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

SANCTION PHASE REPORT

K. SANCTION PHASE REPORT

499. On January 6, 2012 LSA Counsel and Member's Counsel made submissions in respect of sanction and collateral matters.

Law Society of Alberta Submissions

500. LSA Counsel confirmed that the Law Society of Alberta seeks disbarment. LSA Counsel submitted that the grounds for seeking disbarment relate to integrity issues and ungovernability. It is submitted that the record of these proceedings shows signs of ungovernability as early as 1990 and, further, the Member had plenty of time to consider his activities because the second phony settlement occurred long after he had had time to reflect on the impropriety of the first phony settlement. The P.H. phony settlement occurred in February of 2003 whereas the L.M. phony settlement did not arise until May of 2004.

501. Thus, it was over one year after the first phony settlement that the L.M. incident occurred and LSA Counsel submitted that the timeline is very significant. In particular, the practice review processes of the Law Society of Alberta started before the second phony settlement occurred. In addition, in August of 2003 the Member was involved in a formal conduct hearing at which he was found guilty – at the same time as formal practice review was ongoing and after the P.H. phony settlement. It is submitted that the Member had time to reflect on his conduct and perpetrated the 2004 phony settlement notwithstanding.

502. LSA Counsel provided authorities, including:

- Law Society of Alberta v. Nicholson [2010] L.S.D.D. No. 43;
- Law Society of Alberta v. Homberg, LSA File No.: HE 20090082;
- Law Society of New Brunswick v. Michael A. Ryan [2003] 1 S.C.R. 247, 2003 S.C.C. 20;
- Law Society of Alberta v. Geisterfer [2008] L.S.D.D. No. 166.

503. In the Ryan decision, *supra*, the Supreme Court of Canada reviewed an appeal from a Law Society of New Brunswick Discipline Committee and directed that its decision to disbar be restored, in place of the Court of Appeal's substitution of its own sanction of indefinite suspension with conditions for reinstatement. The Supreme Court of Canada found that the Discipline Committee had considered and weighed conflicting medical evidence concerning Mr. Ryan and had concluded, even in light of this fresh evidence, that the reasons originally given for disbarring Mr. Ryan were still correct.

504. The complaint against Mr. Ryan concerned two clients who had sought legal advice with respect to their dismissal by their employer. It is said that for five and a half years Mr. Ryan did nothing to advance the claims. To disguise his inattention to his client's

interests, Mr. Ryan spun an elaborate web of deceit. He lied to his clients by making it seem as if he was taking action on their behalf and placing the blame for delays on others. This deception included giving his clients a forged decision of a New Brunswick Court of Appeal purporting to deal with their case. Further, Mr. Ryan falsely told his clients that a contempt motion against the Defendants was granted and that his clients had been awarded money in connection with that successful motion. Mr. Ryan then invented significant delays and appeal periods that prevented his clients from collecting on their successful motion. Ultimately, Mr. Ryan admitted to his clients that the "whole thing was a lie" at which time the clients filed a complaint with the Law Society. After the initial disbarment decision, Mr. Ryan appealed and brought a motion to adduce medical evidence to show that he was under a mental disability contributing to his misconduct. Notwithstanding the admission of the new evidence, the Discipline Committee affirmed its earlier decision that disbarment was the appropriate sanction.

505. Mr. Ryan testified that he suffered emotional and physical health problems following a separation from his wife that occurred during the material time, that he had abused alcohol and, also, that he had panic attacks for which he took medication. He then suffered a bout of mononucleosis and when he finally recovered from that illness, he believed that the limitation period for his clients' action had expired. The decision says: "Instead of confronting his clients, he 'buried the file'".

506. Mr. Ryan met once with a psychiatrist who gave him a prescription for a pharmaceutical product but Mr. Ryan never filled the prescription. Except for this one meeting and the continuing treatment for his anxiety attacks, Mr. Ryan did not seek any medical or therapeutic intervention during the relevant period.

507. At pages 30-31 of the Supreme Court of Canada's decision [2003 SCC 20], at paragraph 58, the reasons for the Discipline Committee confirming the penalty of disbarment included the following findings and premises:

> "(1) even though the professional self-government regime requires that each case must be decided on its own facts, it is nonetheless relevant that Mr. Ryan's breaches of professional ethics were similar to ones for which professional disciplinary bodies have previously imposed a sanction of disbarment;
>
> (2) Mr. Ryan's conduct amounted to a "serious and egregious breach of his professional conduct and responsibilities";
>
> (3) forging court documents undermines public confidence in the legal system and is so improper that only significant and compelling factors would mitigate the seriousness of such unethical behaviour;
>
> (4) the evidence presented in mitigation was not compelling;

(5) when the duration of Mr. Ryan's deceit was considered against the backdrop of his previous disciplinary record, it was clear that his honesty, trustworthiness, and fitness as a lawyer were irreparably compromised."

508. The Supreme Court of Canada noted that there is "… nothing unreasonable about the Discipline Committee choosing to ban a Member from practising law when his conduct involved an egregious departure from the rules of professional ethics and had the effect of undermining public confidence in basic legal institutions."

509. In the matter of the Law Society of Alberta v. Nicholson, *supra*, the lawyer failed to tell a client about an adverse Court ruling. The case report states (at paragraph 22) that the lawyer misled her client about what had actually transpired during a case management meeting, then lied to her client again and told her that another lawyer's letter was not accurate and further stated that no applications had been heard and that no orders had been granted by the Court of Queen's Bench of Alberta. Eventually, the lawyer contacted her client by telephone and confessed these lies.

510. In Nicholson, after the Hearing Committee reviewed numerous previous decisions cited therein, the Hearing Committee considered various factors to be taken into account when deciding how the public interest should be protected, including:

(a) The nature and gravity of the proven misconduct, including the number of times it occurred;

(b) Whether the misconduct was deliberate;

(c) Whether the misconduct engages the Member's honesty or integrity;

(d) The impact of the misconduct on the client or other persons affected;

(e) General deterrence of other members of the legal profession;

(f) Specific deterrence of the Member from engaging in further misconduct;

(g) Punishment of the Member;

(h) Whether the Member has incurred other serious penalties or financial loss as a result of the circumstances;

(i) Preserving the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members;

(j) The public's denunciation of the misconduct;

(k) The extent to which the offensive conduct is clearly regarded within the profession as falling outside the range of acceptable conduct; and,

(l) Imposing a penalty that is consistent with the penalties imposed in similar cases.

511. In addition, the Hearing Committee in Nicholson considered mitigating circumstances that may temper the sanction to be imposed, including:

(a) The Member's attitude since the misconduct occurred;

(b) The prior disciplinary record of the Member including whether this is a first offence;

(c) The age and inexperience of the Member;

(d) Whether the Member has entered an admission of guilt, thereby showing an acceptance of responsibility;

(e) Whether restitution has been made to the person harmed; and,

(f) The good character of the Member, including a record of professional service.

512. In Nicholson, the lawyer confessed her wrongdoing to her client and steps were taken that ultimately counteracted any potential harm that could have been done by the lawyer's deceit. LSA Counsel points out that the lies were not harmless as they had the potential to put a child in danger. In Nicholson, there was no issue with governability.

513. In the Homberg decision, *supra*, the lawyer took retainers in British Columbia. The lawyer sought exemption from payment of mandatory liability insurance and provided his undertaking not to practise in Alberta without further notice. The Member elected to go on to the inactive, non-practising list, again with his acknowledgement and undertaking not to practise. Thereafter, in breach of his undertaking, the lawyer did practise in British Columbia.

