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 Bonnie M. Wald, a Member of The Law Society of Alberta

Introduction

1. On September 7th and 8th, 2010 a Hearing Committee comprised of Vivian R. Stevenson Q.C. (Chair), Perry R. Mack Q.C. and Amal Umar, convened at the Law Society Offices in Edmonton to inquire into the conduct of Bonnie M. Wald. Ms. Wald was represented by Laura K. Stevens Q.C. Lindsay MacDonald represented the Law Society of Alberta.

Citations

2. The Member faced 11 citations. The citations related to two different clients and two entirely different sets of circumstances. It was not readily apparent to the Hearing Committee, aside from expediency, why the two sets of citations were combined to be dealt with in a single hearing. They will be addressed separately.

3. The first six citations relate to the Member's dealings with an assignee of the proceeds of a personal injury claim. Those six citations are as follows:

    1. It is alleged that you breached an undertaking:

        a. When you took over the file from M. Loewen, you assumed the undertakings given by M. Loewen to X Company. You breached the undertaking in the following respects:

            i. failing to give X Company timely notice that the action had been settled;

            ii. failing to make payment to X Company of monies owing pursuant to the Assignment;

        and that such conduct is deserving of sanction.

    2. It is alleged that you billed for fees you knew or ought to have known were improper and that such conduct is deserving of sanction.

    3. It is alleged that you initially paid your legal fees and disbursements from trust funds belonging to the estate of the deceased at a time when there was no known personal representative and that such conduct is deserving of sanction.

    4. It is alleged that you failed to serve your client:

        a. you failed to make reasonable efforts to determine and locate the representative of your deceased's client's estate;

        and that such conduct is deserving of sanction.

5. It is alleged that you failed to respond to X Company in a full and timely manner and that such conduct is deserving of sanction.

6. It is alleged that you failed to inform X Company, in a timely manner, of the death of your mutual client, despite having communications with X Company and that such conduct is deserving of sanction.

4. Citations 7 to 11 relate to the Member's representation of Mr. and Mrs. H against RMP Ltd. Those citations are as follows:

7. It is alleged that you breached trust conditions in depositing funds into your trust account without providing opposing counsel with an executed Consent Order setting aside Judgment and that such conduct is deserving of sanction.

8. It is alleged that you swore a false Affidavit by stating you never received opposing counsel's trust letter which he alleges accompanied the trust funds and that such conduct is deserving of sanction.

9. It is alleged that you prepared and garnisheed your own trust account and that such conduct is deserving of sanction.

10. It is alleged that you, upon receiving a request from opposing counsel to return the trust monies, failed to do so and that such conduct is deserving of sanction.

11. It is alleged that you paid trust funds into Court knowing that the funds were not attachable and that such conduct is deserving of sanction.

Jurisdiction

5. Jurisdiction was established by entering the first five exhibits contained in the first of two binders circulated to the Hearing Committee in advance of the hearing. Those exhibits were the Letter of Appointment, Notice to Solicitor, Notice to Attend, Certificate of Status and Certificate of Exercise of Discretion. Neither counsel contested jurisdiction or raised any objection to the composition of the Committee.

Private Hearing

6. No application having been made to have the hearing held in private, the matter proceeded as a public hearing.

Other Preliminary Matters

7. In accordance with the Hearing Guidelines, Counsel for the Law Society advised the Hearing Committee that the Law Society would be seeking a lengthy suspension or disbarment in the event of a finding of guilt.

Facts and Evidence With Respect to Citations One to Six

8. The Committee was provided with 2 binders prior to the Hearing containing Exhibits numbered 1 to 86. Additional Exhibits were marked during the Hearing. The Exhibits with respect to this first set of Citations were Exhibits 53 to 86 and Exhibit 89. In addition to the documentary evidence, the Committee heard evidence from one witness called by the Law Society and from the Member.

9. As noted above, Citations 1 to 6 relate to the Member's dealings with an assignee of the proceeds of a personal injury claim.

10. The Member's firm was retained by BM with respect to a personal injury claim in 2004. The matter was originally handled by an associate of the Member's firm, but the Member appears to have assumed conduct of the matter in September of 2005.

11. BM signed a Contingency Agreement with the Member's Firm. The Contingency Agreement provided as follows:

> 8. With respect to the taxable costs described in paragraph 8 (sic) below, it is hereby recognized that:
>
> (d) the percentage of taxable costs that may be received by the Lawyer may not exceed the percentage of the Judgment or Settlement the Solicitors are entitled to receive in legal fees.

12. On February 17th, 2005, the Member's associate acknowledged receipt of an assignment of proceeds of the claim in favour of X Company. The assignment of proceeds contained a direction and authorization by BM to his lawyer to release information to the assignee. The assignment also specifically provided that it would enure to the benefit of and be binding upon BM's heirs, executors, administrators and assigns.

