

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 DARREN PETERSON
a Member of The Law Society of Alberta

INTRODUCTION AND SUMMARY OF RESULT

1. On March 16, 2011 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary to inquire into the conduct of the Member, Darren Peterson. The Committee was comprised of James Glass Q.C., Chair, Neena Ahluwalia Q.C. and Wayne Jacques, Lay Benchers. The LSA was represented by Ms. Molly Naber-Sykes. The Member was present throughout the hearing and was represented by Mr. Sandy Lytle.
2. The Member faced four citations:
 1. IT IS ALLEGED THAT you misled or attempted to mislead your client and that such conduct is conduct deserving of sanction.
 2. IT IS ALLEGED THAT you failed to respond to your client and failed to fulfill commitments to your client on a timely basis and that such conduct is conduct deserving of sanction.
 3. IT IS ALLEGED THAT you failed to keep your client informed as to the progress on his matter and that such conduct is conduct deserving of sanction.
 4. IT IS ALLEGED THAT you failed to provide your client with competent services and that such conduct is conduct deserving of sanction.
3. At the commencement of the hearing, counsel for the LSA and Mr. Peterson presented the Hearing Committee with an Agreed Statement of Facts and Admission of Guilt (Exhibit 22) and a Supplemental Agreed Statement of Facts and Admission of Guilt (Exhibit 23) in relation to Citations 1 and 4. Further, counsel for the LSA and Mr. Peterson confirmed that the Agreed Statement of Facts and Admission of Guilt (Exhibit 22) and a Supplemental Agreed Statement of Facts and Admission of Guilt (Exhibit 23) in relation to Citations 1 and 4 were reviewed and signed by Mr. Peterson prior to the commencement of the hearing and that they were intended to be an Admission of Conduct deserving of Sanction pursuant to s. 60 of the Legal Profession Act.
4. On the basis of the Agreed Statement of Facts and Admission of Guilt (Exhibit 22) and a Supplemental Agreed Statement of Facts and Admission of Guilt (Exhibit 23) in relation

to Citations 1 and 4, the other evidence received at the hearing, and for the reasons that follow, the Hearing Committee finds that Citations 1 and 4 are proven and the Member is guilty of conduct deserving of sanction.

5. Counsel for the LSA and for Mr. Peterson jointly submitted that Citations 2 and 3 could be withdrawn. The Hearing Committee agreed and those citations were withdrawn.
6. The Hearing Committee concluded that the sanction should be a suspension for a period of 30 days commencing at 12:01 am on March 24, 2011, with the following condition:
 - (a) that the member meet with the Practice Review Committee to review with the Member how to deal with clients where mistakes or errors are made and to follow the directions of clients.
7. The Hearing Committee concluded that the Member should pay the actual costs of the Hearing, to be paid within 6 months from the conclusion of the suspension.

JURISDICTION AND PRELIMINARY MATTERS

8. Exhibits 1-4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, established the jurisdiction of the Hearing Committee. The Certificate of Exercise of Discretion was entered as Exhibit 5. These Exhibits were entered into evidence by consent.
9. There was no objection by the Member's counsel or counsel for the LSA regarding the constitution of the Hearing Committee.
10. The entire hearing was conducted in public.

CITATIONS

11. The Member faced four citations:
 1. IT IS ALLEGED THAT you misled or attempted to mislead your client and that such conduct is conduct deserving of sanction.
 2. IT IS ALLEGED THAT you failed to respond to your client and failed to fulfill commitments to your client on a timely basis and that such conduct is conduct deserving of sanction.
 3. IT IS ALLEGED THAT you failed to keep your client informed as to the progress on his matter and that such conduct is conduct deserving of sanction.
 4. IT IS ALLEGED THAT you failed to provide your client with competent services and that such conduct is conduct deserving of sanction.

