Law Society File No.: **HE20090052**

**IN THE MATTER OF THE *LEGAL PROFESSION ACT***
**AND**
**IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF CHARLES FAIR, A MEMBER OF THE LAW SOCIETY OF ALBERTA**

**The Panel**:

James Eamon, Q.C., Chairperson
Kevin Feth, Q.C.
Sarah King - D'Souza, Q.C.

**Counsel Appearances**:

Garner A. Groome, for the Law Society of Alberta
James B. Rooney, Q.C., for Charles Fair

**Date and Place of Hearing**:

June 23, 2010
Calgary, Alberta

## REPORT OF THE HEARING COMMITTEE

## I. INTRODUCTION

1. Charles Fair (sometimes referred to as the "Member") is subject to conduct proceedings under the *Legal Profession Act*, R.S.A. 2000, c. L - 8 ("LPA") on the following citations:

    1. IT IS ALLEGED THAT [you] failed to transfer the file of your clients, B.O and P.M., on a timely basis and you failed to cooperate with successor counsel, and that such conduct is conduct deserving of sanction.

    2. IT IS ALLEGED THAT you disclosed confidential information of your clients, B.O. and P.M., and that such conduct is conduct deserving of sanction.

    3. IT IS ALLEGED THAT you breached the Law Society accounting rules, and that such conduct is conduct deserving of sanction.

2. The Hearing Committee received and accepted a guilty plea, imposed a reprimand and directions concerning Practice Review and awarded costs against the Member.

3. The Member was present throughout the hearing. He was represented by counsel, Mr. Rooney. At the conclusion of the hearing, the Hearing Committee provided oral reasons, and indicated that a written report of the proceedings would be provided in due course in which it would expand on its reasons why the sanction was appropriate. This is the written report. It is consistent with and expands on the oral remarks.

## II. JURISDICTION

4. Jurisdiction is dependent on the existence of citations directed by the Conduct Committee of the Law Society of Alberta against a member of the LSA and the appointment of the Hearing Committee members by the Chair of the Conduct Committee.

5. These jurisdictional requirements were established through Exhibits 1 through 4. Both counsel for the Law Society of Alberta and for the Member agreed that the Hearing Committee had jurisdiction to consider the application.

6. The Hearing Committee determined that it did have jurisdiction to consider the application.

7. Counsel for both the Law Society of Alberta and for the Member were asked whether there was any objection to any of the members of the Hearing Committee based on bias, apprehension of bias or any other reason. No objection was made.

## III. PRIVATE HEARING APPLICATIONS

8. When the hearing commences, the chairperson of a Hearing Committee must invite applications to have the whole or part of the hearing held in private (LPA, s. 78; *Rules of the Law Society of Alberta* (the "Rules"), R. 98).

9. Certain individuals were required to receive a private hearing notice, and the Law Society of Alberta exercised its discretion to issue a private hearing notice to other individuals

(persons who are or may be an interested party) (Exhibit 5). The Hearing Committee was advised that the notices were sent to the recipients at their last known addresses, and that some of the notices (sent to individuals in respect of whom the Law Society of Alberta had exercised discretion) were returned undelivered.

10. No one has come forward to ask that any part of the hearing be conducted in private.

11. The return of private hearing application notices would not usually preclude a hearing committee from proceeding with a hearing. However, the Hearing Committee must be mindful to protect the interests of the intended recipients of the notices.

12. The Law Society of Alberta applied for a direction that any third party names and client names be redacted from the Hearing Committee report, the transcript of proceedings and the exhibits filed in the proceedings. Counsel for the Member indicated he had no objection to the application.

13. Hearings ought to be conducted in public unless a compelling privacy interest requires protection, and then only to the extent necessary: Hearing Guideline dated February 2005 (reformatted December 2008) (The "Hearing Guideline"). It is well established that protection of solicitor and client privilege is a compelling privacy interest, and that the privilege extends to the identity of the client. Sometimes, disclosure of third party names together with the context of the complaint would amount to disclosure of the client's identity to persons having a basic level of knowledge of the matter. The same principles apply to orders to redact information from the record. That was the case here. Therefore, the order sought was justified and granted.

14. Accordingly, the Hearing Committee granted the application and directed that any third party names and client names be redacted from the Hearing Committee report, the transcript of proceedings and the exhibits filed in the proceedings. This direction extends to identifying information such as addresses.

15. The oral hearing proceeded in public.

## IV. EXHIBITS

16. The Hearing Committee received and entered into the record Exhibits 1 through 30.

17. The Exhibits are subject to the direction described in paragraph 14 above.

## V. FINDINGS OF FACT – CONDUCT DERSERVING OF SANCTION

18. The parties tendered Exhibit 25 comprising an Agreed Statement of Facts (the "ASF") and admission of guilt.

19. It was noted that the Member intended to concede, for the purposes of the admission of guilt, whether written directions to pay from a trust account issued by the Member or his office to a bank were cheques within the meaning of Rule 124. The Member's belief that they were cheques (and therefore compliant with Rule 124) remains relevant to the sanction process.

20. The Hearing Committee determined that the ASF and the admission of guilt were in a form acceptable to it pursuant to section 60 of the LPA.

21. Based on the ASF, the Hearing Committee finds the following facts (certain identifying information has been edited from the text of the original ASF in the following extracts):

1. The Member was admitted to the Ontario Bar on February 7, 1992, and the Alberta Bar on May 28, 1998.

2. The Member has practiced as a sole practitioner in Calgary, Alberta since October 31, 2000.

**Citations 1 and 2**

3. A summary of the background to Citations 1 and 2 is as follows:

a. B.O. and her spouse, P.M., are [health care practitioners]. P.M. has a Professional Corporation that wished to purchase another professional practice. To do so, the Professional Corporation had to borrow funds from a bank (the "Bank"). P.M., B.O. and two other [health care practitioners] (M.B. and his wife, S.B.) had to sign personal guarantees on the loan to the Professional Corporation. There was a concern about the bank financing (i.e. that it would be inadequate to complete the purchase or would not be advanced by the scheduled

closing date) so the Professional Corporation borrowed $100,000 from G.V. and his wife, who were employed by P.M. The Member was retained to handle the transaction. He received from P.M. the $100,000 and a further $20,000 as deposits. Those funds were forwarded to the vendor as a sign of good faith. The Bank advanced the full loan and the funds needed to complete the sale were sent to the vendor. This left a balance of at least $100,000 in trust subject to the Member's legal fees and disbursements.

