

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 IHOR BRODA,  
A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING REPORT

A. QUORUM

The Hearing Committee commenced and continued throughout the hearing with three Benchers.

B. REPRESENTATION

The Law Society was represented by Michael J. Penny. The member represented himself.

C. JURISDICTION

Letter of Appointment.

Exhibit 1 established that a panel comprised of Brian Peterson Q.C. (Chair), Fred Fenwick Q.C., and Scott A. Watson Q.C. was appointed to enquire into the said matters.

Notice to Solicitor.

Exhibit 2 established that Notice was given to the member that the Hearing Committee was directed to deal with his conduct beginning February 9, 2009. The Notice contained the 33 citations upon which the hearing was directed. Receipt of the Notice to Solicitor, was acknowledged by the member, Ihor Broda. Exhibit 2(a) established that Notice was given to the member of 37 citations, which, by consent, the hearing continued upon. This Notice was in turn replaced, with consent, by Exhibit 2(b), which also contained 37 citations, and the hearing continued upon this Notice. Exhibit 2(c) established that Notice was given to the member that the Hearing Committee was directed to deal with his conduct beginning May 13, 2009 upon the 53 Citations contained therein. Exhibit 2(c) was admitted with consent of all parties and the hearing continued upon all the 53 citations contained therein. Receipt of the Notice to Solicitor, was acknowledged by the member, Ihor Broda. Finally, Exhibit 2(d) established that Notice was given to the member that the Hearing Committee was directed to deal with his conduct beginning

July 21, 2009 upon the 56 citations contained therein. Exhibit 2(d) was admitted with the consent of all parties and the hearing continued upon all the 56 citations contained therein. Receipt of the Notice to Solicitor, was acknowledged by the member, Ihor Broda.

**Notice to Attend.**

Exhibit 3 established that a Notice to Attend and Private Hearing Notice Application had been served upon the member.

**Certificate of Standing.**

Exhibit 4 was the member's Certificate of Standing, which established that he was on the Active/Practicing List of the Law Society of Alberta.

**Certificate of Exercise of Discretion.**

Exhibit 5, comprised of three Certificates dated February 5, 2009, May 12, 2009, and July 20, 2009, established that no interested party made known their intention to apply to have the hearing held in private.

**Affidavit of Service on Interested Parties.**

Exhibit 5 also established the service on interested parties.

**D. OPEN HEARING**

The Hearing was open to the public, however, part of the Hearing was conducted in private.

**E. CHRONOLOGY OF HEARING**

The Hearing began on February 9, 2009 and continued through to October 5, 2009. On and between these dates, evidence was called, exhibits admitted, and closing arguments were made.

The Hearing began considering 33 citations. During the course of the Hearing, a number of successive Notice to Solicitor documents were added as exhibits, by consent of all parties. The Hearing continued, ultimately considering 56 citations. During the course of the Hearing, a number of the citations were sought to be dismissed, by counsel for the Law Society. Additionally, the

member indicated during the course of argument that he admitted a number of the citations contained within the Notice to Solicitor.

#### **F. SUMMARY OF DECISION**

The member admitted that his conduct was deserving of sanction on 16 of the citations within the Amended Notice to Solicitor [Exhibit 2D]. These admissions were made in respect of citations: 1, 19, 21, 26, 27, 29, 30, 31, 35, 36, 39, 40, 44, 48, 54, and 56. Six of these citations related to a failure by the member to respond on a timely basis to his clients (21, 26, 35, 39, 44, & 48). Two of these citations related to a failure by the member to respond on a timely basis to another lawyer (1 & 29). Two further citations related to the failure of the member to respond on a timely basis to the Law Society (27 & 30). One citation related to the failure to respond to the Public Trustee's office (36). The last five of these citations referred to the member's breach of the conditions imposed by the Benchers of the Law Society (19), the member's failure to follow the Rules of the Law Society regarding his filing of the S and T forms (31), the member's failure to comply with the Rules of the Law Society and the Rules of Court in rendering an account on a contingency agreement (40), the member's failure to follow accounting rules and rectify deficiencies (54), and the acceptance by the member of cash from a client in excess of that permitted (56).

Counsel for the Law Society invited the Hearing Committee to dismiss, or not find the member guilty, on ten citations within the Amended Notice to Solicitor [Exhibit 2D]. This representation was made in respect of the following citations: 4, 16, 17, 22, 34, 38, 43, 47, 51, and 55. The Hearing Committee accepted the invitation of Law Society counsel in each instance.

The Hearing Committee found that the member's conduct was conduct deserving of sanction in a further 20 citations: 2, 5, 12, 13, 14, 15, 20, 23, 24, 28, 32, 33, 37, 41, 42, 45, 46, 49, 50, & 53. Thirteen of these citations related to a failure by the member to respond on a timely basis to the Law Society or a failure to cooperate with the Law Society by not providing his file to them: 13, 15, 23, 32, 33, 37, 41, 42, 45, 46, 49, 50, & 53. Five of these citations related to a failure by the member to respond on a timely basis to clients: 2, 5, 12, 14, & 24. One of these citations related to the member's breach of trust conditions imposed by another lawyer: 28. One of these citations related to the member deceiving or seeking to deceive the auditors of the Law Society: 20.

The Hearing Committee found that the member's conduct was not deserving of sanction in 10 citations: 3, 6, 7, 8, 9, 10, 11, 18, 25, & 52.

**G. BURDEN AND STANDARD OF PROOF.**

With the exception of citation 20, in respect of each and every citation, the same burden and standard of proof was applied to the evidence heard by this Hearing Committee. The Law Society was required to prove each citation on a balance of probabilities.

In *Ringrose v. College of Physicians and Surgeons of Alberta* [1978] 2 W.W.R. 534 (Alta. C.A.) Clement J.A. stated:

"...The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established."

Further, in *Law Society v. Estrin* (1992) 4 Alta. L.R. (3<sup>rd</sup>) 373 (C.A.) the Court stated:

"The evidence required by the Law Society to reach a conclusion of deceit is short of that in a criminal proceeding but must meet a higher standard than the balance of probabilities."

Additionally, the Court of Appeal has specifically dismissed the argument that an allegation of conduct equivalent to criminal behaviour would require proof beyond a reasonable doubt: *K.V. v. College of Physicians and Surgeons of the Province of Alberta* (1999) 4 Alta. L.R. (3<sup>rd</sup>) 373.

Therefore, the Hearing Committee has held the Law Society to a higher standard of proof than the balance of probabilities in respect of citation 20. This allegation requires a higher degree of probability than proof on a balance of probabilities. The degree depends upon the subject-matter, which in the case of citation 20, requires that the proof establish that the member "deceived or sought to deceive." Therefore, the Hearing Committee applied a standard of proof that approaches that of the criminal standard: proof beyond a reasonable doubt.

The concept of proof beyond a reasonable doubt was described by Zuber, J.A. in *R. v. Gordon* (1983) 4 C.C.C.(3<sup>rd</sup>) 492 (Ont. C.A.): "It is...clear that proof beyond a reasonable doubt and proof to a moral certainty are synonymous terms." Another passage, which is often quoted with favour, by other courts, is that of Houlden J.A. in *R. v. Burdick* (1975) 27 C.C.C. (2d) 497: "No difference exists between being satisfied to a moral certainty and being satisfied beyond a reasonable doubt."

Therefore, in determining whether citation 20 has been proven, the Hearing Committee required the Law Society to prove the citation to a standard that approaches proof beyond a reasonable doubt. In determining whether any or all of the other citations have been proven, the Hearing Committee required the Law Society to prove the citations on a balance of probabilities. These are the burden and standards, which were applied to the evidence heard on these citations.

**Re: Citations 1 to 3 and 33 (Estate of W.L.)**

**On the Complaint of Solicitor J. A.**

**Summary**

1. The member acted for the personal representative of the estate of W.L. The personal representative was the deceased's common-law husband and also a beneficiary of the estate. The deceased also had an adult son, not the son of the common-law husband (personal representative) who is also a beneficiary. The son was represented by his own solicitor: J.A.

2. There were delays in the administration of the estate including delays occasioned by the personal representative being sick for a period of time, and, evidently, the personal representative deciding to proceed slowly.

The son's solicitor made inquiries of the member, who delayed in responding to her, and upon her complaint to the Law Society, there was the allegation of delay in responding to the Law Society.

3. Arising out of this, the member was charged with failing to respond to the son's solicitor in a timely fashion, failing to deal with the estate in a conscientious fashion, and two counts of failure to respond in a timely manner to the Law Society.

### **Facts**

4. Correspondence between J.A., the member, and the Law Society of Alberta was entered as Exhibits 6 through 16. An agreed Statement of Facts was entered as Exhibit 169. The member testified and was cross-examined by counsel for the Law Society of Alberta. There was no testimony from J.A., her client, or other witnesses.

5. J.L. passed away in 2006, leaving a common-law husband (W.L.), an adult son (S.K.) who is not the son of the common-law husband plus six other beneficiaries pursuant to her will.

6. The deceased's will named her common-law husband, W.L., as her personal representative and other bequests material to this hearing which included:

- S.K. the son of the deceased was to receive 17.5% of the residue of the estate and the deceased's residence (subject to the below);

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- The common-law husband W.L., also the personal representative was granted a life estate in the home.
7. As became apparent later, there was active animosity between the common-law husband and the son of the deceased.
  8. W.L. retained the member regarding probate of the estate and in giving initial instructions, gave the address of the son as W.L.'s address, although the son did not live there.
  9. When the member and his staff prepared the probate documents, the son (as a beneficiary) was served, but served at the address of the common-law husband and did not receive actual notice.
  10. At a later date, the son retained J.A. to act for him and she wrote a letter to the member dated May 11, 2006 (Exhibit 6).
  11. The member viewed the letter as "aggressive" as it accused the member of being a party to the swearing of a false Affidavit (service on the son), accused the executor of being a "ex-convict" and demanded that the title to the residence be transferred to the son.
  12. Although the letter is by any objective standards, unfriendly, it does contain substantial allegations of fact, some of which the member admitted were true.
  13. The member did not respond to that letter and six months later on November 8, 2006, J.A. wrote a follow-up letter (Exhibit 7).

14. The member did not respond to that letter and on February 21, 2007, J.A. wrote a further follow-up letter to the member (Exhibit 8) and complained to the Law Society by letter of February 28, 2007 (Exhibit 9).

15. The Law Society wrote to the member regarding the complaint of failure to respond to J.A. on March 1, 2007, and March 20, 2007 (Exhibit 10), and the member responded March 22, 2007 (Exhibit 11).

16. Boiled down to its fundamentals, the underlying animosity between the common-law husband and the son was based on the perceptions of past behaviour (the common-law husband blamed the son for not being sufficiently attentive to his mother prior to her death), and they both accused each other of criminal activity. They had a present conflict of interest over the residence, the son wanted it transmitted into his own name, the common-law husband who had a life estate did not want it transmitted directly to the son as he did not trust the son concerning his tenancy.

17. Although the personal representative decided to go slowly, the estate was eventually completed and the dispute concerning the transmission of title into the son's name was handled by the scheduling of an application as a contested matter under the Surrogate Rules resulting in an order that the title to the residence be transmitted to the son, which it was.

#### **Decision - Citation 1 (Failure to respond to J.A.)**

18. The member admitted guilt to this Citation at the hearing, admitting that he should have responded to J.A.'s letter.

19. The panel accepts the member's admission of guilt. Chapter 4, Rule 5 of the Code of Professional Conduct requires a member to respond on a timely basis to all communications from other lawyers that contemplate a reply. Despite the fact that the member found the communication to be aggressive, it did contain factual and legal submissions, which required a considered and timely response from the member, whether he agreed with them or not. This will be developed further regarding Citation 2 below.

### **Decision - Citation 2**

20. Citation 2 alleges that the member failed to deal with the estate in a conscientious, diligent and efficient manner, breaching the Code of Professional Conduct and bringing the profession into disrepute. The panel finds the member's conduct in respect of this citation was conduct deserving of sanction.

21. The panel is not pleased with the rhetoric of either side of this dispute. The letters between the member and J.A. were accusatory, full of inflammatory rhetoric, and tended to blame each other for deficiencies in an estate administration which may or may not have been the fault of the individual members who may be constrained by instructions received by their clients.

22. Having said that, the accusation concerning a false Affidavit in the service of the probate documents could have been easily met by the member with a factual explanation, and an inquiry as to perceived prejudice in whether or not a remedy was sought. Cross allegations concerning criminal behaviour and copies of unsubstantiated newspaper articles going back and forth

between J.A. and the member are not apparently related to the rights of the beneficiaries under the will in question.

23. While the panel understands the conflict between the son who wanted the title to the residence transmitted into his own name and the personal representative who wanted to protect his life estate. This is a technical issue, which could have been answered with the invitation to make an application (which was eventually done), together with a discussion of a transmission of title with appropriate caveats concerning the life estate or any other means, which would have protected the individual client's rights but still moved the matter forward.

24. The member argued that the counsel for the Law Society was erroneously imposing a duty on the member to Mr. K. He argued that the member could only comply with his client's instructions and that the member was further constrained from providing a financial accounting until the executor provided the necessary financial information to complete such. The member also argued that his client was in no hurry to conclude the estate and the member was merely following the instructions of his client and working as fast as the client wished. The panel disagrees with the position of the member. The member's responsibilities as a lawyer are not discharged in such a case, by the oblivious participation, or purposeful inactivity of a client. As a lawyer he owes a duty to the proper administration of justice to ensure that the client understands the responsibilities of an executor and that he, as the lawyer, ensures that they are followed. Even if the personal representative decided to proceed with the estate as he eventually did, the member owed his client a technical

explanation as to his duties as an executor, some recommendation as to procedure and some form of technical response to the solicitor J.A.

25. Chapter 2 of the Code of Professional Conduct made it clear in the commentary (specifically G.1 Aspects of Competence) that a lawyer is expected to utilize sound professional judgment in assessing the strengths and weaknesses of a case, recommending a course of action and assessing the proportionality of the nature of the matter and legal costs. The Hearing Committee sees none of this.

