LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the "LPA"); and

IN THE MATTER OF a hearing (the "Hearing") regarding the conduct of Carol Kraft, a Member of the Law Society of Alberta

INTRODUCTION

[1] On September 27, 2010, a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of Carol Kraft, a Member of the LSA. The Committee was comprised of Anthony G. Young, Q.C. Chair, Dale Spackman Q.C., Bencher and Larry Ohlhauser, M.D., Bencher. The LSA was represented by Molly Naber-Sykes. The Member was present at the Hearing and represented by Peter Leveque. Also present at the Hearing was a Court Reporter to record the transcript of the Hearing.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

[2] The Chair introduced the Committee and asked the Member and Counsel for the LSA whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.

[3] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the LPA, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established jurisdiction of the Committee.

[4] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(a) and Rule 96(2)(b) of the Rules of the LSA ("Rules") pursuant to which the Director, Lawyer Conduct of the LSA, determined that the persons named therein were to be served with a Private Hearing Application was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. The Chair inquired of Counsel for the Member and Counsel for the LSA whether either wished to make a Private Hearing Application and they declined. Accordingly, the Chair directed that the Hearing be held in public.

[5] Exhibits 1 through 12 contained in the Exhibit Book provided to the Committee and the Member were entered into evidence in the Hearing with the consent of the Committee and Counsel for the LSA and the Member.

[6] At the commencement of the Hearing, Counsel for the LSA presented the Committee with a Statement of Facts and Admission of Guilt ("Agreed Statement of Facts") agreed to by the Member on September 27, 2010. With the Consent of the Committee and both Counsel, the Statement of Facts was entered into evidence in the Hearing as Exhibit 13 and is annexed hereto as Schedule "A".

CITATIONS

[7] The Member faced the following Citations:

1. IT IS ALLEGED THAT you failed to follow the accounting rules of the Law Society of Alberta, and that such conduct is conduct deserving of sanction.

2. IT IS ALLEGED THAT you failed to respond to the Law Society of Alberta, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

[8] The Member admitted as fact the statements contained within the Agreed Statement of Facts for the purposes of these proceedings and agreed further that these facts amounted to conduct deserving of sanction.

[9] After the Hearing, the Committee determined that both citations were made out and the conduct complained of was deserving of sanction. The Committee found that a reprimand and a fine, together with conditions was an appropriate sanction in the circumstances. The Chair administered the reprimand.

[10] The Member gave no further testimony.

SUBMISSIONS OF COUNSEL FOR THE LSA

[11] Counsel for the LSA referred the Committee to Section 49 (1) of the LPA that states:

> "For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that
>
> (a) is incompatible with the best interests of the public or of the members of the Society, or
>
> (b) tends to harm the standing of the legal profession generally,
>
> is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta."

[12] Counsel for the LSA encouraged the Committee to consider *Trace v. Institute of Chartered Accounts of Alberta* (1988) 54 D.L.R. (4th) 82 (Alta. C.A. which overruled *Re German and the Law Society of Alberta* (1974) 45 D.L.R. (3d) 535 (Alta. C.A.). In *Trace* the Court ruled that a finding of "conduct unbecoming" (conduct deserving of sanction) was justifiable even in the absence of disgraceful or dishonourable conduct. Since the Institute had passed specific rules and guidelines and found that Trace had violated some of them,

> "…such conduct is "unbecoming" in the dictionary sense. Even if it were not, breaking these specific lawful rules or guidelines must surely be inimical to the best interests of the public or members of the institute, or tend to lower the profession's standing. The institute's objectives must be among its interests. So the statutory definition means that violating such rules is "conduct unbecoming."

MEMBER'S SUBMISSIONS

[13] Counsel for the Member stated that his client practices from her home in the area of child protection. Her clients are children. She has been retained by government agencies and her major client is the Legal Aid Society of Alberta. He stated that the Member bills her client when work is completed. As such, she does not have any need to administer trust funds.

[14] By the year 2002 the Member no longer had any need for a trust account.

[15] The Member was in a serious automobile accident in 1999 requiring surgery in 2002 and 2004 and extended periods of convalescence. Counsel for the Member stated that "the last thing on the Member's mind was to complete her accounting."

[16] During the time in question the Member maintained a mailing address with Mailboxes Unlimited. This mailing address was not something that the Member checked on a regular basis. As such, it was argued that the failure to respond to the LSA was a matter of "inadvertence".