b. B.O. contacted the Law Society alleging that the Member was not responding to her messages concerning a memorandum of understanding that was incomplete and because the Member would not release the $100,000 plus he was holding in his trust account.

c. The Member took the position that he could not release those funds until B.O., P.M., and the B.'s attended at his office to sign off on the financing documents as required by the Bank. Further, he could not release the funds because, in his opinion, the loan between P.M. or his Professional Corporation and G.V. had not been properly documented.

d. The Complaints Resolution Officer assigned to handle the matter attempted to assist in organizing appointments for the health care practitioners with the Member and attempted to have the $100,000 paid to G.V.

e. Despite the suggestion by the [health care practitioners] that they were prepared to attend at the Member's office pretty well anytime (subject only to the fact that S.B. was about to have a baby), the Member insisted that they each provide him with three dates and times they would be available to meet with him. There were some attempts on the parts of B.O. and P.M. to comply with the Member's demands but they came to nothing. S.B. was in labour and could not comply with the Member's suggestion. In the meantime, the Member continued to hold the $100,000 in trust despite an oral request from G.V. that the money be released to him.

f. Eventually, B.O. and P.M. fired the Member and instructed him to transfer all of their files and the funds to their new counsel. The Member refused on the grounds that there was now a conflict of interest between the lender and the health care practitioners and that it was inappropriate for a single lawyer to act on behalf of all of the parties. He sent the balance of the trust funds (after deducting fees and disbursements) to the Bank on the grounds that those funds had been advanced for the purchase and since they were not needed for the purchase, they should be returned to the Bank.

g. When he was requested to provide a copy of his file to the Law Society, he copied all of his files relating to B.O. and P.M. and provided a copy of all of the files to the Law Society and a copy of all of the files to the Bank. The Bank, in turn, forwarded all of the file materials and the funds to the new counsel for B.O. and P.M. With the assistance of their new counsel, the issues of the loan documentation and the release of funds were resolved. There is no indication that the Bank used any of [the] file materials.

4. More specific details relating to B.O.'s complaint submitted to the Law Society are set out in the following paragraphs.

5. On October 29, 2007, B.O. submitted a written complaint to the Law Society. Specifics of the complaint may be described as follows:

a. B.O. had been working with the Member on a memorandum of understanding since the fall of 2006. Due to internal negotiations, the memorandum of understanding still was not completed. The most recent changes were sent to the Member on September 28, 2007, but despite several messages and emails, the Member had not responded to her;

b. The Member represented B.O. and others in the purchase of a professional practice. The purchase price was $630,000. Funds totalling $750,000 were deposited into the Member's trust account. Of these funds, $100,000 was from an investor, $20,000.00 was the initial deposit paid by P.M. and $630,000.00 was from a bank loan. The transaction closed in September 2007, at which time the vendor was paid the balance owing. The Member had not responded to B.O.'s requests for the return of the $120,000 balance.

6. The complaint was referred to a Complaints Resolution Officer. On November 20, 2007 a letter was sent to the Member requesting his response.

7. The Law Society received the Member's response on December 5, 2007 which may be summarized as follows:

a. B.O. and her husband were [health care practitioners] and clinic owners who, despite being long-time clients, had a "frustratingly cavalier attitude toward the drudgery of papering legal transactions";

b. The most pressing issue was that they had not made the time to see that necessary documents were executed in order to complete the transaction that was the source of most of the money in trust;

c. The bigger issue was that the money in trust arguably was not theirs. When B.O. feared a bank financing shortfall they convinced an employee, G.V., to place a $100,000.00 investment into the Member's trust account in the event that emergency financing was required. The Bank did come through with the financing although B.O. and her husband had not completed the bank's paperwork;

d. B.O. and her husband also had not papered the $100,000 investment from G.V.. The employee was told that this could be taken care of after he gave them the money;

e. There were two other [health care practitioners], M.B. and S.B., ("the B.'s") who were also involved in the transaction and whose signatures were also required on the financing documents.

8. On January 7, 2008 the Member forwarded the following information to the CRO with regard to the employee investment:

"Doug, this is the text I read to you when we were on the phone today. As I said, [B.O.] sent the following paragraph in an email to me dated December 19 (the Wednesday before Christmas break began), regarding the unpapered $100,000.00 from the employee":

*"As far as the financing transactions, [G.V. has] provided the $100,000.00 as a GIC for which we will be writing up further details about the repayment structure. It does not require your review of the documentation."*

9. In an email dated January 9, 2008, the CRO asked the Member which signatures were still outstanding (as referred to in the Member's response). The CRO requested that the Member email B.O. this information after which she would reply and advise of the times that these parties would be available to sign the outstanding documentation. The CRO further advised that the Member's concerns regarding the $100,000 were passed onto B.O. who suggested that the funds be paid back directly to G.V. The CRO also discussed this option with G.V. who agreed. The Member was asked to deal with this matter in a timely fashion as it had already gone on too long.

10. In her email dated January 11, 2008, B.O. informed the Law Society that she had not heard from the Member with regard to the scheduling of a meeting. Moreover, G.V. also had not been contacted by the Member with regard to the return of their money.

11. The Law Society received copies of the Member's January 13 and 14, 2008 emails to B.O., her husband and the B.'s. Although he acknowledged having been contacted, the Member requested that each party provide him with three dates and times that each of them would be available to sign the outstanding documentation.

12. In an email dated January 14, 2008, M.B. informed the Member that he would make himself available at a time and date of the Member's choosing. M.B. further complained that the Member, in the preceding four weeks, failed to respond to any of his emails and failed to return any of his calls.

13. By email dated January 14, 2008, the Law Society informed the Member that he was expected to refund the $100,000 which he had been holding in his trust account since September 2007 to G.V. by January 15, 2008. The Member was further advised that the complaint would be referred to the formal process unless he telephoned the CRO the following morning.