13. During the conduct of the action the associate left the Member's firm and the Member assumed conduct of the file. There was an Examination for Discovery which led to some settlement discussions. In February of 2007 the Defendant in the action made an offer of $10,000 all-inclusive. According to the Member, she conveyed the offer to BM who instructed her to refuse it. In May BM contacted her again. At that time he advised that he was becoming "sicker" from his diabetes and asked her to make the best deal she could, as soon as she could. The Member says that she discussed with BM the fact that she had spent a considerable amount of time on the file and that she wanted to take any taxable costs that were obtained as part of a settlement in addition to her contingency fee. She says that BM agreed with this proposal.

14. The Member negotiated a settlement of $11,100 with counsel for the Defendant in June of 2007. She testified that the $1,100 increase from the $10,000 offer was intended to represent taxable costs.

15. Shortly after the matter was settled, BM lapsed into a diabetic coma, and died. Because BM could not sign a release, the Member concluded the settlement by way of a consent dismissal order. The consent dismissal order indicated that the matter was dismissed without costs.

16. On June 26th, 2007, X Company wrote to the Member's office inquiring as to the status of BM's personal injury action (Exhibit 86, Tab 19). X Company has no record of receiving a response.

17. On July 17th, 2007, the Member rendered an account to BM in the amount of $7,424.73. That amount was comprised of a contingency fee of 25% equaling $2,750 plus another $2,500 representing taxable fees under Schedule C with the balance being comprised of disbursements and G.S.T.

18. According to the records of X Company, follow-up letters to the Member's office requesting advice as the status of BM's action were generated and sent on January 1st, 2008, July 3rd, 2008 and July 29th, 2008.

19. On July 31st, 2008, the Member sent a fax to X Company indicating that BM was deceased.

20. There was a series of communications between X Company and the Member during August and September. These e-mails contained a number of requests for information by X Company and a number of somewhat unresponsive and unhelpful responses from the Member.

21. The Member ultimately confirmed to X Company that a settlement had been reached, advised of the amount of the settlement, and provided X Company with copies of the closing documents.

22. The Member says she did not pay any funds out to X Company because she was concerned about a potential claim by CRA and a potential claim by someone named "Carol" who had called her office indicating that BM owed her money.

23. The Member testified that she called a lawyer on the Law Society Mentor Roster about her situation and explained her concern with paying out funds to X Company in the face of some potentially competing claims. She says that the lawyer with whom she spoke thought that the CRA might be able to make a claim and that he thought that the safest route was probably to pay the settlement proceeds into Court.

24. Exhibit 89 in the proceedings was an Agreed Statement of Facts with respect to the Members call to the Law Society Mentor lawyer. According to that Agreed Statement, the lawyer could not absolutely confirm that he had spoken to the Member, but having reviewed a synopsis of the facts, the fact pattern seemed familiar to him. The lawyer believed that it was very likely he had this conversation. He could not say what specific plan or steps he advised the Member to take, but said it would be unusual for him not to have given some advice.

25. On December 4th, 2008 the Member paid the total amount of the settlement proceeds of $11,100 into Court so that the claim by X Company and any other potential competing claims to the proceeds could be addressed.

26. On June 26th, 2009, X Company obtained a court order which provided for the payment of $4,609.73 to the Member with respect to fees and for the payment of the balance to X Company The Member consented to that order. No monies were paid to Carol, to the CRA or to BM's Estate.

Decision With Respect to Citations One to Six

27. During argument, Counsel for the Member advised that the Member would admit Citations 1(a)(i), 5 and 6 and that the Member's conduct with respect to those Citations was conduct deserving of sanction. The Hearing Committee accepted the Members guilty plea and that the conduct was conduct deserving of sanction.

28. The Law Society called no evidence with respect to Citation 3 and the Hearing Committee dismissed that citation.

29. The Member did not admit Citation 1(a)(ii), 2 or 4. For the reasons set out below, the Hearing Committee dismissed Citation 1(a)(ii) and Citation 4 and found the Member guilty with respect to Citation 2.

30. Citation 1(a)(ii) alleged that the Member had engaged in conduct deserving of sanction by failing to make payment to X Company of the monies owing pursuant to the Assignment. Counsel for the Law Society conceded that if the Member believed that there were potentially competing claims to that of X Company, had sought advice from a Law Society Mentor and had followed that advice, that the Citation was not made out.

31. The Committee accepted the evidence of the Member that she was concerned about competing claims, that she had sought appropriate advice and that she had not engaged in improper conduct in interpleading the entire amount of the settlement funds into Court. While this may have been unnecessary and may have been frustrating for X Company because it delayed the receipt of the funds assigned to them, it was not conduct deserving of sanction.

32. With respect to Citation 2, that the Member had billed for fees that she knew or ought to have known were improper, the Law Society argued that the contingency agreement and the Rules of Court were clear that the percentage of the taxable costs that a lawyer is entitled to is limited to the same percentage as the lawyer is entitled to on the settlement or judgment. Furthermore, the dismissal order to which the Member consented to stated that there were no costs awarded and therefore the Member was not entitled to any percentage.