514. In the Homberg case, the Law Society sought disbarment. Numerous decisions were considered, including Nicholson.

515. At paragraph 66 on page 17 of the Homberg decision, the Hearing Committee found that Mr. Homberg rationalized his appearances in the criminal matters and his non-disclosure of the criminal matters to the Law Society of British Columbia on the basis that they were mere agency matters. The Hearing Committee concluded: "These rationalizations are concerning to us, but even more concerning is that some matters could not be rationalized."

516. In ultimately deciding that Mr. Homberg's essential good character was intact and he was governable, the Hearing Committee decided not to disbar Mr. Homberg but imposed a significant sanction of a nine month suspension to denounce the conduct, protect the public confidence in the legal profession and affirm the importance of a lawyer's word.

517. At paragraph 69, it is noted that Mr. Homberg was depressed and was having problems with his mood and ability to concentrate at the time of his misrepresentation to the British Columbia Provincial Court as to his ability to practise law. It is said that Mr. Homberg operated "… under a fog of some sort until he stopped taking the anti-depression medication."

518. The Homberg Hearing Committee found that the impact of the medication did play a role in that lawyer's misconduct. It was found that Mr. Homberg understood that what occurred was wrong and why it was wrong, the Hearing Committee ultimately deciding that this lawyer was at a very low risk of finding himself in similar circumstances again or behaving as he did during the events under consideration. The Hearing Committee stated that while such factors do not excuse the lawyer's conduct, such factors must be considered in deciding what sanction ought to be imposed.

519. LSA Counsel pointed out that Homberg was found to be governable; therefore, Homberg was not disbarred.

520. In the Geisterfer decision, *supra*, the lawyer's trust account was misused in the commission of a fraud in which the lawyer was not involved.

521. The Hearing Committee found that Mr. Geisterfer was imprudent and incautious with respect to his trust account and his receipt and disbursement of funds. The Member admitted guilt in respect of the breach of an undertaking given to another Member of the Law Society and, further, that he deliberately misled two other Members of the Law Society of Alberta, all with respect to a single real estate transaction and a holdback amount that he was to have maintained in his trust account.

522. The Member had no disciplinary record.

523. LSA Counsel noted that Mr. Geisterfer's conduct related only to one transaction and that that Member had no record. That Hearing Committee found that Mr. Geisterfer was a low risk to re-offend on integrity-related matters. Thus, the Hearing Committee concluded that denunciation and general deterrence were the prevalent messages needing to be sent.

524. LSA Counsel submitted that, in contrast, Mr. Ewasiuk's conduct is a graphic illustration of ungovernability: Mr. Ewasiuk was not responsive to Practice Review processes and committed offences during Practice Review's engagement. It is submitted that Mr. Ewasiuk did not respond to the finding of guilt in August of 2003 and committed offences after August of 2003.

525. The Geisterfer Hearing Committee noted that the purpose of disciplinary proceedings as set out in Section 49(1) of the *Legal Profession Act* is to protect the best interests of the public and to protect the standing of the legal profession generally.

526. In considering mitigating factors, the Geisterfer Hearing Committee decided that relevant factors were not in any way an answer to the citations but they did lead to the conclusion that a suspension was not warranted in this particular case, notwithstanding the deliberate nature of the Member's conduct in respect of the breach of undertaking and misleading other lawyers.

527. In the result, Mr. Geisterfer was ordered to pay fines and was given reprimands, the Hearing Committee noting that it was necessary to send a strong message denouncing this Member's conduct and a message of general deterrence with respect to this kind of misconduct.

528. In Geisterfer, the Hearing Committee cited Law Society of Alberta v. Smith and agreed that deliberate deception connected with practising law would ordinarily give rise to a suspension, at minimum: honesty and integrity are fundamental to practising law and instances of deception will usually involve the need for clear general and specific deterrence and the denunciation of the misconduct.

529. Mr. Geisterfer has no disciplinary record.

530. After commending these cases to us, LSA Counsel concluded by stating that the decision in Bolton is both apt and applicable to the present circumstances. In Bolton v. Law Society, [1994] 2 All ER 486 at 492 (C.A.), Sir Thomas Bingham MR for the Court says:

> "It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. … In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled, but denied re-admission. If a member of the public sells his house, very often

> his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

Member's Submissions

531. Member's Counsel commenced his submissions by stating that the Member takes a position that is diametrically opposed to that of the Law Society of Alberta. Member's Counsel stated his intention to comment on LSA Counsel's submissions, Mr. Ewasiuk's history, the relevant case law, sanctions and the appropriate disposition which, it is submitted, is not disbarment.

532. Member's Counsel took issue with the opinions expressed by this Hearing Committee in paragraphs 493-497 of its written reasons and trusted that these comments were not foreshadowing.

533. Member's Counsel commended this Hearing Committee to paragraph 371 of its written reasons in which it is said that any influence life stressors or depressive mood had on the Member's conduct could be addressed in the sanctioning phase of this hearing.

534. Member's Counsel urged this Hearing Committee to consider the public's perception of this case and the appropriate sanction when considered by the well-informed citizen, a different perspective than that of the vindictive or the fear-mongering citizen. Member's Counsel asked this Hearing Committee to consider whether the well-informed citizen will lose faith in the legal profession and the Law Society of Alberta's conduct processes, if there is no disbarment in this case.

535. Member's Counsel submitted that the public would respect the Law Society of Alberta's regulatory process if, in fact, there was no disbarment. It is submitted that disbarment must be a sanction of last resort and is tantamount to an acceptance of failure.

536. Member's Counsel submitted that while this is a case touching upon the honesty and integrity of the Member, this is not egregious misconduct – only unacceptable: unacceptable in a context that is far less egregious, for example, than the facts set out in the Ryan case, wherein Ryan's conduct was elaborate, complex and involved numerous acts of deceit.

537. It is said that this would be quite a different case to decide if this was a Member of only two or three years' standing at the Bar. In contrast, Mr. Ewasiuk is a 1980 call and has had a very lengthy career as a practising lawyer.

538. Thus, in context, the Member's acts of misconduct did not subsist for a lengthy period of time, given that his Bar call was in 1980.

539. It is submitted that up until about the period of time during which the citations arose, the Member's life was stable and his conduct as a lawyer was honourable.

540. In connection with the Member's record, it is noted that in each case the Member was assessed a fine; accordingly, the so-called "step principle" is an appropriate and applicable sanctioning factor which may compel a further short period of suspension, not disbarment.

541. With reference to paragraph 320 on page 97 of this Hearing Committee's written reasons, Member's Counsel points out that the Member's problems were far more serious than those expressed or experienced by others in other cases.

542. Member's Counsel reminded this Hearing Committee of Ms. M.'s evidence commencing at page 154 of the transcript from the hearing and submitted that credibility is not an issue with this witness. It is further submitted that her observations regarding events in 2003 clearly indicate that the Member was suffering problems relating to his ability to focus, his memory, his ability to work and that he had lost interest in his law practice.

543. Ms. M. related that this was a very stressful time for the Member, he could not achieve much by way of completing work and that he was prone to inappropriate outbursts. Ms. M. testified that the changes she saw in Mr. Ewasiuk affected his ability to concentrate, to focus and remember things, there was a gradual effect over time and it got progressively worse.

544. During cross-examination by LSA Counsel, Ms. M. testified that she saw some of these symptoms before she went on maternity leave [in June of 2003] but not nearly as bad as when she returned from maternity leave [likely in June of 2004, about a year later when her benefits ran out].

545. Before Ms. M. left her employment with the Member, in 2006, she testified that towards the end she noticed that the Member's interest in meeting with clients declined, his interest in speaking to clients on the phone declined and his ability to deal with issues on files was affected. Ms. M. describes "mothering" the Member in his law practice.