14. In a January 14, 2008 email to the Law Society, the Member advised that he was unable to comply with the timeline provided by the LSA as the remaining financial documents had to be signed by all parties before any bank financing money could be released out of trust. The Member further indicated that he was unwilling to discuss the order in which those signatures must be obtained due to the CRO's recent mediations. Moreover, the Member insisted that the CRO "not further prejudice any of these multiple parties with conflicting interests." In particular, the Member insisted that the CRO "not discuss the interests of G.V. with P.M. or B.O."

15. The matter was referred to the Manager, Complaints and a letter went to the Member by registered mail on January 17, 2008 requesting his response pursuant to Section 53 of the *Legal Profession Act*.

16. On January 18, 2008 the Member forwarded a copy of email correspondence between himself, B.O. and the B.'s which indicated that a mutually convenient date to sign the outstanding financial documentation still had not been decided.

17. The CRO confirmed that this matter had been referred to the formal process. Therefore, it was not necessary for the Member to provide copies of future communications to him.

18. In the meantime, on January 23, 2008, B.O. and P.M. ended the Member's retainer and directed him to transfer all of their files to new counsel (Exhibit 13).

19. The Member provided his formal response to the Law Society on January 29, 2008 which may be summarized as follows:

a. B.O. and P.M. continued to refuse to complete required bank financing documentation for monies that they had already received. On January 23, 2008, he finally received an email from B.O. which contained dates that she and P.M. would be available. Later that day he received additional communication in which he was advised that they retained another attorney and were cancelling their scheduled appointment;

b. The Member also alleged that he had received several communications from another individual employed by B.O. and P.M. who claimed that B.O. and P.M. were "refusing to permit contact" with him and his wife who also needed to sign documents to complete the financing. It is presumed the Member was referring to G.V.;

c. The Member requested the Law Society's assistance and clarifications in resolving this matter as well as an extension of the deadline to reply.

20. By letter dated February 1, 2008, the Manager, Complaints informed the Member that she was of the view that she could not be of further assistance in resolving the complaint. Accordingly, the Member's full response to the complaint was expected.

21. On February 4, 2008, the Member reiterated his request for an extension of time to respond to the compliant. On February 6, 2008 the Member confirmed he was granted an extension until February 22, 2008.

22. The Member provided the Law Society with a copy of his February 25, 2008 correspondence addressed to the Bank, and the new counsel (Exhibit 14). The contents of the letter may be summarized as follows:

a. The Member confirmed that he was withdrawing from the dual representation of the parties and that the balance of the loan proceeds was being returned to the Bank, less an amount for his fees. This decision was made because he perceived a conflict of interest between the parties that had only recently come to light;

b. The Member believed that the contracted purpose for the funding (i.e. paying the seller) had been met. It was his view that dual representation could not ethically be continued after his withdrawal and could not be remedied by replacing him with a new dual lawyer;

c. P.M. deposited $100,000 directly into his trust account and directed him to pay it to the seller before the Bank advanced funding. The characterization and origin of the deposit remained problematic and undocumented by P.M.;

d. The B.'s appeared to be acting against their own interests by resisting signing documents to complete the transaction and appeared to be unaware or unconcerned with the disposition of the moneys currently being held in his trust account. M.B.'s last communication to him was that he and his wife would be "unavailable [to me] for the next six months". It is noted that M.B.'s email of January 23, 2008 (Exhibit 14, Tab 1) actually stated:

> "[S.B.] and I will not be able to be reached by e-mail for the next six months. Please have all future communications between you and us take place over the phone. We can be reached at any time [telephone number deleted]."

e. Various actions taken by two directors of P.M.'s Professional Corporation related to the financing of the purchase remained unaddressed and were cause for concern. G.V. advanced emergency funds and P.M. directed him to disperse those funds immediately to the seller. P.M. further indicated that the Member would be retained to draft an agreement with G.V.. However, P.M. withdrew his instructions to document the transaction once the funds were dispersed and had asserted various contradictory statements about that transaction;

f. The Member withheld the sum of $1,000 in the event that further services were required in connection with this matter.

23. The Law Society acknowledged receipt of the Member's correspondence on February 27, 2008 and stated that his representations failed to answer all of the complaints against him. Specifically, he did not address his failures to respond to B.O. and P.M. in a timely manner and to transfer their file to their new counsel. The Member was also asked to address the following further issues:

Why he would not get instructions from the lender before providing documents and returning funds to them?

How he could justify retaining $1,000 in trust as a holdback when he was no longer prepared to act on behalf of the parties?

Why he would not transfer the file to new counsel?

The Member was informed that his response was required no later than March 7, 2008.

24. In the meantime the new counsel had emailed the Law Society seeking its assistance in having the Member send all of the files of B.O. and P.M. to him as per the January 23, 2008, direction (Exhibit 16).

25. On March 7, 2008 the Member provided the following responses (Exhibit 17):

a. In response to B.O. and P.M.'s allegation that he did not respond to them in a timely manner, he indicated that timeliness was a red herring. B.O. and

P.M. were trying to stall other parties to whom they had made promises and were making the false assertion that their lawyer was unresponsive as a pretext;

b. With respect to the issue of the transfer of the file to new counsel, the Member stated that he could not ethically provide new counsel with more of the file than he already had. The Member believed that the remainder of the file would demonstrate the conflict and that he would have been violating his continuing duty to keep B.O. and P.M.'s file confidential;

c. He did not get instructions from the lender prior to returning the funds and documents as he believed that only one ethical path existed;

d. After deducting reasonable fees and disbursements (if any) from the money remaining in trust he would return the balance to the lender to finalize his withdrawal, which was his normal practice.

26. On March 10, 2008, the Member wrote the Law Society and confirmed the receipt of three urgent voicemail messages from the Manager, Complaints. The Member insisted that all communications had to be on the record, in writing, due to serious past mischaracterizations by B.O. and P.M.. He further requested that in its next communication the Law Society state with specificity the purpose for the continuing communication and the current nature and status of any remaining complaint (Exhibit 18).