33. The Committee did not accept that the consent dismissal order prevented the Member from claiming a portion of the taxable costs if those costs were part of the settlement that had been negotiated as testified by the Member, but was concerned with the account that had been rendered in breach of the Rules.

34. The Member's counsel admitted that the account that was rendered by the Member was improper in light of the Rules and the Member's Contingency Agreement. She argued that the Member had not done this on purpose as was clear from her reaction on the stand when the Rule had been brought to her attention. She submitted that ignorance of the Rule was not conduct deserving of sanction.

35. The Committee accepts that the Member was caught by surprise by the wording of the Rule and of her own Contingency Agreement and that the Member did not render the improper account in deliberate breach of the Rule and Agreement.

36. The difficult issue for the Committee was whether or not the Member's complete ignorance of the Rule in relation to taxable costs in contingency agreements was conduct deserving of sanction. The Committee recognized that the fact that a lawyer is not aware of a particular Rule is not, in and of itself, conduct deserving of sanction. However, the Rules in relation to Contingency Agreements are particularly important because they are specifically designed to protect the client. In personal injury cases, often these are clients who are in particularly vulnerable situations.

37. It was readily apparent that the Member was unaware of the Rules when she advised her client that she was intending to take the entirety of any taxable costs she could recover. Her evidence was that her client agreed to this. However, her client was ill and in desperate straits at the time. Furthermore, since the Member did not know the Rules she clearly could not have advised him of his rights in that regard. Nor did the Member go back and review the terms of her Contingency Agreement or the Rules when she rendered her statement of account in July of 2007.

38. In the circumstances of this particular case, and taking these factors into account, the Committee was of the view that the Member's failure to make any effort to review her own Agreement or the Rules in relation to contingency agreements with complete and utter disregard for the rights of her client was conduct deserving of sanction.

39. Citation 4 alleged that the Member's failure to make reasonable efforts to determine and locate the representative of BM's estate was conduct deserving of sanction. The Committee dismissed this citation for two main reasons.

40. First of all, there was no evidence before the Committee that a representative of BM's estate had ever been appointed. The Committee was not convinced that the Member was obliged to make efforts to carry out Court House searches on a periodic basis in a number of Judicial Centres in an effort to ascertain whether or not somebody had made application with respect to BM's estate. The Member's position that she thought she would be contacted by a representative if one was appointed did not seem unreasonable.

41. More importantly, it was clear in the face of the assignment to X Company that regardless of what transpired with respect to the competing claims there would be no money going to BM's estate in any event. Even if there were some obligation to make efforts to find a personal representative of an estate in certain circumstances, those circumstances did not exist here.

Facts and Evidence With Respect to Citations Seven to Eleven

42. The Exhibits with respect to this set of Citations were marked as Exhibits 1 to 52, 87 and 88. In addition to the documentary evidence, the Committee heard evidence from two witnesses called by the Law Society and from the Member.

43. The second set of Citations arises out of a dispute between the Member's clients, (Mr. and Mrs. H) and a company which shall be referred to as RMP. Mr. and Mrs. H had sold their farm to RMP in 2004. As part of the sale, Mr. and Mrs. H had taken a mortgage back of the farm land. It had been agreed that they would be employed by RMP as consultants and that they would be paid certain amounts on a periodic basis. They also had rights under the sale agreement to access to the financial information of RMP.

44. By 2006 there were some significant issues between Mr. and Mrs. H and RMP with respect to the payments owing and access to information. In 2007, Mr. and Mrs. H were fired. Mr. and Mrs. H took the position they were owed $70,000 in arrears for consultant fees and interest. They instructed the Member to file a Statement of Claim on their behalf against RMP. She did so on April 3rd. It is not clear when the Statement of Claim was served on RMP, but at some point in the following weeks RMP retained a lawyer by the name of Roy Elander to defend the claim.

45. On April 18th or 19th, Mr. Elander telephoned the Member and requested an extension of time to file RMP's defence. He followed up the call with a written request dated April 19th. The Member responded by letter dated April 20th indicating that she was not able to grant the extension. It appears that Ms. Wald faxed a *praecipe* to note in default to the courthouse the following day, Saturday, April 21st. The *praecipe* was filed on Monday, April 23rd. Mr. Elander testified that he attempted to file a defence on the 23rd, but that the *praecipe* had already been filed and he could not do so.

46. On April 30th, Ms. Wald filed a default judgment. A writ of enforcement was also filed and garnishee summons were filed and served. It appears that there were some discussions between Mr. and Mrs. H and RMP in efforts to resolve matters. On May 8th, 2007, Mr. Elander filed a notice of motion returnable on May 15th seeking to set aside the default judgment. It appears that notice of motion was not served and a second notice of motion was filed May 17th returnable on May 22nd.