25. If the parties were determined, after appropriate and independent advice to "fight it out" that may have been their prerogative but the letters disclosed in the Exhibits simply show two solicitors largely blaming each other.

### **Decision - Citations 3 and 33**

26. J.A. wrote a letter of complaint to the Law Society. The letter was forwarded to the member requiring a response within 14 days. A follow-up was also sent. The member did respond to the complaint letter forwarded by the Law Society (Exhibit 9) approximately four weeks after receipt. The Hearing Committee is not prepared to find that this delay (citation 3) was conduct unbecoming of a solicitor.

27. However, as a result of the follow-up, the Law Society wrote the member letters requesting updates on January 8, January 22, February 4, and February 21, 2008 (all in Exhibit 171), together with a formal letter pursuant to Section 53 of the *Legal Profession Act* April 1, 2008 (Exhibit 172). The member did not respond to these. That is conduct deserving of sanction. The Hearing Panel finds that the member did not respond to communications from the Law Society

contained in Exhibits 171 and 172 and finds the member not guilty of Citation 3 but guilty of Citation 33.

28. In retrospect it is not clear to the Hearing Panel that the member owed J.A. or the Law Society an accounting concerning the estate finances, or whether this was a duty of the personal representative who was going slow. The demands for an accounting figured prominently in the follow-up information requests by J.A. and the Law Society. However, the Hearing Committee does find that if that was the case, or at least the member's position, then that ought to have been communicated to both J.A. and the Law Society.

29. Similar to the Hearing Committee's decision above, the status of the accounting, when it is to be provided, and who is to provide it, is a technical matter which the member could have and ought to have included in his response to the Law Society. Chapter 3, Rule 3 of the *Code of Professional Conduct* requires that the responses to the Law Society be timely, complete and appropriate and the annotation to Chapter 4, Rule 5 notes that even in circumstances where information cannot or ought not to be provided, that the request needs to be recognized courteously.

### **Citations 4, 5 and 6 (Relating to A.D.)**

#### **Introduction**

30. Citations 4, 5 and 6 arose out of a 2006 real estate transaction to purchase a vacant parcel of land by AD. The citations allege the member failed to serve his client in a conscientious, diligent and efficient manner, failed to respond to his client in a timely manner and failed to account to his client.

31. At the conclusion of the hearing of evidence, counsel for the Law Society elected not to pursue conviction on citation 4, which had alleged the member failed to serve his client in a conscientious, diligent and efficient manner.

### **Evidence**

32. The client, A.D., gave evidence and the Agreed Exhibit Book was referred to. Additional exhibits Tabs 146 to 155 were entered. The member cross examined the client, gave evidence and was cross-examined by counsel for the Law Society.

33. A.D. retained the member on June 12, 2006 to represent him on the transaction that had a Closing Date of July 7, 2006.

34. The transfer of land was submitted to Land Titles on July 11, 2006 and because of delays being experienced at Alberta Land Titles, it was not registered until August 2, 2006.

### **Accounting**

35. The member had told A.D. that his bill would be between \$600 and \$650. The member's final bill totalled \$688, being \$400 for fees and \$288 for disbursements and GST. No evidence was produced to show that the member provided a written retainer letter.

36. A.D. testified that after the initial meeting with the member, he was told he needed to pay the member \$1,300 prior to the Closing Date. If, after the transaction was concluded, any funds were left over he was told they would be returned to him. It was not clear to A.D. what the additional money was for.

37. The member testified that he had explained to A.D. when they met, just before closing, that the \$1,300 was for both the legal bill and for routine property tax adjustments of \$611.

38. The member's evidence was that when A.D. attended his office again in late August, A.D. believed the member was charging him \$1,300 for his legal account. The member testified that he again explained to A.D. the breakdown of the \$1,300. The member's evidence was that he only gave A.D. a verbal accounting.

39. While the tax adjustment was evident from the written statement of adjustments the member received from the Vendor's lawyer prior to closing, the member did not deliver this document to A.D. until November 20, 2006. It was A.D.'s evidence that he only understood what the \$1,300 was allocated toward after receipt of the report and accounting on November 20, 2006.

### **Subdivision**

40. A.D. testified that he was anxious to get a copy of his new title soon after the Closing date, as he wanted to proceed to subdivide the land. A.D. testified that he had told the member that he bought the land with the intent of subdividing it and selling it. A.D. could not, however, recall when he had raised the issue of subdivision with the member, nor whether he had raised this issue at his initial meeting with the member.

41. The member testified that A.D. had not told him at their initial meeting that he wanted to subdivide the land and that the issue of subdivision was not raised until late August. The member acknowledged that had he known

A.D. wanted to pursue subdivision he would have delivered a copy of title to A.D. sooner.

42. Based on the uncertainty expressed by A.D. during his testimony, the Hearing Panel found as a fact that A.D. had not revealed to the member his intent to subdivide the land until late August 2006.

### **Reporting**

43. A.D. phoned the member in mid August to enquire as to the whereabouts of his report, an accounting of monies, and a copy of title evidencing change of ownership. A.D. spoke with the member's staff and was told that delays were due to busy conditions.

44. A.D. called the member's office again in August and was told that the transfer was registered. A.D. continued to call the member's office requesting his report.

45. A.D.'s evidence was that he attended at the member's office in late August and asked for a copy of the new title. A.D. claimed the member was rude to him and that the member had humiliated him while in his office. The member refutes that he was rude and that it was A.D. who had been rude to the member's secretaries.

46. The member provided a photocopy of title to A.D. at the time, evidencing title was registered in the name of A.D.'s company.

47. The Law Society received a written complaint from A.D. on October 19, 2006 that the member had not yet reported to him with an accounting, had failed to respond to A.D.'s phone calls, and had overcharged him. It was A.D.'s

evidence that he had completed three other real estate transactions using another lawyer around the same time and that AD had received his report on those deals within fifteen days of completion.

48. The member testified that his real estate files were in a queue and even though A.D. complained to The Law Society, the member did not feel it appropriate moving A.D. up the queue just because he had complained. The member's conveyancing assistant was busy working on closing real estate deals instead of reporting as the member considered the former work more urgent than the latter.

49. The member ultimately sent A.D. his report letter and accounting by mail on November 20, 2006. The report letter contained a copy of title, the vendor's statement of adjustments, a statement of money received and disbursed, a copy of the transmittal letter the member sent the vendor's lawyer with the cash to close, and the member's legal bill.

50. The member admitted that he had all the information necessary to complete A.D.'s report on August 2, 2006, being date of registration. The member stated his office was too busy on other files to attend to A.D.'s report any faster. Shortly after receiving the complaint from the Law Society, the member did instruct his secretary to prepare A.D.'s report. The member had no explanation for why it took a month to complete the preparation of A.D.'s report.

51. The member's evidence was that he ordinarily reported to clients within a reasonable time following registration but as he was very busy during August, 2006, which was the busiest month of the year for real estate, and a

month when he opened 70 files and closed 74 files, the level of activity prevented him from dealing with A.D.'s report on a more timely basis.

52. The member had five secretaries in his office during the time frame of this matter and experienced difficulty hiring another conveyancing secretary, which he claimed contributed to the cause of the delay in reporting. The member also attributed the delay to a Law Society audit, which was occupying a great deal of his time. The member's evidence was that he did not have voice-mail, that he was not taking calls, and tried to get back to people that had called. All calls dealing with real estate matters were diverted to the member's conveyancing secretary to handle.

53. The member cited an Edmonton Journal article in support of his claim that a high volume of real estate activity existed in the market during the summer and fall of 2006 serving to delay the time it took to register documents at Alberta Land Titles. The member stated most of his clients were aware of the delays associated with real estate matters during this time. However, the member could not recall whether he had initially advised A.D. of the potential delays he might experience in receiving his report.

54. The member testified that he was aware of law firms that had stopped taking on new real estate files during this time frame because they were so far behind in reporting. He stated that some law firms had been three to five months behind in reporting at the time.

## **GST**

55. In February, 2007 a lien was registered against A.D.'s land by the Vendor, relating to unpaid GST on the transaction. A.D. believed this lien arose

due to some failure of the member. At or about the time of closing, the member asked A.D. for his GST number, and A.D. stated he had decided not to get one. A.D. had agreed to deal with GST directly. The GST issue was ultimately settled and the lien was discharged. The member wrote A.D. in March, 2007 to advise him as to the lien and that the member was not prepared to deal with any other issues that may arise on the file. No evidence was led by A.D. at the hearing that the member failed to adequately advise him or failed to deal with GST on the purchase. The issue did, however, appear to contribute to A.D.'s frustration with the member.

**Decision – Citations 4, 5, & 6.**

56. Counsel for the Law Society elected not to pursue conviction on Citation 4, which had alleged the member failed to serve his client in a conscientious, diligent and efficient manner. Accordingly the Hearing Panel makes no finding in respect to Citation 4.

57. Citation 5 alleges the member failed to respond to his client in a timely manner and that such conduct is deserving of sanction.

58. The transfer of land was registered August 2, 2006 yet the member did not provide his report to A.D. for another three and a half months despite A.D.'s requests for it.

59. The member did not notify A.D. that registration had taken place until after A.D. phoned the member's office to enquire about the status of the transaction. A.D. made the member aware that he was anxious to receive his

report so that he could pursue a subdivision application. A.D. requested the report from the member and, after what A.D. considered a reasonable time, attended at the member's office in late August 2006 to demand it. A.D. was not provided with his report at that time but was only provided with a copy of title evidencing registration.

60. On October 19, 2006, having still not received his report, and not yet having a clear understanding of the property tax adjustments which led A.D. to believe he had been overcharged, A.D. complained to the Law Society. The member then provided his report to A.D. the following month.

61. The member testified that he had verbally explained the use of the monies to A.D. previously. It was A.D.'s evidence that it was not until A.D. received the November 20, 2006 report containing a written accounting of monies that he finally understood how his funds had been applied and that he had not been overcharged, as was his suspicion. While the Hearing Panel accepts the member took steps to verbally explain the allocation of monies towards property tax adjustments and the member's fees, disbursements and GST, the Hearing Panel also accepts A.D.'s testimony that he did not come to truly understand the accounting until he saw it in writing as part of his final report.

62. The member's evidence was that he was very busy during this time period and was not aware of all the attempts A.D. had made to reach the member. The member testified he also experienced difficulty in hiring capable support staff during this time period.

63. There is an expectation that lawyer's services be timely and efficient. A lawyer has an obligation to inform his client as to the progress of their matter and this obligation includes providing the client a prompt and complete report when a matter is concluded. There is also an expectation that lawyers be punctual in fulfilling commitments made to clients and respond on a timely basis to client communications that contemplate a reply. If a lawyer is legitimately unable to respond to a client then the lawyer is expected to make arrangements for another person in their office to contact the client. There is an expectation that lawyers will maintain adequate staff and implement office support systems to effectively deal with file management.

64. The Hearing Panel recognizes that the local real estate market was busy during this time frame and that high work volumes contributed to delays by the member and many other lawyers in Edmonton. However, the evidence failed to show that the member adequately apprised A.D. of the anticipated delays in reporting on his matter. Nor did the evidence show that the member adequately responded to A.D.'s requests for a report. The member's actions caused A.D. anxiety and contributed to A.D.'s frustration with the member. The Hearing Panel finds that the member failed to respond to his client in a timely manner and that such conduct is deserving of sanction.

65. **Citation 6** alleges the member failed to account to his client, thereby breaching the Code of Conduct, and such conduct is conduct deserving of sanction.

66. While the member provided a verbal accounting to A.D. in August 2006, A.D.'s evidence was that he did not come to understand the financial adjustments until he received the member's report of November 20, 2006. As

indicated above, there is an expectation that a lawyer provide the client with a prompt and complete report when a matter is concluded. A written accounting is expected to be included in the case of real estate transactions. While the member delayed providing a suitable accounting that satisfied his client for three and a half months after registration of the transfer, the Hearing Panel does not find this conduct to be independent of the failure forming the basis for convicting under Citation 5. Accordingly, the Hearing Panel does not find the member guilty of conduct deserving of sanction for failing to account to his client on a timely basis.

### **Citations 7 to 11 (Relating to M.D. Estate)**

#### **Summary**

67. This matter involves a contested Estate. The Will was not drafted by the member but drafted on a stationer's form and upon the death of the testator it became apparent that there were issues of interpretation of the will and marshalling of assets.

68. The member acted for the Personal Representative, and the residual beneficiary had two senior lawyers acting for her, one from Winnipeg and one from Alberta. The deceased's sisters resided in the Ukraine, were represented by counsel, and there was an issue arising out of the possibility of a trust for the sisters. There were individual charitable bequests, and, some of the charities were represented by counsel. The interpretation issues were contentious.

69. In the conduct of the Estate litigation there were several Court Applications, several reported decisions by a Queen's Bench Justice, some portions of which were critical of the member's handling of the Estate matter.

70. The matter proceeded to the Hearing Committee based on the complaint of the Manitoba counsel (not the Alberta counsel) of the residuary beneficiary. Neither the Alberta counsel nor the Alberta Courts pursued a complaint against the member.

71. The Hearing proceeded with an Agreed Statement of Facts (Exh 342) and agreed exhibits (Exhibits 309 to 346). The member testified, but, none of the complainant, the Personal Representative or the residuary beneficiary testified.

## **Facts**

72. The Will in question, executed on a stationer's form, and dated December 11, 1978 was exhibited as Exhibit 345. Key factors regarding the deceased and the Will include:

73. The deceased had emigrated from the Ukraine, and had no wife or children.

74. His closest relative in Canada was the daughter of the niece who had sponsored him in immigration to Canada. She lived in Winnipeg and was named as the residuary beneficiary of the Will.

