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 MARY JO ROTHECKER
a Member of The Law Society of Alberta

INTRODUCTION AND SUMMARY OF RESULTS

1. On February 16, 17, and 18, 2010 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, Mary Jo Rothecker. The Committee was composed of Fred R. Fenwick, Q.C. (chair), Sarah J. King-D'Souza, Q.C. and James A. Glass, Q.C. The LSA was represented by Mr. W. Lindsay MacDonald, Q.C. The Member was present throughout the hearing and was self-represented.

2. The Member faced six citations:

Complaint of M.R.

(1) IT IS ALLEGED that you failed to respond on a timely basis and in a complete and appropriate manner to communications from the Audit and Conduct Departments of the Law Society that contemplated a reply, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

(2) IT IS ALLEGED that you failed to respond on a timely basis and in a complete and appropriate manner to communications from the Law Society of Alberta that contemplated a reply and thereby breached Chapter 3, Rule 3 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

(3) IT IS ALLEGED that you failed to follow the provisions of the Rules of Court or of your own written fee agreement with your client when calculating your fees, and thereby breached Chapter 1, Rules 1 and 7 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

(4) IT IS ALLEGED that you failed to charge your client a fair and reasonable fee with respect to a Contingency Fee Agreement and thereby breached Chapter 13, Rule 1 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

Complaint of the Law Society of Alberta

(5) IT IS ALLEGED that you failed to respond on a timely basis and in a complete and appropriate manner to communications from the Practice Review and Conduct departments of the Law Society of Alberta that contemplated a reply, and that such conduct is conduct deserving of sanction.

Complaint of L.M.

(6) IT IS ALLEGED that you failed to properly serve your client and thereby breached Chapter 8 and Chapter 13 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

3. At the commencement of the hearing, counsel for the LSA and Ms. Rothecker presented the Hearing Committee with a binder containing Agreed Exhibits tabbed 1-58. Additional Exhibits were entered at the hearing.

4. The LSA produced witnesses who were examined in chief and cross-examined, the Member testified and was cross-examined and as well, produced a witness who was cross-examined.

5. At the conclusion of the evidence, counsel from the LSA stipulated that Citation No. 6 had not been made out, which the Hearing Committee accepted. Based on the evidence and upon hearing argument from counsel for the LSA and from the Member, the Hearing Committee decided that Citations 1, 2, 3, 4, and 5 were made out and represented conduct deserving of sanction.

6. The Hearing Committee delivered brief oral reasons at the conclusion of the hearing on February 18, 2010, and adjourned the hearing to May 10, 2010 at the Law Society offices to continue the hearing regarding sanction. These written reasons were produced by the Hearing Committee to be made available to the Member and Law Society counsel prior to the Sanction Hearing and the Member and the Law Society Counsel were requested to make written submissions in advance of the Sanction Hearing.

7. The Sanction Hearing was adjourned by consent to June 24, 2010 and on that date the Hearing Panel convened at Calgary with Law Society Counsel, the member attending, by consent, by telephone conference. The Hearing Committee received submissions, made amendments to its finding of facts concerning the date that a contingency fee agreement in question was received by Law Society investigators (referred to in paragraphs 20 and 44), and the appropriate contingency fee calculation (35%) referred to in paragraphs 69 and 70. Upon consideration of the written and oral representations of counsel for the Law Society and the member, the Hearing Committee delivered oral reasons for sanction and suspended the member for 15 months with other conditions.

JURISDICTION AND OTHER 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 or counsel for the LSA regarding the constitution of the Hearing Committee.

10. The entire hearing was conducted in public.

11. The Member confirmed that prior to the hearing she had been informed of the availability of pro bono defence counsel and confirmed her intention to be self-represented.

CITATIONS 1 & 2

12. These citations arise out of complaints by the LSA regarding the Member's failure to respond in a meaningful or timely fashion to requests made by the LSA.

13. Citation 1 arises from an allegation that the Member did not respond to correspondence from the LSA requesting the Member to provide information in regards to concerns of possible overcharging by the Member.

14. Citation 2 arises from an allegation that the Member did not respond to requests for information from an investigator appointed by the Director, Lawyer Conduct, of the LSA.

15. Citations 1 and 2 involve similar facts and evidence as are dealt with in Citations 3 and 4; however, the two citations do not deal with the allegations of overcharging.

EVIDENCE

16. The key Exhibits with regards to the citations are:

    Exhibit 6 (Tabs 1-8), 7, 8, 9, 10 (Tabs 4, 16, 17, 18, 22), 11, 12, 16 and 18.

17. The Member was subject to a Rule 130 Audit that was conducted at the Member's office in December 2005.

18. The LSA issued its Rule 130 Audit Report on March 7, 2006. In it, the LSA made numerous requests of the Member to provide information and documents in relation to the M.R. file as follows:

    - The Retainer Agreement;
    - Statement(s) of Account;
    - Supporting documents for the payment to P.M.;
    - Support documents for the payment to AMA; and
    - Statement of Receipts and Disbursements provide to the client.