546. When Ms. M. was asked whether it got to the point that Ms. M. was concerned about Mr. Ewasiuk's ability to serve his clients and provide his clients with the service they needed, Ms. M. replied: "somewhat".

547. Member's Counsel submitted that these observed problems must have had an effect on the Member's judgment and his ability to make appropriate decisions and this Hearing Committee must carefully consider whether the perpetration of the phony settlements

arose by reason only of a lack of diligence stemming from the Member's impaired emotional status.

548. Put another way, while it cannot be said definitively when the onset of a psychiatric condition arose, it is submitted that Ms. M.'s observations are indicative of some disorder and should be considered in the context of the impact of such a disorder on the Member's ability to make appropriate decisions.

549. Authorities provided by Member's Counsel included:

- Law Society of Alberta v. Stroppel, [2003] L.S.D.D. No. 38;
- Law Society of Alberta v. Nickless, [2010] L.S.D.D. No. 203;
- Law Society of Alberta v. Matwe, [2007] L.S.D.D. No. 39;
- Law Society of Alberta v. Stepper, [2004] L.S.D.D. No. 62;
- Law Society of Alberta v. Rooneem, [2004] L.S.D.D. No. 47;
- Law Society of Alberta v. Adamson, [2006] L.S.D.D. No. 136; and
- Law Society of Alberta v. Basi, [2007] L.S.D.D. No. 152.

550. In Stroppel, *supra*, the lawyer lied to his clients and failed to serve his clients on five separate occasions. At about the time that the matters the subject of the discipline hearing came to the attention of the Law Society, the lawyer ceased practising law and was referred to and began receiving medical treatment from a psychiatrist at the University of Alberta. Four reports were provided by the psychiatrist to the Hearing Committee. In summary, it was the psychiatrist's opinion that the Member's misconduct resulted from an undiagnosed major depressive illness. It is said in this decision that: "The Member's lack of insight as to the cause of his difficulties resulted in him becoming impaired in judgment and negatively affected his ability to complete tasks".

551. What the psychiatrist says about depression is instructive, quoting from paragraph 9 on page 2 of the decision:

> "Depression is perhaps not the best word to describe this illness because many people use depression in our society to describe the general sadness which is ubiquitous to humans. In fact, depressive illness affects only 15% of the population. It is a biological illness involving the brain. Not only does it impact the mood and affect emotions, but it also attacks the cognitive processes, namely attention span, short term memory, the ability to make decisions and judgment. For a person who has never experienced a depression before, they can be at a real loss to understand what is going on, because it is quite an insidious illness and because the illness actually attacks the very organ in which we make sense of our environment. It can be very difficult to see outside that box …
>
> Classically, as depression evolves, adaptation takes the form of increasing the workload in an attempt to force discipline and deal with the

> procrastination which occurs with depression and then work, projects, cases don't get done and a vicious circle begins. One lies to themselves and to others. With a first-time episode, because the evolution of the illness can be slow and insidious, the person can be in a real quagmire socially and occupationally by the time it is recognized. Rehabilitation usually involves time off work with minimizing stress and medication, the combination of which facilitates healing over several months. As important is the psycho-education into the nature of the illness, the risk of relapse and the importance of medication. Having a depression-educated support system, both at work and at home is a very important aspect. Sometimes the barriers to this are institutionalized as stigma, embarrassment and weakness. Our society still has some way to go when removing pejorative descriptions of depression. It needs to be placed alongside other illness [sic] which affect humans such as heart disease and diabetes. Mr. Stroppel, before the events of the past year, was very much a part of the system which viewed depression as weakness of character. I would suspect that the subset of active criminal lawyers would hold this view. It is in keeping with the aggressive, do anything adversarial nature of the personality that characterizes criminal lawyers, in my opinion."

552. In the Stroppel case the Member responded very well to treatment for depression. The psychiatrist expressed the view that Mr. Stroppel was in remission from an illness perspective and that a return to his career and work would be beneficial.

553. Mr. Stroppel had been offered a salaried position with supervision and controlled caseload and his psychiatrist felt that Mr. Stroppel had a good insight into his illness, the risk of relapse and the importance of recognizing early warning signs; thus, the job offer from the youth criminal defence office had important protective factors reducing the chance of relapse – including staff and co-workers aware of the Member's medical circumstances being involved in supervision of his files and the control of his file load.

554. The Hearing Committee in Stroppel noted that the Member's conduct in relation to the matters in issue, without more, warranted consideration of the most serious sanctions, being suspension or disbarment. The Hearing Committee noted that while it was open to the Member to seek assistance from members of his firm, other counsel or the Law Society, he failed to do so and fell into a pattern of deception, but that after detection the Member was completely cooperative and made efforts to minimize the consequences of his conduct as it impacted his affected clients.

555. The Hearing Committee noted that Mr. Stroppel provided a detailed expression of remorse and further, that Mr. Stroppel took sole and complete responsibility for his misconduct, expressing embarrassment and regret over the effect these matters had had on his clients, his current and past legal associates and the Law Society of Alberta. The Hearing Committee also found that Mr. Stroppel received no financial benefit from any of the misconduct in these matters.

556. There was evidence of prior exemplary character and excellent reputation, indicating that lawyers and judges who had long term involvement with the Member had respect for his legal ability, integrity and community involvement. Those who commented on the conduct at issue in the proceedings were of the view that it was entirely out of character and in no way arose from any latent dishonesty.

557. In accepting the expert medical evidence that the misconduct of Mr. Stroppel arose from the Member's medical condition in remission and not the result of any latent dishonesty - which medical evidence was strongly corroborated and supported by the information received from the Bench and his colleagues - the Stroppel Hearing Committee accepted the joint submission of Counsel for the Law Society and Counsel for the Member. The Hearing Committee imposed a period of suspension, directing that the Member satisfy the Practice Review Committee that his treatment plan (planned to prevent a relapse of his depressive illness) was appropriate and that the Member would enter into a supervision and monitoring contract with Practice Review Committee satisfactory to the Practice Review Committee.

558. In the Nickless decision, *supra,* the lawyer faced 14 citations including criminal conduct, failing to be candid and wrongful conversion of trust funds. The Member admitted to being addicted to drugs. The citations included four separate incidents of very serious misconduct where, as a result of his illicit drug use, the Member was incapable of properly representing his client in court. The citations also related that during the course of the Law Society of Alberta's investigation into the Member's conduct and until his interim suspension, the Member deceived, lied to and misled the Law Society of Alberta as to his abuse of narcotics.

559. Nickless' Counsel described the Member's downward spiral and "hitting rock bottom", submitting that while the Member was totally incapacitated by drugs and thus incompetent to practise law, the Member had not crossed the line from incompetence to engaging in misappropriation or wrongful conversion of trust funds. This aspect of the case - dealing with trust funds - was found by the Hearing Committee to be only partially made out, the circumstances of the case being somewhat different than overt theft or deliberate misappropriation.

560. In Nickless, the Hearing Committee accepted the joint submission of Counsel for the Law Society of Alberta and Counsel for the Member that the misconduct arose by reason of incompetence due to addiction to narcotics and prescription drugs and that the Member had already paid a great price for his misconduct.

561. Mr. Nickless' Counsel also said that it was not in the best interests of the public or the legal profession to focus on the punitive nature of sanctioning. Further, it was submitted that it would serve the profession well in the future if members suffering from physical or mental illness were able to be honest and forthcoming to their governing body so that help could be provided and so that members could continue to serve the public without being a risk to the public, rather than having members who are struggling with illness and addictions deceiving everyone around them for fear of punitive measures being imposed.