75. The deceased had sisters in the Ukraine and the wording of the Will suggested a desire to have the residuary beneficiary make unspecified payments to the sisters.

76. The Will was executed on a stationer's form, without assistance from counsel or the Personal Representative. Indeed the Personal Representative did not know that he was the Executor of the Will until after the deceased died.

77. The Will was executed in 1978 before the break-up of the former Soviet Union and not renewed prior to the death of the deceased.

78. The member, of Ukrainian descent, and some familiarity with that community testified that although he did not participate in the drafting of the Will, that the words used would have been common at the time (1978) to indicate a secret trust where the residuary beneficiary would arrange to make payments to relatives (in this case the sisters) in the Ukraine.

79. The member testified that Wills had been worded in such a fashion as this in the Ukrainian immigrant community prior to the break-up of the Soviet Union because Soviet officials had been quite aggressive in their pursuit of the cash value of specific bequests in an effort to secure foreign currency for state purposes, rather than the personal purposes of the beneficiaries.

80. The member testified that both he and the Personal Representative were of this opinion when they read the Will for the first time. This explanation was not contradicted or otherwise challenged by the Law Society or the complainant.

### **Original Application for Probate**

81. The original Application for Probate was made and the member testified that he disclosed to Justice Lefsrud, a Justice of the Court of Queen's Bench/Surrogate Court, the secret trust issue. A limited Grant of Probate was

given with a direction that an application be made for advice and direction concerning the secret trust and the marshalling of the estate assets.

82. At an early stage, the main issues in the Estate were:

- (a) The value of the asset was reasonably modest, approximately \$255,000.00 including a house, which was sold for \$170,000.00 and approximately \$80,000.00 worth of bank accounts.
- (b) There were specific bequests from the bank accounts to charities, some of which charities were not registered. The wording of the Will concerning the bequests to charities was ambiguous and could be interpreted as specific bequests or, alternatively allowing the charities to split the residue of the bank accounts. This required direction.
- (c) The deceased's house was another part of the residue of the Estate, which was directed to the residuary beneficiary. A secret trust may have been enforceable as against the residuary beneficiary requiring her to send unspecified benefits to the deceased's sisters in the Ukraine. This as well required direction.
- (d) Justice Lefsrud heard the initial advice and direction application on August 22, 2002 and after hearing the application told the parties that he would delay the giving of Judgment in the hope that the parties would reach a negotiated settlement on what was, in the end, a reasonably modest estate. At the advice and direction application, the

personal representative, the residuary beneficiaries, the sisters, and the charities were all represented by separate counsel.

83. The parties were not able to settle and Justice Lefsrud gave his written Judgment on October 31, 2002 exhibited as Exhibit 311. Key provisions of the Judgment were as follows:

- (a) The house was ordered to be sold with sale proceeds held in trust for the residuary beneficiary in the trust account of her Edmonton lawyer (i.e. outside of the estate funds).
- (b) The secret trust was rejected. Although the wording of the Will may have indicated an intent to create a secret trust, the residuary beneficiary denied any agreement with the deceased concerning a trust. As there was no corroborating evidence, the trust failed.
- (c) The position of the charities concerning their status as possible residuary beneficiaries of the bank accounts was rejected and they were entitled to modest specific bequests.

84. Paragraph 20 of the Judgment, states:

It is clear that the application was necessary in order that finalization of the estate might be achieved. Accordingly, I direct that the respective accounts which are, of course, subject to taxation, be paid out of the residue of the estate.

85. The member testified that he did not understand this to state that taxation was a necessary precondition to the payment of the Executor's expenses including legal fees.

86. The member also states that he had attempted many times at subsequent applications to get Justice Lefsrud to either tax the accounts himself or order a taxation and he was never able to get the Justice to do this or order this.

87. Counsel on behalf of the sisters in the Ukraine appealed the rejection of the secret trust to the Court of Appeal and the member did not participate in this Appeal, seeing it as a matter as between the sisters in the Ukraine and the residuary beneficiary, both of whom were represented by counsel.

88. At a preliminary application in the Appeal heard December 19, 2002, Costigan J.A. gave an Order entered as Exhibit 312 contained the following provisions:

- (a) \$60,000.00 from the sale of the deceased's house was releasable by her lawyers (who handled the sale) to the residuary beneficiary, without going through the estate.
- (b) The balance of the house sale proceeds were to be held in trust by the residuary beneficiary's solicitors.
- (c) The member was ordered to hold the "residue" of the estate in trust pending the outcome of the stay application at the

Court of Appeal and the receipt of a CCRA Clearance Certificate.

89. From the Estate's point of view:
- (a) The Order provided for relief, which the Estate ordinarily would have been interested in. The residuary beneficiary was granted direct access to funds from the house sale as opposed to having these go through the Estate.
  - (b) No Notice of Motion or Affidavit was produced showing that the member, acting on behalf of the Personal Representative, was faced with notice of relief being awarded which had to do with monies that ordinarily would have flowed through the Estate.
  - (d) The Order does state that the member had been made aware of the Order prior to it being entered and the member admits to having been served with a copy of the Order soon after it was granted but claims not to have reviewed the Order regarding the terms because he hadn't expected relief being granted against the Estate in such a fashion.
  - (e) The member claims to have become first aware of the specifics of the Order in or about June of 2004 (approximately 18 months later).
90. The Appeal was eventually dismissed, as the sisters in the Ukraine were unable to respond to a Security for Costs Order.

91. The matter eventually found its way back to Justice Lefsrud in an Application held on March 23, 2003, where the member, and the solicitor for the residual beneficiary, were heard. In support of the Application before Justice Lefsrud, the Personal Representative swore an Affidavit, [Exhibit 339 - Tab 5] setting out the state of the Estate legal accounts including as follows:

- (a) Accounts paid to the member October 18, 2002 (\$5,000.00) and January 17, 2003 (\$957.29)
- (b) An outstanding account of the member March 19, 2003 in the amount of \$16,486.51.

92. Justice Lefsrud eventually gave his Decision concerning the March 23, 2004 application on October 24, 2003, exhibited as Exhibit 344. The Key provisions of the Decision included as follows:

- (a) Para 15, that he was "satisfied" that the Personal Representative was controlled by and acted at all times in accordance with instructions from the member.
- (b) Para 27, that \$16,803.56 of accounts rendered by the member and paid by transfer from the members trust account (accounts rendered after the accounts referenced in the Affidavit of the Personal Representative) were "unauthorized" and "unreasonable" and were to be paid back to the Clerk of the Court to the credit of the Estate.

- (c) Para 31, Justice Lefsrud suggested that he may have overlooked matters or made errors and invited comments of counsel on those affected.

93. The member testified that despite the Justice' comments concerning him paying his accounts, that some of these accounts had been set out clearly in the Personal Representative's Affidavit of March 23<sup>rd</sup>, and that the payment of the accounts had been discussed at that Application, and at the Court of Appeal before Justice Costigan and Justice Ritter. No counsel had questioned the accounts in Affidavit or other written form.

94. The Hearing Committee has not seen any Notice of Motion, Affidavit, or pleading concerning the appearance before Justice Lefsrud on March 23, 2003 but the member states that the most contentious allegations in Justice Lefsrud's eventual Judgment, i.e. payments of the accounts, and the allegation that he was somehow controlling the Personal Representative were not raised in argument or in the Pleadings.

95. Pursuant to Justice Lefsrud's invitation to comment, the member sent Justice Lefsrud a letter [Exhibit 339 – Tab 12], which contained seven single spaced pages of mostly inquiries of what evidence the Judge used to make the findings of fact he made in the Judgment. The letter was copied to counsel for the other parties and to the Chief Justice of the Court of Queen's Bench. Many times in the letter the member asked the Justice to set out the nature of the evidence that he used to make certain decisions. Justice Lefsrud did not respond, nor did the Chief Justice.

### General comments

96. Transcripts of Applications before Justice Lefsrud were entered as exhibits. The Winnipeg solicitor for the residual beneficiary was extremely aggressive in his attack on the member and dominated all of the hearings with unsubstantiated allegations of conspiracies, plots, and milking of the estate (although as will be commented on later the residual beneficiary's legal bills far exceeded anyone else's).

97. The accounts of the various parties were set out in both the Personal Representative's Affidavit of March 23<sup>rd</sup> and in the Judgment of Justice Lefsrud.

98. Although the Personal Representative did not appear through the member at one application at the Court of Appeal before Justice Costigan (the December 19, 2002 Order of Justice Costigan), the Personal Representative and his counsel were obligated to respond to applications, which generated enormous legal fees paid to the solicitors for the residual beneficiary.

99. It is apparent that this whole matter has gotten "under the member's skin". The bulk of the member's letter to Justice Lefsrud (Exhibit 339 – Tab 12), the member's evidence, and even the member's written and oral argument before the Panel was how Justice Lefsrud was wrong in his "secret trust" decision, although the subject at the Hearing concerned the dispute between counsel, the payment of fees, and the nature of the responses provided to Justice Lefsrud and the Law Society.

100. When counsel of the residual beneficiary complained to the Law Society, the Law Society forwarded the complaint to the member on

September 2, 2004 [Exhibit 319] and the member was able to send a detailed

response to the Law Society September 7, 2004 [Exhibit 320] and follow-up responses including May 28, 2007 [Exhibit 337] and August 31, 2007 [Exhibit 339] attaching thirteen Exhibits. This incident occurred during a time when the member was failing to respond to the Law Society on other complaints within the multiple citations heard by this Hearing Committee. Apparently, when motivated, as was the case here, the member is capable of making a fulsome and timely response to Law Society inquiries.

### **Decision – Citation 7**

101. The member is charged that he breached the terms of Justice Costigan's Order of December 19, 2002 by paying his accounts (and causing the executor to pay his accounts) when the "residue" of the Estate was to be held in trust pending receipt of a CRA Clearance Certificate and the outcome of the Stay Application at the Court of Appeal, which died with the appeal when Security for Costs was not posted.

102. The committee finds that the "residue" of the Estate referred to in the Order, arguably deals with distributions to beneficiaries after estate expenses. Legal fees are estate expenses and the committee is not prepared to find that the Order was specifically directed against the members' legal expenses on behalf of the personal representative. The member is acquitted of this charge.

### **Decision – Citation 8**

103. The member is charged with applying trust funds from the residue of the estate without authority and in the face of a dispute amongst the parties.

104. The committee was not provided with any material (Notices, Motions, Affidavits), which put the matter of the payment of the member's fees specifically in issue. The committee is not prepared to find that the dispute in the estate was sufficiently focused on the matter of the member's accounts to make it appropriate for the member to delay indefinitely in taking compensation for responding to the litigation commenced and maintained by the solicitors for the residuary beneficiary.

105. The member is acquitted of this charge.

### **Decision – Citation 9**

106. The member is charged with being less than candid about monies received in payment of accounts in written and oral representations made to the Court.

107. Justice Lefsrud mentioned this specifically in his Order (judgment) of October 25, 2004.

108. However, Justice Lefsrud did not respond to the members comments concerning this judgment, did not testify at the hearing and the committee was not directed to any portion of the extensive transcripts of the hearings which were presented in evidence at the hearing to discussions at those hearings which would have implied that the member was to make a complete disclosure of past or future expected payments. The committee is not prepared to find, based on the very little evidence in this regard that the member was under a positive duty concerning this sort of disclosure, or would have been put in a position, where he knew or ought to have known, that such disclosure was expected of him.

109. The member is acquitted of this charge.

**Decision – Citation 10**

110. The member is charged that he failed to be fair, accurate, courteous and respectful to Justice of the Court of Queen’s Bench and in correspondence provided to the Law Society of Alberta.

111. Communications with Justice Lefsrud were detailed and questioned the evidence that the Justice used to make his decision. The Justice did request suggestions on matters that he may have overlooked or made errors in. It may have been that the Justice was looking for rather more technical, or matters of a summary nature, but comments were invited.

112. Communication with the Law Society was quite frankly, breathtaking in its scope and tone including the specific allegation of senility. The correspondence to the Law Society was backed up with specific examples and at the hearing the member pointed to specific portions of the transcript of the hearing before Justice Lefsrud indicating that the Justice heard evidence which arguably was later ignored, from time to time apparently may have lost control of the proceedings, and proceeded on what appeared to be immaterial tangents when council were trying to get him to focus on issues.

113. Without commenting on whether or not the criticism of the Justice was or would have been ultimately found to have been accurate, the comments were backed up with what the member considered was appropriate evidence and was not circulated.

114. Under all of the circumstances, the hearing committee acquits the member with regards to this charge.

### **Decision – Citation 11**

115. The member is charged that overall, this estate was handled in a manner which might weaken public respect for the law or the Justice system.

116. The hearing committee finds this was a very unusual contentious estate, handled by the member wherein he had to respond to extremely aggressive attacks from the solicitor for the residuary beneficiary. Justice Lefsrud found that he was unable to tax the accounts as between the residuary beneficiary and her two solicitors which exceeded \$100,000. The sheer size of the accounts rendered and paid by council for the residuary beneficiary (counsel for the residuary beneficiary was the complainant) give an indication of the size of the concerted legal attack by two senior members of the Bar acting on behalf of the residuary beneficiary that the personal representative, and his counsel (the member) had to meet. The hearing committee cannot ignore that the member and the personal representative he represented were confronted with well over \$100,000.00 worth of highly aggressive and highly sophisticated attacks on their administration of what in the end was a very modest estate.

117. Although the member's comments at the close of the matter (for example his correspondence with the Justice and the correspondence with the Law Society of Alberta) are unusual, those communications ended with the requested "comments" given to the Justice and the explanations given to the complaint to the Law Society. The member's explanations, and the transcripts

of the hearings conducted in front of the Justice during the conduct of the estate rather show that the member was attempting albeit unsuccessfully, to keep somewhat of a lid on the matter. He was unsuccessful.

118. The member failed to follow Justice Costigan's Order of December 19, 2002 which was served on him by fax and thus ignored the restriction dealing with the "residue" of the estate until a Clearance Certificate was obtained. This was careless practice but not of a level to weaken respect for the Justice System.