    (Exhibit 6, Tab 1)

19. The Member responded to the LSA on April 25, 2006. She provided the following information and documents:

- Copy of the original retainer letter;
- Copies of all Statement(s) of Account;
- Copies of supporting documents for the payment to P.M.;
- Copies of supporting documents for the payment to AMA; and
- Copies of Statements of Funds Received and Disbursed provided to the client.

(Exhibit 10, Tab 4)

20. It was noted by the Hearing Committee that the Retainer Agreement provided that the Member's "fees will be a percentage of the amount recovered, if any, as provided for in the Contingency Fee Agreement, a draft of which is enclosed." The Member's response did not enclose a copy of the Contingency Fee Agreement. The contingency fee agreement was provided to the Law Society Investigator on about August 2, 2007.

21. On May 13, 2006, the LSA completed a reconciliation of the Member's fees based upon the information provided and requested the Member to review and respond to the recalculation. (Exhibit 6, Tab 2)

22. The Member requested an extension to respond to the May 13, 2006 letter to May 31, 2006. (Exhibit 6, Tab 3). The LSA agreed to the extension (Exhibit 6, Tab 4).

23. On May 25, 2006 the Member requested a further extension to respond to June 9, 2006. (Exhibit 6, Tab 7).

24. As a result of the Member's failure to respond to the inquiries regarding the contingency fee calculations, the Senior Auditor of the LSA filed a complaint with the Manager, Complaints on May 29, 2006. (Exhibit 6)

25. On June 5, 2006, pursuant to s.53 of the *Legal Profession Act* ("LPA"), the LSA requested the Member respond to the complaint of the Senior Auditor. (Exhibit 7)

26. The LSA followed up with the Member again on June 28, 2006, requesting a response as none had been received at that time.

27. The Member never responded to the inquiries of the Senior Auditor regarding the recalculation in writing until this matter proceeded before the Hearing Committee.

28. Having not received any response from the Member to its inquiries regarding the recalculations, an investigation pursuant to s.53(3)(b) of the LPA was directed on March 26, 2007. (Exhibit 9)

29. On August 3, 2007 the Member was interviewed at length by the LSA investigator, Donald Procyk. (Exhibit 10, Tab 16)

30. On August 7, 2007, the Investigator wrote to the Member requesting her response to the following:"

(a) *As stated during our interview, you are in disagreement with the calculations created by Mr. Glen Arnston, in his correspondence of May 13, 2006, concerning the various charges and disbursements attributed to your contingency file, for M.R.*

Utilizing Mr. Arnston's format, and formula, please provide, to me, the documented changes that reflect your calculations, including fees, disbursements and other charges, together with the information that you provided concerning your reduction in fees charged to Ms. R. at the time that this matter was settled. Please document, specifically, any areas in which you believe that Mr. Arnston was in error.

(b) *Client trust ledger for the M.R. file;*

(c) *Copies of any written agreement with P.M. concerning the reduction in fees charged to M.R. in this contingency file; and*

(d) *Copy of P.M.'s Contingency Fee Agreement as contained in your file."*

31. The Member was asked to respond by August 17, 2007. (Exhibit 10, Tab 17)

32. On August 17, 2007 the Member responded to the investigator by email. The substance of this response to the various requests was as follows:

(a) In relation to the recalculations, that she had provided details of her response to Mr. Procyk in the interview of August 3, 2007 and queried why it was necessary to repeat them. She then addressed numerous issues she had with the auditor's calculations but did not provide any of her own calculations in relation to how the fee is to be calculated;

(b) In relation to the trust ledger, the Member suggested that the investigator obtain a copy of the trust ledger for the M.R. file from the LSA auditor, and if "upon written confirmation that Mr. Arnston does not have this ledger" she would then provide a copy;

(c) In relation to an agreement with P.M., the Member responded to the request by indicating that she had already provided this information to the auditor; and

(d) In relation to the provision of P.M.'s contingency file, the Member indicated she was out of the Province at the time the response was required and that she would look for P.M.'s Contingency Agreement upon her return. She also inquired as to the relevance of this document. (Exhibit 10, Tab 18)

33. On November 26, 2007, as a result of the lack of response to the requests of the Investigator, the LSA issued a request for the Member's response to same pursuant to s.53 of the LPA. (Exhibit 11)

34. On December 21, 2007 the LSA sent a reminder to the Member, again requesting a response. (Exhibit 12)

35. The Member did call the LSA on December 24, 2007 and left a message requesting a phone call on January 3, 2008 to discuss the response.

36. On January 3, 2008, staff from the LSA called the Member's office and was advised that the Member was still in Ontario. Phone numbers for the Member were provided to the staff but no follow up calls were made to the Member.