[17] Counsel for the Member concluded his argument by stating that there was "no harm to the public" and "no harm (excepting inconvenience) to the profession" in this matter.

DECISION

[18] The Hearing Committee determined that the Agreed Statement of Facts was in a form acceptable to it. The Agreed Statement of Facts is therefore deemed for all purposes to be a finding of the Hearing Committee that the conduct of the Member was conduct deserving of sanction

[19] Section 49(1) of the LPA (quoted above) defines conduct deserving of sanction

[20] The Hearing Committee was guided by the reasoning set out in *Trace v. Institute of Chartered Accounts of Alberta* (1988) 54 D.L.R. (4th) 82 (Alta. C.A.).

[21] The Rules of the Law Society of Alberta ("Rules") clearly set out accounting requirements for its members. Rule 120 (1) states as follows:

> **120 (1)** Except as otherwise provided in this Part, a member shall not engage in practice as a barrister and solicitor in Alberta unless the member practises with a law firm that maintains financial records in compliance with these Rules.

[22] Rule 130 of the Rules of the Law Society of Alberta state, in part, that:

> **130 (1)** The Benchers may at any time direct that an examination, review, audit, investigation or completion of the financial records as are necessary be made by a particular person designated by the Benchers, either by a general or a particular designation, of the financial records and other records of any member or law firm that in any way relate to the member's or the firm's practice of law for the purpose of ascertaining and advising as to whether the provisions of the Act and the Rules have been and are being complied with by the member or law firm.

[23] These powers conferred by sub rule (1) on the Benchers may also be exercised, among others, by "the Director of Audit of the Society".

[24] At the request of the Director of Audit of the LSA, an audit pursuant to section 130 of the LPA of the financial records, accounts and trust money maintained by the member was conducted and completed by Francine Leroux, CA. The audit commenced on May 12, 2006 and the filed work was concluded on May 15, 2006 (the "Rule 130 Audit").

[25] The Rule 130 Audit revealed the following exceptions:

1. Three instances of trust ledger account shortages as a result of overpayment in the total sum of $200.11 violating sub rule 125(2) which states:

   > **"(2)** A law firm must never withdraw from a trust account for or on behalf of any client a sum greater than the amount to that client's credit in the trust account."

2. One instance of insufficient funds in trust to cover trust obligations in the amount of $19.71 violating sub rule 125(1) which states:

   > "**125 (1)** A law firm must at all times maintain money on deposit in the law firm's trust account or accounts in an aggregate amount sufficient to meet all obligations with respect to money held in trust for the firm's clients."

3. The 2003, 2004 and 2005 Form Ts had not been received by the Law Society of Alberta violating sub rule 126 (2) which states:

   > **"126 (2)** A law firm must annually, within 90 days after the designated filing date of the law firm:
   >
   > (a) have the law firm's prescribed financial records reviewed by an accounting firm, and
   >
   > (b) cause an Accountant's Report in Form T (5-2) to be duly completed by an accounting firm and filed with the Executive Director by the accountant responsible for the review."

4. The Form S for the year-ended December 31, 2005, due on February 14, 2006 was not provided until June 12, 2006, 118 days late violating sub rule 126 (1) which states in part that:

"**126 (1)** A law firm must annually:

(a) within 45 days after the designated filing date of the law firm, furnish to the Executive Director a completed Annual Certificate in Form S (5-1) and furnish a copy of it to the law firm's accounting firm, …"

5. The Member did not maintain trust journals in violation of sub rule 122(2) (a) and (b) which states that:

"The financial records required to be maintained under this Rule shall consist of at least the following:

(a) a book of original entry showing the date of receipt, method by which money is received, source of all trust money received and identifying the client to whom the money belongs or on whose behalf the money is received;
(b) a book of original entry showing all withdrawals of trust money and showing the cheque number, the date of the withdrawal, the name of the payee and identification of the client with respect to whose affairs the withdrawal is made; …"

6. The Member did not maintain general journals in violation of sub rule 122(2)(e) which states that:

"The financial records required to be maintained under this Rule shall consist of at least the following: … (e) a book of original entry showing the date of receipt, method by which money is received and source of all money received other than trust money;"

7. The Member did not maintain ledger cards in violation of sub rule 122(2)(c) which states that:

"The financial records required to be maintained under this Rule shall consist of at least the following: … (c) a trust ledger consisting of trust ledger accounts, one for each client from whom the law firm has received trust money or on whose behalf or at whose direction or order the law firm has received trust money, with each trust ledger account showing