119. The Hearing Panel acquits the member of this charge.

### **Citations 12 and 13 (Relating to L.O.)**

#### **Introduction**

120. Citations 12 and 13 arose out of a 2006 real estate purchase transaction. The citations allege the member failed to serve his clients in a conscientious, diligent and efficient manner, and failed to respond in a timely manner to communications from the Law Society that contemplate a reply.

#### **Evidence**

121. The Agreed Exhibit Book was referred to and additional exhibit Tab 165 was entered. The member gave evidence and was cross-examined by counsel for the Law Society.

122. K retained the member to represent his interest as buyer of the land with a closing date of August 1, 2006 (the "Closing Date")

123. The transaction was to close using the Western Law Societies Conveyancing Protocol whereby the member would submit the transfer and mortgage documents to Land Titles and, before registration was confirmed, pay the cash to close to the seller's solicitor. Pursuant to the Protocol, the Law Society underwrites the risk inherent in such transaction. Namely, the Law Society indemnifies against intervening registrations arising prior to registration of the transfer and mortgage. The Protocol requires the transfer and mortgage be submitted to the Land Titles Office in a timely manner.

124. The member sent the cash to close to the seller's lawyer, L.O., on August 1, 2006 but failed to submit the transfer and mortgage to Land Titles for approximately five months.

125. The member had assumed his secretary had submitted the documents to Land Titles on August 1, 2006.

126. August and September of 2006 were very busy months for the member. As a result of misfiling, the member's staff failed to submit the documents. The Member's position was that as he had so many transactions on the go, it got missed.

127. The failure to submit the documents to Land Titles was discovered by the member's assistant sometime in November or December, 2006. The documents were then submitted to Land Titles sometime in January 2007 and registration occurred February 8, 2007. The member reported to his clients in February, 2007.

128. Based on L.O.'s complaint regarding the member's delays, on March 1, 2007 the Law Society sent the member a request for information

relating to this file pursuant to section 53 of the *Legal Profession Act*. The member responded March 22, 2007.

129. Under letter dated March 26, 2007, the Law Society requested the member's file. The Law Society sent follow-up letters dated April 5, April 26, May 14 and May 25, asking for a response. The member did not deny receiving any of these letters.

130. The member sent the original of his file to the Law Society on May 28, 2007. It was the member's testimony that the two-month delay in sending his file to the Law Society was due to inadequate staff to copy his file before sending it to them. The member ultimately sent the original file to the Law Society without copying it.

### **Decision**

131. Citation 12 alleges the member failed to serve his clients in a conscientious, diligent and efficient manner.

132. The member proceeded to close on the basis of the Western Law Societies Conveyancing Protocol. The Protocol prescribes standards of conveyancing practice which are intended to result in better service for clients. The intention of the Protocol is to streamline conveyancing practice to facilitate the full release of funds on the closing date. The Protocol permits a buyer's lawyer to pay out the purchase money before obtaining registration of the transfer and mortgage at Land Titles. Should an intervening registration occur prior to registration of the transfer and mortgage, which results in a loss to the buyer or mortgagee, the buyer's lawyer's professional liability insurer will step in and provide coverage. The Protocol requires, among other things, that the

buyer's lawyer forthwith and within two business days after closing, forward the transfer and mortgage to Land Titles for registration.

133. The member released the purchase funds on the closing date, August 1, 2006, yet failed to submit the transfer and mortgage to Land Titles until early January, 2007. Not only was this delay inconsistent with the requirements of the Protocol, it also delayed the conclusion of the transaction and the member's final report to his client and mortgagee with a copy of title for approximately five months.

134. The member's evidence was that he was very busy during this time period and the problem arose through a simple case of inadvertence caused by a staff member's mistake and when it was brought to his attention he acted to remedy the problem without any prejudice to K. or the mortgagee.

135. While neither K. nor the mortgagee suffered a loss, the member put both parties at risk. An intervening registration may have impaired K.'s title to the land and may have impaired the mortgagee's interest in the land. A five month delay is incompatible with the best interest of the public, including the member's client and the members of the Law Society, who underwrite a portion of the losses arising under the Conveyancing Protocol.

136. The Hearing Panel recognizes that the local real estate market was busy during this time frame. However, the evidence revealed that the member maintained poor document management systems and inadequately trained staff to handle real estate transactions.

137. There is an expectation that lawyer's services be timely and efficient. A lawyer has an obligation to inform his client as to the progress of their

matter and this obligation includes providing the client a prompt and complete report when a matter is concluded. There is also an expectation that lawyers be punctual in fulfilling commitments made to clients. Lawyers are also expected to maintain adequate staff, which are properly trained and supervised. Lawyers are expected to implement office support systems to effectively deal with transactions and file management. The Member failed to maintain adequately trained and supervised staff, and he failed to implement effective support systems to ensure the adequacy of his file management.

138. The Hearing Panel finds that the member failed to serve his client in a conscientious, diligent and efficient manner and that such conduct is deserving of sanction.

139. **Citation 13** alleges the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply.

140. The Law Society requested the member's file March 26, 2007. The member failed to promptly respond to five letters from the Law Society. The member finally provided the file to the Law Society May 28, 2007.

141. In argument, the member contended that the actions of M.D., as opposed to the actions of L.W., were responsible for the escalation of the matter. The conjecture was that M.D.'s demands of the member were excessive and resulted in excessive attention and charges against the member. The Hearing Panel disagrees. There is no evidence to suggest that M.D. exceeded his authority, acted on any bias, or failed to conduct himself in an appropriate and diligent manner. In argument, the member also contended that the Law Society was not entitled to the client file as the member's client

was not the complainant and that the member's delivery of the file upon M.D.'s insistence therefore amounted to a breach of client confidentiality. The Hearing Panel disagrees. Section 53 of the Legal Profession Act specifically permits the Executive Director to request delivery of relevant records for review in connection with a complaint.

142. Lawyers are obligated under the Code of Professional Conduct, Chapter 3, to respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply.

143. The Hearing Panel finds that the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply and that such conduct is deserving of sanction.

### **Citations 14 & 15 (Relating to M.N.)**

#### **Introduction**

144. The client M.N. retained the member to represent him in the sale of property. An arithmetic error was made in the member's office concerning the Statement of Adjustments which resulted in the client being short approximately \$1,260.00 after closing. The member undertook negotiations with the Purchaser of the property to collect the amounts owing and the client complained to The Law Society regarding the delay. The client was eventually paid. The citations involve the provision of service to the client (regarding the arithmetic error and the member's attempts to rectify) and the member's responses to The Law Society concerning the nature of the error and its rectification.

## Evidence

145. The client M.N. gave evidence, the Agreed Exhibit Book was referred to including Tabs 33 to 39 and an additional exhibit entered by the member as Tab 166. The member cross-examined the client, gave evidence and was in turn cross-examined by counsel for The Law Society.

146. The member gave the most complete evidence concerning the events surrounding this citation. In the closing Statement of Adjustments, entered as Tab 166, one of the members conveyancing paralegals made an arithmetic error resulting in the municipal tax which ought to have been credited to the client in the amount of \$1,259.21, being debited.

147. The member explained that he was informed by his paralegal weeks after the event that this mistake was discovered by the paralegal when the client came in after the closing to receive funds. The paralegal explained to the client that he was "short" and the member's paralegal sought to rectify the situation by dealing directly with the Purchaser's lawyer and Realtor.

148. The member did not know about the paralegal's mistake, the notification of the client or the rectification right away as the paralegal sought to take care of the matter on her own. Some weeks later he received a complaint call from the Purchaser's realtor complaining that the member's staff member was giving legal advice and upon looking into the matter discovered the issue of the arithmetic error and the rectification attempts.

149. The member then assumed the rectification project which was attempting to have the Purchaser pay an additional \$1,259.21 which was properly payable although all trust conditions had been satisfied, funds

exchanged and the title transferred. The Purchaser, instead of paying, made an allegation that there was off setting damage. The member testified that although the funds remained unpaid for a period of time that the client's interest was protected by a filed unpaid Vendor's Lien which remained on the property.

150. During the negotiations to have the Purchaser rectify the shortfall, the client became frustrated with the delay and complained to the Law Society. The Law Society corresponded with the member about the complaint September 17, 2006 (Tab 33), September 25, 2006 (Tab 35), October 17, 2006 (Tab 36), November 14, 2006 (Tab 37), December 4, 2006 (Tab 38).

151. The member responded September 19, 2006 (Tab 34) giving an explanation but did not enclose a copy of the Statement of Adjustments in question as had been requested by the Law Society to the Law Society. The member responded to the Law Society again December 13, 2006 (Tab 39) when the matter had been resolved by the Purchaser paying the shortfall but the member never sent the Law Society the Statement of Adjustments which was brought to the Hearing by the member and entered during his cross-examination as Tab 166.

152. The client M.N. gave evidence. He recalled meeting with the member's paralegal and being informed of the shortfall but had no recollection of being informed that the shortfall was the result of the member's assistant's arithmetic error (i.e. the member's mistake). The client believed that the shortfall was because of the later alleged off setting damages. When the client was unable to get satisfactory answers or compensation from the member, he complained to The Law Society which resulted in The Law Society's letter of

September 17, 2006 (Tab 33). The client acknowledges that he was eventually paid the shortfall directly by the Purchaser.

153. In the correspondence between The Law Society and the member, and in particular Tab 35, a letter from The Law Society to the member dated September 25, 2006, counsel for The Law Society ventured the opinion that the shortfall of \$1,259.21 arose from the member's mistake and that it was the member's obligation to pay the client directly, rather than wait for the successful conclusion (or ultimate break-down of the rectification negotiations).

154. The member acknowledged the mistake in the Hearing but gave reasons why it did not make sense to pay the client directly, or at least right away, without an Assignment or other procedure, which would allow the member to collect the shortfall amount directly from the Purchaser. The member did not testify that an Assignment was prepared or submitted to the client or that the client refused to execute an Assignment.

### **Decision**

155. The following rules from the Code of Professional Conduct are engaged.

156. Chapter 9, Rule 18 – a lawyer must promptly inform the client if any material error or omission in connection with the lawyer's representation irrespective of whether it is capable of rectification.

157. Chapter 3, Rule 3 – a lawyer must respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply.

**Citation 14**

158. Cross-examination of the member focused on the difference between M.D.'s letter of September 26 urging on the member that it was his obligation to pay the client arising out of his employee's arithmetic error versus the member's position that a period of time to rectify the error was appropriate. The Hearing Committee accepts the evidence of the client, on the client's understanding (or lack thereof) concerning the mistake, the delay, and whether or not he made an informed decision concerning waiting for the (ultimately successful) rectification. The period of rectification took between the closing in mid-July of 2006 and October 25, 2006 when the client was sent rectification of the shortfall by the member as received from the Purchaser. The client's evidence appeared to be credible and reliable, was not inconsistent with any documentation, and the veracity and reliability of the client on these points was not diminished by cross-examination.

159. While arithmetic errors may from time to time happen, the member's obligation upon discovering the error (if in fact it could not be rectified more or less immediately) was to promptly inform the client of the error and his plan to rectify it. It is notable that although the member's explanation was that the original error was arithmetic and that the later allegation of damage to the residence was some sort of "excuse", that this was not the client's understanding at the Hearing. The client, 2 ½ years later, did not understand that the shortfall was because of an arithmetic error made by the member's staff.

160. The client was owed an explanation that the error came out of the member's office, that the member was taking reasonable steps to rectify the

situation and would, in the end see that the client was made whole, either from the member's own means, or if it had have been an error involving a larger sum, from Law Society insurance given proper and prompt notification of the insurer. If under those circumstances the client agreed, with full knowledge, to the rectification plan, then that may have been a sufficient answer for the Law Society.

161. In failing to promptly inform the client of the arithmetic error, failing to inform the client of the manner in which he was proposing to proceed to recover on the error, and failing to obtain the client's assent to the procedure, the member failed to serve his client in a conscientious, diligent and efficient manner, breached Chapter 9, Rule 18 of the *Code of Professional Conduct*, and such conduct is conduct deserving of sanction.

#### **Citation 15**

162. The client became frustrated with the delay and made a complaint to the Law Society in her own handwriting which was submitted to the Law Society July 27, 2007. The complaint was entered as Tab 124 and was forwarded to the member July 25, 2007.

#### **Response to The Law Society**

163. The member's response to The Law Society was not a fulsome response. Although the member did state that he would try to resolve the matter as expeditiously as possible, there was no obvious acknowledgement from the member that the ultimate responsibility to make the client whole was his, there is no indication that the client had been given complete disclosure as

required by the Code of Professional Conduct, nor was the Statement of Adjustments requested provided.

164. The Panel finds that the member did not respond on a timely basis to communications from the Law Society that contemplated a reply, thereby breaching the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

#### **Citations 16, 17 & 18 (Relating to Client R.)**

165. Client R did not attend the Hearing to give evidence. Citations 16 and 17, regarding failure to provide service to the client, and failure to respond on a timely basis are **dismissed** by the Hearing Committee, on the invitation of counsel for the Law Society. The Hearing Committee considered the evidence in respect of Citation 18 regarding failure to respond to The Law Society.

#### **Introduction**

166. Client R retained the member regarding the purchase of real estate. The Agreement for Sale was originally presented as a personal purchase but the client decided that the land was to be registered in the name of his Corporation. Delays in registration resulted from the member choosing of an inappropriate Foreign Ownership of Land form to be submitted to the Land Titles Office. The client complained to The Law Society regarding the registration delay and The Law Society complains of delay in the member responding to their correspondence.

## Evidence

167. As noted above, client R did not attend. Tabs 43 through 49 of the Exhibit Book were referred to, counsel for The Law Society questioned the member and the member responded.

168. The purchase in question was to close in June of 2006. It was delayed arising out of the choice of an inappropriate Foreign Ownership of Land form by the member's staff.

