settlement. Does that suggest to you that - - if those facts were true, would that inform you as to the character of Mr. Ewasiuk?

A. I - - it's hard for me to answer that question because I've already formed an idea of his character based on my experience of him.

Q. Okay. Would it be inconsistent with your current view of Mr. Ewasiuk's character that he would deliberately do the things I've just described?

A. Yes. Yeah. [transcript, pages 680-684] [Emphasis added]

402. The Member says that in the year or two before Dr. Rosie's initial consultation, i.e., in 2006 -2007 he couldn't sleep. He said he was "afraid". At no point until then had the Member indicated being frightened by his diabetes, his ostomy bag, his wife, his daughter, his long-serving staff and, especially, his assistant Ms. M.

403. The Member reported being anxious about this hearing. This was understandable given the potentially very serious consequences.

404. Considering our own professional practices, it would not be unusual or unlikely for a Member, having done what the Member had done, to be afraid - afraid that in 2006 and 2007 the Law Society of Alberta was closing in on the truth and substance of his deceit. It would be more probable than not for a lawyer in the Member's situation to be very afraid of the consequences of his professional wrongdoing.

405. It is more probable than not that the symptoms being reported to Dr. Rosie had much to do with the Member's anxiety about these proceedings. If anything, that anxiety was the precipitant for his depressive symptoms and the primary and dominant cause of the symptoms that Dr. Rosie observed and treated.

406. It is understandable that the Member found it impossible to deal with anything from the Law Society of Alberta, even telephone calls. The Law Society was making pointed and repeated requests that the Member deliver up specific files, including the phony settlement files.

407. The Member says about the citations against him that when he got the Law Society of Alberta letters, it was like a "block in the road and he just couldn't get by it", that he would cringe when the telephone rang. He says he told his conveyancer to deal with the discharge of the writs the subject-matter of his undertaking in connection with Citations 23 and 24. He says he told Ms. M. to rectify the trust shortfall. He told someone else to attend to the Form Ts. Someone else did not properly attend to service requirements for P.H.'s statement of claim. L.M.'s claim was missed, unbelievably, even though it was in the diary system. He expected his subordinates to attend to his practice and regulatory obligations and they did not, implying that they were derelict and that is not his fault. Besides, he remitted the trust money to N.V.'s lawyer so he should not be found guilty of breach of a court order. He eventually sent a CCT to the lawyer opposite showing discharge of the offending writs and expressly pointed out that this lawyer's clients had not suffered any prejudice.

408. [Material concerning private family health matters has been redacted]. Taking everything into account, we are asked to find the Member not guilty of any of these citations.

409. We cannot accede to this request because lying and blaming others are defects in character, not symptoms of depressive disorder.

410. In answer to Member's Counsel's direct question as to what insight the Member now has into why he did not respond to the Law Society, the Member is hesitant and halting and does not ultimately answer the question. [See transcript pages 448-449, excerpts above.] What the Member does say is that he finds now that he doesn't suddenly cringe when the telephone rings "as I did then". He says he would have his staff filtering his calls because he simply couldn't take them and he wasn't functioning very well. And some days he got nothing done at the office at all and a lot of things his staff performed, attempting to assist. The Member then says: "…all the while trying to be that tower of strength that I thought I was; that my clients believed that I was".

411. As for Practice Review, the Member repeats his complaint about the "hammering letters": "I felt that I complied. I think what they're referring to is a letter - - they would - - they sent me letters wanting a snapshot of my practice, as I recall. And, I had given them that initially. About a year went by, and then they wanted another one. It hadn't changed much …". [supra, transcript page 450] [Emphasis added]

412. This testimony is entirely consistent with the Member's written communications to Practice Review department and is consistent with this Hearing Committee's conclusion that the real reason the Member did not appropriately deal with the Practice Review department is that he had had enough of what he thought were its incessant letters.