562. The Nickless Hearing Committee found that, as distinct from the Williamson [decided April 24, 2006] and Elliot [[2002] L.S.D.D. No. 53] cases provided to it, there were mitigating factors in Mr. Nickless' circumstances which did not require the ultimate sanction of disbarment. Specifically, the Hearing Committee found that there were no elements of ungovernability or credibility at issue and that all the citations arose from incompetence; thus, the sanction of disbarment would neither be in the interests of the public nor the legal profession.

563. That Hearing Committee was of the viewpoint that the Law Society ought to focus more on rehabilitation where the ability of a lawyer to competently practise is impaired by mental illness or addictions and concluded that the public would be properly protected if sufficient conditions were imposed upon the Member's reinstatement to practise law, should that ever occur.

564. Mr. Nickless was given the sanction jointly submitted by Counsel - a further 18 month period of suspension. Further, prior to any application for readmission the Member would be required to satisfy the Practice Review Committee that his ability to practise law was no longer impaired.

565. In the Matwe case, *supra*, the Hearing Committee found that the Agreed Statement of Facts, including admissions of guilt, raised issues of governability, not only of the Member but of the profession itself. The Hearing Committee said that if the Law Society of Alberta cannot rely on its members to respond to the regulator when called upon, the right to self-governance is itself jeopardized. It further found that the impugned conduct raised a serious issue of professionalism, in that lawyers rely on one another for prompt action and response or at least action and response within a reasonable period of time. Otherwise, it was said, clients on both sides cannot be properly served.

566. The Matwe Hearing Committee also found that the sheer number of citations and the number of files to which the citations related indicated serious problems with this Member's ability to practise and did raise the question of whether the Member should be allowed to practise at all.

567. In the end result, the Matwe Hearing Committee was of the opinion that the Member did not represent a "hopeless case" and that "somewhere within the mix of circumstances, there is a good lawyer to be salvaged".

568. A suspension of one year was imposed, with several conditions.

569. In the Stepper case, *supra*, the Law Society of Alberta sought suspension or disbarment of the Member on the basis of lack of governability. The citations related to a failure to file and serve a brief in a judicial dispute resolution process, a failure to seek the client's instructions before an adjournment was sought and a failure to prepare for the process.

570. The Member additionally was cited for failing to respond to opposing counsel in a timely fashion, failure to keep his client informed, failure to respond to his client in a timely fashion and failure to respond to both the Law Society of Alberta and the Alberta Lawyers Insurance Association in a complete and appropriate manner.

571. In the Stepper case, Counsel for the Law Society of Alberta and Counsel for the Member both agreed that while a suspension was in order, there was no agreement on its duration.

572. The Member testified that he did not initially correspond with ALIA because he did not "take it seriously". After his interim suspension, the Member said that he was "shocked, disappointed, furious and full of self-loathing". While he did intend to respond to the correspondence from the Law Society of Alberta concerning a complaint, after his suspension he stated that he began experiencing significant financial and personal problems and he was preoccupied with those.

573. Subsequently, he left Alberta for his parents' home in Saskatchewan and he became depressed, ultimately contacting a psychologist for assistance.

574. Mr. Stepper testified that he wanted to practise law and he believed that he could be a very good criminal lawyer, advising that he expected to be suspended and that after his suspension he would seek reinstatement. The Member denied that he had a drinking problem or that alcohol was a factor in the conduct giving rise to the citations. He also said that while he had seen a psychiatrist, he was not currently under psychiatric care.

575. After considering Mr. Stepper's comments that he resolved to mend his ways, the Hearing Committee noted that the Member had made similar statements to a previous Hearing Committee; however, as that earlier hearing was proceeding, the Member had failed to respond to correspondence from the Alberta Lawyers Insurance Association.

576. The Hearing Committee found that the Member must be deterred from the conduct that has given rise to difficulties in the past - expressing the hope that a period of suspension exceeding 8 months would send a strong message to the Member and would cause the Member to seriously reflect upon his responsibilities to the public and to the Law Society of Alberta.

577. In the Rooneem case, *supra*, the Member was charged with failing to meet his obligations under a subsisting Recovery, Maintenance and Monitoring Contract and, further, that the Member failed to respond to the Law Society of Alberta on a timely basis and in a complete and appropriate manner.

578. Mr. Rooneem was obliged to provide data and information on a regular basis to the Practice Review Committee, respecting the nature of his practice and his general and trust accounting information. The Member was consistently late in doing so. It is reported that after being provided with many chances, the Practice Review Committee became

exasperated with Mr. Rooneem's continuing failure to pay attention to detail and referred the matter to the Conduct Committee, thus giving rise to the mentioned citations.

579. The Hearing Committee found that there was no question on the evidence that Mr. Rooneem was continuously delinquent in meeting his obligations under imposed Practice Review processes.

580. The Law Society of Alberta asserted that Mr. Rooneem was grossly negligent, if not intentional, in these delinquencies and that he was borderline ungovernable, arguing that if Mr. Rooneem was unable or unwilling to fulfill his obligations to the Law Society of Alberta as a self-regulating organization for the legal profession, his ability to practise within the profession should be removed from him for a substantial period of time.

581. Mr. Rooneem stated that throughout the course of time during which he dealt with the Practice Review Committee he suffered from a depressive illness, undiagnosed until late in the applicable timeframe. Then, when diagnosed, Mr. Rooneem said that he did not take his doctor's advice with respect to medical treatment for the condition and stated that he did not do so because his wife firmly disbelieved in the use of medicines. His wife put him on an holistic regimen to cure his problems. Mr. Rooneem said that the holistic regimen was unsuccessful and it was not until some considerable period of time later (a year or so) that he started to take prescribed medicines to control his condition. Mr. Rooneem said that he had been on an active medication regime for a period of approximately one month leading up to the first stage of the hearing.

582. The Hearing Committee required more information about the effect the medications would have on Mr. Rooneem's ability to practise in the future and required information about whether or not the medical condition accounted for Mr. Rooneem's failure to live up to his Practice Review contractual obligations.

583. It was noted to be of interest and concern that Mr. Rooneem stated that he was quite capable of carrying on his law practice – it was just his dealings with the Law Society of Alberta that were being affected. The Hearing Committee decided that it did not have the expertise to determine whether the depressive illness would affect Mr. Rooneem in this limited manner; as a consequence, Mr. Rooneem was invited to lead medical evidence and the hearing adjourned.

584. The Rooneem Hearing Committee reconvened and reviewed a letter from a medical practitioner which confirmed the diagnosis of a depressive illness but, unfortunately, did not provide any meaningful information as to how the illness may have affected Mr. Rooneem from an historical sense and, more importantly, how his medical condition had improved such that he would be able to meet all of his obligations in the future.

585. The Rooneem Hearing Committee concluded that it was not within its area of knowledge or expertise to draw medical conclusions, the evidence did not support a finding that the past delinquencies of Mr. Rooneem were solely related to the medical condition as at

then untreated, nor that the treatment regime was going to see Mr. Rooneem practise properly.

586. Bearing all these matters in mind, the Rooneem Hearing Committee decided that a lengthy suspension was in order and imposed a suspension period of 18 months plus additional conditions.

587. In the Adamson case, *supra*, the Member was cited for failing to provide reporting and accounting documentation in a timely fashion and for failing to respond to the Law Society on a timely basis.

588. Counsel for the Law Society took the position that an appropriate sanction was a fine, together with a reprimand and the payment of costs.

589. The Law Society of Alberta did not seek a suspension and, in the result, that Hearing Committee decided that it was appropriate to impose significant fines to impress upon the Member the seriousness of her conduct.