169. Client R became unhappy about the delay and made a complaint to The Law Society September 25, 2006, which was forwarded to the member as a section 53 matter on September 25, 2006. Not having heard from the member, The Law Society reminded the member and again requested a response October 16, 2006 (Tab 44) and the member responded October 17, 2006 (Tab 45).

170. Based on the testimony of the member, the member's assistant, after having client R's registration rejected by the Land Titles Office for an inappropriate Foreign Ownership of Land Declaration, prepared an alternative Declaration which one of the member's employees put into a pile of documents awaiting a commissioned signature and it sat in the pile unnoticed until The Law Society "reminded" the member.

171. The member recalls The Law Society's letter of September 25, 2006 (Tab 43) (the first notice of client R's complaint) and that he asked his assistant to look for the file documentation. The member, however, has no answer as to why it took from September 25, 2006 to October 17, 2006 to locate the

document. Further, the member described his in-office reminder system for real

estate files as having to do with “piles” of files or documents awaiting registration, awaiting a response from the other side’s solicitor or other self reminding event. The member had no system to remind himself internally concerning files like client R where there would be no reminder from outside counsel or Land Titles Office and an internally generated diary reminder was necessary.

172. In this case it is not clear that the client was prejudiced, other than the difficulty of having to remind the member. The client’s complaint about prejudice is in delay and his hopes that the land could be subdivided, and in his further hopes that The Law Society to provide a refund in fees. The member explains that registration at Land Titles was not necessary for subdivision, and this was not challenged by counsel for The Law Society. The client was not present to give evidence regarding the financial consequences, if any, of the delay complained of.

173. The member had no explanation concerning the delay from the September 25 letter to a further letter from The Law Society of October 16 other than the fact that at this time he was getting “many letters” from Mr. Dumont. Exhibit 45, Mr. Broda’s letter of October 16, 2006 contains an explanation of the events three weeks plus one day after the Law Society’s letter of September 25<sup>th</sup> and one day after the Law Society’s three week deadline for a reply.

174. The member testified that he accepted the Law Society’s letter of September 25<sup>th</sup> (containing a complaint of the client) as a reminder to his staff to get the necessary forms filled out and explained that it took that period of time (approximately three weeks), during an extremely busy period, to find the paperwork, find the reason for the delay (the wrong form), obtain the correct

form and redirect registration to the Land Titles Office. And throughout, the actual work concerning the forms and the registration, was done by Mr. Broda's staff.

175. The member testified that one of his employees, whom he expected had been charged with rectifying the matter, went on holidays in early October and that Mr. Broda himself forgot about the file until the October 16<sup>th</sup> letter from the Law Society. At that time the member says that he went "scrounging", located the file, obtained other paralegal help to obtain the right documentation and submitted it.

**Citation 17 (Failure to respond to the Client)**

176. The client's complaint letter to the Law Society of September 21, 2006 was forwarded to the member September 25, 2006. The complaint letter had the client stating that they are "extremely disappointed, furious, and frustrated..." with the lack of responsiveness of the member. The member's response to the Law Society on October 16 stated in the final paragraph "had I been aware of Mr. and Mrs. R's frustration I would have advised them as to what is happening..."

177. The member was aware, not later than September 25, 2006 of the frustration of the client. It is the member's general obligation under chapter 9 of the Code of Professional Conduct to "...provide informed, independent and confident advice and to obtain and implement the client's proper instructions". Rule 14 further states "a lawyer must keep a client informed as to the progress of the client's matter."

178. The Hearing Panel finds that there is no excuse for the member not responding in writing, within a few days of September 25, 2006 to the client's frustration and that in so doing the member contravened chapter 9 of the Code of Professional Conduct.

**Citation 18 – (Failure to respond to the Law Society)**

179. The member did not have a system to remind himself of internal limitation dates. Because of this Mr. R's file "sat" in a pile of some sort waiting for someone to remember it. Absent the complaint of the client and the forwarding of that complaint by the Law Society to the member, the registration would have been delayed an unknown length of time.

180. The Hearing Panel is not prepared to find that the time between Mr. Dumont's first letter of September 25, Mr. Dumont's second letter of October 16 and the member's response October 17 was an inordinate length of delay. The Hearing Committee is not prepared to find, on the particular circumstances of this case, that the member failed to respond in a timely fashion, and that such conduct is conduct deserving of sanction. This citation is dismissed.

**Citations 19 & 20**

**Introduction**

181. Citations 19 and 20 relate to conditions that were imposed on the member that arose out of an application for his suspension. The citations allege the member breached the conditions imposed on him by the Benchers of the Law Society on October 19, 2006, and that the member deceived or sought to

deceive the auditors of the Law Society, thereby breaching the Code of Professional Conduct.

182. At the conclusion of the hearing of evidence, the member submitted a statement of admission of guilt of conduct deserving of sanction in respect to Citation 19. The Hearing Panel accepts the member's admission of guilt pursuant to section 60 of the *Legal Profession Act*.

### **Evidence**

183. The Agreed Exhibit Book was referred to and additional exhibits Tabs 177 to 182, including member's statement of facts, were entered with consent. The member gave evidence and was cross-examined by counsel for the Law Society.

184. The member experienced difficulty with his computers, computer software and had trouble hiring suitable employees to assist in accounting. This contributed to the difficulty he experienced in keeping his financial records up to date and in order. The member admitted he was not computer literate.

### **Statement of Facts**

185. On August 1, 2006 the audit department of the law Society commenced an audit of the member's trust account (the "Old Trust Account") but could not complete it because the member had not reconciled his trust account, which was held at CIBC, since October, 2005.

186. The Law Society auditors requested the member sign an undertaking not to use his Old Trust Account until such time as his trust records were brought current and it could be confirmed that there was no shortage.

187. The member failed to sign the undertaking, and on October 19, 2006, an application was made to the Benchers of the Law Society to suspend the member pursuant to section 63 of the *Legal Profession Act*. That application for suspension was dismissed, but the Benchers imposed the following conditions on the member:

1. not to open any new files;
2. not to pay himself any fees from his Old Trust Account;
3. to open a "New Trust Account";
4. to obtain a co-signor for all trust bank accounts;
5. to submit monthly trust reconciliations to the Law Society; and
6. to provide a promissory note for \$500,000.00 together with mortgage security on his office building.

188. The member's level of compliance with these conditions was investigated and an Interim Investigation Report, dated April 16, 2007 was prepared. The investigation disclosed:

- (a) the member began opening new files in January, 2007 and by the end of February, 2007 had opened about 20 files;
- (b) in March, 2007 the member opened approximately 90 new files;
- (c) the member in opening some new files used existing client numbers and added the suffix "A" or "B" to identify them;

- (d) at the end of February 2007, the member billed files that had money in the Old Trust account, and transferred money from that account using two cheques, one for \$10,673.70 and one for \$68,639.14 into an account at the same branch of TD Canada Trust in which he had his New Trust Account. This account was not a trust account, but the member described it as a "Special Holding Account";
- (e) the member did open a New Trust Account at TD Bank prior to November 1, 2006; and
- (f) the member initially arranged for four active member lawyers to act as co-signers on the trust bank accounts, but at the end of February, 2007, unilaterally cancelled this arrangement.

### **Bank Accounts**

189. The member refused the Law Society's request to undertake to not use his Old Trust Account because he was extremely busy and needed to use it to deal with his client's real estate transactions.

190. The day before the spot audit took place the member had over \$2,653,000.00 in client funds in his Old Trust Account. During the month of August 2006, over \$17 million went through the member's Old Trust Account.

191. It was the member's testimony that he explained to the Law Society that if he was unable to deal with the money in the Old Trust Account, his clients

would be severely prejudiced and would lead to many complaints to the Law Society, and many claims against the Alberta Lawyers Insurance Association.

192. The member's own accountant attempted to reconcile the Old Trust Account in early August, 2006 and came within \$10,000.00 of reconciling it. In discussions with the Law Society, it was suggested the member deposit \$11,000.00 of his own resources into the Old Trust Account to cover the discrepancy, which the member did immediately. The member maintained close contact with the Law Society since the date of the spot audit.

193. The member's accountant had difficulty reconciling the Old Trust Account due to missing ledger cards. This, together with clerical errors, contributed to the inability to reconcile. The member admitted at the hearing that he had too many cards from too many files to deal with.

194. In an effort to reduce the number of cards, the member wanted to close files, so he wrote cheques on the Old Trust Account to pay accounts he had rendered. The member would thereafter close the files and remove the cards from the system. The member thought that by doing so he would improve his ability to reconcile the Old Trust Account. Those cheques, totalling \$79,312.00, were deposited into the Special Holding Account, which the member opened for that purpose. Funds in the Special Holding Account were not withdrawn by the member to pay accounts nor office expenses.

195. At the hearing the member acknowledged having paid money out of the Old Trust Account in contravention of the conditions imposed in the October 19<sup>th</sup> Order of the Benchers. The member also testified that when the Law Society auditor attended the member's office in March 2007, the member

immediately confessed to having transferred funds in contravention of the conditions imposed in the Bencher's Order.

196. The Old Trust Account was ultimately reconciled in August or September, 2007.

### **Accounting System**

197. The member acknowledged that one of the conditions imposed on October 19, 2006 was that the member not open any new files until such time as an approved accounting system was put in place. A system approved by the Executive Director or his delegate. The member had understood this to mean a computerized accounting system.

198. In February, 2007, the member commenced using Esilaw, a computerized accounting system. He had been using a manual system up to that time. While the member never received any formal written approval from the Executive Director, the member's evidence was that the Law Society's auditor attended at the member's office in March 2007 and would have noted then that the member was using Esilaw.

199. Another condition the member acknowledged having been imposed was that he comply with Part 5 of the Law Society's Rules to the satisfaction of the Executive Director or his delegate. These Rules relate to trust accounts and financial dealings of a law firm. While the member never received any formal written approval from the Executive Director, the member's evidence was that he sent reconciliations on his New Trust Account to the Law Society's auditor on a monthly basis. With respect to the Old Trust Account, the member reported to the Law Society on the progress toward reconciliation.

## File Openings

200. At the hearing the member acknowledged he opened files in contravention of the conditions imposed in the October 19<sup>th</sup> order.

201. The member's evidence was that during October through December, 2006 he would receive instructions from realtors requesting him to represent parties to the transaction. The member would notify realtors and clients saying he couldn't represent them and that they would have to retain another lawyer. He attempted to assist them in finding other lawyers.

202. Around the middle of December, 2006, and in consultation with his accountant, the member came to believe he would have his Old Trust Account reconciled by the end of December, so the member stopped turning away files. The matters he accepted related to deals closing within the 45 days that followed. The member did not open new files for such matters immediately but rather held the instructions with a view to opening the files once the Old Trust Account had been reconciled.

203. The member was not able to reconcile the Old Trust Account by the end of December 2006, as anticipated.

204. The member began opening new files in January 2007. Instead of opening new files using the next consecutive file number, as was customary for his office, in some cases the member re-opened old files that he had for the same clients. For example, the file the member had for a client's home purchase some time ago was re-opened and used for the sale of the same client's home. The member used the old file number and added an alphabetical letter to it.

205. The member acknowledged that prior to the Order being imposed, he had never re-opened files in such a way before. His testimony was that he only began doing that in January and February 2007 because of a busy market.

206. It was the member's testimony that when he met with the Law Society representatives on February 12, 2007 he confirmed that he had not taken on any new files since October 2006.

207. The member admitted at the hearing that when the Law Society auditor attended the member's office in March 2007, he immediately confessed to having opened files and showed the auditor the file list.

208. The member maintained that had he intended to deceive the Law Society, he would not have kept a list of the old files he had re-opened.

### **Cosignor**

209. At the hearing the member acknowledged that he had issued cheques on his trust account without another lawyer as cosignor, in contravention of the conditions imposed in the October 19<sup>th</sup> Order of the Benchers.

210. The member arranged for four lawyers to cosign cheques.

211. In approximately February, 2007, the member suffered health problems and received advice from his doctor to take steps to improve his health.

212. It was the member's evidence that the cosigning process became burdensome on him and on the practice of the cosignors. The co-signing

function was extremely time consuming and in an effort to reduce stress, the member discontinued getting his trust cheques cosigned.

213. The member stopped using cosignors at the end of February, 2007.

### Decision

214. **Citation 19** alleges the member breached the conditions imposed on him by the Benchers of the Law Society on October 19, 2006, thereby breaching the Code of Professional Conduct.

215. Pursuant to an application to suspend the member, the Benchers agreed to permit the member to continue to practice provided he abide by certain conditions imposed by Order of the Benchers on October 19, 2006.

216. One such condition was that the member was not to open any new files. Without consent of the Benchers, the member began opening new files in January 2007 and by the end of March, 2007 had opened 110 new files, in contravention of the Order.

217. Another condition was that the member was not to pay himself any fees from his Old Trust Account. At the end of February 2007, the member billed files that had money in the Old Trust Account and paid out approximately \$79,000.00 from the Old Trust Account. Such funds were deposited to the member's Special Holding Account. The member thereafter left the funds in the Special Holding Account. The member nevertheless paid his fees from his Old Trust Account without consent of the Benchers, and in contravention of the Order.

218. It was also a condition that the member obtain a so-signor for all trust bank accounts. The member arranged for four lawyers to act as co-signors. Without consent of the Benchers, the member discontinued using a co-signor on his trust bank accounts after the end of February, 2007, in contravention of the Order.

219. Pursuant to the member's statement of admission of guilt of conduct deserving of sanction, the member acknowledged that he breached conditions imposed by the Benchers.

220. The Hearing Panel finds that the member breached the conditions imposed on him by the Benchers of the Law Society on October 19, 2006, thereby breaching the Code of Professional Conduct. and that such conduct is deserving of sanction.

221. **Citation 20** alleges the member deceived or sought to deceive the auditors of the Law Society, thereby breaching the Code of Professional Conduct.