27. By letter dated March 18, 2008 the Law Society confirmed that the Member's response to the complaints was as follows (Exhibit 19):

a. He denied that he failed to respond to B.O. and P.M. in a timely fashion. Indeed, he accused B.O. and P.M. of failing to deal with the lender's documents and himself in a timely fashion;

b. He had not transferred B.O. and P.M.'s file to their new counsel on the basis that new counsel could not act concurrently for B.O. and P.M. and their lender. Moreover, he had nothing substantial in his file since he had returned the lender's documents and funds to the lender;

The Member's response to the queries as set out in the February 27, 2008 letter were summarized as follows:

c. He did not need instructions from the lender to return the documents and most of the funds;

d. He would bill the $1,000 left in his trust account to the lender when wrapping up the file; and

e. He would not transfer the file because of his perception of conflict between the [health care practitioners] and the lender.

28. The Manager, Complaints went on to advise the Member that these complaints were unresolved and, therefore, he would be required to communicate further. In the opinion of the Manager, Complaints, it was not up to the Member to decide whether or not it was appropriate for B.O. and P.M. to retain one lawyer to act on their behalf and on behalf of their lender. Furthermore, he had no authority to refuse B.O. and P.M.'s

request that their file be transferred to their new counsel. The Member was required to provide the Law Society with a complete copy of B.O. and P.M.'s file, a copy of any Statement of Account that he intended to render to the lender and a copy of all accounting records as related to this file. The Member was asked why he thought he had complied with Chapter 14, Rules 3 and 4. The aforementioned information was requested by March 26, 2008.

29. On March 26, 2008 the Member confirmed receipt of the Law Society's letter and advised that [he] was out of the country but would provide his response after he returned.

30. On April 23, 2008 the Law Society confirmed that the Member's response was past due.

31. By letter dated May 2, 2008 the Member provided the following response (Exhibit 20):

a. He had faxed a response on March 26, 2008. He took no further action because he believed that the complaint had been abandoned;

b. As the Law Society stated that the complaint file was relevant to B.O. and PM.'s transaction, the Bank was also entitled to a complete copy of the file (which was over 2,000 pages), including the Law Society's contentions;

c. The Member had been unable to decipher what outcome the Law Society was pursuing as B.O. and P.M. no longer wanted his legal representation;

d. The Law Society's letter contained numerous mischaracterizations of his previous responses. The Member believed that the lack of contact from anyone suggested that the complaint had been abandoned. The Member intended to forward a more detailed response to the Law Society under separate cover.

32. By letter dated May 7, 2008 the Law Society advised the Member of the following (Exhibit 21):

a. On March 26, 2008 the Member indicated that he would respond to the Law Society's requests when he returned to his office. He did not;

b. A reminder letter was sent on April 23, 2008 to which the Member responded on May 2, 2008. In his letter the Member implied surprise that further action was required as he "believed that the complaint had been abandoned". The complaint was not abandoned, further, the Member failed to comply with the requirements of the Law Society's March 18, 2008 letter;

c. The Member was required to produce all of the documents and records that had been previously requested forthwith;

d. Unless and until the Member received further written communication from the Law Society rescinding this demand, he should not assume that he need not comply with this demand.

33. On May 21, 2008 the Member provided the Law Society with a copy of all of the clients' files (Exhibit 22). The Member further stated:

a. He was ethically compelled to provide a copy of the entire file to the Bank as the Law Society determined that the documents were relevant to the transaction;

b. The new counsel could not ethically represent both sides. Similarly, ethically he was not permitted to allow the appearance that he condoned the new counel's [sic] position by actions such as "passing on" the file to him;

c. To the Member's knowledge, the Bank had no complaints regarding his representation of it;

d. He believed B.O. and P.M. had pursued the Law Society complaint in retaliation for his refusal to quietly forward them the excess funds in trust to which they were not entitled;

e. With regard to Chapter 14, Rule 3, he had not prejudiced B.O. and P.M. because the financed transaction had, in essence, been completed;

f. With regard to Chapter 14, Rule 4, he had already rendered the bulk of his account in this more than one-half-million-dollar deal and he held back less than 0.2% of the amount of funds received by B.O. and P.M. to cover final expenses. The current trust balance was 0;

g. The Member renewed his request that he be provided with copies of all correspondence between the Law Society and B.O. and P.M. as he believed that the Bank was entitled to copies of any activity by their co-clients relating to the transaction.

34. Concurrently the Member sent to the Bank and to B.O. and P.M. copies of all of the B.O. and P.M. files (Exhibit 23) along with a final Statement of Account (Exhibit 23 Tab 1). The material sent to the Bank included not only the whole financing file and the whole purchase file but material from B.O. and P.M.'s other files unrelated to the financing such as:

a. Negotiations back and forth between the Member and counsel for a former associate, and earnings information starting from March 2005;

b. Materials related to M.B.'s associate agreement negotiations starting in June 2005 including statements of account;

c. Materials related to a commercial lease review starting from December 2006 including a statement of account;

d. Materials related to the B.'s merger starting from December 2006 including financial information, tax planning from the accountant, information from minute books of P.M.'s Professional Corporation, M.B.'s Professional Corporation, B.O. and P.M.'s holding companies, and statements of account with time sheets;

e. Material related to the G.V. emergency loan;

f. Material related to B.O.'s complaint to the Law Society; and

g. A client trust ledger showing trust account activity for the lease review, M.B. and S.B. merger, purchase and financing

35. At no time did B.O. or P.M. authorize the release of all of their files to the Bank.

36. By letter dated June 5, 2008 the Law Society provided the following response to the Member (Exhibit 24):

a. It was suggested that the disclosure which the Member provided to the Bank was inappropriate given that the Bank had not submitted a complaint against him and, as he had been previously advised, all complaints to the Law Society were confidential;

b. Although it was agreed that there was no confidentiality with respect to the transaction, the Law Society disagreed with the Member's assertion that he had an obligation to disclose anything to the Bank with respect to the complaint;

c. the Bank had released the balance of the $100,000, as well as the file materials to the clients' new counsel;

**Citation 3**

37. The facts pertaining to Citation 3 are detailed in the Audit Manager Memorandum and attached Audit Report of August 13, 2008 (Exhibit 6). The Member's responses to that audit and the issues noted therein, along with the Law Society's replies, are contained in Exhibits 7 through 12.