413. The Member's attitude to Practice Review, the auditors, investigators and all Law Society of Alberta processes is reflected in the Member's combative reaction to most Law Society of Alberta communications: "totally unreasonable"; "constant harassment"; badgering"; "it seems that I do require legal representation"; "When will it end?" The Member's evidence, both oral and written, is conclusive, clear and cogent evidence of the Member's conscious decision that he was not going to cooperate because he thought he had complied and that was good enough and because he thought he was being harassed and badgered and the demands being made by the Law Society of Alberta were totally unreasonable and never-ending.

414. Fear about the outcome of these disciplinary proceedings more probably than not triggered the symptoms reported to Dr. Rosie and led Dr. Rosie to conclude, initially, that the symptoms had been ongoing for a year or two – during the time period in which the Law Society of Alberta was putting much time and resources into investigating the Member's files.

415. We are supported in this finding because (by the Member's own evidence), in the 2006-2007 timeframe the Member was happily involved and living with W.N., who was extremely supportive of the Member, was helpful and kind and was concerned and loving to the Member's daughters. Kelli was not in the Member's home.

416. It is the finding of this Hearing Committee that it was more likely than not that the dominant and primary cause of the Member's reported depressive symptoms was the Member's dread about the outcome of the Law Society of Alberta's investigations and subsequent disciplinary proceedings.

417. The Member's symptoms – although the same as some of the factors which underlie a diagnosis of a major depressive disorder – were also indicia of something else: fear – the fear of being caught. As practising lawyers, we accept that worrying about having deceitful and concealed actions detected by your regulator would be very distracting for the Member.

418. Major depressive disorder did not cause the Member to lie to and deceive his clients. Nor did it cause the Member to fail to serve his clients. Nor did it cause the Member to fail to replenish his trust account and allow a continuing breach of a court order and implied undertaking to opposite counsel. Nor did it disable the Member from calling back clients when a response was mandatory. Nor did it cause the Member to fail to respond to other counsel when responses were contemplated. Nor did it cause the Member's disrespect, discourtesy, passive resistance and active avoidance of the Law Society of Alberta's mandatory accounting rules, practice review department, regulators, auditors and investigators.

Citations 23 and 24

419. These allegations relate to a failure to respond to opposing counsel on a sale on behalf of client K. and failure to respond to opposing counsel on the civil litigation file. Further, it is alleged that the Member failed to comply with undertakings.

420. Formal Admissions by the Member, made at paragraph 30, acknowledge that he gave his solicitor's undertaking on June 23, 2005 which undertaking was to clear the title of non-permitted encumbrances including Writs by the Royal Bank of Canada.

421. Some six months later, on December 20, 2005, opposing counsel asked the Member to provide a copy of the Certificate of Title evidencing discharge of the Writs. The Member admits that opposing counsel followed up on February 2 and March 22, 2006 as a result of a complaint he had received from his clients' lender that the title remained encumbered by non-permitted encumbrances. Further, opposing counsel informed the Member that counsel for the Royal Bank of Canada had sent opposing counsel's clients a demand letter because the Royal Bank of Canada continued to have Writs of Enforcement on the new owners' Certificate of Title.

422. At paragraph 33, the Member states that he provided evidence of the discharge of the Writs to opposing counsel on June 28, 2006. The Member says he explained to opposing counsel that an intervening bankruptcy of the former owner (which had occurred in October 2005) had complicated matters.

423. LSA Counsel made the point that the undertaking was given in June of 2005 which was well before the assignment into bankruptcy in October of 2005. LSA Counsel says that this could have been dealt with well before the bankruptcy had the Member been sufficiently diligent.

424. A solicitor's undertaking is personal to the lawyer and is unrelated to any external events whatsoever. The Member eventually satisfied his undertaking and cleared title – a full year after he gave his personal undertaking to do so.

425. What is particularly disturbing about the facts relating to these citations is that it was a full six months between the time that opposing counsel said that his clients were being contacted about these non-permitted encumbrances and the date upon which the Member eventually provided the evidence of the discharges with an explanation about the bankruptcy.