12. Upon the application of counsel for the LSA and the Member, citations 2 and 3 were withdrawn.

EVIDENCE

13. As noted above, Exhibits 1-5 (the jurisdictional exhibits) were entered into evidence by consent.
14. Exhibits 6 – 23, 27 and 28, all relevant to the Citation, were entered into evidence by consent.
15. The Member provided an Agreed Statement of Facts and Admission of Guilt (Exhibit 22) and a Supplemental Agreed Statement of Facts and Admission of Guilt (Exhibit 23) in relation to Citations 1 and 4 that were signed by him on March 15, 2011 and March 16, 2011 respectively. Through his counsel, the Member acknowledged and agreed that the Agreed Statement of Facts was also an Admission of Conduct Deserving of Sanction.
15. The Hearing Committee reviewed the Agreed Statement of Facts and Admission of Guilt (Exhibit 22) and a Supplemental Agreed Statement of Facts and Admission of Guilt (Exhibit 23) in relation to Citations 1 and 4, and found them to be in a form acceptable to the Hearing Committee. Accordingly, pursuant to s.60 (4) of the *Legal Profession Act* the admission is deemed for all purposes to be a finding of the Hearing Committee that the conduct of the Member is conduct deserving of sanction. The Agreed Statement of Facts and Admission of Guilt (Exhibit 22) and a Supplemental Agreed Statement of Facts and Admission of Guilt (Exhibit 23) in relation to Citations 1 and 4 were entered into evidence by consent.

FACTS

16. The key Exhibits with regard to the citations are Exhibits 6, 7, 8, 10, 13, 15, 16, 17, 18, 22, 23, 24, 25, 27 and 28.
17. The Agreed Statement of Facts and Admission of Guilt (Exhibit 22) and a Supplemental Agreed Statement of Facts and Admission of Guilt (Exhibit 23) in relation to Citations 1 and 4 are reproduced herein:

AGREED STATEMENT OF FACTS

INTRODUCTION

1. Mr. Peterson was admitted to the Bar on November 15, 1999, and practices in Calgary, Alberta.
2. Mr. Peterson's primary area of practice is real estate.
3. S. J. S. first became Mr. Peterson's client in 2003. Mr. Peterson did legal work for Mr. S. and his company, S. H. Ltd., from 2003 until April, 2009.

4. On April 9, 2009, Mr. S. complained to the Law Society of Alberta about Mr. Peterson's representation of him (**Exhibit 6**).

CITATIONS

5. On September 16, 2010, the Conduct Committee referred the following conduct to hearing:
 1. IT IS ALLEGED THAT you misled or attempted to mislead your client, and that such conduct is conduct deserving of sanction.
 2. IT IS ALLEGED THAT you failed to respond to your client and failed to fulfill commitments to your client on a timely basis, and that such conduct is conduct deserving of sanction.
 3. IT IS ALLEGED THAT you failed to keep your client informed as to the progress of his matter, and that such conduct is conduct deserving of sanction.
 4. IT IS ALLEGED THAT you failed to provide your client with competent services, and that such conduct is conduct deserving of sanction.

FACTS

Caveats

6. In early 2006, Mr. S. instructed Mr. Peterson to file Restrictive Covenants on behalf of S. H. Ltd. against Lots 1 through 4 of Plan 0..., Block 2 (the "Lots").
7. As instructed, Mr. Peterson drafted Restrictive Covenants dated January 31, 2006, against the Lots.
8. On February 6, 2006, Mr. Peterson sent the four Restrictive Covenants dated January 31, 2006 to the Land Titles Office for registration.
9. On February 9, 2006, the Land Titles Office rejected all four Restrictive Covenants (**Exhibit 7**).
10. On February 16, 2006, Mr. Peterson issued a Statement of Account to S. H. Ltd. for preparing and registering the Restrictive Covenants. This account of \$1,488.20 was paid from trust in February, 2006 (**Exhibit 8**).
11. In early 2008, the St., who beneficially owned Lot 2, Block 2, Plan 0..., began to build a two-storey structure on their property in breach of the Restrictive Covenant. Mr. S. instructed Mr. Peterson to take steps to require the St. to comply with the Restrictive Covenant.