38. The most significant breaches of the accounting rules noted by the Rule 130 Audit were as follows:

a. trust ledger shortages left uncorrected for significant periods of time;

b. non-cheque payments from trust; and

c. late filings of Forms S and T.

39. By January 26, 2009, the breaches and deficiencies noted in the Rule 130 Audit report were remedied by the Member (Exhibit 9).

22. The admissions of guilt contained in the ASF were that the facts in the ASF constituted conduct deserving of sanction as particularized in the citations (as described in paragraph 1 of this report) and as defined in section 49 of the LPA. Each party reserved the right to adduce additional evidence not inconsistent with the agreed facts.

23. There were 3 trust ledger shortages identified in the Law Society audit. One arose from the transaction for the purchase of the professional practice that underlies citations 1 and 2. This shortage was in the amount of $511,950 and was outstanding for 3 days. The second was in the amount of $1,141.41 and was outstanding for 14 months. These arose

from overpayment or payment prior to funds being received, contrary to Rule 125. The third, in the amount of $316.76, arose from a client's cheque which was dishounoured by a bank. This was corrected almost 6 months later.

24. The Member disputed the largest trust shortage. The trust cheque was issued Friday, October 12, 2007 in anticipation that the Bank would advance the loan proceeds that day. The Member held the cheque. Later in the day, the Bank advised him that the loan proceeds would not be disbursed until the following Monday. The Member held the cheque until he confirmed with the Bank that the funds were transferred and could be released, then delivered the cheque to the vendor on Tuesday, October 16, 2007.

25. The ASF indicates that there were non-cheque payments from trust. On 36 occasions, debit memos were made on a trust account using either a bank draft or faxed instruction from the Member to the Bank. In these instances, no cheque was drawn on the account to the Bank.

26. The Member disputed that there were no cheques within the meaning of Rule 124. He provided written, signed instructions to the Bank for each trust transfer. As noted, he conceded this issue for the purpose of the admission of guilt.

27. The ASF indicates there were late filings of Forms S and T. Form S was filed late for the years 2002 through 2007. The delinquency ranged from 3 months to almost 2 years. Form T was late for the years 2002 through 2007. The delinquency ranged from about 2 months to almost 1 ½ years.

28. Several potential violations of various aspects of Rule 122, which are not particularized in the ASF, were identified in the audit. The auditors alleged the following: Many of the trust account reconciliations were prepared late. Computerized accounting records were not printed monthly. The trust receipt journal was not properly maintained in that it did not show the method of receipt of funds. A trust transfer journal was not maintained. The general receipts journal was not properly maintained in that it did not show the method of receipt. A billing journal, showing a chronological file of statements of accounts rendered to clients, was not current. Some bank source documents for the month of August 2007

were not available. The duplicate receipt book for cash receipts did not have provision for signature from the person who provides cash. The trust bank statement for one account did not identify it as a trust account and cheques on this account were not clearly marked as being trust cheques. The Member indicated in the survey form that on occasion he has signed a post-dated trust cheque. Minor amounts of trust account interest were not remitted to the Alberta Law Foundation. Books and records were not kept at the office listed on the latest Form S. There were minor omissions relating to stale dated cheques or inactive accounts.

29. The Member disputed some of the accounting matters. For example, he asserted that his computerized accounting software did allow for records of the source of trust receipts and that he did record that information and always had. Another example is that the missing bank statement was for a general account, not a trust account, and he reconciled it using information available from the bank online. Another example is that he provided a chronological file containing statements of account, but these were not examined by the auditor. Another example is that the CIBC cheques on the trust account were not preprinted as trust cheques, but were hand labelled as trust cheques. There is no requirement that the cheques be pre-printed with the label "trust"; further there is no requirement that the account statement be labelled trust, and the account was designated a trust account with the bank. The Member did not recall signing a post-dated trust cheque, whereas he has on occasion prepared printed trust cheques in anticipation of the closing of a transaction. The Member admitted to minor violations and indicated he had corrected his practices.

30. The ASF merely references the LSA's correspondence describing the alleged breaches identified during the audit and the Member's response. As noted, the Member disputed many of the allegations (Some have since been conceded by him and dealt with separately in this report – see paragraphs 24 through 26 above). It is not clear to the Hearing Committee whether all of the matters identified by the auditor as described in the Exhibits were actually breaches. The auditor did not testify and the Member was not asked about them in his testimony. We take the correspondence in the Exhibits relating to these other accounting breaches as supporting a finding that the Member's accounting

systems were non-compliant in some respects and required improvement. None of the non-compliances occasioned a loss.

31. The Member was ordered by the Conduct Committee to pay the Law Society audit costs, and has paid them. The Conduct Committee generally does not provide extensive reasons in support of such an order and the reasons, if any, were not before us.

## VI. DECISION WHETHER CONDUCT WAS DESERVING OF SANCTION

32. As described above, the Hearing Committee accepted an admission of guilt. Accordingly there is a finding that the conduct is deserving of sanction: LPA, section 60.

## VII. ADDITIONAL FINDINGS OF FACT – SANCTION

33. The Member testified in the sanction phase of the hearing and Exhibits 26 through 30 were marked in the sanction phase of the hearing.

34. In his testimony, the Member explained that he perceived a conflict of interest among some of the clients, that arose from the uncompleted memorandum of agreement and the $100,000 loan. The loan could have breached the debt servicing covenants in the loan agreement with the Bank. The failure to complete the memorandum of agreement was a concern because personal guarantees may have been given by some of the clients in the expectation that the memorandum would be signed. The Member did not know how to facilitate transfer of the file to a new lawyer, wondering how he could transfer the file to both sides. Eventually he provided all the files to both sides. The Member acknowledges that he ought to have transferred the files sooner, and that he should have provided all the files requested to the new counsel who contacted him to arrange for the transfer. He acknowledges that he did not properly turn his mind to the scope of the retainer by the Bank, and that that it was a breach of duty to provide a copy of all file materials to the Bank.

35. The Member testified, and we have found, that the Member was not paying as much attention to his accounting systems as he ought to have. The Member has since hired a bookkeeper to address accounting systems.