590. Finally, the Basi decision, *supra*, a decision of the Law Society of British Columbia Discipline Hearing Panel, is provided for the proposition that the remedy of disbarment is extreme and ought to be imposed only in circumstances where the protection of the public can be achieved through such a remedy.

591. In considering sanction and ultimately imposing a period of suspension, the Discipline Hearing Panel referred to Law Society of Upper Canada v. Fenik [2005] L.S.D.D. No. 72. It is said that the latter panel noted:

> "Although unresponsiveness, rather than dishonesty, is the centre piece of the Member's misconduct here, there were instances where the Member was not candid with the Society, clients or fellow solicitors."

592. Further, the Basi Panel adopted the approach found in Law Society of Upper Canada v. Hicks, [2005] L.S.D.D. No. 6 wherein it is stated:

> "[45] There is no fixed definition of ungovernability. The cases which deal with ungovernability make little attempt to define or delineate this aspect of professional misconduct. There is no case that says: 'This is where you crossed the line into ungovernability'. Instead, a factual analysis is needed on a case-by-case basis." [Authorities omitted]

593. Member's Counsel submitted that this Hearing Committee ought to act in a fashion consistent with decisions that have gone before.

594. Member's Counsel submitted that Mr. Ewasiuk voluntarily sought help even when Mr. Ewasiuk did not want to admit to his problems. Now, there is medication in place that Mr. Ewasiuk is taking and there are mechanisms in place to assist Mr. Ewasiuk in coping with any matters that might arise in his life, most of which stressors have been resolved or have substantially dissipated.

595. [Material concerning private family health matters has been redacted]. Friends and colleagues have and continue to be very supportive and Mr. Ewasiuk continues with the regimen of Effixor, which he believes to be a cure that he ought to have had a long time ago. Dr. Strilchuk, the Member's physician of some 20 years, is monitoring the medication.

596. Member's Counsel submitted that Mr. Ewasiuk is truly remorseful, has come to the table and has expressed insight and appreciation for what caused the problems the subject matter of the citations against him.

597. Member's Counsel further submitted that while the Member's conduct is certainly unacceptable, it is not egregious, and the Member is not ungovernable.

598. Thus, it is submitted that a suspension with conditions would be appropriate and noted that since the Member was initially suspended in August of 2008, a period of three and a half years had already elapsed since that suspension.

599. Finally, based upon the authorities provided, it was submitted that this Hearing Committee can take into account the suspension already served and can conclude that this has acted both as denunciation and deterrence: the well-informed public would not be offended if a further short period of suspension is imposed, not disbarment.

600. Member's Counsel carefully dealt with the citations, grouping them into four categories:

(a) Law Society of Alberta Related Citations
Citations 1, 2, 16, 17, 19, 20

(b) Failing To Serve Clients Diligently And Related Citations
Citations 4, 5, 6, 9, 12, 15, 21, 23, 24, 26, 30

(c) Misleading Client
Citations 22, 27

(d) Ungovernable
Citation 3

601. In relation to the first category of allegations, it was submitted that these citations do not involve acts of defiance and it is questionable whether these were deliberate choices on the Member's behalf - there is no independent evidence of defiance and there is no evidence that the Member was essentially saying: "Get lost, leave me alone". It is said,

in short, that there is no evidence from the offices of the Law Society of Alberta that the Member acted in a defiant matter, there is no evidence that it was in the Member's self-interest to not respond and, further, the Member knew that the Law Society was not going to go away.

602. It is submitted that, quite to the contrary, this is a case where the Member "turtled" or "cocooned" and simply could not respond to a "barrage" of correspondence. And, clear evidence is needed to find ungovernability - not speculation - especially where such speculation would attract a more serious penalty.

603. A failure to respond when it was in the Member's best interests to do so is said to be consistent with a mental disorder or emotional problems, especially when there is no evidence of defiance.

604. In the category of allegations relating to failing to serve clients diligently Member's Counsel conceded that the Member breached a court order. This lack of diligence, however, was due to incompetence or impaired judgment; therefore, disbarment would be inappropriate. Further, it is said that the breaches outlined in the Reasons do not fall within the serious range: placing the Member's misconduct on a scale of least serious to most serious, this is not a lawyer who decided to defy a court order and this is not a situation where the lawyer's conduct is not objectively defensible, i.e., a pure act of defiance.

605. It is submitted that the Member's misconduct is at the bottom of the scale and amounts to a failure to comply along the scale of reasons which would include lack of experience, lack of knowledge or due to other misapprehension. Member's Counsel pointed out that Mr. Ewasiuk did not intentionally decide to breach the court order; rather, it was breached due to an administrative error in his office, at a time when Mr. Ewasiuk's focus, insight and ability to practise were impaired due to depression – in reality, a problem caused because of a lack of diligence, not wrongful intention.

606. With respect to the third category of allegations which comprise the P.H. and L.M. phony settlements, Member's Counsel said that that these are obviously serious problems but on a scale of moral culpability, it is said that the Member's lies were not as egregious as other circumstances where a Member stole money or achieved personal gain through deceit.

607. It is submitted that this Hearing Committee must consider the Member's intent, the fact that there was no personal gain involved, the fact that these were not elaborate schemes and, finally, the fact that the Member's clients suffered no losses because the Member effected individual reparations to ensure that his clients did not suffer.

608. Member's Counsel queried whether, in fact, the clients' relative lack of knowledge of legal processes was exploited because Mr. Ewasiuk did not hear from P.H. and L.M. and later found out that he had missed filing and service deadlines. While Member's Counsel conceded the misconduct involved deceit, it was not an elaborate or complex series of

deceptions – the documents were simple and quite rudimentary, not sophisticated. Member's Counsel contrasted the Member's simple deception with that which is characterized as the sustained and complex, sophisticated deception recited in the Ryan case.

609. It is submitted that making reparation ought to be counted as a mitigating factor because the Member paid his own money to P.H. and L.M. This factor, it is contended, distinguishes the Member's misconduct from situations where lawyers lie to their client about outcomes that lead the client to believe they are entitled to nothing.

610. Member's Counsel submitted that the payments made by the Member to P.H. and L.M. were appropriate payments for the types of personal injury damages claims they had advanced. And, it is noted that the Law Society of Alberta did not lead evidence to say the payments were not proper. In each case, the Member is said to have worked up the cases, prepared the claims and made settlement attempts.

611. It is submitted that the ultimate extinguishment of the Member's clients' claims were due to technical failures, the clients obtained reparation and the Law Society has not led evidence to prove that the amounts paid were improper, which is said to be the obligation of the Law Society of Alberta.

612. In the final category – ungovernability - Member's Counsel submitted it is in respect of Practice Review that the issue of ungovernability arises. While the Member omitted to provide timely responses to Practice Review, it is submitted that he committed no overt offences. Member's Counsel submitted that because the citations do not go to a general lack of governability, disbarment is not justified.

Law Society of Alberta's Rebuttal

613. In a brief rebuttal, LSA Counsel said that the real issue is: when is disbarment an appropriate sanction? This Committee was referred to the 1997 Alberta Court of Appeal decision in Adams v. Law Society of Alberta, 2000 ABCA 240 wherein at pages 2-3, paragraphs 10-11, it is said:

> "[10] Historians may question the origin and the history of the oft-repeated statements about the honour and integrity of the legal profession, but it cannot be denied that the relationship of solicitor and client is founded on trust. That fundamental trust is precisely why persons can and do confidently bring their most intimate problems and all manner of matters great or small to their lawyers. That is an overarching trust that the profession and each member of the profession accepts. Indeed, it is the very foundation of the profession and governs the relationships and services that are rendered. While it may be difficult to measure with precision the harm that a lawyer's misconduct may have on

> the reputation of the profession, there can be little doubt that public confidence in the administration of justice and trust in the legal profession will be eroded by disreputable conduct of an individual lawyer.
>
> [11] It is therefore erroneous to suggest that in professional disciplinary matters, the range of sanctions may be compared to penal sentences and to suggest that only the most serious misconduct by the most serious offenders warrants disbarment. Indeed, that proposition has been rejected in criminal cases for the same reasons it should be rejected here. It will always be possible to find someone whose circumstances and conduct are more egregious than the case under consideration. Disbarment is but one disciplinary option available from a range of sanctions and as such, it is not reserved for only the very worst conduct engaged in by the very worst lawyers."