426. The best that can be said of the Member is that he was careless and indifferent to the other lawyer's (and other clients') concerns. The Member said he told his conveyancer to fix the problem, more than once. In reality, the Member was unable or unwilling to exercise the skill of a reasonably competent solicitor and did not satisfy his undertaking within a reasonable time, given the circumstances. Bankruptcy is a common occurrence. In Alberta, bankruptcy issues in the context of real estate conveyancing are also very common.

427. The Hearing Committee finds that the Member knew or ought to have known that he, not his staff, would have to take steps either to pay money into court to clear title or that he, not his staff, would have to make a suitable alternate arrangement with the Trustee in Bankruptcy and the lawyer for the Royal Bank to clear title so that he, not his staff, could satisfy his undertaking.

428. The Hearing Committee finds that despite the escalating tone of urgency in the other lawyer's letters and the fact that innocent citizens – the new owners - were being brought into this long outstanding problem, the Member did nothing until counsel for the Royal Bank of Canada suggested the obvious solution.

429. It is the finding of this Hearing Committee that it was not until at least April 13, 2006, [Exhibit 130] when counsel for the Royal Bank of Canada suggested a solution to clearing title that the Member took any reasonable or substantive or positive steps to comply with the undertaking he had given under cover of his letter of June 23, 2005. [Exhibit 122] Before April of 2006, the Member was ignorant as to how to solve the problem or indifferent, or both.

430. Exhibit 154 references a May 16, 2006 telephone conversation between Connie (of the Member's office) and the bankruptcy trustee, this telephone conversation resulting in the Member's letter of May 17, 2006 (Exhibit 154) which made payment to the bankruptcy trustee and ultimately resulted in the Royal Bank of Canada's agreement to discharge the non-permitted encumbrances.

431. One letter from David Handerek to the Member is marked (in bold) "URGENT" and is dated March 22, 2006. [Exhibit 127] Another URGENT letter from Mr. Handerek to the Member is dated March 31, 2006. [Exhibit 128] There is no indication that the Member responded in any fashion to Mr. Handerek's urgent requests until providing the evidence of the discharges in June of 2006. While there is some indication that one of the Member's conveyancers advised Mr. Handerek's office that there were numerous difficulties concerning clearing the title "but that it would be cleared", this staff communication is wholly insufficient and completely unresponsive to Mr. Handerek's written and escalating concerns.

432. Exhibit 133 is the Member's July 11, 2006 response to the Handerek complaint to the Law Society. This response attempts to excuse or minimize the seriousness of his conduct when he says: "At no time was Mr. Handerek's client in jeopardy and the transaction is completed and fully reported on to Mr. Handerek. This was done June 28, 2006 (copy enclosed)."

433. This Hearing Committee finds that it is not an excuse or an explanation for a Member of this profession to say that because there was "no harm done" therefore there is no basis for guilt. To the contrary, the Code of Professional Conduct, the Law Society of Alberta and the Court of Appeal have all made it perfectly clear that the giving of an undertaking is a most solemn obligation that must be fulfilled in accordance with the terms of that undertaking. At no time did opposing counsel agree to amend the terms of the undertaking given by the Member. The amount of time between the Member's giving of the undertaking (June 23, 2005: Exhibit 121) and the satisfaction of the undertaking by the Member (June 28, 2006: Exhibit 133, enclosure) is inordinate and inexcusable.

434. Taking all evidence into account and reflecting upon the Member's viewpoint that there was no prejudice to Mr. Handerek's clients and thus seeking to excuse the inexcusable, this Hearing Committee finds the Member guilty in respect of Citations 23 and 24 and finds the Member's conduct deserving of sanction.

Citation 25

435. This alleged that the Member failed to properly supervise his staff. The Law Society of Alberta has called no evidence in respect of this allegation. There being insufficient proof to make a finding of guilt, this citation is dismissed.