47. The parties met on May 12th to discuss possible resolution. The May 12th meeting was attended by the Member, Mr. and Mrs. H and Mr. Elander. TM, the President of RMP, and GM and BP who were both shareholders and directors of RMP were also in attendance. At the end of the meeting, all of the attendees signed an untitled handwritten document containing six numbered paragraphs:

    a. Pay (H) 70,000;

    b. Transfer SW quarter to (H) subject to use of transfer station;

    c. Pay (Mr. H) 2500/mo for next 3 months thereafter (Mr. H) or (Mrs. H) to get 1100/mo
        1. Directors will not be paid until after Mr. H and Mrs. H are paid. To be reviewed Sept 1, 2007.

    d. RMP will assign to Mr. H and Mrs. H all right to receive comp from Hutterite Lands and Surface Rights Lease.

    e. RMP to put on paper that FCC can discus w/ Mr. and Mrs. H or their counsel.

    f. RMP will give security to Mr. and Mrs. H on all of the assets held by RMP, second security to current securities granted plus an agreement that RMP may provide security to Masterfeeds on the Lacombe office building.

48. The testimony of the Member, TM and Mr. Elander differed on some key aspects of the May 12th meeting. TM testified that the purpose of the meeting was to find a way to have the default judgment set aside. It was his evidence that as soon as RMP's banker became aware of the default judgment, RMP could not access any funds. If the default judgment was not set aside, then everything else was irrelevant. It was his evidence

that the handwritten document represented notes reflecting the parties attempt to reach a solution to the default judgment situation.

49. Mr. Elander testified that there was no firm agreement arising from the May 12th meeting. He said that the purpose of the handwritten document was to document points the parties wanted in order to settle the matter. On cross examination he said that he could not recall whether the purpose of the signatures was to indicate agreement with the points in the document.

50. Mr. Elander acknowledged that there was a discussion at the meeting about there being no further garnishee proceedings. He would not agree with the suggestion put to him by Counsel for the Member that the Member made it clear there would be no consent to setting aside the default judgment. He agreed that Mr. and Mrs. H were reluctant to do it, but said that it had to be done.

51. On cross-examination, Counsel for the Member put to Mr. Elander that the signed handwritten document was an agreement that RMP was to do the things listed in the document. His response was that he could not recall. When he was asked by Ms. Stevens whether Mr. and Mrs. H were prepared to stop enforcement, but not give up the default judgment and that this was made clear at the meeting, Mr. Elander's response was that he "could not say yes or no to that."

52. The Member testified that it was made clear at the meeting that her clients were not prepared to give up the default judgment, but would consider ceasing enforcement proceedings if RMP met certain obligations.

53. RMP's application to set aside the default judgment was returnable on May 22nd.

54. On May 18th, 2007, TM delivered a bank draft in the sum of $70,000 payable to the Member to Mr. Elander to be given to the Member. It was his evidence that May 18th was a "panic deadline" because of the Tuesday court application, and for that reason he drove the bank draft over to Mr. Elander's house. He said that Mr. Elander was waiting to get the draft and to drive over to the Member's office in Ponoka to try to get the funds there before the close of business. He said that he literally met Mr. Elander on the driveway to his house to hand over the funds.

55. Mr. Elander testified that he had typed up a cover letter to go with the draft from RMP and that he was waiting at home for the draft so he could get it to the Member's office. He identified Exhibit A to the Affidavit marked as Exhibit 15 as being a file copy of the letter that he typed. The letter refers to 4 enclosures:

i. Bank draft in the sum of $70,000;
ii. Consent Order setting aside judgment;
iii. Copy of Directors resolution;
iv. Copy of correspondence to Farm Credit.

On this copy of the letter item 4 has been crossed out and the words "Not provided" are written next to it.

56. Mr. Elander testified that he prepared a consent order setting aside the default judgment. There was no testimony regarding the third enclosure referred to in the cover letter. Mr. Elander confirmed that the fourth item had not been provided, but could not say when

the item had been crossed out on the letter or when the handwritten note had been added. The Committee was not provided with a file copy of the consent order or of the Directors' Resolution nor with any evidence about whether Mr. Elander's computer had been examined to find drafts of these documents or the dates of such drafts.

57. Mr. Elander testified that he showed the cover letter to TM when they met at his house, although he did not explain why he did so.

58. According to TM he saw the May 18th, 2007 letter when he gave Mr. Elander the draft. He testified that Mr. Elander showed the letter to him and that he understood that the funds were being delivered to the Member in trust. Although TM had sworn an affidavit about attending at Mr. Elander's house and had been cross-examined on his affidavit, his evidence on the stand that he had seen the letter appears to have been the first time that he was specifically asked this question and the first time that he testified to that effect.

59. The key issue in relation to Citations 7, 8 and 10 was whether or not the Member received the May 18th letter. TM was not present when Mr. Elander actually attended at the Member's office. Accordingly, the only direct evidence on this point before the Committee was the evidence of Mr. Elander and the evidence of the Member.

60. It was Mr. Elander's evidence that he delivered the draft and the letter to the Member at her office on May 18th. He could not recall if the documents were in an envelope or not.