37. In early January 2008 the Member requested clarification regarding all outstanding complaints from the LSA. In addition, she indicated that she did not have access to her Law Office or documents so could not respond.

38. Time to respond to the LSA requests was extended to January 24, 2008. The Member requested a further extension to February 19, 2008. The request for an extension was agreed to by the LSA.

39. On February 19, 2008, the Member requested another extension to respond to the LSA to March 4, 2008. The LSA agreed.

40. The LSA did not receive a response as promised by the Member.

DECISION ON CITATIONS 1 AND 2

41. The Hearing Committee is mindful of:

- Chapter 3 of the *Code of Professional Conduct* concerning; a lawyer's duty to uphold the standards and reputation of the profession.

- Chapter 3, Rule 3 which states that "A lawyer must respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply."

42. The Member's evidence was that, had she been asked for a copy of her Contingency Agreement, she would have provided it. Further, she acknowledged that she did not provide a recalculation of her fees and disbursements as requested by the auditor and investigator.

43. The Member testified that her practice was in trouble in 2005 and 2006. She was responding to numerous complaints, audits and had involvement with the Practice Review Committee at the time. In addition, she had significant familial issues occurring that required her attention and numerous attendances in Ontario.

44. As noted above, the Member provided the contingency fee agreement to the Law Society Investigator on or about August 2, 2007.

45. The Member also acknowledged that she now understands her obligations under Rule 130, s.53 and s.55 of the LPA and that answers must be prompt, complete and unconditional.

46. The Member testified that she was confused about the response required of her at the time but now fully understands what the LSA was requesting.

47. The Hearing Committee finds the excuses provided by the Member in failing to respond timely or effectively lack plausibility.

48. The requests of the auditor and investigator were clear and understandable. There was absolutely no confusion in the requests made. The Rules and ss. 53 and 55 of the LPA are also clear – they require a response by the Member in a timely and complete manner.

49. The Member's responses to the inquiries of the auditor and investigator are almost non-existent. Her responses throughout were oppositional and were attempts to divert attention from herself to others. The Member failed to respond in any meaningful way to the requests of the auditor and investigator.

50. As a result, the Hearing Committee finds that Citations 1 and 2 are made out and that the conduct is deserving of sanction.

CITATIONS 3 AND 4

51. The citations arose out of the settlement of a personal injury action which the Member conducted on behalf of M.R.. M.R. had a previous solicitor (solicitor M) who transferred the file to the Member, the Member had a written Retainer Agreement and a Contingency Fee Agreement and the client's claim was settled at a JDR based on the client's instructions to get her a round number settlement ($21,000), "in her hands".

52. Arising out of instructions and the settlement, the Member calculated her fee, the disbursements, and the amounts payable to the previous solicitor M and a subrogated claim from the client's auto insurer based on providing the client with her round number settlement goal, as opposed to pursuant to the Contingency Fee Agreement. The substance of the complaint is that the Member thereby ended up with a considerably larger fee than had it been calculated according to the Contingency Fee Agreement.

53. The client did not complain. The Law Society investigation arose out of a Rule 130 Audit and the Law Society's auditors' calculations.

EVIDENCE

54. The matter having been settled and amounts paid out in April of 2005, the evidence at the hearing consisted of a Contingency Fee Agreement and other records produced from the Member's files during the Rule 130 Audit together with various calculations of amounts owing. The Law Society investigator, Mr. Glen Arnston, testified about the various calculations and was cross-examined by the Member. The Member herself testified about the calculations and was cross-examined.

55. The key Exhibits with regards to the citations included (in the order entered, not necessarily in date order):

Exhibit 6-2	May 30, 2006, letter from the Law Society of Alberta to the Member enquiring as to the recalculations and the payout to the client
Exhibit 6-9	June 15, 2002, Retainer Agreement between the Member and the client concerning the motor vehicle accident in question
Exhibit 10-1	The Member's trust ledger concerning the client showing payments and payouts
Exhibit 10-5A	A collection of the Member's accounts to the client from October 30, 2002, to the final settlement account April 1, 2005
Exhibit 10-14	Contingency Agreement signed January 19, 2004, but effective July 1, 2002, between the Member and the client MR concerning the conduct of the action
Exhibit 59	Mr. Arnston's calculation of re payment required for contingency fee files (re MR)
Exhibit 68	The Member's hand written comments annotating the previous Exhibit from Mr. Arnston
Exhibit 69	The Member's hand written summary of staff payments, disbursements, overhead payments and fees charged to the client

56. The calculation of the fee charged to the client by the Member was considerably complicated at the time it was rendered, during the Rule 130 Audit, and at the Hearing Committee phase by the following factors:

(a) The original Retainer Agreement of June 15, 2002, was a cash fee Retainer Agreement that had a detailed section concerning "other charges" which listed charges such as contract research lawyer, research assistant, legal secretary, secretary, etc. as additional charges that the client would be charged over and above other fees. In essence, the Member purported to charge-out the vast majority of her office expenses to the client in addition to her hourly rate.