Citations 26 to 28

436. As previously discussed, these citations relate to the P.H. phony settlement and allege that the Member failed to serve the client's Statement of Claim within the limitation period and that the Member misled his client P.H. into believing he had settled her claim with the insurance company. Citation 28 alleges a failure to respond to the insurance company adverse in interest, in a timely fashion.

437. The Member's Formal Admissions at paragraphs 34-37 (Exhibit 303) state (in part) that the insurer had requested through numerous successive communications a further medical report concerning P.H. which the Member had promised to the insurer. The Member says:

> "As I replied to none of these letters, the insurer retained counsel, who noticed that the Statement of Claim had expired through want of service on the Defendants. That counsel set down an application to strike the claim."

438. It is not the invariable or unqualified duty of a lawyer to respond to non-client communications received from a party adverse in interest. Therefore, this Hearing Committee is not satisfied that the Member's failure to respond to the insurance company – which was adverse in interest – is sanctionable conduct. Accordingly, the Member is found not guilty of Citation 28.

439. The Member admits that he consented to the formal discontinuance of P.H.'s claim and paid P.H. a sum of money from his own funds, "saying that this amount was settlement proceeds".

440. The Member asserts that had this claim been litigated the Member believes that a reasonable settlement of this lawsuit would have been between $6,000.00 to $7,000.00 gross. He concludes by saying that P.H. "has never complained to anyone about being unhappy with the amount of settlement."

441. The Member's professional obligation was to loyally and honestly serve his client. A lawyer must report all communications the lawyer has with others, promptly, fully and fairly. It is the lawyer's obligation to effect bona fide settlements of his clients' claims. It is the duty of a lawyer to be honest and it is the lawyer who owes the highest degree of fidelity to his client. A lawyer must give comprehensive and comprehensible advice as to why the lawyer has reached a professional opinion in respect of the client's legal problem.

442. It is astonishing that the Member seems to invite this Hearing Committee to excuse his deceitful and deliberate behavior by stating that the money paid by him to P.H. (and L.M.) was equivalent, in his own opinion, to a fair and reasonable settlement; therefore, "no harm, no foul".

443. Member's Counsel urges that this behavior is similar to the circumstances in Re Beresford, [1994] O.C.P.S.D. No. 6, in which a medical doctor was diagnosed as having a manic depressive disorder with an "acute manic episode" concerning a patient. The expert evidence included an opinion that this physician, while in a manic phase when the events described occurred, was not capable of appreciating that his behavior was wrong or unacceptable and that his judgment and insight were severely impaired.

444. It is noted that the physician entered a plea of guilty and that the disciplinary committee accepted the plea and made a finding of guilt.

445. This Hearing Committee does not find that the Member was incapable of appreciating that his behavior was wrong or unacceptable and this Hearing Committee does not find that the Member's judgment and insight in connection with the L.M. and P.H. incidents was "severely impaired by acute mental disorder". Rather, the Member over a period of time came to realize the fatal errors in his service to these clients, discussed these fatal errors with his wife, constructed a resolution to these problems which involved making payments out of his own pocket and, finally, in 2003 and 2004 created documents with the express intention of completely misleading his clients as to the true state of affairs. To achieve his desired result he met personally with each of these clients in furtherance of the deceit.

446. Re Beresford is wholly distinguishable from the present case.

447. A case which discusses incompetence is Law Society of Alberta v. Anderson [1996] L.S.D.D. No. 302 wherein at para. 9 the Hearing Committee's decision is summarized by saying that the Hearing Committee considered the application of the "but for" test as enunciated in Zinkhofer. Without adopting it specifically as a test for cases of the kind before it, that Hearing Committee found that while that Member was suffering from depression they were not satisfied that the acts complained of would not have happened "but for" the depression. The Hearing Committee concluded that while that Member was under financial stress, the inability to face such problems did not justify the actions which gave rise to the charges.