61. It was the Member's evidence that Mr. Elander delivered a bank draft to her at her office on May 18th, but that the draft was not accompanied by a letter or any other documents. She categorically denied receipt of the May 18th letter.

62. On May 22nd, 2007, the Member and Mr. Elander attended in Chambers. According to Mr. Elander, he spoke to the Member prior to the application and asked her where the consent order was and she told him that her client was not providing it. He says he then asked her where the funds were and she said they were in her trust account. He testified that he told her she was in breach of trust and she replied something like "we'll see about that". Mr. Elander also testified that the Member told him she had put the funds into trust because she did not want them hanging around in the office over the weekend.

63. The Member's testimony was quite different. She testified that she asked for an adjournment of the application in order to examine TM on his affidavit and that Mr. Elander agreed that TM would be available Wednesday night and they would be back in Chambers on May 25th. On this basis the application was adjourned. She says that after Chambers she saw Mr. Elander outside the courthouse and he told her that she was in breach of trust conditions. Her recollection is that Mr. Elander asked for the $70,000 back and said she had breached trust conditions and she said "I don't know what you are talking about". She says that he replied "you will hear from me". When asked if this exchange caused her concern, she said "somewhat".

64. The Member testified that she went back to the office, and told her clients that Mr. Elander wanted the funds returned because they did not consent to set aside the default judgment.

65. According to Mr. Elander he was concerned about the suggestion that the Member had deposited the funds to her trust account and he immediately went to another lawyer's office in Wetaskiwin and used their photocopier to photocopy an old letter in order to reproduce his letterhead on a new piece of paper. He then handwrote a letter onto that piece of paper dated May 22nd which stated:

> Further to our discussion at the Court House in Wetaskiwin, our offer to you of May 18th, 2007 is hereby withdrawn and I require you to return the bank draft and funds of $70,000 to my office forthwith.

66. When asked on cross-examination why the letter referred to an offer being withdrawn as opposed to a breach of trust conditions, Mr. Elander's explanation was that he was in a hurry and that his goal was to have something in writing to the Member saying that he had requested the return of funds. He conceded that the enforcement of a trust condition against a lawyer was relatively straightforward. He also conceded that he knew a breach of a trust condition was a reportable matter but said he did not report the Member to the Law Society because that was not the way he practiced.

67. TM was asked what offer of May 18th was being referenced in Mr. Elander's May 22nd letter. He was clearly puzzled, and suggested that perhaps Mr. Elander had the wrong date and should have referred to the May 12th offer.

68. For her part, the Member was asked why, in view of the serious allegation that she had breached a trust condition, she did not follow up to find out what Mr. Elander was talking about. She said that she was focused on trying to protect her clients' judgment and that she intended to discuss the issue with Mr. Elander the following day when she was scheduled to cross-examine TM on his affidavit. However, that discussion did not take place because Mr. Elander and his client were late attending the examination, and then ended up walking out before she had concluded her examination.

69. On May 25th, the Member and Mr. Elander attended in Chambers with respect to Mr. Elander's application to set aside the default judgment. Mr. Justice Verville dismissed Mr. Elander's application.

70. There was no suggestion that any of the matters set out in the handwritten memorandum of May 12th, other than the payment of $70,000 had been completed by May 25th. It is unclear what discussions, if any, were taking place between the parties at this time.

71. The Member forwarded a draft order to Mr. Elander with respect to the May 25th application for his approval. Mr. Elander admitted that he was mad about the outcome of his application and the $70,000 that had not been returned and that he simply ignored the letter. The Member then had the order signed by the Clerk and entered.

72. The next contentious event occurred on May 31st when a garnishee summons was issued on behalf of Mr. and Mrs. H against the Member's trust account. The summons was prepared by staff at the Member's office upon her instructions. The affidavit which forms part of the summons was sworn by one of her staff as agent for Mr. and Mrs. H and states: "I believe that the proposed Garnishee owes the debtor money now or will owe the debtor money the future" (sic).

73. On cross-examination the Member was asked how her staff member could have the honest belief that the Member had money or would have money in her trust account that was owed to RMP. It was suggested to the Member by Law Society Counsel that this was a clear acknowledgment that the $70,000 had been paid to her in trust since there were no other funds in her account and there was no other way the $70,000 could be owed to RMP. The Member maintained that although she thought the funds were her clients', because Mr. Elander had suggested that RMP was entitled to have the funds back, she considered them funds that could be owed to RMP in the future. She testified that at the time she directed the garnishee summons to be prepared, she did not believe that the $70,000 was trust money. Accordingly, the statement of belief in the garnishee summons was "not her belief on May 23rd" (the date that the affidavit was sworn), but she thought that her belief could change in the future based on a court order or if she learned of other evidence.

74. The Member also testified that her clients were asking her to give them the funds, but that she felt she could not do so because of Mr. Elander's comments. At the same time, it does not appear the Member took any steps to clarify what those comments meant or upon what they were based.