(b) The Contingency Fee Agreement was signed considerably later, January 19, 2004, but states on its face that it is effective July 1, 2002, making the previous Retainer Agreement of limited value. The Contingency Fee Agreement expresses fees for the recovery of the injury accident "as a percentage of the total recovered by the Client, not including disbursements".:

- 25% prior to the filing of the Statement of Claim
- 30% prior to Examinations for Discovery
- 35% between Examinations for Discovery and trial

- 40% at trial.

The Contingency Fee Agreement dealt with the previous solicitor M by stating:

> *"The Solicitors will pay to PM $4,458.74 representing disbursements incurred by his law office while he was retained and will pay him 15% of the gross recovery amount, minus disbursements representing his fees, and the Solicitors will pay these amounts from the above detailed percentage, upon the settlement of this matter." (emphasis added)*

The Contingency Fee Agreement contained an entire agreement clause (Clause 16), which limits the relevance of any previous agreement.

(c) The matter was settled at a JDR which the Member argued at the Hearing to be sufficiently like a trial to justify a 40% contingency fee, however a JDR is not mentioned in the Contingency Fee Agreement and settlement was before trial.

(d) The Member was also retained by or responsible for the collection of a subrogated insurance claim on behalf of the client payable to her insurer, the AMA. The amount of the subrogated claim was $8,150 and the Member was entitled to and did charge the AMA a 35% fee for the collection of that amount.

(e) The Member, as evidenced by her collection of Statements of Account, billed the client for, and collected from the client on a regular basis, disbursements and overhead charges such as secretarial and research up until the conclusion of the matter. The Member did not reimburse the client for these amounts.

(f) At the JDR, the client decided that she wanted a round number settlement ($21,000) and the settlement, fees, disbursements etc. were built around the round number goal, rather than the Contingency Fee Agreement specifically.

(g) There was an additional amount to be paid on behalf of the Member to S. D. C. in the amount of $3,000. This did not appear to be a disbursement in the ordinary sense of the word, related to the motor vehicle accident but was a separate amount payable on behalf of the client, in addition to the $21,000 cash recovery she expected out of the JDR.

57. The calculations presented the Hearing Committee were further complicated by some (now in retrospect) obvious errors in the calculations made by the Member during the settlement process:

(a) The Member calculated her fee based on a gross recovery of $55,000 (which included the gross amount of $8,150 payable to the AMA. The Member then deducted the $8,150 from the amount payable to the client and paid the AMA their $8,150, less a 35% fee. The Member was paid a 35% fee, in essence, twice on that $8,150.

(b) Although the Contingency Agreement clearly stated that the amounts payable to the previous solicitor were payable out of the Member's contingency fee, the Member did not deduct the previous solicitor's 15% from her 35%.

58. The Hearing Committee has been presented with a number of calculations of fees owing including the Member's original calculations, the Law Society's calculations done twice during the Rule 130 Audit, and the Member's calculations further developed at the hearing.

59. During her submissions on the citations, while discussing what appeared to be the appropriate calculation based on a strict wording of the Contingency Fee Agreement, the Member suggested at Page 407 that:

> "This is -- and I suggest to you that for the work done, the legal work done from 1998 to 2005, that $11,000 would not be economically feasible. It wouldn't support that type of practice. I don't think lawyers would do that type of work so I don't think the fee would be fair and reasonable because it's not fair and reasonable to the lawyers, but it's also not good for the public because the public is using that method of payment, that contingency method, to gain damages."

60. Both the Member and counsel for the LSA agreed that the Contingency Fee Agreement was substantially in compliance with the *Rules of Court*, however the submission of the LSA was that the calculation of the fee was not pursuant to the strict wording of the Agreement.

DECISION ON CITATIONS 3 AND 4

61. The Hearing Committee is mindful of:

- Chapter 1 of the *Code of Professional Conduct* concerning the responsibility of a member as an officer of the Court and by virtue of the privileges accorded the legal profession;
- Rule 1 concerning upholding and respecting the law in personal conduct and in rendering advice; and
- Rule 7 concerning not taking unfair advantage.

62. In this regard, the Hearing Committee notes that the Contingency Fee Agreement was drafted by the Member and the ordinary rules of contract interpretation would obligate the most favourable interpretation of that contract on behalf of the client. The *Code of Professional Conduct* and the rules impose an even higher standard than that.

63. Further, arising out of the situation where the client had determined to get a round number settlement it is possible that a lawyer could be put in a conflict position where they could obtain a larger fee than the Contingency Fee Agreement provided for by calculating back from the round number rather than forward from the gross number in the Contingency Agreement which was drafted by the lawyer. It is reasonably clear to the Hearing Committee in this situation that the Member put herself in that situation. The client did not complain, as she did not know and would have no reasonable way of knowing unless the Member told her that she may actually "do better" than the $21,000 number, arising out of the $55,000 round number settlement offered just arising out of the construction of the Contingency Fee Agreement.