448. That Member appealed to the Benchers for an order under the incompetence provisions of the *Legal Profession Act*, or, alternatively, for a decision that the disbarment penalty was too severe and to substitute a suspension in its place.

449. After reviewing the *Legal Profession Act*, the Benchers on appeal rejected the incompetence argument as inapplicable to this lawyer, who by all accounts was very competent. The Benchers, however, considered a list of factors and came to the conclusion that disbarment was too harsh a sanction in the circumstances.

450. The Benchers on appeal said at page 8, para. 24:

> "In any event, we agree with the Hearing Committee that the conduct complained of did not arise from incompetence. The question of competence in the context of the Legal Profession Act deals with the ability of the Member to practise law. To be incompetent, the Member must either lack the knowledge or skill to carry on the practice of law, or must be prevented from applying that knowledge or skill because of a mental or physical disability which would include a disability caused by addiction. The determination of incompetence in disciplinary proceedings is always made in the context of the conduct deserving of sanction and accordingly, the finding may be with respect to a specific area or certain conduct on the part of the Member, as opposed to the practice of law generally. In any event, this is not a case of incompetence. Indeed, this Member is a very able practitioner and the fact that some illness may have contributed to his aberrant behaviour does not mean he was or is incompetent." [Emphasis added]

451. Clarence Ewasiuk was not prevented from applying his knowledge or skill because of a mental or physical disability. Quite to the contrary, the Member did in fact apply his unique knowledge and skill as a lawyer to deceive his clients.

452. In the Fletcher decision [1996] L.S.D.D. No. 271, Member's Counsel points to para. 14 of that decision in which the Hearing Committee says that in considering the causal connection between alcohol and the misconduct, "… the Committee acknowledged that the test or standard requires evidence of substantial substance abuse, which is demonstrated to have been the direct or dominant cause of the misconduct".

453. In Fletcher, the Hearing Committee accepted the submissions of the expert that the Member was incompetent to practice law by reason of his dependence upon alcohol: "but for his depression and alcohol addiction, none of this would have occurred".

454. The Member has not persuaded us that any symptoms of depression which he may have suffered throughout the period the subject matter of 33 citations were either the direct or dominant cause of the Member's misconduct. Rather, it is the finding of this Hearing Committee that the direct and dominant causes of the Member's misconduct were a self-interested desire to avoid the consequences of the professional negligence and breaches described in the citations and his displeasure with the Law Society's demands.

455. It is noted that the Member Fletcher was charged with abandoning his law practice and breaching the rules respecting accounts. Far from abandoning his law practice, which on any score would be considered to be aberrant and not consistent with a competent practising lawyer, the Member continued to operate a thriving law practice.

456. In Nickless [2010] L.S.D.D. No. 203, the Member admitted guilt in respect of most of the pending citations.

457. In Nickless, the Hearing Committee made a specific declaration that the misconduct of the Member arose from incompetence as a result of drug addiction. The citations against the Member included allegations that he "engaged in bizarre public behavior at the Fort McMurray Courthouse"; "that he engaged in inappropriate courtroom behavior before the Provincial Court of Alberta"; "that he engaged in inappropriate courtroom behavior before the Court of Queen's Bench of Alberta and elsewhere in the Calgary Courthouse"; "that he failed to properly handle trust funds of a client"; "that he was addicted to drugs and that as a result he inappropriately handled client funds"; and included several citations having to do with failures to be candid with the Law Society of Alberta and failing to properly serve clients, as a result of his drug addiction.

458. The Nickless Hearing Committee found that four separate citations alleging very serious misconduct – whereby the Member was incapable of properly representing his clients in Court – arose as a result of his drug use. This is completely distinct and distinguishable from the facts in the present case. Nickless' Counsel described Nickless as "hitting rock bottom".

459. Nickless was found guilty on all 14 citations. When the hearing turned to the sanctioning phase, LSA Counsel and Member's Counsel made a joint submission in respect of the appropriate sanction. It was the Law Society of Alberta's position that Nickless' misconduct arose from his incompetence by reason of his addiction to narcotics and prescription drugs. This is not the position of LSA Counsel in the present proceedings.