614. In its concluding paragraph [paragraph 27], the Court of Appeal says:

> "As stated earlier, we do not accept the proposition still often invoked in criminal cases, that the most serious disciplinary sanction, disbarment, should be reserved for the most serious misconduct by the most serious offender. In this case, the majority of the Hearing Committee correctly addressed the relevant factors and held that disbarment was the appropriate disposition. Likewise the majority of the Benchers reviewed that disposition and agreed that disbarment was the appropriate order. We do not find that disposition to be manifestly unreasonable. Pursuant to s.79(1)(c) of the *Legal Profession Act*, the order of the Benchers disbarring Adams is confirmed."

615. In Adams, the Member had no prior record. It is submitted that the application of the step principle is not invariably appropriate.

616. LSA Counsel disagreed that Mr. Ewasiuk's phony settlement schemes were simple, not elaborate, as characterized by Member's Counsel: far from being simple schemes, the deceit was elaborate enough to convince separate clients that there were legitimate settlements, to the extent that the clients upon meeting with the Member were convinced that the Member had negotiated bona fide settlements and was concluding the clients' matters in the usual course, with the execution by each client of the standard General Release and the provision by the Member of the final accounting to each client.

Member's Brief Reply

617. Member's Counsel briefly replied, emphasizing that it is very important for this Hearing Committee to have due regard for all mitigating factors when considering the appropriate sanction.

618. Concerning the phony settlements, it is submitted that the scheme did not get more elaborate over time - it was just repeated. Finally, it was submitted that a deliberate course of action designed to avoid discovery would be worse than what the Member did.

Costs Submissions

619. LSA Counsel stated that the costs as claimed did not include any time for the continuation of the hearing on January 6, 2012 and were appropriate.

620. Member's Counsel submitted that costs ought to be reduced by one-third because that is the percentage of the aggregate citations that were dismissed or about which no finding of guilt was made.

L. SANCTION DECISION

621. This Hearing Committee is well aware that its decision must be supported by tenable reasons which are grounded in the evidentiary foundation.

622. This Hearing Committee, too, is keenly aware of the gravity of its undertaking: to decide upon a reasonable and appropriate sanction and fully understands the potential impact its decision will have on the Member, the legal profession, the Law Society of Alberta and the public.

623. It is noted that Mr. Ewasiuk has a disciplinary record:

(a) January 26, 1990

Guilty of five counts of professional misdemeanor
1. Failing to serve client;
2. Failing to reply to the Law Society;
3. Failing to reply to the Law Society;
4. Failing to pay an account arising from practice; and
5. Failing to reply to a fellow practitioner.

Penalty imposed of hearing costs in the fixed amount of $1,500.00 and a fine in the amount of $1,400.00.

(b) August 3, 2003

Guilty of one count of conduct deserving of sanction
1. Failure to comply with a trust condition.

Penalty imposed of actual hearing costs in the amount of $2,862.25 and a fine in the amount of $1,000.00.

624. The Codes of Conduct effective both prior to and after November 1, 2011 contain pronouncements on integrity and on the expectations reposed in Alberta's legal profession.

625. It has been said on many occasions and in many different but equally eloquent ways that integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession and, further, that if a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. It has also been said that if integrity is lacking, then the lawyer's usefulness to the client and that lawyer's reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

626. Quite often, lawyers are called upon to make decisions in situations that involve substantial pressure or stress, in circumstances that are not easily reviewed later and that have serious, perhaps irreversible consequences for the client.

627. A lawyer must be trusted to carry out these critical duties honestly and without supervision, irrespective of whether the decision is amenable to later review.

628. Furthermore, if the Law Society of Alberta does not respond appropriately where integrity is an issue, the public cannot reasonably be assured that the trusted role of lawyer will be maintained.

629. The Court of Appeal's dicta in Adams, supra at paragraph 6, is apt:

> "A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. The public dimension is of critical significance to the mandate of professional disciplinary bodies."

630. In addition to Mr. Ewasiuk's past record mentioned above, the factors that have been considered by this Hearing Committee and have formed the basis of our unanimous decision, include:

1) The Member did not provide simple, straightforward information to the Practice Review department until the Member was told that his failure to respond would result in a referral to the Conduct department. [paragraphs 28 and 29]

2) The Member complained that the information was being demanded without the benefit of the Member consulting with independent counsel. [paragraph 31]

3) The Member told Practice Review that much has already been discussed and there was little to add. [paragraph 43]

4) The Member finally provided a snapshot, which was a simple, straightforward and uncomplicated task for the Member, in the face of repeated and increasingly persistent requests, including the threat of disciplinary proceedings. [paragraph 45]

5) It was not by reason of any debilitating disorder that the Member was unable to respond and cooperate in a timely manner. [paragraph 54]

6) The matters involving the phony settlements overlaid and intersected this formal Practice Review period.

7) In his June 12, 2006 letter to Practice Review, the Member lied by omitting to disclose the errors made by the Member in missing the statutory and procedural limitations that culminated in the phony settlements perpetrated upon P.H. and L.M.; instead, the Member stated in that letter that all limitations were preserved - a statement intended by the Member to be relied upon by the his regulator, the Law Society of Alberta. [paragraph 79]

8) In perpetrating the phony settlements, the Member acted very ably, albeit deceitfully: this was not incompetence. [paragraph 87]

9) The Member expressed his viewpoint that P.H. and L.M. got what they wanted and the settlement funds were just from a different source. [paragraph 88]

10) The Member's failure to cooperate with the Practice Review process was a serious and ongoing disregard for this particular process and, derivatively, the governance and regulatory obligations of the Law Society of Alberta. Further, the Member's conduct prevented and delayed the process for an unacceptable period of time, raising substantial concerns about the Member's governability. [paragraphs 99 and 100]

11) The Member resisted any further review of his practice and files for fear that further Practice Review processes would detect the P.H. and L.M. phony settlements. [paragraph 103]

12) In connection with the J.W. citations, the Member admitted his failure to respond to counsel opposite in a timely fashion. [paragraph 121]

13) The Member failed to keep his client apprised of the numerous communications from counsel opposite. [paragraph 128]

14) The Member's explanation as to why he failed to serve his client was inconsistent with the probabilities that surround this particular matter. [paragraph 130]

15) The Member's evidence about why he did not attend to his client's inquiries was not credible. The Member said, in oral testimony, that he did not feel up to responding to his client. Yet, the Member promptly rendered an account when his client terminated his services, a fact wholly inconsistent with an inability to respond. [paragraph 132]

16) The Member did nothing to advance J.W.'s case, without explanation, for a period of five months, when time was of the essence. [paragraph 134]

17) Opposite counsel's repeated communications were left unanswered. [paragraph 134]

18) The Member's statement to J.W. in his final written communication - that it appeared that perhaps the client did not want him to act - had no foundation in the evidence; rather, this statement was self-serving and inconsistent with the evidence, and provided an example of the Member's tendency to deflect blame for his own professional shortcomings onto others. [paragraph 136]