64. The Hearing Committee can also take judicial notice of the usual procedure in litigation matters to collect costs according to the appropriate column of the *Rules of Court* and disbursements as a separate item of recovery in order to partially repay the client for the costs. It would be a conflict for a lawyer to effectively increase the fee paid for legal services by either not collecting costs or ignoring the costs issue.

65. The Member's submission (albeit in argument) that the approximate $11,000 fee which (was being argued) was the appropriate fee under the Contingency Fee Agreement was unsuitable because no lawyer would take on such a task for $11,000 is really beside the point if the Member's own agreement specifies that charge. The fact that a retainer agreement is no longer a good bargain for a lawyer does not make the retainer contract impossible to perform and therefore unenforceable.

    The Member is a practising lawyer and ought to know that she cannot draft an ambiguous contract and then argue that ambiguity to her favour, ought to understand that a retainer agreement which will still pay her, but at a slightly lower profitability is not a legal definition of impossibility of performance, and further ought to be mindful of her responsibility to her client in the conclusion of settlement negotiations and calculation of fee amounts which the client relies upon the Member to accurately calculate the fee according to the Contingency Fee Agreement.

66. The Committee finds that the Member's fees ought to have been calculated according the Contingency Fee Agreement and notwithstanding the fact that the client had a round number settlement amount in her mind, she was at least owed by the Member a principled explanation of the calculation of the fees.

67. The Hearing Committee finds that in failing to calculate fees and disbursements in accordance with her own Contingency Fee Agreement and putting herself in a position where she is in conflict with her client in the calculation of the fee, the Member contravened Chapter 1, Rule 1 by not correctly applying her own Contingency Fee Agreement and contravened Chapter 1, Rule 7 by putting herself in a position where she took unfair advantage of her own client. Further, in failing to correctly apply her own Contingency Fee Agreement, the Member's fee exceeded a fair and reasonable amount which the Hearing Committee finds is the amount that would have been payable had the Contingency Fee Agreement been adhered to, and the Hearing Committee further finds that this is conduct worthy of sanction.

68. The Hearing Committee will attempt, below to recalculate appropriate fees paid based on the principles listed below. The Hearing Committee invites submission from the Law Society counsel and the Member as to whether or not the calculation is accurate in terms of whether or not we have missed any obvious taxes or disbursements and on the matter of what ought to be done in terms of any repayment to the client, if any (consistent with the Member's obligation, limitations of actions, etc.). Although the Hearing Committee invites submissions concerning the mathematics of the calculations, the Committee does <u>not</u> seek submission on the following factors.

69. The factors the Hearing Committee takes into consideration concerning the appropriate calculations are as follows:

(a) The appropriate fees are to be calculated pursuant to the Contingency Agreement dated January 19, 2004 (Exhibit 10-14).

(b) The $8,150 payment to the AMA which the Member is entitled to charge the AMA a 35% collection fee for is not to be included in the gross amount subject to the contingency fee percentage.

(c) The Member is entitled to a fee based on 35%.

(d) Further deducted from the gross amount subject to the contingency fee percentage are the disbursements in the approximate amount of $4,900 paid to the previous solicitor M.

(e) Further deducted from the gross amount subject to the contingency fee calculation are Ms. Rothecker's disbursements as set out in Exhibit 69 in the amount of $1,143.38.

(f) The fee portion of solicitor M's payment is to be paid out of the 35% fee payable to the Member.

(g) The Member billed the client for disbursements, staff, and overhead charges as set out in Exhibit 39. The client is entitled to be repaid the disbursements as if they had been collected and is also to be reimbursed staff and overhead charges as these are outside of the Contingency Fee Agreement.

70. Accordingly, the Hearing Committee finds that the appropriate fee pursuant to the Member's own Contingency Fee Agreement in these situations to be calculatable as follows:

Gross Settlement	55,000.00
Less subrogated AMA claim	8,150.00
Subtotal	46,850.00
Less solicitor M's disbursements	4,900.00
Less Member's disbursements	1,143.38
Net settlement amount	40,806.62
X contingency fee amount	x .35
Basic contingency fee	14,282.22
Plus 7% GST	999.76
Total fee	15,281.98
Plus disbursements	4,900.00
	1,143.38
Total Fee	21,325.36

71. Distribution of settlement funds to the client at conclusion ought to have been as follows:

Gross Settlement	55,000.00
Less subrogated AMA claim	8,150.00
Less account pursuant to Contingency Fee Agreement	21,325.36
Less payable directly to Sierra Dental	3,000.00
	22,524.64
Plus reimbursement of disbursement and office expenses	7,663.21
	30,187.85

72. Based on the calculation above, the client was underpaid the amount of:

30,187.85
– 21,000.00
9,187.85

which represents the overpayment of fees to the Member. The Hearing Committee directs that the LSA and the Member make submissions as to the entitlement of the client to the repayment of this amount in light of the client's lack of complaint, the client's knowledge or lack of knowledge of the overpayment, and applicable limitations legislation.