460. Moodie [1998] L.S.D.D. No. 142 speaks to the need for clear evidence preferably supported by expert evidence where matters have been clearly diagnosed, that the symptoms of the illness caused incompetence and the symptoms of the illness were a direct or dominant cause of the misconduct.

461. In Merchant, [2008] L.S.D.D. No. 129, a sitting Master characterized the Member's conduct as: "helpless ineptitude and disorganization rather than deceit". It is noted by that Hearing Committee that that Member was very junior at the Bar and that his demonstrated incompetence was transactional rather than general or chronic. That is entirely distinguishable from the present case.

462. It is the finding of this Hearing Committee that in respect of the L.M. and P.H. matters, incompetence by reason of mental disorder did not prevent the Member from applying the knowledge or skill required to practise law, and did not prevent him from knowing right from wrong. The Member employed very sophisticated processes to avoid having to tell his clients the truth or report his professional errors and the Member knew then that what he did was wrong.

463. In Marullo, [1996] L.S.D.D. No. 290, the citations for which convictions were entered included a failure to properly advise and represent clients and a failure to treat colleagues and the Court with courtesy and respect.

464. The conduct described in Marullo is distinctly different than the allegations of deceit facing the Member in this hearing. The Hearing Committee in Marullo took note that while finding guilt, Mr. Marullo was suffering from severe depression and stress at the time of the incidents and took this into account in not levying a penalty of the severity that it would otherwise consider appropriate.

465. Factors that may mitigate sentence do not here vitiate a finding of guilt or a finding that the Member's conduct is deserving of sanction.

466. Assessing the risk of harm to a client is a core activity of a practising lawyer. Clients entrust lawyers to make such assessments because they are incapable of assessing risk for themselves, having no education or expertise in such matters.

467. This Hearing Committee repeats here what has ably been said by others: The inability of citizens to evaluate either the content or the quality of legal services creates a fundamental requirement for the existence, in any citizen's transactions with the legal system, of a third presence – an organization with both the expertise to evaluate the citizen's legal expert and – and here is the rub – the power to regulate and thus control that expert. [S.R. Ellis, Q.C., the Paralegal Task Force Report of March 2000 prepared by the Law Society of Upper Canada.] [Emphasis added]

468. When the Member lied to and deceived his clients, making representations with the objective of misleading them to believe in a state of affairs that was not true (all of which is admitted, not denied) by telling them the money he gave them "was from the insurance company", implicit and embedded in that deceit was his professional lawyerly advice that the monies paid were a reasonable sum of money to be paid for their respective personal injury claims and, further, that he had fully and faithfully discharged his professional duties of honesty, loyalty and fidelity.

469. The Member perpetrated the ultimate deceit because his clients had no basis upon which they could independently evaluate whether the Member's representations were true (they were not) or whether his advice was sound (not established) or whether he was telling the truth (he was not) or whether he was acting in their best interests (he did not – he let their claims become statute-barred) or whether the Member was acting free of conflicting interests (he was not; instead he was favouring his own interests – by lying to avoid lawsuits by clients and having to report himself).

470. A consumer of legal services who retains a lawyer is seeking appropriate and honest legal guidance precisely because he or she does not have the requisite knowledge or information to attend to their own legal problems.

471. These clients, L.M. and P.H. were unable to avoid the deceit visited upon them and were unaware of the Member's disgraceful, sanctionable conduct because they had no basis upon which to evaluate the quality or integrity of the Member's services. These clients trusted their lawyer. These clients were entitled to trust their lawyer. These clients were

deceived by their lawyer – a most profound and fundamental breach of the Member's ethical obligations. Sadly, the Member does not express any real appreciation for the content, the depth or the gravity of his egregious conduct.