12. Mr. Peterson has given the Law Society of Alberta a letter dated April 1, 2008 which he says was sent to the St. to ask them to comply with the Restrictive Covenant (**Exhibit 9**).
13. In early April, 2008, Mr. S. swore an Affidavit to support an application to stop the St. from violating the Restrictive Covenant. Mr. Peterson drafted this Affidavit (**Exhibit 10**).
14. In early April 2008, Mr. S. spoke to his neighbour Darren Taylor about the St.' infringement of the Restrictive Covenant and asked him to help Mr. Peterson resolve the issue. On April 15, 2008, Mr. Peterson asked Mr. Taylor, another member of the Law Society, to help him redraft the Restrictive Covenant.
15. On April 21, 2008, Mr. Taylor sent the Restrictive Covenant back to Mr. Peterson with his suggested revisions (**Exhibit 11**).
16. Before July 12, 2008, Mr. Peterson sought advice and directions from M. L. about the steps he might take to require the St. to comply with the Restrictive Covenant.
17. By handwritten memo to file dated July 12, 2008, Mr. Peterson records some of the steps he took with respect to the St. and his instructions from Mr. S. going forward (**Exhibit 12**).
18. In fall 2008, Mr. Peterson had stomach, pancreatic and hernia problems.
19. On November 12, 2008, Mr. Peterson issued a Statement of Account to S. H. Ltd. for his services trying to enforce the Restrictive Covenant against the St.. This account for \$1,000.49 was paid by Mr. S. (**Exhibit 13**).
20. In late 2008, Mr. Peterson told Mr. S. he had recovered from his stomach, pancreatic and hernia problems.

Statement of Claim

21. On January 30, 2007, Mr. S. instructed Mr. Peterson to commence action against M. L. and C. Company for \$147,704.38 and against T. P. for \$20,000.00 (**Exhibit 14**).
22. Throughout 2007, Mr. Peterson worked with Mr. S. to gather the facts and evidence necessary to complete this Statement of Claim.
23. In August 2007, Mr. S. was still gathering information to support this claim.
24. **Exhibit 15** is some handwritten notes with a business card attached.

25. The Statement of Claim which Mr. Peterson drafted against P. was never filed nor was it served on Mr. P. (**Exhibit 16**).
26. In April 2009, Mr. S. retained Michael Bondar to commence an action against Mr. Peterson for damages arising from his failure to file the Statement of Claim against P. (**Exhibit 17**).

Mr. S.'s Complaint and Claim Against Mr. Peterson

27. On April 9, 2009, Mr. S. complained to the Law Society of Alberta about Mr. Peterson's representation of him on the caveats and the claim against P. (**Exhibit 6**).
28. On May 29, 2009, Mr. Peterson responded to the Law Society of Alberta (**Exhibit 18**).
29. On July 6, 2009, Mr. S. responded to Mr. Peterson's response (**Exhibit 19**).
30. On August 10, 2009, Mr. Peterson responded to Mr. S.'s response (**Exhibit 20**).

Misled or attempted to Mislead Mr. S.

31. Mr. S. instructed Mr. Peterson to file a Statement of Claim against M. L. and C. Company and T. P. on January 30, 2007.
32. Mr. Peterson worked with Mr. S. during the next seven months to gather the facts and evidence necessary to support the allegations in the Statement of Claim.
33. In September 2007, Mr. Peterson asked Mr. S. where he could find T. P. so as to serve him with the Statement of Claim. Mr. S. told Mr. Peterson that Mr. P. would be at the Calgary Airport on October 11, 2007, to return to Thailand.
34. Mr. Peterson did not file the Statement of Claim against P.. Mr. Peterson did not tell Mr. S. that he had not filed the Statement of Claim against P..

Failure to Fulfil Commitments to Mr. S. and to Respond to Mr. S.

35. Mr. Peterson committed to Mr. S. that he would:
 - a. file Restrictive Covenants against the Lots on a timely basis;
 - b. file a Statement of Claim against T. P. before the limitation period expired;

- c. attempt to serve P. with the filed Statement of Claim at his Calgary residence.
36. Mr. Peterson admits he did not fulfill the commitments described in paragraph 35 which he made to Mr. S..

Failure to Keep Mr. S. Informed

37. Mr. Peterson admits he did not inform Mr. S.:
- a. Before early 2008 that the Restrictive Covenants were not registered; and
 - b. the Statement of Claim was not filed.

Failure to Provide Competent Service

38. Mr. Peterson admits:
- a. the Restrictive Covenants were not properly drafted as identified by the Land Titles Office in their rejection notice;
 - b. he was responsible to ensure he knew when the Land Titles Office rejected documents so he could take appropriate steps to reregister the documents.