222. One of the conditions imposed on the member by the Bencher's Order of October 19, 2006 was that the member was not to open any new files.

223. In January 2007, after the Order was imposed, the member began taking on new files.

224. The member used old files numbers for those clients the member had represented before. He did not assign new file numbers, as was his previous custom. Instead, the member re-opened the old file for that client and added an alphabetical letter, to distinguish it.

225. The member testified that he had not previously used old files with alphabetical letters before January 2007.

226. At a meeting with representatives of the Law Society on February 12, 2007, the member represented to the Law Society that he had not taken on any new files since October 2006. That representation was false.

227. Two fundamental principles underlie the Code of Professional Conduct. Firstly, a lawyer is expected to establish and maintain a reputation for integrity. This is the most important attribute of a member of the legal profession. Secondly, a lawyer's conduct should be above reproach. Lawyers are expected to observe the highest standards of conduct so as to retain the trust, respect and confidence of colleagues and members of the public.

228. The Hearing Panel finds the member's actions were designed to conceal new files taken on by the member and that such actions were without consent of the Benchers and in contravention of the Order.

229. The Hearing Committee applies the burden, on this count, on the Law Society, to prove the elements of the citation to a degree of proof approaching beyond a reasonable doubt. Employing old file numbers, for new files, at a time when he was prohibited from opening new files is an elemental part of the deceit showing planning and execution. It was the creation of a new practice or scheme, the only possible purpose for which was to create an impression that no new files were being opened. The member's false representation to the Law Society, on February 12, 2007, to the effect that he had not taken on any new files since October 2006, was a continuation of this deceit. The Hearing Panel finds that the member deceived or sought to

deceive the auditors of the Law Society, thereby breaching the Code of Professional Conduct and that such conduct is conduct deserving of sanction.

### **Citations 21, 22 and 23 (Relating to H.M. and D.M.)**

#### **Introduction**

230. Citations 21, 22 and 23 arose out of a condominium problem and an application for guardianship. Their complaint was that nothing seemed to be happening on their files.

231. The citations allege the member failed to provide conscientious, diligent and efficient services to his clients, that he failed to respond on a timely basis to communications from complainants that contemplated a reply, and failed to respond in a timely manner to communications from the Law Society that contemplated a reply.

232. At the conclusion of the hearing of evidence, the member submitted a statement of admission of guilt of conduct deserving of sanction in respect to Citation 21. The Hearing Panel accepts the member's statement as having been submitted to the Executive Director pursuant to section 60 of the *Legal Profession Act* and finds the statement to be in an acceptable form.

233. At the conclusion of the hearing of evidence, counsel for the Law Society elected not to pursue conviction on citation 22, which had alleged the member failed to respond on a timely basis to communications from complainants that contemplated a reply.

## Evidence

234. The Agreed Exhibit Book was referred to and additional exhibit Tab 174, member's statement of facts, was entered with consent. The member gave evidence and was cross-examined by counsel for the Law Society.

## Condominium Dispute

235. The clients initially met with the member in February 2005 to assist them with a condominium problem relating to its boundaries. They attempted to resolve the issue themselves over the next year. The following February, 2006, the clients met with the member again.

236. The member commenced an action and embarked on negotiations with the defendants. The parties could not come to an agreement as the they wanted damages and costs in addition to rectification of the boundaries. The member admitted the file then "sat on the back burner" as the defendants refused to agree to pay his clients damages or costs.

237. The clients' complaint of September 24, 2007 stated that matters had been settled in June, 2006. It was the member's evidence that an agreement had not been arrived at until much later. Based on a file note dated June 1, 2007, the member did not come to an agreement until June of 2007. The member's testimony was that the statement of claim was only served in 2006 and they would not have come to an agreement right away in June 2006 as the defendants would not agree to pay damages or costs.

238. The member acknowledged no work was done on the file from June 1, 2007 until the spring of 2008.

239. After writing letters to the defendants, one of the defendants responded sometime in 2008 that they were then in agreement. The member then prepared and circulated an agreement between the parties but the member received no response from one of the defendants. The member continued to follow up with the defendants from time to time and updated his clients of his steps by phone.

240. In the fall or early winter of 2008, a representative of one of the defendants contacted the member to say that his in-house counsel, was no longer employed by him, and that he was unaware of the matter. The defendant hired a new lawyer to review the agreement and it was finally approved and signed by all parties in April 2009.

241. While a surveyor had been to the property, the survey had not yet been filed at Land Titles, which must be done before the matter is complete.

242. The clients also complained that the member had lost their file. The member stated the client dropped into his office unexpectedly and he was simply unable to locate the file at the time.

### **Guardianship**

243. The clients also retained the member in June 2007 to file for permanent guardianship for their granddaughter. Paperwork was prepared and signed in August, 2007 and a court application was set for September, 2007.

244. The member's evidence was that the location of the child's mother was not certain and that the clients could not locate the mother to enable the member to serve the documents for the September court application.

245. The client's complaint to the Law Society indicates they had left the member messages about the mother's whereabouts so as to permit service.

246. The mother was not served and the September application did not proceed.

247. Clients then made a complaint (September 24, 2007) to the Law Society about the guardianship matter. This is the same complaint referencing the foregoing condominium matter.

248. Because of the complaint, the member ceased working on the guardianship matter. A few months later, the member phoned the clients and they came in to his office and asked the member to conclude the guardianship matter. The member's testimony was that as the granddaughter was with the clients, there was no urgency in prosecuting the work.

249. The member obtained the court orders and completed the guardianship matter on June 12, 2008.

250. The member continues to represent the clients on new matters related to pursuing the father of the client's granddaughter for support payments.

### **Complaint**

251. The clients complained to the Law Society September 24, 2007 about both the condominium and guardianship matters. That same day, the Law Society wrote the member seeking his response to the complaint.

252. The member replied by way of a brief email to the Law Society that he was attending to completing the matters and would report further during the week of October 22<sup>nd</sup>.

253. The Law Society wrote the member October 30<sup>th</sup> requesting an update. On November 9<sup>th</sup>, the Law Society wrote the member requesting a response within 14 days.

254. On November 29<sup>th</sup>, the member emailed the Law Society saying he hoped to complete his response that coming weekend.

255. The Law Society sent follow up letters to the member on December 17<sup>th</sup>, January 8, 2008, and January 22<sup>nd</sup>. No response was provided by the member.

256. The member's evidence was that since he was working on the condominium matter, was having ongoing discussion with the clients, and given he thought the clients were happy, he had nothing firm to respond to the Law Society about as he still hadn't yet concluded the matter. Upon conclusion of the matters, he felt he would then have something to report to the Law Society.

257. The member admitted at the hearing that he should have responded to the Law Society but that the Law Society had "bombarded" him with letters on these matters and on others.

258. The member admitted that his work had not been prompt and efficient.

## Decision

259. Citation 21 alleges the member failed to provide conscientious, diligent and efficient services to his clients. Pursuant to the member's statement of admission of guilt of conduct deserving of sanction, the member acknowledged that he did not prosecute his client's work in a timely manner and failed to keep his clients informed. The Hearing Panel finds that the member failed to provide conscientious, diligent and efficient services to his clients and that such conduct is deserving of sanction.

260. Counsel for the Law Society elected not to pursue conviction on Citation 22, which had alleged the member failed to respond on a timely basis to communications from complainants that contemplated a reply. Accordingly the Hearing Panel makes no finding in respect to **Citation 22**.

261. **Citation 23** alleges the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply.

262. The Law Society notified the member by letter dated September 24, 2007 that a complaint had been made against him and requested a response. Five follow up letters were sent to the member by the Law Society. Although the member promised to respond to the Law Society, he never did provide an appropriate response.

263. The member argument was that things escalated at the Law Society when the matter was taken over by M.D. from L.W. The member contended that, in this instance, the matter should have been mediated by Mr. Wasel. This argument is rejected. It is not an answer whatsoever to the failure to respond to communications from the Law Society. Lawyers are obligated under

the *Code of Professional Conduct*, Chapter 3, to respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply.

264. The Hearing Panel finds that the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.

**Citations 24, 25, 26, and 27 (Relating to complaint of A.T.)**

**Summary**

265. The member signed a caveat on behalf of the complainant and her husband, W.Z, in 1998. In 2002, member began to receive communications from interested parties concerning postponement and then eventually removal of the caveat. By the time the member communicated with his client, the beneficiary of the caveat (W.Z.) had died and the caveat had been discharged through a Notice to Take Proceedings.

266. The wife complained to the Law Society. The Law Society corresponded with the member.

267. Arising out of this are citations involving failing to provide conscientious diligent and efficient service to a client (Citation 24) and failing to respond in a timely fashion to another lawyer, the complainant, and the Law Society (Citations 25, 26 and 27).

268. Extracts from the file of the member, in correspondence between the Law Society and the member were entered as Exhibits 75 to 92. The

member testified and was cross-examined. There was no Admitted Statement of Facts and there were no other witnesses.

## Facts

269. Exhibit 65, a photocopy of the file folder on the original file shows that a file was opened April 27, 1988, in the name of A.T. and W.Z. regarding transfer of properties. The following file was closed September 17, 1998.

270. The member signed, on behalf of W.Z. a caveat placed on a certain property arising out of the above noted file.

271. On March 28, 2002, another solicitor began corresponding with the member concerning the caveat requesting a postponement for the purpose of placing a new mortgage. The member responded April 11, 2002 (Exhibit 67), but there is no evidence that the member alerted his clients of the inquiry.

272. Correspondence went back and forth between the member and the solicitor enquiring about the caveat through April, June, and September of 2003. The letter of June 4, 2003, (Exhibit 70) mentioned that a Notice to Take Proceedings would be filed concerning the caveat. That letter was not answered nor was the client contacted and a September 2, 2003, letter (Exhibit 71) stated that a Notice had been served.

273. September 15, 2003, the member corresponded to the last known address of W.Z. and on October 6, 2003, A.T. called about the September 15th letter. Although the phone message from A.T. was received by the member's office as evidenced by a written phone message (Exhibit 73) the member did not recall receiving this message.

274. A.T. first managed to contact the member October 23, 2003, and the member's notes are exhibited as Exhibit 74. A.T. informed the member that W.Z. died September 2, 2003. By that time, the caveat had been discharged.

275. A.T. complained to the Law Society by letter of November 21, 2006, concerning the member's "inattentiveness, inaction and ignorance of our correspondences ...".

276. The complaint was provided to the member, by the Law Society by letter of March 27, 2007 (Exhibit 82) with a request for a response. The member was reminded April 16, 2007 (Exhibit 83), June 21, 2007 (Exhibit 84), November 12, 2007 (Exhibit 85), December 17, 2007 (Exhibit 90), January 7, 2008 (Exhibit 91), January 22, 2008 (Exhibit 92).

277. There was correspondence by e-mail between the member and the Law Society in November of 2007. The Law Society retrieved the member's file and reviewed it and returned it to the member. The member acknowledged by e-mail November 29, 2007, after receipt of the file back from the Law Society that he must "... respond to you on these matters ..." (Exhibit 89) but no response was ever given by the member to the Law Society.

#### **Decision - Citation 24**

278. The member is charged with failing to provide conscientious, diligent, and efficient services to his client. The member's defence is two-fold, first that the complainant A.T. was not his client in that he acted for the complainant's common-law husband, W.Z., in the filing of the caveat and secondly, that the caveat would have been discharged through lapsing or foreclosure in any event.

279. The file opening clearly discloses that both complainants, A.T. and W.Z. were clients. The member accepted through his dealings with another solicitor that W.Z. was his client throughout.

280. The Hearing Panel finds that the member owed his client whether it was A.T. or W.Z. or the executor of W.Z.'s estate, the earliest possible communication concerning the nature of the caveat, the nature of the inquiries, and the danger that the caveat could be lost through the simple mechanism of ignoring a Notice to Take Proceedings. The Hearing Panel finds the member guilty on this citation.

**Decision - Citation 25**

281. The Hearing Panel finds that the member did respond to another lawyer. The member's responses were not particularly helpful but in the end it was the member's client that was prejudiced not another lawyer or his client. The Hearing Panel acquits the member on Citation 25.

**Decision - Citation 26**

282. The member admits that he should have responded when he was contacted and the Hearing Panel accepts the member's admission of guilt. The Hearing Committee finds that the member failed to respond on a timely basis to communications from another lawyer that contemplated a reply, and that such conduct is conduct deserving of sanction.

**Decision - Citation 27**

283. The member admits that he should have responded to the Law Society of Alberta and the Hearing Committee accepts the member's

admission of guilt. The Hearing Committee finds that the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.

**Citations 28, 29 and 30 (Relating to C.B.)**

**Introduction**

284. Citations 28, 29 and 30 arose out of a 2007 real estate purchase transaction for a condominium unit. The citations allege the member breached trust conditions imposed by another lawyer CB, failed to respond in a timely manner to communications from another lawyer, CB, that contemplated a reply, and failed to respond to communications concerning the complaint of CB from the Law Society, in a timely manner.

285. At the conclusion of the hearing of evidence, the member submitted a statement of admission of guilt of conduct deserving of sanction in respect to Citation 29. The Hearing Panel accepts the member's statement as having been submitted to the Executive Director pursuant to section 60 of the *Legal Profession Act* and finds the statement to be in an acceptable form.

**Evidence**

286. The Agreed Exhibit Book was referred to and additional exhibits 161 to 164 were entered. C.B. was, examined by the Law Society, and was cross-examined by the member. The member gave evidence and was cross-examined by counsel for the Law Society.

287. C.B., a lawyer, represented a vendor on the sale of several condominium units. One such sale was to the member's client. CB sent transfer

documents to the member in respect of one condominium unit on March 20, 2007. The documents were sent to the member subject to certain trust conditions contained in CB's letter of the same date. That is, upon the member's use of the documents he would become bound to honour the trust conditions.