36. The Member has no disciplinary history with the Law Society of Alberta (Exhibit 26).

37. The Member was referred to the practice review process of the Law Society of Alberta in June 2009. The referrals were made by the Conduct Committee in connection with the citations which are before this Hearing Committee.

38. A practice assessment was carried out in November 2009 and reported in January 2010 (Exhibit 29). The report describes difficulties with file organization and time management. The Member's life was affected by the chaos of a marriage breakdown and bitter divorce, and subsequent indecision whether to move to Oregon where his new fiancé lived. All this was compounded by an automobile accident in March 2009 when the Member was in a vehicle which hit a moose. The vehicle was written off. The Member reported to the practice assessors that he suspects a head injury from the accident because he sometimes has difficulty remembering things. The Member appeared to the practice assessors to be unfocussed. The assessors reported the Member had difficulty completing tasks and procrastinated. In their view, this was a cycle that involved the Member's personal circumstances and emotional or medical matters, and that he needed to focus on well being and pursue remediation in order to break the cycle.

39. The Practice Review Committee and the Member (through his counsel) are discussing undertakings governing the Member's continued practice of law (Exhibit 30). One requested undertaking is of concern to the Member and that is under discussion with the Law Society. The Member is taking steps to address his personal issues. He works with a therapist on time management techniques. He discussed with his counsellor breaking off a personal relationship that was distracting him and interfering with his ability to focus, and in February 2010 he broke off the relationship. This has enabled him to focus his efforts in Alberta, instead of the potential for a cross-border practice involving the other individual. The primary focus of his efforts to date in the office is getting existing files in order. He has hired staff to assist him in his practice. Exhibit 30 indicates that the Member recently reported to Ms. Rattan (counsel for the Practice Review Committee) that he is taking other steps toward personal well being. He and his counsel are working

with the Practice Review Committee with a view to resolving the practice issues and their underlying causes.

40. The Hearing Committee concluded that the Member has difficulties with file management and organization and with focussing on issues in his practice. These difficulties manifest themselves in the accounting deficiencies and in the inappropriate conduct described in citations 1 and 2. There is no element of dishonesty or bad faith in his conduct.

41. The practice problems were either caused or contributed to by the Member's personal and emotional situation and the challenges he faced in his practice. The Member has been in therapy and receiving counselling. There are concrete examples in the evidence of the challenges in his life that contributed to the problems. For example, his cross-border relationship distracted him and interfered with his focus on his practice. Another example is that he did not appear to fully appreciate the risks of practicing alone or without adequate staff. Another example is that he had difficulties with time management and required assistance with time management techniques. We hesitate to make findings as to the cause beyond this because assessments are pending in the practice review process. In light of the contents of the practice assessment report and the Member's testimony, the practice review process is the best mechanism in this case to assess continued remediation of the Member's practice.

## VIII. DECISIONS AND REASONS - SANCTION

42. Mr. Fair has been found, as a result of an admission of guilt, to be guilty of conduct deserving of sanction in respect of the following matters:

(a) He failed to transfer the file of his clients BO and PM on a timely basis and failed to cooperate with successor counsel;

(b) He disclosed confidential information of his clients BO and PM to a bank;

(c) He breached Law Society accounting rules.

43. As the ASF indicates, the Member acted for B.O and P.M (or a professional corporation related to them – this distinction is not material to the matter and we will refer to this group as the Complainants) on a number of matters. These included a negotiation with a former associate, a commercial lease review, a merger (which included financial and tax planning information), a loan from an employee (GV), and a purchase and financing of a professional practice. The Member also acted for the Bank in respect of the financing of the purchase of the professional practice.

44. The substance of the complaints is that:

(a) The Member held $100,000 in trust in relation to a transaction for the acquisition of the professional practice and associated purchase financing. The transaction closed in September, 2007. The Member did not return the funds to the Complainants (who were his clients), notwithstanding requests that he do so. Instead, he paid the funds to the Bank (also a client in respect of the financing transaction) in late February or early March, 2008. The Member unreasonably delayed payment of the funds. There is also an issue as to whether the payment was made to the correct party.

(b) The Complainants directed the Member to transfer their files to another lawyer on January 23, 2008. The Member did not transfer the file.

(c) On May 21, 2008 the Member sent a copy of all the Complainants' files to the Complainants and the Bank. These included files which the Member admits are not related to the financing file on which he represented both the Complainants and the Bank. Effectively, the Complainants then obtained all their files. So did the Bank.

(d) The Member's accounting practices were not in compliance with the Rules.

45. The accounting breaches are as particularized in the Exhibits and Part V of this report. The main breaches are (a) trust ledger shortages left uncorrected, (b) noncheque payments from trust, and (c) late filings of Forms S and T. As described above, Mr. Fair had an argument in respect of item (b) that the written signed instructions to the bank requesting a trust transfer were cheques, but conceded that issue for the purpose of this

hearing. The concession does not preclude him from relying on his belief as a mitigating factor in sanctioning.

46. Counsel for the Law Society and Mr. Fair made a joint submission with respect to sanction on the citations, proposing that the Hearing Committee should order the following: (1) a reprimand, (2) that Mr. Fair be directed to pay the costs of these proceedings, (3) that as a condition of continued practice under Section 72(2) of the LPA, Mr. Fair continue to reasonably cooperate with the Practice Review Committee and reasonably submit to the supervision of the Practice Review Committee.

47. The primary purpose of disciplinary proceedings is derived from Section 49(1) of the LPA, and is the protection of the best interests of the public (which include but are not limited to the members of the Law Society of Alberta) and the protection of the standing of the legal profession generally. The fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.

48. The Hearing Committee accounted for the general factors as outlined in paragraph 60 of the Hearing Guide. We are mindful that the weight to be given to each factor will depend on the nature of the case, keeping in mind the purpose of the sanctioning process. Among those factors are the need to maintain the public's confidence in the integrity of the profession, the ability of the profession to effectively govern its own members, deterrence of members generally and the member whose conduct is at issue, denunciation of the conduct, and rehabilitation of the member. More specific factors may include the nature of the conduct, the level of intent, the impact of or injury caused by the conduct, the number of incidents involved, and the length of time involved. There are also special circumstances to take into account in some cases. These are described in paragraph 61 of the Hearing Guide.