CITATION 5

73. This Citation arose out of a complaint from Complaint from the Law Society of Alberta regarding the Member's failure to respond on a timely basis and in a complete and appropriate manner to communications from the Practice Review and Conduct departments of the Law Society of Alberta that contemplated a reply.

EVIDENCE RESPECTING CITATION 5

74. The key Exhibits in relation to the citation that the member failed to respond on a timely basis and in a complete and appropriate manner to communications from the Practice Review and Conduct departments of the Law Society of Alberta are: Exhibit 19 Tabs 1-10, Exhibits 20- 23, Exhibits 62, 63 and 65.

75. The Member was referred to Practice Review on April 24, 2003 by a Conduct Committee Panel in light of the Member's practice history. The Conduct Committee Panel in addition referred a matter of the Member's conduct to a Hearing Committee. (Exhibit 19, Tab1)

76. On December 14, 2004 the Member had faxed an Updated Snapshot of her practice to Ms Rogers. (Exhibit 62)

77. On December 14, 2004 the Member met with a Practice Review Panel for a third face to face meeting.

78. In its follow up letter to the Member dated December 17, 2004, and at the request of the Member for clarification as to the steps required to be taken by her before the next meeting, (Exhibit 19 Tab 2) the Panel asked for a written updated Practice Snapshot by January 17, 2005 to include a report on visits to other rural /sole practitioners including some specific information on some points. (Exhibit 19, Tab 3)

79. In response to the follow up letter from Practice Review the Member advised, on January 17, 2005, that she was enthused by the project and would have it completed by January 24, 2005. (Exhibit 19, Tab 5)

80. The Member met with Practice Review again on April 11, 2005.

81. On April 14, 2005 the (then) Chair of Practice Review in a letter advised that the Member would be contacted in August 2005 for an updated Practice Snapshot. (Exhibit 19, Tab 5)

82. On March 10, 2006, (the Member's note of this call is dated February 28, 2006) Ms Rogers, an LSA staff member with the Practice Review department, spoke to the Member and indicated that Practice Review had been waiting over a year for her "Report". The Member indicated to Ms Rogers that she was unable to make it a priority "at this time". Ms Rogers indicated the Report was no longer needed. (Exhibit 63)

83. On March 30, 2006 the (then) Chair of Practice Review in a letter asked that the Member comply by May 12, 2006, with the previous requests of December 16, 2004 and April 14, 2005 for a practice snapshot.(Exhibit 19, Tab 6)

84. On May 12, 2006 Barbara Cooper, Manager Practice Review, faxed to the Member at her request a copy of Exhibit 19, Tab 6 and advised that Ms Rogers was still looking for a reply to it. (Exhibit 65)

85. On May 15, 2006 the Member faxed a letter to Ms Rogers, advising that on February 28, 2006, Ms Rogers had advised her that the practice snapshot was a "moot point " and would not be required. (Exhibit 63)

86. The Member expressed a concern in her fax letter that, in her opinion, the Practice Review Committee was continuing "without a clear definition or understanding of the intention of the practice review and of it [sic] completion."(Exhibit 19, Tab7)

87. On May 19, 2006 Barbara Cooper, Manager Practice Review, faxed to the Member a Guideline of suggested information to be included in a Practice Snapshot. (Exhibit 65)

88. On May 25, 2006 the Member's office (in response to a letter from Practice Review dated May 19, 2006) sent a fax advising that the Member was away, would be unable to meet with

her lawyer until June 2, 2006, and asking for an extension to June 9, 2006. (Exhibit 19, Tab 8)

89. On May 25, 2006 the Member provided instructions to a staff member (D.) to prepare a draft response using the Guideline, for the Member to complete. (Exhibit 65)

90. On June 23, 2006 Ms Rogers wrote to the Member advising that the Practice Review Panel had been unable to proceed in the absence of the responses contemplated in the exchange of communications in December 2004. (Exhibit 19, Tab 9)

91. On October 3, 2006 the Member was advised by a fourth Chair of Practice Review that due to her failure to provide the Report and snapshot there was nothing further that Practice Review could do to assist her.(Exhibit 19, Tab10)

92. On November 8, 2006 the Member was advised in writing by the LSA Complaints Manager, Katherine Whitburn, that the above events had resulted in a complaint from Practice Review and requesting a response within 14 days. (Exhibit 20)

93. On December 11, 2006 the Member was advised in writing by the LSA Complaints Manager, Katherine Whitburn that if she did not respond, the matter would go to a Conduct Committee Panel notwithstanding. (Exhibit 21)

94. On December 22, 2006 at the Member's request another copy of Exhibit 20 was faxed to her and an extension of time to respond granted to January 12, 2007.(Exhibits 22 and 23)

95. On January 26, 2007 at the Member's request, a third copy of Exhibit 20 was faxed to her by the LSA Complaints Manager, Katherine Whitburn along with a letter advising the Member that if she did not respond the matter would go to a Conduct Committee Panel notwithstanding. (Exhibit 23)

DECISION ON CITATION 5

96. The Hearing Committee is mindful of:

- Chapter 3 of the *Code of Professional Conduct* concerning; a lawyer's duty to uphold the standards and reputation of the profession.