ADMISSION OF FACTS AND GUILT

39. Darren Peterson admits as facts the statements in this Agreed Statement of Facts for the purposes of these proceedings.
40. This Agreed Statement of Facts is not exhaustive. Mr. Peterson and the Law Society may lead additional evidence not inconsistent with the facts stated herein. Mr. Peterson acknowledges the Law Society may cross-examine him, adduce additional evidence or otherwise challenge any point of fact it may dispute except as set out in this Agreed Statement of Facts.

THIS AGREED STATEMENT OF FACTS IS MADE ON MARCH _____, 2011.

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SUPPLEMENTAL AGREED STATEMENT OF FACTS

INTRODUCTION

1. This Agreed Statement of Facts supplements the facts agreed to by Mr. Peterson in the Agreed Statement of Facts signed March 15, 2011.

ADMISSION OF FACTS

2. Mr. Peterson admits he told Mr. S. in a telephone conversation in October 2007 that his process server went to the Calgary airport to serve Mr. P. when, in fact, the process server had not gone to the airport. Mr. Peterson admits that Mr. S.'s testimony today would be that Mr. Peterson told Mr. S. his process server was unable to locate Mr. P. at the Calgary airport. Mr. Peterson does not have sufficient recollection of the conversation to contradict this.
3. Mr. Peterson admits that Mr. S. was under the impression in the course of the telephone conversation referred to above that the Statement of Claim had been filed when, in fact, it had not. Mr. Peterson also admits that he was aware at the time that Mr. S. was under this impression and that he did nothing to correct Mr. S.'s misunderstanding.

ADMISSION OF GUILT

4. For the purposes of Section 60 of the *Legal Profession Act*, Mr. Peterson admits his guilt to Citation 1 directed September 16, 2010 and admits that his conduct is conduct deserving of sanction.

THIS SUPPLEMENTAL AGREED STATEMENT OF FACTS IS MADE THIS 16TH DAY OF MARCH, 2011.

SUBMISSIONS AND EVIDENCE ON SANCTION

18. The Member was sworn and provided the following evidence:
 - (a) in accordance with his clients instructions, he prepared a restrictive covenant that was to be registered against lots in a sub-division that he had assisted the client with six months prior;
 - (b) the restrictive covenant was sent for filing at the Land Titles office in February 2006. It was rejected by the Land Titles office, however, the rejection was never brought to his attention by the legal assistant employed by him;
 - (c) in December 2006, that same legal assistant was caught stealing from the Member and his firm and was dismissed from her employ;
 - (d) in February 2008, the Member was advised by a purchaser of a lot in the sub-division (who was also a lawyer) that the restrictive covenant was not registered against the title. This was the first that he had heard that the restrictive covenant was not

- registered against the title. Upon searching his old files, he found the Land Titles rejection notices that had been placed in the file by his former assistant;
- (e) the restrictive covenants were rejected because the dominant and servient tenements were reversed on the document. The Member, with the assistance of another lawyer, revised the restrictive covenants, however, was advised by his client (the complainant) not to register them as he was thinking of moving;
 - (f) in accordance with his client's instructions, the Member prepared a Statement of Claim in the fall of 2007. He advised his client that he would file it;
 - (g) prior to filing the Statement of Claim, the Member contacted a process server to make arrangements to have it served upon the Defendant at the airport prior to the Defendant leaving the country. The process server was unable to arrange to serve the Statement of Claim;
 - (h) the Member did not file the Statement of Claim at that time. The Member has no reason to doubt his client's understanding that the Statement of Claim had been filed, just not served, at that time;
 - (i) the Member believed that the limitation period for the claim expired in August 2009 and thus was not overly concerned with the filing of the Statement of Claim;
 - (j) the Member received a letter from the complainant's new counsel in April 2009 that indicated that the limitation period expired in January 2009 as opposed to August 2009;
 - (k) the Member was sued by the complainant and the matter was settled upon payment of \$25,000.00 plus costs;
 - (l) the Member explained that at the time of these events, he was dealing with health issues of his own and of his wife's. At the time, the Member was experiencing severe pain in his stomach. He was not digesting food properly, it affected his sleep patterns and he found that he was not able to be at the office as much. He was eventually diagnosed from suffering from accelerated liver syndrome. He is currently on medication, is under active medical supervision and his liver is improving. In addition, he has changed his diet and is now exercising which is also helping him.
 - (m) The Member also explained that his Wife has been suffering from a debilitating back problem. Between attending to his own medical issues, assisting and supporting his Wife (who was hospitalized from time to time) and looking after their four children, that he simply was not paying attention to his legal practice as he should have;
 - (n) The Member's practice was described as being approximately 50% real estate, some wills and estates, some family law and some general litigation. He has been practicing now for 11 ½ years and works in association with four other lawyers. They are moving towards a partnership arrangement;
 - (o) The Member has been involved recently with Practice Review. In March 2011, the Member received the report of the Practice Reviewer and received a positive assessment. The report indicated no competency concerns. It was suggested that the Member had far too many files and that he was underbilling the files that he did have. In addition, there was an acknowledgement that the Members health certainly complicated matters, but that that appeared to no longer be an issue;
 - (p) The Member indicated that he was a member of the Church of Latter Day Saints and that for the past 4 – 5 years has been a bishop within the church. He found the work