472. The American Bar Association Guidelines say this: "The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the Court is undermined when lawyers engage in illegal conduct." (at page 36) … "A lawyer who engages in any of the illegal acts listed above [intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, theft, anything involving dishonesty, fraud and deceit and so on] has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity. This duty to the public is breached regardless of whether a criminal charge has been brought against the lawyer. In fact, this type of misconduct is so closely related to practice and poses such an immediate threat to the public that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate discipline to be imposed." [emphasis added]

473. The guidelines go on to say: "In imposing final discipline in such cases, most Courts impose disbarment on lawyers who are convicted of serious felonies." (at page 36)

474. G. McKenzie, in Lawyers & Ethics: Professional Responsibility and Discipline, at pages 26 to 45, refers to the unreported decision of Re Milrod: "In cases involving fraud or theft, in spite of evidence of prior good character and financial or other pressures, lawyers are almost certain to be disbarred … thus the profession sends an unequivocal message in the interests of maintaining public trust and the reputation of the profession." [Emphasis added]

475. The preface to the Alberta Code of Professional Conduct says that two fundamental principles underlie the code and are implicit throughout its provisions: First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. [emphasis added] Second, a lawyer's conduct should be above reproach." The Member's conduct, in lying to his clients and faking bona fide settlements with the express objective of deceiving his clients into believing that he had discharged all of his professional obligations with propriety and competently, was deceitful and deliberate.

476. The Hearing Committee finds that the purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system and the legal profession.

477. This Hearing Committee finds that the Member has not discharged his most solemn obligations of candor, honesty and integrity. Accordingly, the Hearing Committee finds

the Member guilty of the allegations set out in Citations 26, and 27 and that such conduct is deserving of sanction.

Citation 28

478. Citation 28 alleges that the Member failed to respond to communications from the insurance company that contemplated a reply and that such conduct is conduct deserving of sanction.

479. There being insufficient evidence in respect of Citation 28 to meet the Law Society of Alberta's burden of proof, this Hearing Committee finds the Member not guilty of Citation 28.

Citation 29

480. Citation 29 alleges that the Member failed to serve his clients M.G. and D.V. in a conscientious, diligent and efficient manner and that such conduct is conduct deserving of sanction.

481. Having considered all of the evidence and the nature of the lawsuit, there is insufficient evidence to satisfy the Law Society of Alberta's burden of proof; accordingly, this Hearing Committee finds the Member not guilty of Citation 29.

Citation 30

482. Exhibits 183-224 relate to Citation 30, namely that the Member failed to respond in a timely manner to communications from his clients M.G. and D.V. in a conscientious and diligent manner and that such conduct is conduct deserving of sanction. This lawsuit concerned property damage occurring after a purchase and sale contract. The defendants were the vendors. The vendors assigned themselves into bankruptcy during the currency of the lawsuit. That created the complication of having to deal with the Trustee in Bankruptcy to continue the lawsuit. There was also some suspicion on the part of the Member's clients that the bankrupts had improperly assigned because they had hidden or disposed of valuable assets at or about the time of their assignment into bankruptcy.

483. Citation 30 does not deal with the manner in which the Member conducted the lawsuit, per se. That issue has been dealt with in relation to Citation 29; the Member being found not guilty. Rather, Citation 30 deals with the manner in which the Member chose to respond to communications from his clients that contemplated a response.

484. The testimony of client D.V. is that every day for two weeks, client D.V. called to ask to speak to the Member about the subsisting lawsuit against the vendors of their property. In answer to Member's Counsel's question about how it was that D.V. was sure of his calling each day for two weeks, D.V. testified that he distinctly recalls doing so because, he says, it became a sort of game – to see if the Member would respond. The testimony is that at first the other client M.G. called the Member a few times a week, then M.G. asked D.V. to call every day. D.V. says his phone records would verify this daily calling

log. D.V. said they were wanting this matter to be set for trial and wanted the Member to take steps to set it down for trial. When asked whether a call back was received from the Member during the time M.G. had been phoning a couple times a week and D.V. had been phoning every day, D.V. said: "Negative" [transcript, page 264, lines 3-27.