288. The trust conditions stated, in part, that upon CB's receipt of the cash to close, CB would not release such funds to the vendor but would continue to hold the funds until such time as the member had first notified CB that registration of the transfer had occurred. Interest would accrue to the benefit of the vendor from the date of possession (April 4<sup>th</sup>) until the funds became releasable to the vendor. It was CB's evidence that he had used this trust condition on each sale of 220 units in the project.

289. The member used CB's transfer documents and on April 3, 2007 the member wrote CB enclosing the cash to close. In that letter, the member referenced CB's letter of March 20<sup>th</sup> and acknowledged that he would indeed notify CB when registration had occurred. Although the member signed the one-page letter, he admitted that he had not read the sentence in his letter containing the undertaking to notify CB of registration.

290. Documents were registered at Land Titles on April 20, 2007 but a copy of title was not sent to CB.

291. Not having heard anything from the member for several weeks, CB undertook a search at Land Titles and discovered registration had occurred. CB wrote the member May 29<sup>th</sup> asking for the interest that had accrued until May 28<sup>th</sup> in accordance with his trust letter.

292. CB also wrote the member July 6<sup>th</sup>, August 15<sup>th</sup> and January 30, 2008 asking for the interest.

293. The member did not respond to CB's letters of May 29<sup>th</sup>, July 6<sup>th</sup>, August 15<sup>th</sup> and January 30, 2008 until February 6, 2008 when the member wrote CB enquiring what interest CB had earned on the cash to close held by CB. CB responded with that information in a letter dated February 11<sup>th</sup>, 2008.

294. CB's August 15<sup>th</sup> letter to the member stated that the member was in breach of his trust conditions. The member testified that he was not aware of CB's request for interest until receiving that letter. At the hearing, the member acknowledged that CB's letter of August 15<sup>th</sup> had been brought to his attention that same day for review.

295. CB admitted that while he and other lawyers representing developers had used similar conditions before, it may be considered by some lawyers to be an unusual condition in a routine residential real estate transaction. CB had highlighted the interest condition in bold type in his letter to the member.

296. Section 14(3) of the *Condominium Property Act* requires a developer to hold in trust all money paid by a buyer of a unit until title has issued in the name of the buyer.

297. The member's evidence was that he had not read CB's March 20, 2007 letter imposing the trust conditions on him. It was his evidence that his assistant should have brought this trust condition to his attention, as it was unusual. The member admitted that he did not, as a matter of course, read

every trust letter that was sent to him, word for word. He would typically scan the letter and look at the accompanying statement of adjustments.

298. The member could not recollect ever having seen a similar trust condition before. Had he been aware of the particular trust condition, the member stated he would not have accepted it. The member thought the trust condition was improper. The member acknowledged at the hearing that when presented with a trust condition that he did not wish to accept, a lawyer's options are to either negotiate a revision to it, or reject it and return the accompanying documents without using them.

299. The member testified that C.B.'s letters of May 29<sup>th</sup> and July 6<sup>th</sup> had not been brought to the member's attention nor placed on the file. Those letters were discovered by the member, in the desk of one of his assistants. After discovering there was a problem on the file, the member had asked his assistant to prepare a memorandum as soon as possible explaining what had happened on the file. The member followed up on the status of the memorandum a month later. Although he repeated his requests from time to time, the assistant never did produce the memorandum. The assistant quit the member's employ December 25, 2007.

300. During the course of the member's evidence he testified that in approximately September 2007 he discovered that the same assistant had forged the member's signature on a document presented to Land Titles. It was the member's evidence that as his other assistant would soon be leaving for her honeymoon, he decided to overlook the forgery as it was extremely difficult to find conveyancing staff. The member did not consider the forgery a significant issue as no money had been involved. He dealt with the matter by asking the

assistant to ensure in the future that documents requiring his signature were presented to him to sign.

301. During the course of the member's review and examination of the CB file, he detected another example of the assistant's forgery. She had forged a signature of another employee on a fax letter sent to CB's office on April 4, 2007. It was the member's evidence that this assistant hid and falsified documents.

302. At the hearing, the member presented a memorandum prepared by this same assistant which stated she had enquired of CB's office on April 2<sup>nd</sup>, 2007 whether the transaction could be closed using title insurance. Her memorandum stated CB's assistant, Andrea, was agreeable to this. It was the member's testimony that if the memorandum was indeed true, title insurance should have satisfied CB and permitted CB to release the funds to his client without any further need for confirmation of registration. It was CB's testimony that he was not aware of any conversation occurring between his assistant and the member's assistant about closing with title insurance. Given the evidence that the member's assistant had allegedly forged documents on two previous occasions, the Hearing Panel gives no weight to the accuracy of the memorandum prepared by her.

303. In argument the member contended that even though he had not performed the trust condition, at no time had he indicated he would not be bound by it. Following C.B.'s appearance at the hearing, the member contacted C.B. to negotiate and ultimately settle the amount outstanding to the mutual satisfaction of the member, CB and his client. The member contends he has since honoured the trust condition, that he never intended to fail to

comply with a proper trust condition but felt that some negotiation was warranted and that ultimately negotiation resolved the matter.

304. The Law Society notified the member by letter dated February 26, 2008 that a complaint had been made against him by CB, and requested a response. Follow-up letters were sent to the member by the Law Society, on March 25<sup>th</sup>, and April 7<sup>th</sup>. The member failed to respond to any of the Law Society's letters.

### Decision

305. **Citation 28** alleges the member breached trust conditions imposed by another lawyer, CB. The member used CB's documents and thereby became obliged to honour the conditions attached to their use. Pursuant to CB's trust letter, interest began accruing April 4, 2007.

306. The use of trust conditions is a mechanism that enables lawyers to implement a transaction agreed upon by their respective clients. If a lawyer is unwilling to honour a trust condition imposed on him he must forthwith return the trust property or come to an agreement with the party imposing the conditions to amend them. If an amendment cannot be agreed to within a reasonable time, the lawyer must return the trust property. The member irrevocably used the trust property and therefore agreed to CB's trust conditions and became bound by them.

307. A lawyer is expected to be punctual in fulfilling commitments made to another lawyer. Purporting to honour the trust condition after a period of approximately two years is not reasonable and is inconsistent with this commitment.

308. As for title insurance, even if the memorandum prepared by the member's assistant, the alleged forger, was given full weight, which it is not, and if CB's assistant, A., had indeed agreed to the request of the member's assistant to close the transaction using title insurance, this would not, without more, have cancelled the member's obligation to pay interest under CB's trust letter. While a lawyer may assign to support personnel tasks that they are competent to perform and are properly trained and supervised on, certain tasks may not be delegated to a non-lawyer. A lawyer may not delegate to a non-lawyer, the task of exercising judgment with respect to accepting, imposing or amending trust conditions.

309. The Hearing Panel finds that the member breached trust conditions imposed by another lawyer, C.B., and that such conduct is deserving of sanction.

310. **Citation 29** alleges the member failed to respond in a timely manner to communications from another lawyer, C.B., that contemplated a reply. The member failed to respond to CB's requests for over eight months. Pursuant to the member's statement of admission of guilt of conduct deserving of sanction, the member acknowledged that he should not have delayed responding to CB and should have responded to CB much sooner even if only to express disagreement with the trust condition and calculation of interest. The member agrees that due to the lengthy delay before responding, his conduct is sanctionable. The Hearing Panel finds that the member failed to respond in a timely manner to communications from another lawyer, CB, that contemplated a reply and that such conduct is deserving of sanction.

311. **Citation 30** alleges the member failed to respond to communications concerning the complaint of CB from the Law Society, in a timely manner.

312. The Law Society notified the member by letter dated February 26, 2008 that a complaint had been made against him by CB alleging a breach of trust condition, and requested a response. Two follow-up letters were sent to the member by the Law Society. The member failed to respond.

313. Lawyers are obligated under the Code of Professional Conduct, Chapter 3, to respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply. The member's position was that the Law Society should have tried to mediate the dispute over the trust condition. The member asked the Hearing Committee to find him not guilty, in order to send a message expressing disapproval to the Law Society for failing to proceed with mediation. Again, the member seeks to deflect responsibility to M.D., of the Law Society, rather than accepting full responsibility for his own failure to comply with the *Code of Professional Conduct*.

314. The Hearing Panel finds that the member failed to respond to communications concerning the complaint of CB from the Law Society, in a timely manner and that such conduct is conduct deserving of sanction.

Citations 31 and 32

**Introduction**

315. The member in August of 2006 admitted to the Law Society that he had not reconciled his trust account since October 2005. Other aspects of this issue were the subject of earlier and separate hearings concerning conditions applied to the member to allow him to continue in practice. Those conditions are the subject of other citations at this hearing.

316. It took the member several iterations of new bookkeeping staff, new accountants and new computer hardware and software to finally resolve the accounting reconciliation issues. During this time he fell behind in the filing of his Forms S and T.

317. These citations involve the failure of the member to file his Form S for 2007 (due August 15, 2007) and his Form T (due September 30, 2007) together with failure to respond to The Law Society with regards to requests for follow up information in relation to the failure (including a section 53 letter).

**Evidence**

318. An Admitted Statement of Facts was entered as Exhibit 183 together with Exhibits 184 to 189, correspondence between The Law Society and the member.

319. The member testified and was cross-examined by counsel for The Law Society. At the hearing the member entered a guilty plea to Citation 31 (failure to file Forms S and T).

## Facts

320. The member did not file this Forms S and T for the year ending June 2007 in August and September 2007 as required.

321. At the hearing, the member entered a guilty plea to Citation 31 (failure to file Forms S and T). The Hearing Committee accepts the plea and finds the failure to file to be worthy of sanction.

322. The Law Society reminded the member of the need for the filing of the forms S and T by letter on November 8, 2007 [Exhibit 184] and November 26, 2007 [Exhibit 185] and the member responded by e-mail to The Law Society on November 29, 2007 [Exhibit 186]. In that e-mail, the member offered to send his latest Form S "within a week" (of November 29, 2007) but asked for guidance concerning the Form T, the member fearing that he would be unable to get an accountant to sign the Form T while he was in the middle of unresolved audit and reconciliation problems.

323. Forms S and T still not filed by March 31, 2008, The Law Society sent the member a "Section 53" letter March 31, 2008 [Exhibit 187] and a further reminder letter April 21, 2008 [Exhibit 188].

324. The member admitted receiving all of the notices and also admitted to not responding to the notices including Exhibits 187 or 188 except when Forms S and T were finally provided to The Law Society September 18, 2008. The final date coincided with the member resolving his reconciliation issues.

**DECISION - Citation 31**

325. The hearing committee accepts the member's guilty plea of Citation 31 regarding the failure to file Forms S and T citation. The Hearing Committee finds that the member failed to follow the *Rules of the Law Society of Alberta* by failing to file Form S and T for the year ending in 2007 as required by rules 126(1) and (2), and that such conduct is conduct deserving of sanction.

**DECISION - Citation 32**

326. This citation involves the continued failure of the member to file Forms S and T after reminder and the failure to provide information to The Law Society in the face of a Section 53 demand.

327. The member's defence was that as his account reconciliations were an active work-in-progress throughout the time involved, that he was prevented from filing Forms S and T in that he didn't want to be accused of making a mistake on the forms. As well there was no accountant who was prepared to sign the Form T in advance of the reconciliations being completed.

328. Further, the member states that the status of his accounts was well known to The Law Society as during the relevant period of time, as he was subject to both The Law Society audit and a separate hearing concerning the status of his accounts and the failure to reconcile. The member postulated that there was no prejudice to The Law Society because The Law Society had the necessary information and eventually received completed Form S and Form T.

329. The counsel for The Law Society entered as Exhibit 189 a blank Form S and argued that the factual statements set forward in the Form S form could

have been answered whether or not the underlying accounting reconciliations were completed.

330. The hearing committee finds the member guilty of **Citation 32**. The Hearing Committee finds that the member failed to respond to the Law Society in a timely manner and that such conduct is conduct deserving of sanction.

331. The filing of the forms is a statutory requirement (member has pled guilty to that in Citation 31) and The Law Society continued to insist on the filing of the forms after their due date by regular correspondence to the member. There was no impediment to the member responding by filing Form S all of which could have been filled out factually and truthfully by the member with or without a completed reconciliation.

332. Similarly, even if the member had not been able to obtain an accountant willing to sign his Form T prior to the reconciliations being completed, the form could have been filled out and signed by the member in draft, not as an official filing but as a response to a legitimate question by The Law Society concerning progress.

333. Alternatively, the member could have entered into correspondence with the Law Society concerning interim information, updates on progress, requests for indulgences, etc. In any event, simply ignoring the requests for the filing of the required forms does not comply with the obligation contained in Chapter 3, Rule 3 of the Code of Professional Conduct to respond in a timely, complete and appropriate manner to a communication by the Law Society that contemplated a reply.

334. The member's defence that all of this information was in the possession of The Law Society presupposes that The Law Society as a regulatory agency has the time, the manpower (or is required to take the time and manpower) to comb through separate proceedings of its audit department, another hearing committee or other records to supply the Forms S and T (the subject of Citation 31), or to provide its own answer to a legitimate request for a declaration as to the progress on Forms S and T which ultimately was the member's own responsibility.

### **Citations 34 - 37**

#### **Amendment of the Notice to Solicitor**

335. These citations were added to the other 33 citations faced by the member at the Hearing Wednesday, February 11, 2009. The member confirmed that he had been given sufficient notice of the intent to add the citations and particulars, and consented to the amendment of the Notice to Solicitor. The Panel allowed the amendment and the Amended Notice was admitted as Exhibit 2A. The member signed acknowledgement of service at the Hearing. The matter then proceeded to the hearing of evidence.

### **CITATIONS 34 – 37.**

#### **Introduction**

336. The client AM's adult son MB, had died in a motorcycle accident October 10, 2005. The deceased died intestate leaving a 16 year-old daughter who was in the custody of his ex-wife. The deceased's father, although

estranged from AM and the deceased was still alive. The member was retained by the deceased's mother AM regarding the Estate of MB.