to be quite demanding but also rewarding. He noted that his term was set to expire 9 months from the date of the hearing;

- (q) The Member indicated that he had been married for 23 years, has no mental health issues and no substance abuse issues;
- (r) In specific response to the handling of the complainant's matters, the Member indicated that he felt terrible. He noted that the complainant and he were good friends and acknowledges that he could have provided better services. He noted that following the involvement with Practice Review and the experience of dealing with this complaint, that he has better systems in place at his office and feels generally that his practice has improved. He acknowledged that he let his client down. He admitted that he was focussing more on his real estate files, rather than his litigation files and that he was being reactive rather than proactive.

19. The Member was cross-examined by counsel for the LSA and provided the following evidence:

- (a) the Member's stomach problems began in 2006 and reached its worst severity in 2008;
- (b) the real problem with the restrictive covenant was that there was only one tenement referred to;
- (c) whether the restrictive covenant had been filed at the Land Titles office or not, it may not have prevented individuals building on the property in contravention of the restrictive covenant;
- (d) the Member did charge the client for the filing of the restrictive covenants even though they did not get filed;
- (e) the Member did do a draft of the Statement of Claim in the fall of 2007;
- (f) the Member did not try to contact any other process servers to try and get the Statement of Claim served despite being advised that the Defendant was leaving the country for an undetermined amount of time;
- (g) the Member was aware that the complainant believed that the Statement of Claim was filed in October 2007 and admitted that his actions deprived the complainant the ability to pursue the lawsuit as the limitation had expired.

20. The Member was examined by members of the panel and provided the following evidence:

- (a) the Member believed that the limitation date was extended due to ongoing business relations between the complainant and the Defendant;
- (b) the Member did nothing in relation to the law suit or that file between the dates of October 2007 and February 2009. He had no explanation as to why he did not address his mind to the file or claim between these dates;
- (c) that he was referred to Practice Review due to the frequency of complaints against the Member since 2007;