75. The parties then became involved in negotiations regarding the purchase back by Mr. and Mrs. H of the farm lands that had been sold to RMP. An Offer to Purchase was signed by Mr. and Mrs. H on June 11th. It was accepted by TM on behalf of RMP on June 13th and witnessed by Mr. Elander. Paragraph 17 of the Offer to Purchase provides as follows:

> 17. The Vendor has paid the sum of $70,000 to the Purchasers and will pay an additional $3,000 on closing and a term of this agreement is that all the funds, $73,000 shall be unconditionally releaseable (sic) to the Purchasers to facilitate the closing of this transaction.

76. Both TM and Mr. Elander had some difficulty explaining this paragraph given their position that the $70,000 had not been paid, but rather had been delivered in trust for a consent order setting aside the default judgment. TM testified that he did not know what $70,000 payment was being referred to since RMP never paid $70,000 to Mr. and Mrs. H. He suggested that they were "stupid" to have acknowledged receipt of a payment that had not been made.

77. Mr. Elander testified that the $70,000 was the balance owing to RMP after the deposit and financing was taken into account. He testified that he did not know that this was reference to the $70,000 that he had delivered by way of bank draft. He conceded that he was unaware of any other funds having been paid to Mr. and Mrs. H and could not explain why if this was the $70,000 that he said was under trust conditions, it was considered a payment in the context of the Offer to Purchase.

78. The Offer to Purchase did not proceed since it required the consent of FCC who held a first mortgage on the lands and that consent was not forthcoming.

79. An interim receiver was subsequently appointed and that was the end of the matter insofar as it concerns the matters relevant to this Hearing.

Decision With Respect to Citations Seven to Eleven

80. Citations 7, 8 and 10 are all based on the premise that the Member received and was aware of the trust letter of May 18th, 2007. If that is the case, then the Member breached the trust conditions by depositing the funds into her trust account without providing Mr. Elander with a consent judgment, swore a false affidavit denying receipt of the letter, and failed to return the funds to Mr. Elander when requested to do so as alleged. On the other hand, if the Member did not receive the trust letter, the Citations were not made out.

81. Counsel for the Law Society argued that this was a classic credibility contest and urged the Committee to accept the evidence of Mr. Elander over that of the Member.

82. It was Law Society Counsel's position that an agreement or tentative agreement had been reached on May 12th between the parties, but that on May 18th RMP had made a new offer based on the payment of $70,000 in exchange for the setting aside of the default judgment. The evidence of Mr. Elander that he typed up the trust letter was corroborated by the evidence of TM who says he saw the letter and other papers when he attended at Mr. Elander's house to deliver the draft.

83. Counsel for the Law Society argued that since the sole purpose of Mr. Elander's trip was to deliver the letter and enclosed funds, and since he had just typed up the trust letter, it was inconceivable that he would have forgotten or mistakenly failed to deliver that letter.

84. He pointed to the Member's evidence after the loss as being inconsistent with the suggestion that she did not receive Mr. Elander's trust letter with the funds. First of all, he argued that the Member admits that Mr. Elander told her on May 22nd that she was in breach of trust, and yet she did nothing to follow up to see what he was complaining about. Then she received another letter from Mr. Elander requesting the return of funds. Although it does not mention trust conditions, he suggests it would have merited some further investigation.

85. Then Law Society Counsel referenced the "nonsensical" garnishment procedure orchestrated by the Member and the fact that the Member could only have suggested that she owed RMP money if she knew that the $70,000 had been received on trust conditions.

86. Counsel for the Member suggested that there were a number of explanations for the difference between the testimony of Mr. Elander and the Member, ranging from the nefarious, to a careless mistake by one or the other given the manner in which the events unfolded in a rapidly deteriorating situation.

87. The Member's counsel commented on the documentary evidence and suggested that the conduct of Mr. Elander and said the Member after May 18th was more consistent with the conclusion that the Member did not receive the May 18th letter, than the conclusion that she had.

88. In terms of the May 18th letter itself, counsel for the Member pointed out that it indicated on its face that it had been sent by fax. Furthermore, there were alterations and handwriting on the file copy that had been added in circumstances that were unclear. She pointed out that nowhere in the documentary evidence before the Committee were there copies of any of the enclosures referenced in the letter. She suggested that it was clearly possible that Mr. Elander forgot to deliver the letter and thought that he had, or intended to send it and did not.

89. Counsel for the Member also referenced the conduct of Mr. Elander on May 22nd and May 25th as being inconsistent with a clear belief that he had delivered the May 18th letter. She questioned why, if Mr. Elander believed that he had delivered the funds on trust conditions requiring a consent order setting aside the default judgment in exchange he would not have raised that with the court on May 22nd rather than agreeing to an adjournment of the application so that the Member could cross-examine on the affidavit. Furthermore, if Mr. Elander was concerned about a breach of trust conditions, why did he not specifically reference that breach in his fax of May 22nd dealing with the funds? Instead, the fax refers to the withdrawal of an "offer" made on May 18th.