49. The conduct at issue with respect to all of the citations is in some respects related. The Member was aware of his ethical obligations respecting file transfers and disclosure of information to joint clients, but the problem appears to have been that he failed to

correctly assess them or to comply with them. Our impression from all of the evidence, and our fact finding as described in Part VII of this report, is that the difficulties appear to have arisen from a pattern of some procrastination and lack of decisiveness or focus. These were either caused or contributed to by personal pressures on the Member at the time and challenges that he faced in his practice. As a result, he did not respond appropriately to the demands for the file transfer, committed an error of judgment in disclosing more information to the Bank than he ought to have, and did not correct the deficiencies in his practice books and records.

50. Part of the cause of the failure to transfer the file and pay out the trust money in a timely way was a more factually specific issue relating to the representation of the clients; there was some question over the status of the $100,000 and identifying the person or entity to whom it belonged – bank or borrower. This was a genuine issue, not an excuse to delay implementing instructions. The Member appears to have been unable to address that issue in a timely way, and in our opinion that also arose from his inability to focus as described in Part VII of this Report.

51. We have also taken into the account the admission of guilt and the fact that the Member has no prior disciplinary history.

52. Each case is fact specific. The Hearing Committee is not bound by the decisions of other hearing committees. Moreover, in sanctioning there may be more than one reasonable solution and therefore there is no single correct sanction. Nevertheless, other decisions may be persuasive. Reasonable consistency in sanctioning is necessary to maintain the confidence of the public and the members of the Law Society that the process is transparent, rational and justifiable. Counsel, with their usual candour, have brought to our attention decisions of 2 hearing committees which imposed a fine where confidential information of a client was disclosed. Counsel sought to distinguish these decisions and submitted that the Member should not be fined.

53. In ***Law Society of Alberta v. Bissett***, 1999 LSDD 74, the lawyer was fined $5,000, reprimanded, and ordered to pay costs for disclosing confidential information and using

it for another client. The confidential information was obtained in the representation of client RW in a business transaction. The information included that RW may have sworn a false statutory declaration concerning a land purchase. In a subsequent retainer, the lawyer represented JL in a prosecution. Former client RW was the key prosecution witness. The lawyer used and disclosed confidential information to cross-examine RW and later submitted that the witness lacked credibility having previously sworn a false statutory declaration. RW was humiliated and potentially subject to prosecution for perjury. The Member was contrite and apologetic, admitted his guilt, and had no prior disciplinary record. He had spoken to other lawyers about the proposed course of action, but had not consulted the Code of Professional Conduct (from which he would have learned the course of action was inappropriate).

54. In ***Law Society of Alberta v. Francoise Belzil***, 2008 LSDD 167, the lawyer was reprimanded for engaging in conduct which was a conflict of interest, and fined $10,000 and reprimanded for disclosing confidential information. The facts as found by that hearing committee included the following:

(a) The lawyer, having ceased to act for client D, was contacted by DD, who had a claim against D. The lawyer referred DD to another lawyer, but attended a meeting or meetings where she supported the advice given by the other lawyer that DD should petition D into bankruptcy.

(b) The lawyer was later consulted by a friend, TP, who had been present at a previous meeting with DD, and was asked to draft documents to acquire a security interest in certain software which was part of a strategy to acquire the software. It was contemplated that a guarantor (V) would pay an amount (loaned by TP or his company) to the secured lender in exchange for a release of the guarantee and assignment of the security interest over the software. The security would then be assigned to TP or his company. D also sought to acquire the software. The hearing committee found that the involvement of the guarantor, V, was information disclosed to the lawyer when she was working for D when D was her client.

(c) The hearing committee found the lawyer was in a conflict of interest involving the misuse of confidential information to a disadvantage of a former client (at para. 48), disclosed her unpaid statement of account to assist in the bankruptcy petition which went beyond a mere passive or explanatory role (at para. 49), acted in a grave conflict of interest in preparing the documents to acquire the security interest (at para. 51), and disclosed confidential information consisting of her statement of account and information respecting the documents to acquire the security interest (at para. 56, 61, 62, 65, 68, 69, and 77). The hearing committee found a significant overlap between the conflict of interest and disclosure of confidential information citations (para. 68). The conflicts of interest and disclosures continued over a long period of time and there were detriments to the former client (para 98). Mitigating circumstances included remorse, personal and family difficulties, misguided reliance on TP, very low risk to reoffend, and no malice.

55. Unjustified disclosure of a client's confidences is a serious matter because the public trust in lawyers and the solicitor and client relationship is dependent on lawyers keeping their clients' secrets. The fundamental importance of solicitor and client privilege and the relationship between a solicitor and his or her client, and its role in the administration of justice, has been emphasized many times by the Supreme Court of Canada. ***Smith v. Jones***, [1999] 1 S.C.R. 455; ***R. v. McClure***, 2001 SCC 14, [2001] 1 S.C.R. 445, at paras. 35 and 41; ***Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink,*** [2002] 3 S.C.R. 209, 2002 SCC 61, at para. 36; ***Maranda v. Richer***, 2003 SCC 67, [2003] 3 S.C.R. 193; ***Pritchard v. Ontario (Human Rights Commission),*** [2004] 1 S.C.R. 809, 2004 SCC 31, at para. 14 - 21; ***Goodis v. Ontario (Ministry of Correctional Services)***, [2006] 2 S.C.R. 32, 2006 SCC 31, at para. 14 - 19; ***British Columbia (Attorney General) v. Christie***, [2007] 1 S.C.R. 873, 2007 SCC 21 at para. 22; ***Canada (Privacy Commissioner) v. Blood Tribe Department of Health***, [2008] 2 S.C.R. 574, 2008 SCC 44, at para. 9 - 11; ***Ontario (Public Safety and Security) v. Criminal Lawyers' Association***, 2010 SCC 23, at para. 53.

56. Speaking for the Court in ***Pritchard*** (at para. 17), Justice Major stated:

> As stated in *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, at para. 2:
>
> > Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.
>
> The privilege is jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction.