19) The Member breached a court order and permitted a shortfall in his trust account to subsist for an inordinate and inexcusable period of time. [paragraph 157]

20) The Member deflects his non-delegable duty by stating that he did not instruct the trust transfer. The Member told his loyal assistant that "we have a problem here", essentially leaving it to her to get back the money entrusted by court order. [paragraph 164]

21) The staff member's innocent mistake in transferring this trust money was obvious and immaterial to the Member's obligation, which was triggered immediately upon his gaining knowledge of the mistake. Failing to take immediate steps to rectify the subsisting breach of a court order is sanctionable conduct. [paragraph 167]

22) The Member's misconduct went 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. [paragraph 169]

23) It is a cardinal element of a lawyer's relations with the court that counsel shall never 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. Self-regulation depends upon the integrity of members of the legal profession, as do the administration of justice and the rule of law. [paragraphs 170 and 171]

24) Only the Member had knowledge of the breach, not the Court and not opposing counsel. [paragraph 172]

25) In the face of pointed and unambiguous requests from opposing counsel, the Member failed to act with propriety and failed to remit to that lawyer a citizen's money. [paragraph 174]

26) On the evidence, it was found that the money mistakenly taken from the Member's trust account on August 30, 2004 was not remitted to counsel opposite until September 29, 2005 under threat by opposing counsel of a formal complaint to the Law Society of Alberta. [paragraph 186]

27) In connection with the S.V. complaint, it was the Law Society of Alberta that returned the file contents to S.V., not the Member. [paragraph 198]

28) Without adequate excuse, the Member failed to meet his professional obligation to return this file. [paragraph 200]

29) Commencing November 30, 2006, Law Society of Alberta investigators requested ten client files from the Member, which files included the P.H. and L.M. phony settlement files. [paragraph 205]

30) The Member was directed to deliver the requested files no later than January 15, 2007. [paragraph 206]

31) On April 13, 2007, the Member wrote to the Law Society of Alberta complaining, in part, about the Law Society of Alberta's constant harassment. [paragraph 218]

32) After the Law Society set a final deadline and stated that a failure to comply would escalate matters, the Member delivered five files. [paragraphs 224 and 225]

33) This Hearing Committee found that the time it took for the Member to comply with the lawful request to produce ten files was inexcusably and inordinately long. [paragraph 230]

34) Only after the Member produced the P.H. and L.M. files did the investigators learn of the Member's frauds, perpetrated by using his professional knowledge to orchestrate a scenario by which the Member's clients 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' interests and entitling his clients – had they been informed – to negligence and breach of contract claims against the Member. [paragraph 233]

35) The Member failed to provide the Law Society of Alberta auditors with a timely response, in the face of pointed and repeated requests, which misconduct is inimical to the best interests of the public and in violation of a rule that is specifically designed to protect the public interest by ensuring complete and timely reviews by an independent accountant of a lawyer's trust account. [paragraph 257]

36) In the L.M. case, the Member justified and deflected responsibility for deceiving his client by explaining that had the case been litigated it would have netted the client about the same as he paid the client, plus: L.M. "has never complained to anyone about being unhappy with the amount of the settlement." [paragraph 267]

37) This explanation demonstrated the Member's failure to appreciate the content of and basis for his professional responsibilities. [paragraph 269]

38) In connection with the P.H. matter, this Hearing Committee came to the same conclusion. [paragraph 281]

39) In cross-examination, the Member did not concede that he was defrauding P.H. [page 91, Reasons]

40) The Member said that the payment of money to P.H. was simply an administrative matter. [page 92, Reasons]

41) Throughout, this Hearing Committee has carefully considered the medical, personal, emotional and other life stressors to which the Member was subjected from time to time and, sometimes, all the time. [for example, paragraphs 287-293 and 320]

42) A loyal and eminently credible witness who was the Member's assistant knew nothing of the phony P.H. and L.M. settlements and there is no evidence that she was aware of the regulatory letters coming from the Law Society of Alberta to the Member. [paragraphs 309 and 310]

43) The Member said he opened Law Society of Alberta communications in the privacy of his office and kept these written communications in his desk drawer. [paragraph 310]

44) Section 49 of the Legal Profession Act expressly includes incompetence: this Hearing Committee found the Member guilty of a number of citations. [paragraph 319]

45) The dishonesty and deceit in connection with the P.H. and L.M. claims occurred before the Member's self-described spiral into a sadder and sadder emotional state which emotional state was exacerbated in June of 2004 by [material concerning private family health matters has been redacted].

46) To rely on Ms. M.'s testimony as clear and cogent evidence of the existence of a depressive disorder would be dangerous. [paragraphs 351 and 352]

47) The Member explained, globally, why he did not respond to or cooperate with the Law Society of Alberta by saying that his state of mind at that time was confused, he was very tired, he had not been sleeping and he was afraid. [paragraph 355]

48) The Member told us that his general account finally had a surplus, his conveyancers were doing a fair amount of real estate work and then a letter from the Law Society of Alberta would come and he couldn't function, he finding it impossible to deal with anything coming from the Law Society of Alberta. [paragraph 355 and 356]

49) In connection with the period 2005-2006, the Member said he thought he had complied, it seemed that every time he turned around he was getting another letter, he asked for extensions, something else would come up. Mr. Ewasiuk told us that he did not have an answer for his failure – he was just not spending enough time in the office, he was not able to function, not able to concentrate on his work and focus: when he got the letters there would be "a block in the road". [paragraphs 357-359]

50) This Hearing Committee rejected Ms. M.'s evidence about the causal connection between the Member's behavior and a major depressive disorder. [paragraphs 362 and 363]

51) The Member explained that he can now cope – in the past he had just come to a complete impasse "with respect to the constant hammering of these [Law Society of Alberta] 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". [paragraph 364]

52) The Member said that he was compassionate and a sucker for everybody that walked in the door and between that and the problems he was having, he failed to respond appropriately to the Law Society of Alberta. [paragraph 365]

53) We noted that the Member's deceit in connection with the phony settlement was not behavior that was strange or public, not odd or inexplicable, not plainly self-harming and destructive, acted out in seeming indifference to certain and terrible professional consequences. [paragraph 368]

54) Rather, 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. [paragraph 369]

55) Even though the Member's misconduct 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. [paragraph 372]

56) While the Member now conceded that his misconduct was "very stupid", he did not agree that it was necessarily professionally negligent conduct or that his actions seriously impugned his lawyerly integrity. The Member referred to the manner in which he dealt with P.H. and L.M. as "administrative" matters. This Hearing Committee found that attitude to be very troubling and found that this comment raised substantial concerns about the protection of the public and also about the Member's character and fitness to return to practising law. [paragraph 373]

57) This Hearing Committee found that the Member's inaction and failure to respond to the Law Society's reasonable and lawful requests to deliver up 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. [paragraph 377]

631. In our Reasons, we cited an excerpt from the 1888 Hands v. Law Society of Upper Canada decision (at paragraph 375 of the Hearing Committee's written reasons) and its ratio bears repeating: honesty by compulsion – because the lawyer is in jeopardy of degradation - is not the kind of honest demeanour to which the lawyer pledged by his oath of office. The indulgence of mistaken lenity where the payment of money is allowed to purchase immunity from wholesome discipline, 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.

632. Mr. Ewasiuk freely chose to make payments to P.H. and L.M. which were made in circumstances intended to mislead the clients as to their propriety. The deception was artful and complete and repeated while Mr. Ewasiuk was under active practice review. The misconduct might never have been detected but for other investigations being conducted by the Law Society of Alberta. In our opinion, these facts distinguish the Member's misconduct from most of what is described in Nickless, whose behavior was patently and publicly bizarre, certain to attract the most serious professional consequences.