90. The parties appeared before the Court on May 25th. Again there was no suggestion that Mr. Elander raised the issue of trust conditions before the Court and sought to have the $70,000 returned if his application was contested.

91. Finally, Counsel for the Member pointed to the Offer to Purchase which referenced payment to Mr. and Mrs. H of $70,000. She argued that there was no way to make sense of that reference if RMP and Mr. Elander were asserting that the monies had in fact been paid pursuant to trust conditions.

92. Citations 9 and 11 related specifically to the garnishee summons and are essentially the same in nature, namely that the Member had improperly garnisheed her own trust account, knowing this was improper and that this was conduct deserving of sanction.

93. Ms. Stevens argued that the garnishment was consistent with her client's evidence because it was clear by the time that the garnishee summons was issued that there were issues being raised about her client's entitlement to the $70,000. She argues that using a garnishee summons to get the money into Court may have been unorthodox and incorrect, but the net result was to preserve the funds in Court where the parties had the right to assert their claims and someone other than the Member could decide their entitlement.

94. Counsel were agreed on the standard of proof to be applied by the Committee with respect to allegations of dishonesty or fraud such as those raised by this set of Citations. Prior to 2008, the appropriate standard in civil cases was expressed to be a higher degree of probability than in the ordinary civil case. However, in 2008, the Supreme Court clarified the standard in *F.H.* v. *McDougall* [2008] 3 S.C.R. 41, 2008 SCC 53:

> [45] …I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

95. The standard of proof of a balance of probabilities based on clear, convincing and cogent evidence has been adopted by the Law Society of Upper Canada in its disciplinary proceedings, and the Hearing Committee accepts that it is the appropriate standard to be applied here.

96. Did the Law Society of Alberta adduce clear, convincing and cogent evidence that the Member received the May 18th trust letter from Mr. Elander, deliberately breached the trust conditions and then swore a false affidavit denying any knowledge of the letter?

97. The Hearing Committee is of the view that it did not.

98. This was not a case of two witnesses giving contradictory testimony where the evidence of one witness was clearly credible and the evidence of the other was not. The Hearing Committee did not find aspects of either the Member's testimony or Mr. Elander's evidence to be particularly convincing.

99. While it may seem odd that a lawyer would type a cover letter and then mistakenly fail to deliver that letter on a trip specifically for that purpose, or that a lawyer would hand over a bank draft without some sort of covering letter, it was certainly possible for either of those things to have occurred here.

100. The document signed by all parties on May 12th referenced payment of $70,000 to Mr. and Mrs. H. It did not reference any conditions on that payment, and in particular did not reference the fact that the payment would be in exchange for the setting aside of a default judgment. While TM testified the May 12th document was not an agreement, the Committee had difficulty understanding why the parties signed it if this was not the case. When pressed on the issue, Mr. Elander was not prepared to commit either way. If the May 12th document was an agreement requiring RMP to take certain steps in exchange for a forbearance on enforcement proceedings as suggested by the Member, the payment of $70,000 was simply one of those steps. There was no need for trust conditions.

101. It might have been of assistance to the Hearing Committee if it had been provided with copies of the other attachments referenced in the May 18th letter. Mr. Elander testified that one of the attachments was not enclosed with the letter. In the absence of a copy of the draft consent order or the Directors' Resolution, or any evidence that a Directors' Resolution had been signed, it appears that there may have been other enclosures that were not available, and this makes it decreasingly likely that the May 18th letter was delivered.

102. While the Committee was troubled by the Member's somewhat indifferent reaction to Mr. Elander's suggestion in Chambers that she was in breach of trust conditions, her indifference is at least as consistent with not receiving the letter as having received it.

103. Mr. Elander's fax of May 22nd was not clear evidence of the trust letter having been delivered either. It makes no reference to trust conditions. The Hearing Committee did not find Mr. Elander's explanation that he was in a hurry particularly convincing.

104. The reference in the Offer to Purchase to the payment of $70,000 was another aspect of the evidence that did not support the Law Society's case regarding delivery of the funds

on trust conditions. Again, the testimony of Mr. Elander and of TM with respect to this issue was not convincing.

105. The main reason for the Hearing Committee not being satisfied on the issue of the delivery of the May 18th letter is related to the Chambers appearances on May 22nd and 25th. There was no evidence that Mr. Elander raised the issue of his May 18th letter before the Court on either occasion. The Hearing Committee was not provided with transcripts of the submissions made to the Court on those dates. The evidence of the Member and Mr. Elander related more to what occurred before and after those appearances than what was said during them.

106. The absence of evidence that this was mentioned to the Court suggests that it was not. If Mr. Elander was confident that he had delivered the May 18th letter it was illogical for him to proceed with his application to set aside the default judgment without advising the Court that the setting aside of that judgment was already the subject of trust conditions. Furthermore, Mr. Elander did not report the Member to the Law Society when he lost the application. His explanation that he did not practice this way would not likely have been of much comfort to his client if this might have assisted his client in the recovery of the funds. At the end of the day, the evidence relied upon by the Law Society left the Hearing Committee with more questions than answers on too many critical points.