485. As potentially annoying as it is might be for a client to call every day for two weeks when they had been calling a few times a week prior to that, after a certain point the failure to respond slides into a refusal or a conscious choice not to respond and, in that eventuality, becomes conduct deserving of sanction. It is always a question of degree; however, this Hearing Committee accepts that for not less than 3 weeks the clients called with much frequency and the Member did not respond. That is not timely.

486. Eventually, these clients asked for their file and it was retrieved. They testified that the lawsuit against the vendors never proceeded after they took back their file because they could not find another lawyer willing to take it.

487. This Hearing Committee accepts that these clients presented as difficult clients. We can also accept that these clients were less than diligent about paying their lawyer's bills. And, we can accept that these clients were asked to provide information to the Member about the "hidden assets" allegations against the vendor and they, themselves, caused delays in the litigation. We accept that for a myriad of reasons the Member found it most difficult to deal with these clients.

488. These factors do not answer the charge of failing to respond in a timely manner to communications from the client that contemplated a reply. It was the Member's prerogative to cease to act; in fact, it may have been the Member's duty to cease to act if the clients had indicated or intimated that they had lost confidence in the Member. Lawyers with any experience know that there are simply times when the lawyer-client relationship becomes so difficult that it is not in the client's best interests for that relationship to continue. Clearly, the Member did not cease to act and continued to owe his clients an obligation to respond promptly.

489. Although M.G. and D.V. could not produce a calendar upon which a record had been made of their calls to the Member, this does not detract from the distinct memory of D.V. that he made a "game of it" by calling daily.

490. The Member was frank in his testimony that there were times when he did call these clients back and times when he did not. The Member cannot point to a note or memo to file during the period of time just before the clients retrieved their file that would memorialize that he did, in fact, make a call back in the face of their increasingly insistent demands. The Member has admitted that, in general, his memory may have been impaired during this period and so, on the requisite balance of probabilities, this Hearing Committee finds that it is more probable than not that he did not respond.

491. As previously stated, this Hearing Committee finds the Member guilty of Citation 30 and finds that the Member's conduct is conduct deserving of sanction.

Citations 31, 32 and 33

492. There being insufficient evidence for the Law Society to meet its burden of proof, the Member is found not guilty of these citations.

J. THE FUTURE

493. The Member says that the problems which he claims caused him to lie have now been resolved and he will not offend again. The Member says that prior to these aberrations, he was a lawyer of good character and that further sanction would be little short of tragic for him, his family and his future.

494. While all of these matters are relevant and should be considered perhaps none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.

495. Given that the primary purposes of disciplinary proceedings are found in Section 49(1) of the *Legal Profession Act*, and these are the protection of the best interests of the public and protecting the standard of the legal profession generally, while the findings of guilt on some or all of the citations may seem harsh, this Hearing Committee has throughout borne in mind this purposeful approach to disciplinary proceedings.

496. It was noted in Bolton v. Law Society, *supra*, that: "A profession's most valuable asset is its collective reputation and the confidence which that inspires."

497. The Member has seriously harmed the collective reputation of the legal profession and has substantially diminished the confidence that inspires this most valuable asset. The Member's misconduct is extremely serious and very troubling to this Hearing Committee.

498. This hearing will reconvene to consider sanction and all remaining collateral matters.

DATED this 4th day of November, 2011.

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Frederica Schutz, Q.C. (Chair)

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James Glass, Q.C. (Member)

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Larry Ackerl, Q.C. (Member)

DECISION ON SANCTION

On January 6, 2012, the Hearing Committee reconvened to decide the appropriate sanction. After hearing evidence and argument the Hearing Committee directed the member be disbarred and ordered to pay the actual costs of the hearing in the amount of $17,945.02. The Hearing Committee will provide written reasons for its decision. The reasons will be published when released.