- (d) that the complainant relied upon the Member to commence the action by filing the Statement of Claim.
21. Ms. Naber-Sykes submitted that Citation 1 involved a breach of integrity. The complainant believed the Statement of Claim had been filed and the Member did nothing to disabuse the complainant of that belief, thereby depriving the complainant of the opportunity to pursue the claim.
 22. Ms. Naber-Sykes tendered the record of the Member, which was entered as Exhibit 24 by consent. The Record showed one previous conviction in October 2005 relating to an integrity related offence. Ms. Naber-Sykes then tendered the Hearing Committee report relating to that offence, which was entered as Exhibit 25 by consent.
 23. Ms. Naber-Sykes submitted that it was not believable that the member had more than one draft of the Statement of Claim. Only one copy was produced in the materials, and prudent practice would be to keep various drafts.
 24. Ms. Naber-Sykes indicated that the letter of instruction from the client to the Member to commence legal action (Exhibit 6, Tab 1) that was dated January 30, 2007 was indicative of the limitation period expiring two years later – January 30, 2009. Despite that however, the Member determined that the limitation period was August 2009. Further, the instruction letter requested that the action be commenced within seven days. Prudent practice would have dictated that the Statement of Claim should have been filed in February 2007. The evidence of the Member was that he did not draft the Statement of Claim until the fall of 2007.
 25. Ms. Naber-Sykes directed the Hearing Committees's attention to paragraph 51 of the Hearing Guide where the purposeful approach to sanctioning is confirmed.
 26. Ms. Naber-Sykes submitted that the Practice Review process was dealing with the Member's shortcomings as it related to citation 4; however, it was not dealing with the integrity issues found in citation 1.
 27. Ms. Naber-Sykes submitted that the Member provided no evidence regarding his failure to file the Statement of Claim between the date of his being instructed to do so and the date that his retainer with the client was terminated. She submitted that the Member did nothing to disabuse the complainants belief that the Statement of Claim had been filed other than for selfish motives.
 28. Ms. Naber-Sykes referred the Hearing Committee to paragraphs 60 and 61 of the Hearing Guide. She submitted that this was the Members second conviction for an integrity related offence and should therefore be of grave concern to the LSA.
 29. Ms. Naber-Sykes indicated that in relation to paragraph 61 of the Hearing Guide the following factors were the most relevant for the panel to consider:

- (a)(i) **Does the conduct raise concerns about the protection of the public?**
Ms. Naber-Sykes suggests that it does as the complainant had to hire another lawyer;
 - (a)(ii) **Does the conduct raise concerns about maintaining public confidence in the legal profession?**
Ms. Naber- Sykes suggests it does as a lawyer is obligated to tell clients if they have misunderstood something or are wrong in their understandings on an issue and failure to do so reduces confidence in the profession;
 - (b) **Level of Intent**
Ms. Naber-Sykes suggests that the client's reliance on the Member and his failures without explanation is a breach of integrity;
 - (c) **Impact or injury caused**
Ms. Naber-Sykes suggests that the client was injured – he was deprived of his right to sue;
 - (h) The Members prior discipline record and risk of recurrence (this is the Members second offence related to misleading) were aggravating factors. Mitigating factors included that the Member has reacted well to the practice review process, restitution was made and an apology was made.
30. Ms. Naber-Sykes submitted that the Member should also be directed to pay the costs of the hearing and tendered an Estimate of Costs that was entered as Exhibit 26 by consent.
31. Ms. Naber-Sykes submitted that in consideration of all of the circumstances of this matter that a suspension of the Member for a period of three months was warranted.
32. Mr. Lytle submitted that drafts of Statements of Claim need not be saved. He noted that this placed too high an onus on Members. He suggested that Members are not required to keep drafts of letters to clients and that this is really no different. The evidence of the Member and the documentary evidence suggested that the Statement of Claim was in fact drafted in the fall of 2007.
33. Mr. Lytle submitted that the Member neglected to file the Statement of Claim. The Member had no selfish motive to lie about this – there was no gain in it for him. The Member admitted to not filing the Statemenmt of Claim and has settled the law suit with the complainant regarding this neglect.
34. Mr. Lytle submitted that the restrictive covenant was not registerable. The drafting suggested that the Member, at that time, lacked substantive knowledge of the law as it related to restrictive covenants. This was compounded by the action of a dishonest staff member and poor administrative practices.
35. Mr. Lytle indicated that the Member had taken steps to remedy the problems that were facing him – he is working in a solid partnership with experienced lawyers, he has cooperated fully with the Practice Review process, and has hired good staff. He noted that the Member made admissions of guilt and thereby saved witnesses the need to attend to give evidence and shortened the proceeding as a result.

36. Mr. Lytle submitted that the conduct of the Member is not a symptom of a fundamental character flaw. The conduct was out of character for the Member. That the Member was now ten years at the bar, had shown significant dedication to his family and to his church, was committed to the Practice Review process and was very motivated in getting his practice under control.
37. Mr. Lytle submitted that having regard to the “step up” principle in relation to sanctioning, that the Member should be subject to a serious fine. A suspension would have significant financial consequences upon him. Mr. Lytle confirmed that the Member has been advised by the LSA that it might be seeking a suspension prior to the commencement of the Hearing.
38. Ms. Naber-Sykes submitted that the Hearing Committee should not be derailed from considering a suspension due to economic consequences as every Member who is suspended suffers the same consequence. It was submitted that this is a matter of character, not negligence.