- Chapter 3 Rule 3 which states that "A lawyer must respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply."

97. The Member's evidence is that when she appeared before Practice Review in December 2004 she had understood it was to discuss her business plan and Revenue Canada debt. She was shocked and hurt by the content of the meeting which reviewed her client complaints and reputation, and was quite critical of her. She gave evidence that as a result she was afraid, froze up and shoved things to the side. At the Practice Review meeting the Member offered to survey other lawyers with similar practices to her own. However, the Member's evidence

was that she had a lot going on in her personal life and office, and her focus at the time was simply not to generate more complaints as opposed to follow through on her commitment to Practice Review.

98. The Member had provided a snapshot for Practice Review on December 14, 2004, the day of the meeting with the Practice Review Panel. The Member apparently did not appreciate that the plan of action was that she was to undertake the "survey" and report back to Practice Review by January 17, 2005 by way of a further "snapshot", but this was clear from the letter from Practice Review.

99. On March 10, 2006, Ms Rogers spoke to the Member and during the discussion Ms Rogers indicated to the Member that the Report was "a moot point". Within three weeks of that conversation, on March 30, 2006, the (then) Chair of Practice Review in a letter asked that the Member comply by May 12, 2006, with the previous requests of December 16, 2004 and April 14, 2005 for a practice snapshot.

100. Although the Member suggested that Ms Roger's comments about the Report no longer being necessary caused confusion on the part of the Member, three different Practice Review Chairs at various times (December 17, 2004, April 14, 2005, March 30, 2006) wrote the Member asking or advising that a practice snapshot needed to be provided, and therefore this excuse is not plausible.

101. The Member acknowledges she should have been more proactive in clearing things up.

102. The Member indicated that she was not asked again for the Practice Snapshot until May 12, 2006 (Exhibit 65). The Member appears to have considered it the responsibility of Practice Review to continue to remind her of this obligation.

103. Having received the Guideline of suggested information to be included in a Practice Snapshot in May 2006 from Ms Cooper, the Member provided instructions to a staff Member (D.) to prepare a draft response on May 25, 2006. On the same day the Member's office (in response to a letter from Practice Review dated May 19, 2006) sent a fax advising that the Member was away. The Member's evidence was that she assumed the Practice Snapshot had been sent in by her staff and she has no further recollection of the snapshot.

104. The Member acknowledges that she did not have a good enough system in place to determine whether she had responded accurately or completely to Law Society letters.

105. The Member also indicated in her evidence that Ms Arsenault had not advised her of the failure to respond to Practice Review in the list of outstanding client complaints sent to the Member on January 8, 2008. The Member also indicated that she understood from her counsel that someone would be getting in touch with her after a hearing panel directed a mandatory Practice Review in November 2006.

106. There is a theme in the evidence of the Member being oppositional and uncooperative with the Law Society on several occasions, "closed" from hearing what she did not want to hear, assuming her view of matters was correct and the information provided by others was not. On the other hand, the Member also assumed the Law Society should throughout have the onus of reminding her of her obligations. It is the Member's responsibility to be willing to

cooperate with the Law Society, carefully read communications from the Law Society, seek clarifications as needed, follow up and respond.

107. The Committee finds that Citation #5 has been made out and that the conduct is deserving of sanction.

ADJOURNMENT FOR SUBMISSIONS ON SANCTION

108. Having found that Citations 1 through 5 to have been made out and that the conduct is deserving of sanction, the Hearing Committee delivered brief oral reasons February 18, 2010, at the conclusion of the hearing. The Hearing was adjourned for the delivery of written reasons and a hearing on sanction. Written reasons were delivered by the Hearing Committee to the Member and counsel for the Law Society, written submissions were received by counsel for the Law Society and the member and a Sanction Hearing was held June 24, 2010 at Calgary, with the Hearing Committee and the Law Society Counsel appearing in person and the Member appearing by telephone.

109. At the Sanction Hearing, Exhibit 73 was entered showing the Member's record of discipline including:

- April 24, 1990 – failing to serve her client, reprimand and costs;
- May 8, 1997 – failing to respond in a timely matter to the Law Society, reprimand and costs;
- November 28, 1997 – failing to serve a client, reprimand and costs;
- April 13, 1999 – failing to respond to the Law Society, reprimand and costs;
- November 10, 2006 – engaging in a business transaction with a client without independent legal representation, reprimand, costs and $5,000 fine;
- December 7, 2006 – failing to give opposing counsel notice, threatening opposing counsel, failing to serve client x 2, reprimand, costs and $4,000 fine.