(i) the name of the client,
(ii) all receipts and withdrawals, in chronological order with the dates of receipt and withdrawal and indicating the source of the money or the person to whom the payment was made, as the case may be, and
(iii) the balance remaining in the account;

8. Bank errors were not corrected promptly in violation of sub rule 125(3) which states that:

"If a member becomes aware of a deficiency in a trust account of the member's law firm and the law firm does not immediately make good the deficiency, the member must immediately notify the Executive Director of the deficiency and of any relevant information regarding the reason therefore."

9. The Member had inactive accounts trust balances.

[26] As result of the Rule 130 Audit the LSA requested from the Member a compliance confirmation that stated, among other things that:

> "1. The law firm has corrected all of the correctable exceptions noted in the report.
>
> 2. The law firm's books and records are now in compliance with the Rules.
>
> 3. I undertake to maintain the law firm books and records in compliance with the Rules in the future.
>
> 4. I am aware that should the law firm fail to properly maintain its books and records in the future, the costs of any follow-up audits may be charged against the firm and the members of the firm may face conduct proceedings. …"

[27] The Member did not provide this compliance confirmation to the LSA.

[28] On April 23, 2008, as the result of a follow-up Rule 130 audit (the "Follow-Up Audit") conducted by the LSA, it was determined that the Member's trust books and accounting records had not been reconciled since July 2006. As such, the Member was requested to sign an undertaking as follows:

> 1. to cease using her trust account;
>
> 2. to sign any authorizations … which may be required by the Law Society of Alberta in the course of the Rule 130 Audit of her practice or any other investigation under the *Legal Professions Act*.
>
> 3. to provide all unused trust cheques for the trust account.
>
> 4. to be bound by the undertaking until released by the Law Society of Alberta."

The Member was advised that if she failed to sign the undertaking the LSA would recommend that:

> "an interim suspension be considered given the problems with (her) trust accounting records and the potential shortage that may exist."

[29] The Member signed the undertaking on April 24, 2008.

[30] The Follow-Up Audit, completed May 12, 2008 by Carol Ellergodt, CGA, revealed the following exceptions:

> 1. The trust account was inactive for 2007 and the amount held in trust was $100 of the Member's own funds. This is a violation of sub rule 122(3)

which requires that the records be entered and posted currently at all times to comply with Rule 122(1).

2. Trust reconciliations were not properly completed in violation of sub rule 122(2)(j) which states:

> **"**The financial records required to be maintained under this Rule shall consist of at least the following: … (j) a comparison, dated and signed by the member, shall be prepared within 30 days of the month end, showing any differences between the total of the trust accounts of the law firm and the total of all unexpended trust balances as per the trust ledger accounts, together with the reasons for such differences, supported by:
>
> (i) a detailed bank reconciliation made monthly of each trust account, and
>
> (ii) a detailed listing made monthly by trust account showing the unexpended balance of money in each trust ledger account;"

3. The Form Ts had not been submitted since 2002. (This exception was previously reported to the Member.)

4. The Form S for the year ended December 31, 2007 had not been received. (This exception was previously reported to the Member.)

5. Bank source documents have not been maintained in violation of sub rule 122(2)(i) which states:

> **"**The financial records required to be maintained under this Rule shall consist of at least the following: … (i) bank statements or passbooks, negotiated cheques, transfers between accounts and detailed duplicate deposit slips for all trust accounts and general accounts;"

6. The trust receipts journal was not properly maintained. (This exception was previously reported to the Member.)

7. The trust disbursements journal has not been properly maintained. (This exception was previously reported to the Member.)

8. The general receipts journal has not been properly maintained. (This exception was previously reported to the Member.)

9. The general disbursements journal has not been properly maintained. (This exception was previously reported to the Member.)

10. Other charges and disbursements were not correctly classified on Statements of Account in violation of Chapter 13 Rule 5 of the Code of Professional Conduct which states:

> "A lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf."

And the commentary to that Rule:

> "Payment of such items as government search and registration fees, agent fees and courier charges are properly shown on a statement of account as disbursements. Internal office expenses assigned some value by the law firm itself, such as photocopying and fax charges (apart from the long distance component), do not constitute disbursements and should not be presented to the client as such on a statement of account. Expenses of this kind are in fact a fee component and must be charged to the client as fees, although they may be itemized separately under the fees heading on an account.