107. There were certainly aspects of the Member's testimony that were problematic. For example, if the Member was of the view that the $70,000 belonged unconditionally to her clients, it was unclear why she did not pay out the funds promptly on Tuesday morning, although this may have been because of the May long weekend and the fact that she was appearing in Court on Tuesday morning.

108. The fact that the Member directed a staff member to swear an affidavit that she owed monies to RMP or would owe monies in the future was also hard to understand. The Member's explanation that this was not her belief on May 23rd, but that she thought her belief might change in the future was at best ill-advised and at worst, disingenuous.

109. Taking all of the evidence that was presented into account, given the conflicting testimony, and given the lack of evidence on certain matters that might have provided some corroboration or clarification, the Hearing Committee did not find that there was clear, cogent and convincing evidence that the May 18th letter was delivered to the Member and therefore that the facts required to be proved in relation to Citations 7, 8 and 10 had been proved on a balance of probabilities.

110. Citations 9 and 11 related to the garnishee summons. I have already commented on the difficulty the Hearing Committee had with the Member's explanation for the affidavit sworn by her staff member in support of that garnishee summons. If the Member believed that the monies were paid to her client unconditionally there was no basis upon which she could owe those monies to RMP.

111. Counsel for the Member conceded that the procedure followed by her client in issuing a garnishee summons was bizarre and probably wrong. However, she argued that it was not conduct deserving of sanction. The Member testified that her clients were instructing her to pay the funds to them. She was concerned about the fact that Mr. Elander had requested their return. Having the monies paid into Court in this fashion may not have been the correct way to resolve the issue, but it was a highly visible step and ended up preserving the funds both for her clients and RMP.

112. The Hearing Committee was troubled by the Member's actions in directing her staff to issue the garnishee summons and having a staff member swear an affidavit based on information and belief that she did not appear to hold. Had her actions resulted in putting the funds beyond the reach of RMP the Committee might well have been prepared to consider that her actions were conducted in bad faith and were deserving of sanction. However, in all of the circumstances the Committee was not prepared to conclude that the Member's conduct was more than a poorly thought out and misguided attempt on her part to try to protect the funds she considered to be owed to Mr. and Mrs. H.

Sanction

113. The most serious Citations having been dismissed, Counsel for the Law Society did not seek the Member's disbarment. However, he submitted that a suspension was in order and left the length of that suspension to the discretion of the Committee. In support of his submission Counsel for the Law Society referenced the Member's record which was entered as Exhibit 91 in the proceedings. The record disclosed that on September 12th, 2007 the Member had been found guilty of conduct deserving of sanction for:

- Failing to advise M.W. to obtain independent legal advice, and failing in her duty to an unrepresented party;
- Failing to remit to M.W. funds to which M.W. was entitled; and
- Misleading the Court at a hearing when M.L. was applying for the trusteeship of M.W.'s Estate.

114. The Member had been suspended for 45 days and ordered to pay the actual costs of that Hearing in the amount of $15,410.23. Counsel for the Law Society conceded that generally a finding of a breach of undertaking would not result in a suspension, but that the record in this case, and the sanctioning principle that penalties are cumulative, justified a suspension.

115. It was submitted that the Member pay the costs of this Hearing, taking into account that there had been no early guilty pleas, but also the Member's successful defence of many of the Citations.

116. The Member's Counsel provided a brief background of the Member's personal circumstances. The Member was 47 years old, having practiced law as a second career following 13 years as a nurse. She had practiced 13 of her 15 years as a sole practitioner, principally in Ponoka. As indicated on her record, she had been suspended in 2007. Upon returning to practice, she had written to the Court and to her clients about that suspension and her commitment to do better. The Member had recently made the decision to sell her practice and had done so as of the end of July. She was waiting to hear from the Law Society before going inactive and was intending to take a "time-out" from the practice of law. The Member was seeking treatment for long-term depression.

117. Ms. Stevens submitted that a suspension was not warranted based on the Citations that had been made out and submitted that a significant fine would be more appropriate. With respect to costs, she submitted that the Member should pay something proportionate to the number and subject of Citations proven as against the total amount of time and effort that went into the Hearing on all 11 Citations. Since it was unclear

whether the Law Society had received the Member's application to become inactive, the Member gave an undertaking to resubmit the application by fax within one week of the date of the Hearing.

118. The Committee directed that the Member be reprimanded and pay a fine of $2,000 with respect to each of the 4 Citations which had been proven. Perry R. Mack Q.C. delivered the reprimand.

119. The Member was also directed to pay costs of the Hearing in the amount of $3,500.

120. The Committee recommends that should the Member apply to be reinstated to active status, that the matter be referred to a hearing in that regard.

Dated this 15th day of December, 2010.

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Vivian Stevenson, Q.C., Chair

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Perry R. Mack, Q.C.

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Amal Umar