57. Among other things, the Supreme Court of Canada has observed that clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system, as we have recognized it, may properly function ***(Smith v. Jones***, *supra*, at para. 46). It does not matter whether litigation was in contemplation when the advice was sought, and absent rare exceptions it is "applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer..." (***Canada (Privacy Commissioner) v. Blood Tribe Department of Health***, *supra*, at para. 10). There is a high public interest in maintaining the confidentiality of the solicitor and client relationship (***Ontario (Public Safety and Security) v. Criminal Lawyers' Association***, *supra*, at para. 53).

58. It does not necessarily follow that there is a presumptive rule that disclosure of confidences should be penalized by a fine.

59. In each of ***Bissett*** and ***Belzil***, the information was disclosed to the detriment of a former client and provided for the benefit of a new client (***Bissett*** and ***Belzil***) or to another who sought to retain the lawyer (***Belzil***). In both cases, the information was used to the detriment of the former client.

60. The impact of or injury caused by the impugned conduct, length of time of the breach, and severity of the breach are recognized factors to be accounted for in determining sanction (Hearing Guide, para. 61). There are important features in the present case

distinguishing ***Bissett*** and ***Belzil***. Mr. Fair did not seek to disclose the information for the benefit of a new client nor use it for the benefit or detriment of anyone. There are no secrets between joint clients in the joint retainer and the lawyer owes duties of disclosure to all of them. Mr. Fair's error was misconstruing his disclosure obligation in the joint retainer to apply to documents in the non-Bank retainers. The Bank made no use of the information. The information was not used in any way against the clients. There was no harm to the clients other than the release of their documents contrary to their right to confidentiality. Mr. Fair did not undertake a new retainer that was incompatible with his existing ones. Mr. Fair was driven by excessive caution, not by some failure to apprehend his obligations.

61. We must also consider the general factors of sanctioning, including rehabilitation (Hearing Guide, para. 60). We prefer to craft a sanction which is tailored to the causes of the sanctionable conduct. Here the proposed sanction includes a condition relating to cooperation with the Practice Review Committee. In our view, the causes of the conduct are the types of matters which are within the purview of the Practice Review Committee. That committee is able to directly address the causes of the conduct and try to remediate matters so that Mr. Fair will remain as a productive member of the Alberta legal profession. In addition, Mr. Fair will incur costs and effort associated with complying with the practice review process.

62. The Member's personal challenges and the Member's efforts to correct them are significant mitigating circumstances. Also, Mr. Fair's practice has not been productive of late. In the circumstances of this case, a fine would only amount to a burdensome and harsh penalty that would interfere with the effort to rehabilitate and remediate and perhaps force him out of the profession. Deterrence of other members and denunciation is served by the reprimand, our re-affirmation of the fundamental importance of solicitor and client privilege, and the potential for significant additional sanctions as demonstrated in the ***Bissett*** and ***Belzil*** decisions.

63. In these circumstances, the Hearing Committee concluded that imposing a fine or some additional sanction in these circumstances was not necessary or justified. Accordingly, the Hearing Committee accepted the joint submission on sanction.

## IX. RECORD OF DECISIONS

64. There is a direction in place for redaction of certain information from the record. See paragraph 14 above.

65. The Member was found guilty of the citations described in paragraph 1 of this report.

66. The Hearing Committee imposed sanctions on the Member as follows:

(a) The Member was reprimanded. The reprimand (with minor grammatical corrections not affecting the substance) administered to the Member by the Chairperson on June 23, 2010 is appended (Schedule "A").

(b) The Hearing Committee directed that as a condition of continued practice under Section 72(2) of the LPA, Mr. Fair will continue to reasonably cooperate with the Practice Review Committee and will reasonably submit to the supervision of the Practice Review Committee.

(c) The Member shall pay the costs of these proceedings to the Law Society of Alberta, in the amount of $3601.00 within 6 months of June 23, 2010.

67. The Hearing Committee is mindful that there must be a mechanism (other than judicial review) to resolve potential issues between the Member and the Practice Review Committee such as the scope of undertakings and termination of practice review. The reasonableness conditions are intended to address this. Mr. Fair will not be required to continue in practice review when it becomes unreasonable to do so, nor submit to unreasonable conditions. If the parties cannot agree on what is reasonable, there are mechanisms within the Law Society to resolve that.

68. Publication of the proceedings and this report is in the hands of the Executive Director pursuant to the Rules, subject to paragraph 14 of this Report. There is no direction that any report be made to the Attorney General.

Dated August 23, 2010 at Calgary, Alberta.

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|---|---|
| _____ | _____ |
| James Eamon, Q.C. (Chairperson) | Kevin Feth, Q.C. |

_____
Sarah King - D'Souza, Q.C.

## APPENDIX "A" – TEXT OF REPRIMAND ADMINISTERED JUNE 23, 2010

Mr. Fair, the regulation of the legal profession is necessary to foster and maintain public confidence in the legal profession and the reputation of our profession. The profession does not properly function if clients cannot expect and receive timely and decisive responses to their requests, or if clients are not assured that their confidences will be upheld by their lawyer. The right to consult a lawyer and receive legal advice is one of the fundamental rights of all the members in our community. And I would point out that solicitor/client privilege is recognized by the Supreme Court of Canada as one of the fundamental underpinnings on which our legal system and the administration of justice in this country are based. Your actions in delaying delivery of the file to your clients and in providing the clients' confidential information to a bank injures confidence of the public in the lawyers, but it is fortunate that our process and our actions will restore it.

Part of the price of self-regulation is complying with the trust and other accounting obligations of the Law Society of Alberta. A self-regulating profession is dependent upon the willingness and the ability of the members of the Law Society of Alberta to be governed. Proper books and records reduce the potential for loss and permit the Law Society of Alberta to perform its governance function. Impeding the governance function by failing to keep proper books and records is not acceptable, and it is fortunate that no losses were occasioned as a result of the errors in the books and records.

It is also fortunate that the bank did not make use of the confidential information. But you must be mindful that having released that information to the bank, a reasonable client would be led to question whether the profession could be trusted. I have previously addressed that.

You are hereby reprimanded for the conduct to which you have admitted.