110. Counsel for the Law Society noted:

(a) That Sanctions would normally be expected to be cumulative;

(b) That a previous Hearing Committee had given a warning to the Member that a suspension may be the appropriate sanction at subsequent (i.e. this) Hearings;

(c) That failing to properly respond to the Law Society as in citations 1, 2 and 5 undermine the ability of the Law Society to govern this particular member and the profession in general.

(d) That the overcharging of her client with regards the Contingency Fee Agreement involved the breach of a fiduciary relationship with her client.

(e) That the member has a record for engaging in a business transaction with her client without independent legal representation

and argued that a suspension with the Member coming back to practice at the end of the suspension would be inappropriate, the position of Law Society Council being that disbarment was the appropriate remedy.

111. The member noted:

(a) In dealings with the Law Society since her suspension for non-payment of fines and costs of December 11, 2007, that the Member has cooperated with the Law Society, the custodian of her practice and former clients, thus demonstrating her governability subsequent to the within events;

(b) That there had been no finding of deceit or lack of integrity on the part of the Member with regards the overcharging in the Contingency Fee Agreement matter.

(c) In addition, the Member quoted a number of cases listed below, seeking to put this matter in perspective with precedent cases:

(i) *Law Society of Alberta v. Britton* [2006] L.S.D.D. No. 15

(ii) *Law Society of Alberta v. Matwe* [2007] L.S.D.D. No. 39

(iii) *Law Society of Alberta v. Wayne Coultry*, 2007 LSA 25 (Can LII)

(iv) *Law Society of Alberta v. Susan Hendricks*, 2007 LSA II (Can LII)

(v) *Law Society of Alberta v. Cauga* [2008] L.S.D.D. No. 128

(vi) *Law Society of Alberta v. Casuga* 2008 LSA 3 (Can LII)

(vii) *Law Society of Alberta v. Rigler*, 2008 LSA 10 (Can LII)

(viii) *Law Society of Alberta v. Paul LeClair*, 2009 LSA 11 (Can LII)

(ix) *Law Society of Alberta v. Michael Grosh*, 2009 LSA 21 (Can LII)

(x) *Law Society of Alberta v. Terry Britton*, 2009 LSA 1 (Can LII)

The member submitted that a suspension was appropriate and argued for a six month suspension.

DECISION ON SANCTION

112. The Hearing Committee agreed with the Member with regards the question of suspension or disbarment. When compared to the cases quoted by the Member it is noted that there is no finding of an overt dishonesty or lack of integrity, and therefore a suspension, rather than an disbarment is the appropriate sanction.

113. Having noted that, the Hearing Committee finds that the behaviour was sufficiently serious to require a lengthy suspension and additional conditions:

(a) Although no finding of overt dishonesty was made, the client was deprived of approximately $9,000.00, just as surely as if the money had been misappropriated. The magnitude of the deprivation is significant, the payment to the client as a result of her personal injury would have been 50% larger had the member paid proper attention to the calculations which were mandated by her own Contingency Fee Agreement.

(b) Count 4 (the "overcharging" count) is a type of failing to serve her client and the Member had been previously disciplined for this in 1990, 1997, and twice in 2006.

(c) With regards to failing to respond to the Law Society, the Member had been previously disciplined for this in 1997, 1999 and 2006.

(d) A pattern emerges, the Member is either unwilling or unable to distinguish and balance her personal or business issues on the one hand and important duties to the client and the profession on the other hand. Not only is the Member a senior member of the Bar who should know better, but the Member has been disciplined and cautioned about these sorts of things in the past.

The Hearing Committee find the substantial record of the Member for similar sorts of conduct to be a substantially aggravating factor.

114. In light of all of the above, the Hearing Committee agrees with the Member that a suspension is an appropriate disposition but finds that the suspension ought to be substantially longer than the six month period which she proposed. Upon consideration of the submissions of the Member and counsel for the Law Society, the Hearing Committee imposes a sanction as follows:

(a) The Member will be suspended for a period of 15 months;

(b) The Member will pay the actual costs of the Hearing;

(c) If the Member makes an application for reinstatement, costs of the Hearing must be paid prior to reinstatement;

(d) If the Member makes an application for reinstatement, she will sign a written undertaking to the Law Society to co-operate fully with all proper requests of the Law Society for information.

CONCLUDING MATTERS

115. No referral to the Attorney General is required in this matter.

116. No separate notice to the profession is required in respect of this matter.

117. The Decision, the evidence and exhibits 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 9th day of September, 2010.

Fred R. Fenwick, Q.C., Bencher
Chair

Sarah J. King-D'Souza, Q.C., Bencher

James A. Glass, Q.C., Bencher