DECISION AS TO SANCTION

39. In determining an appropriate sanction, the Hearing Committee is guided by the public interest, which seeks to protect the public from acts of professional misconduct. The primary purpose of disciplinary proceedings is the protection of the best interests of the public and protecting the standing of the legal profession generally. The fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.
40. In *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

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

41. The Hearing Guide for the LSA, at paragraphs 60 and 61, articulate the relevant factors to be considered in determining the appropriate sanction:

60. A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.
- a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.
 - b) Specific deterrence of the member in further misconduct.
 - c) Incapacitation of the member (through disbarment or suspension).
 - d) General deterrence of other members.
 - e) Denunciation of the conduct.
 - f) Rehabilitation of the member.
 - g) Avoiding undue disparity with the sanctions imposed in other cases.

In one way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.

61. More specific factors may include the following:

- a) The nature of the conduct:
 - (i) Does the conduct raise concerns about the protection of the public?
 - (ii) Does the conduct raise concerns about maintaining public confidence in the legal profession?
 - (iii) Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties to the court, other lawyers or the Law Society)

- (iv) Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?
- b) Level of intent: the appropriate sanction may vary depending on whether the member acted intentionally, knowingly, recklessly or negligently. In some cases, the need to protect the public or maintain the public confidence in the legal profession may require a particular sanction regardless of the state of mind of the member at the time.
- c) Impact or injury caused by the conduct.
- d) Potential injury, being the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.
- e) The number of incidents involved.
- f) The length of time involved.
- g) Whether and to what extent there was a breach of trust.
- h) Any special circumstances (aggravating/mitigating) including the following:
- prior discipline record
 - risk of recurrence
 - member's reaction to the discipline process (acknowledgement of wrongdoing, guilty plea, self-reporting, refusal to acknowledge wrongdoing, etc.)
 - restitution made, if any
 - length of time lawyer has been in practice
 - general character
 - whether the conduct involved taking advantage of a vulnerable party
 - a dishonest or selfish motive
 - personal or emotional problems
 - full and free disclosure to those involved in the complaint and hearing process or cooperative attitude toward proceedings
 - physical or mental disability or impairment
 - delay in disciplinary proceedings
 - interim rehabilitation
 - remorse

- remoteness of prior offences.
42. The Member has learned from his experience and was contrite. During the Hearing, he did not attempt to minimize his conduct and that he should have conducted himself differently.
 43. The Hearing Committee was influenced in its decision as to sanction by the following factors:
 - (a) the Member's co-operation with the LSA;
 - (b) the Members prior discipline record;
 - (c) that specific deterrence of the Member will be achieved with a suspension in these circumstances;
 - (d) the significant efforts made by the Member to remedy the difficulties he encountered; and
 - (e) that from a general deterrence perspective, that it is important for all Members of the LSA that compliance with the Code of Conduct are important not only to the Bar, but also to maintain the public's confidence in the legal profession.
 44. Taking into account all of the foregoing factors, the Hearing Committee concluded that the public interest would be protected and confidence in the profession maintained through a suspension of 30 days commencing at 12:01 am on March 24, 2011, with the following condition:
 - (a) that the member is to meet with the Practice Review Committee to review with the Member how to deal with clients where mistakes or errors are made and to follow the directions of clients.
 45. The Hearing Committee directed that the Member should pay the actual costs of the Hearing, to be paid within 6 months from the conclusion of the suspension.

CONCLUDING MATTERS

46. No referral to the Attorney General is required in this matter.
47. A separate notice to the profession is required in respect of this matter.
48. The decision and the transcript in this hearing are to be made available to the public with the names of the complainant, clients, third parties or other employees to be redacted.

Dated this 17th day of June, 2011.

James A. Glass, Q.C., Bencher
Chair

Neena Ahluwalia, Q.C., Bencher

Wayne Jacques, Lay Bencher