633. We were not persuaded by the totality of the evidence, including that of Dr. Rosie, that the Member's creation of the schemes to dupe P.H. and L.M., the meetings he planned and orchestrated to deceive the clients, his preparation and presentation of the fraudulent documents and accounts, his concealment of his professional errors in his representation of his clients, his failure to inform his clients of occurrences that extinguished their rightful claims – all of which misconduct, without more, raises integrity concerns - arose by reason of mental disorder. This distinguishes Mr. Ewasiuk's misconduct from the Stroppel case, where the expert evidence convinced that Hearing Committee that Mr. Stroppel's misconduct arose from his medical condition, not any latent dishonesty.

634. The evidence has fallen short of persuading us that the Member's past misconduct is mitigated because it was due to incompetence due to mental disorder (whether expressed as major depressive state or as something else going on), as at the currency of these deceptions unrecognized by the Member and untreated medically or psychiatrically.

635. Nor are we persuaded that the Member's present state of remission or his ongoing treatment regimen will prevent future integrity-related breaches. The evidence did not explain how the medication and current stability in the Member's life would make him honest and trustworthy. We cannot speculate on this.

636. The Member's previous record is an aggravating factor, as is the Member's utilization of his legal knowledge in deceiving P.H. and L.M.. His lengthy number of years as a practising lawyer is a somewhat aggravating factor, also, because the Member took advantage of his knowledge and experience; indeed, the Member may well have thought that he would "get away" with these frauds and no one would ever be the wiser.

637. We have noted that while the Member conceded that what he did was "stupid", Mr. Ewasiuk never disclosed his wrongdoing to his clients or to the Law Society of Alberta, despite being under Practice Review and other disciplinary proceedings during the commission of these deceptions.

638. Similarly, Mr. Ewasiuk did not disclose to his fellow lawyer that he had breached the Court's order – albeit inadvertently – and finally acted in the face of threats to be reported

to the Law Society of Alberta. All the while, Mr. Ewasiuk did not seem to appreciate that it was his obligation to correct the problem, immediately.

639. In our Reasons, we noted other examples of the Member's tendency to deflect blame onto his staff and his clients, and we noted Mr. Ewasiuk's apparent inability to understand critically important personal professional obligations and duties that come with the privilege of being permitted to practise law.

640. In his dealings with Practice Review, with the investigators, with the auditors, all in their regulatory capacities on behalf of the Law Society of Alberta, the Member did not seem to understand that he had an ongoing professional responsibility to cooperate, to be responsive and to comply. Mr. Ewasiuk used expressions like "constant hammering" to describe his reaction to his professional regulator's lawful demands. Mr. Ewasiuk's delayed responses caused a delay in the detection of the fully executed schemes which deceived P.H. and L.M..

641. Mr. Ewasiuk told us that he would do things differently now. Mr. Ewasiuk did not do things differently after his 2003 disciplinary hearing; rather, he committed fraud, again. We are of the opinion that this misconduct calls for the strongest possible denunciation, both for individual and general deterrence reasons.

642. We agree with those learned decisions that have decided that there is no fixed definition of ungovernability. We have found that the Member was unwilling to accept governance, not that he was rendered incapacitated and incompetent and thereby unable to accept governance by reason of mental disorder or emotional state.

643. A slightly mitigating factor is that the Member made certain admissions [Exhibit 303], although it must be said that the admissions concerning perhaps the most serious misconduct – those involving P.H. and L.M. - were admissions made only in the face of substantial inculpatory evidence and do not contain any meaningful expressions of remorse or understanding of the gravity of his misconduct. In each instance, the Member said in his formal admissions that the respective clients "never complained to anyone about being unhappy with the amount of settlement".

644. The very difficult personal situations in which the Member found himself between 2000 and the near present and the effect these had on the Member neither explained nor excused the Member's lying and deceit – this misconduct arose because the Member's character is compromised. This misconduct is integrity-related and <u>not</u> due to illness. In contrast, Mr. Stroppel suffered no character defects and did not show signs of ungovernability – Mr. Stroppel's misconduct was caused <u>solely</u> by then undiagnosed mental illness. Mr. Stroppel's prognosis in controlled professional circumstances was accordingly very positive. The same cannot be said of Mr. Ewasiuk.

645. Not all admissions of guilt should be found to have a significant mitigating effect on sanction. When viewed in their entirety, the Member's admissions are rather bare

statements of incontestable facts and are devoid of acceptance or acknowledgement of wrongdoing or remorse or even much personal professional responsibility for what gave rise to the citations.

646. Rather, the Member seemed to want us to understand and agree that despite his commission of gravely serious integrity-related offences against P.H. and L.M., his deceptions are excusable because his clients did not complain about the amount paid.

647. During submissions on sanction, Member's Counsel said that the Member's reparations to his clients ought to be a significant mitigating factor. We do not agree: either the Member was going to pay out of his own pocket to cover up his irreversible errors and failures to serve these clients, or his errors would eventually be discovered by clients awaiting their claims settlement money.

648. We are of the opinion that the Member's rationalizations are cynical and serve to greatly debase the legal profession. Honesty by compulsion is not the standard to which this profession is held and such misconduct will not be countenanced or excused. Such wrong-headedness is really quite shocking and shameful. Such rationalizations are unworthy of a professional who has sworn an oath to conduct himself at all times with the utmost honesty and probity, whether or not that conduct is detectable. We find that the Member's attitude since the citations were laid is not a mitigating factor.

649. Furthermore, in 1990 the Member was found guilty of failing to serve client, failing to reply to the Law Society of Alberta and failing to reply to a fellow practitioner, all offences which were repeated under new circumstances in the current citations. The 2003 finding of guilt cited a failure to comply with a trust condition, an offence not entirely unrelated to the content of some current citations.

650. The Member's previous personal troubles and instability may be a partial explanation for some of his responsiveness issues; however, there is no finding that the Member was incompetent due to mental disorder. We find that the impact of these troubles on Mr. Ewasiuk's judgment and actions as a lawyer are not sufficient to substantially mitigate sanction.

651. We find that it is in the public interest that Mr. Ewasiuk be deterred from having any opportunity to again commit egregious breaches of professional ethics. We find that it is in the interests of the legal profession to send the clearest possible message that deceit is unacceptable: ever: in any circumstances.

652. This Hearing Committee has no confidence that the Law Society of Alberta can adequately supervise this lawyer from committing further offences that are intentionally concealed.

653. Lastly, we find that the public's confidence in the ability of the Law Society of Alberta to properly supervise this lawyer would be misplaced if Mr. Ewasiuk was allowed to

continue to practise, with or without a further period of suspension. The public can and should denounce this conduct. The Law Society of Alberta and the legal profession can and should denounce this conduct.

654. The Law Society of Alberta is obliged by its legislative mandate to protect the public, first and foremost. In this case, that mandate is met by imposing the ultimate sanction.

655. We order that the Member, Mr. Clarence Ewasiuk, be disbarred.

M. CONCLUDING MATTERS

656. The Member is also directed to pay the actual costs of the hearing within in the amount set out in Exhibit 308, prior to any application for reinstatement.

657. There will be no notice issued to the Attorney-General.

658. The Exhibits in this matter will be available to the public, subject to redaction to protect third party names and identities, to protect confidential information and to protect solicitor-client privilege.

DATED this _____ day of March, 2012.

_____ _____

Frederica Schutz, Q.C. (Chair) Larry Ackerl, Q.C. (Member)

_____

James Glass, Q.C. (Member)