[31] As result of the Follow-Up Audit the Member was requested to sign a further compliance confirmation.

[32] The Member did not provide this compliance confirmation to the LSA.

[33] By letter dated January 5, 2009 the Member was provided with material from the Follow-Up Audit and advised that the information should be considered as a formal complaint.

[34] There was no response by the Member to the January 5, 2009 letter.

[35] A reminder letter was forwarded to the Member on January 26, 2009 advising as follows:

"….

If we do not get your immediate response to this correspondence, this matter will go to a Conduct Committee Panel without the benefit of your response. Also, be advised that there will be no further extensions of time granted.

Please note that failure to respond may result in both a hearing for failing to respond, and an adverse inference being drawn against you on the original complaint itself.

…"

[36] At the core of this Hearing is the issue of governability. As a self regulating profession the LSA must be able to govern its members. The failure of members to comply with the Rules of the LSA should not be tolerated because this is an indication of the member's unwillingness or reluctance to be governed by their professional body.

[37] An argument that the conduct complained of did not result in harm to the public is not an answer to the Member's failure to comply with LSA Rules.

[38] In this matter there were many opportunities for the Member to bring her accounting into compliance. None of these opportunities were taken. Furthermore, if the Member had familiarized herself with the Rules relating to trust accounts, she would could have applied at any time for an exemption from the Executive Director from the Rules relating to trust accounts, based on the

advice of Counsel for the Member that the Member did not require a trust account for purposes of her practice.

[39] The failure of the Member to comply with the Rules and the Member's failure to respond to the LSA can only be interpreted as neglect or refusal of the Member to be governed by the LSA.

[40] As noted above the Member violated specific Rules and guidelines of the LSA. This conduct, in and of itself and by its very nature, is deserving of sanction.

SANCTION

[41] Counsel for the LSA and Counsel for the Member made a joint submission for the following sanction:

1. The Member shall receive a reprimand.

2. The Member shall be fined $1,000.00.

3. The Member's practice shall be subject to the following conditions:

   (a) The Member shall not open a new trust account or reopen her old trust account until January 1, 2011 when the Safety of Trust Fund initiatives are expected to come into force;

   (b) The Member shall file her Form S by October 27, 2010;

   (c) The Member shall file a Statutory Declaration pursuant to Rule 128(2) by October 27, 2010; and

   (d) The Member shall, at her option, either:

      (i) file a final Form T by November 27, 2010; or

      (ii) provide such information as the LSA may reasonably request or require to ensure compliance with the Rules by November 27, 2010.

[42] The Hearing Committee found no reason to depart from the joint submission. As such, the Hearing Committee ordered the sanction set out in paragraph 42 above.

[43] In taking a purposeful approach to sanctioning the Hearing Committee noted the following:

(a) The Member has no formal discipline record;

(b) The Member was co-operative with the LSA during the complaint and Hearing phases of this matter;

(c) The privilege of holding trust funds is one of the most venerable duties that a lawyer has to his client and it is essential that all members strictly comply with the Rules that have been implemented by the LSA to ensure the public's trust and confidence;

(d) The Member's failure to comply with the Rules continues; and

(e) The Member must be encouraged through sanction to comply with the Rules and refrain from further misconduct;

[44] The Hearing Committee determined that it was necessary for the Member to receive a financial penalty, a direction by way of a reprimand and conditions to ensure compliance and to adequately instruct the Member that the type of conduct complained of in this matter will not to be tolerated.

[45] Counsel for the LSA requested that the Member pay the actual costs of the hearing.

[46] Counsel for the Member argued that the matter should have been referred to a Mandatory Conduct Advisory and as such the hearing was not necessary.

[47] The Hearing Committee rejected the argument of Counsel for the Member but recognized that members should be encouraged to be cooperative and facilitative with their governing body. As such, the Hearing Committee determined that the Member should pay one half of the actual costs of the hearing. The Member has 30 days from the date that that a statement of actual costs are transmitted to the Member to pay both the fine and costs.

[48] There shall be no referral to the Attorney General.

[49] There shall be an order for the usual redaction of names of clients and other personal information from the record for the purposes of publication.

Dated this 6th day of November, 2010.

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

Dale Spackman, Q.C. (Bencher)

Larry Ohlhauser, M.D. (Bencher)