337. Administration of the Estate involved issues including the right of the client AM or alternatively the estranged father of the deceased to apply for Letters of Administration, the practical necessity of a Renunciation and a negotiation of such with the father, dealing with the Public Trustee on behalf of the Estate which regards to the interests of the 16 year old daughter and the payment of Estate expenses out of an Estate which itself might have been impecunious depending on the payment of life insurance on certain loans.

338. The citations involve allegations of failure to proceed with diligence in the Estate including failure to proceed with steps, failure to report to the client, failure to respond to letters from the Public Trustee and failure to respond to the Law Society.

### **Evidence**

339. The binders of exhibits entered by consent of the parties contained Exhibits Tabs 104 to 143 relating to these issues. Additional exhibits were entered at the hearing through the consent of the parties, which were received and tabbed exhibits 156 to 160.

340. The client AM gave evidence, was sworn and cross-examined by the member. The member gave evidence and was cross-examined by The Law Society counsel.

## Summary of Facts

341. AM's adult son died as a result of a motorcycle accident October 10, 2005. The deceased was divorced and had a 16 year-old daughter who resided with her mother, the deceased's ex-wife. The deceased died without a Will.

342. The client AM was close to her son and as well maintained close relations with her granddaughter (the deceased's daughter) and the deceased's ex-wife. AM was the logical person to make application for Letters of Administration but regard would have to be had for the right of the deceased's estranged father to make such an application and the necessity of a Renunciation from the father to allow the client to go ahead with Letters of Administration.

343. The client was a capable and diligent client who kept good notes, gave detailed instructions and was able on her own to do many of the tasks related to the Estate including dealing with the deceased's life insurance policy (which did not pass through the Estate but was paid in trust for the deceased's daughter), arranging and paying for the funeral, arranging for the sale of the deceased's mobile home on behalf of the Estate and dealing with other insurance companies regarding payment of life insured loans, (for example, a life insured loan on the deceased's mobile home). The member was impressed enough with the client's detailed administration of the Estate that he offered her a job, which the client did not take.

344. The member kept detailed notes of his meetings with his client which were entered as exhibits tabbed 104, 107, 111, 113, and 114. It was

continuously expressed by the client from her first meeting, and throughout, and recorded by the member that it was important to her to have the Estate "bills" paid. She had paid for some of the funeral expenses from a CPP death benefit and was anxious to have the rest of the Estate bills paid out of the Estate, leaving the fund provided by the deceased's life insurance as a segregated account for the benefit of the deceased's daughter.

345. The liquidity of the Estate was questionable. Although the client had arranged for a sale of the deceased's mobile home prior to Letters of Administration being given, a loan secured against the mobile home would have to be paid either out of the proceeds of the sale (leaving a questionable amount in the Estate), or alternatively the loan would need to be paid off by access to a life insurance policy on the loan which the deceased had arranged for prior to his death.

346. On cross examination from counsel for the Law Society, the member admitted that he had most of the information that he needed to make the Application for Letters of Administration either at the first meeting with the client on October 31<sup>st</sup>, 2005 (three weeks after the date of death) or shortly thereafter. He did not make the Application for Letters of Administration until August of 2007.

347. The member explained that the delay initially involved preliminary matters which needed to be taken care of including: the practical issue of whether or not there would be substantial funds in the Estate (whether or not the life insurance on the mobile home loan would be paid), the position of the Public Trustee concerning whether or not they would be the Applicant for Letters of Administration, and the position of the estranged father, (whether he would

apply for Letters of Administration or Renounce). These matters were resolved gradually, the last outstanding item being the Renunciation from the father being received by the member in his office on December 4, 2006.

348. Notwithstanding the resolution of the outstanding issues by Dec. 4, 2006, the member did not submit Probate documents to the Surrogate Court until August 3, 2007, a delay of approximately eight months from the resolution of the father's Renunciation.

349. The client became frustrated with the delay and made a complaint to the Law Society in her own handwriting July 24, 2007 relating to the delay. The complaint was entered as Tab 124, and was forwarded to the member.

350. The member responded to the Law Society, mostly by email including:

- (a) Exhibit 129 email dated September 7, 2007
- (b) Exhibit 133 email dated November 6, 2007
- (c) Exhibit 136 email dated November 29, 2007
- (d) Exhibit 138 email dated March 9, 2008

351. These emails although they contained details about the administration of the estate, did not deal with or mention the root cause of the complaint, which was the delay between December 4, 2006 and August 3, 2007 while the Application for Administration "sat" in the member's office.

352. Eventually, the Law Society noticed this unexplained delay and wrote the member on June 5, 2008 (Exhibit 139), requesting an explanation, which was not provided by the member despite repeated requests June 24, 2008 (Exhibit 140), July 8, 2008 (Exhibit 141), July 21, 2008 (Exhibit 142), and August 5, 2008 (Exhibit 143).

353. At the Hearing, under cross-examination by the member, the client stated clearly that it was her intent by making the complaint to the Law Society to have the Law Society "light a fire under her lawyer" because she had been unable to get an explanation or action regarding the delays in the submitting of the Probate documents. Further on cross-examination, the member attempted to get the client to state that it was not her intention to cause a Hearing. However the client answered that one of the reasons for the complaint was that she didn't want anyone else to go through this sort of delay.

354. Letters of Administration were signed by Justice Belzil on September 24, 2007. At the Hearing (although not in the earlier responses to the complaint the member acknowledged the delay between the renunciation by the deceased's father in December of 2006 and the submitting of the Probate in August of 2007 and in his final Statement of Account, [Tab 156] acknowledged the delay and gave the client a "courtesy discount to compensate for delays" in the amount of \$1,300.00 (off of a gross bill of \$3,800.00) which the member thought more than compensated for any financial delay such as penalty interest on estate related accounts.

355. The member's explanation for the delay was that the Estate coincided in time (although was factually unrelated to) a Law Society spot audit which was commenced in August of 2006. The spot audit had pointed out

difficulties and inconsistencies in the member's accounting records which had required a great amount of work from August, 2006 to August, 2007 including the hiring of extra accounting help, the purchase of new computers, and countless hours of work and resulting work related stress on the member.

356. The member testified that during the period he was under considerable financial and emotional stress, and was hospitalized for symptoms which he at the time thought represented a series of strokes but which were diagnosed to be "Transient Ischemic Attacks". No medical evidence was presented concerning the member's health but neither was he cross-examined or contradicted on these points.

357. During the time when various preliminary details concerning administration of the estate were being worked out, the Public Trustee became involved. The first telephone contact between the member and the Public Trustee was a phone call February 15, 2007, which was followed by letter [Tab 110] April 18, 2007. In the administration of its Public mandate, the Public Trustee had a statutory interest in the administration of the Estate (which it eventually did not pursue), a Statutory interest in the beneficial interest of the deceased's minor daughter (in the life insurance fund), and an interest in the possibility of *Fatal Accident Act* litigation arising out of the circumstances of the deceased's motorcycle accident and the minor's resulting dependency.

358. The Public Trustee wrote to the member on April 18 [tab 110] which was partially answered by the member July 6, 2006 [tab 115]. The Public Trustee continued to write for further detail on July 25, 2006 [tab 116], August 15, 2007 [tab 127], and September 20, 2007 [tab 130]. These letters contemplated, requested and even demanded a reply.

359. The member did not answer the Public Trustee's questions concerning the *Fatal Accident Act*, never sent the Public Trustee the Letters of Administration which were issued by Justice Belzil September 24, 2007. By the time Letters of Administration had issued, the deceased's daughter had turned 18 and the member took the position that the Public Trustee was no longer involved.

360. Arising out of complaints of delay, The Law Society sent letters requesting explanations to the member on June 5, 2008 [tab 139], June 24, 2008 [tab 140], July 8, 2008 [tab 141], July 21, 2008 [tab 142], August 5, 2008 [tab 143]. None of these letters were answered, except by the member providing a "courtesy discount" [tab 156] to the client arising out of the delay.

## Decision

### **Citation 34 (Failure to provide conscientious service – delay in the progress of the Estate)**

361 The client made it clear in her meetings with the member that she was anxious to have Letters of Administration in order that she could pay bills with Estate money, not her own, and be free of annoyance phone calls from Estate creditors. While it might have been possible to apply for Letters of Administration fairly soon after the death, the Panel is prepared to accept that some period of time was necessary to allow the issues of Estate liquidity (life insurance on the mobile home loans and pay out of loans), and Renunciation by the deceased's father. However there is no good reason for the delay between December 4, 2006 when the Renunciation was signed and August 3, 2007 when Probate was submitted.

362. The member's only explanation relates to the disruption in his office caused by unresolved Law Society accounting matters which had nothing to do with the matter of this client and which in any event ought not to have prevented the completed probate documents from being submitted to the Court.

363. The following Rules from the Code of Professional Conduct are engaged:

- (a) Chapter 2, Competence
- (b) Statement of principal: A lawyer has a duty to be competent and to render competent services.
- (c) R.2 – A lawyer must not act or continue to act in any matter in which it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services.
- (d) Chapter 9 – The lawyer as advisor
- (e) Statement of principal: a lawyer has a duty to provide informed, independent and competent advice and to obtain and implement the client's proper instructions.
- (f) R.13 – A lawyer must be punctual in fulfilling commitments made to a client and must respond on a timely basis to all client communications that contemplate the reply.
- (g) Commentary on Rule 13

364. Many of the reasons relied upon by lawyers to justify failure to respond to a telephone call or letter are ethically unacceptable. Such reasons include a desire to avoid unpleasant consequences that may flow from response; the view that response is unnecessary although the client is unaware of this; and the argument that one's schedule does not allow time for response.

365. The member's explanation concerning delay seems to suggest that the eventual filing of the Probate documents upon The Law Society complaint and the crediting of a discount for fees ought to end the matter. However, the client's answer to the member's cross-examination that she did not wish other members of the public to be put in the similar position, is a succinct, and accurate, (if perhaps unwitting) summary of the responsibility of the Law Society concerning the protection of the public.

366. The Panel finds no justifiable reason for the delay in the submission of Probate documents from December, 2006 to August of 2007 in the face of client requests and finds the member guilty of **citation 34**.

367. The client AM was in regular communication with and met regularly with the member during 2006 and the member kept notes of these meetings including Exhibit 107 (January 18, 2006), Exhibit 108 (January 26, 2006), Exhibit 109 (January 30, 2006), Exhibit 111 (April 25, 2006), Exhibit 113 (July 10, 2006), Exhibit 114 (July 17, 2006), Exhibit 119 (note of phone call September 14, 2006), a common feature of most of these communications was the client's desire to have the probate concluded.

368. These communications all happened during the time when the member was awaiting for the preliminary matters to be concluded, most

especially the receipt of the Renunciation from the deceased's estranged father, which was received December 4, 2006. No notes of conversations or letters from the client to the member for the period between the receipt of the renunciation in December 2006 and the submission of the probate documents in August, 2007 were tendered in evidence.

369. In the absence of specific communications from the client to the member contemplating a reply, the Panel acquits the member of **citation 35**.

**Citations 36 (Failure to respond to the Public Trustee)**

370. The following rules of the Code of Professional Conduct are engaged.

- (a) Chapter 4, Rule 5 – a lawyer must be punctual in fulfilling commitments made to other lawyers and must respond on a timely basis to all communications from other lawyers that contemplate a reply.

371. The member ignored the continued correspondence of the solicitor for the Public Trustee from April 18, 2006 until September 20, 2007, and at no time provided a considered reply. Simply ignoring the Public Trustee until the minor turned 18 is not the sort of response contemplated by the rule.

372. The solicitor for the Public Trustee is a lawyer contemplated by the Rule, and is acting in the administration of an important public and statutory jurisdiction. In administering its public function, the Public Trustee needed to make decisions concerning the administration of Estates including the application, if necessary, for Letters of Administration, and importantly in this

case the consideration of the maintenance of a *Fatal Accident Act* action on behalf of a minor.

373. The Panel finds that in filing to respond to the Public Trustee the member breached Chapter 4, Rule 5 of the *Code of Professional Conduct* and finds the member guilty of citation 37.

**Citation 37 (Failure to Respond to The Law Society)**

374. This citation engages:

- (a) Chapter 3, Rule 3 of the Code of Professional Conduct
- (b) R.3 – A lawyer must respond on a timely basis and in a complete and appropriate matter to any communication from the Law Society that contemplates a reply.

375. The member's initial responses to The Law Society (Exhibits 129, 133,136, 138) made no mention of the reason or accepted any responsibility for the delay in submitting the Probate documents. A fulsome response at that time would have involved an explanation as to the reason for the delay, the presence or absence of appropriate diarization and other file management processes and whether or not, arising out of unrelated Law Society accounting matters, the member was in a position to provide competent timely services on all his files.

376. When the Law Society was able to discern the fundamental reason for the delay (the failure to submit) and asked the member for a response, the member now went silent, despite repeated requests June 5, 2008, June 24, 2008, July 8, 2008, July 21, 2008 and August 4, 2008. The failure to respond was more

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than a time delay or a technical failure to respond, is contrasted with the facile nature of the earlier responses and leads to the inevitable conclusion that the member knew that there was no reasonable explanation but could not bring himself to the simple admission of responsibility.

377. The Panel finds the member guilty of **Citation 37**. The initial mistake made by the member (not submitting documents for approx. 8 months) was serious and distressing to the client but in the end, other than the delay there appears to be no lasting prejudice to the client's position. However the member's failure to be candid with the Law Society in the initial response, the complete disregard for appropriate requests for follow up, and the members seeming inability to take responsibility for the conduct of the file until the "last minute" (at the Hearing) raise serious concerns about the governability of the member.

### **Citations 38 – 42 (Relating to E.W.)**

#### **Summary**

378. E.W. was injured in a motor vehicle accident involving Edmonton Transit. The member advised the client that injuries might take some years to settle. The Statement of Claim was filed within the limitation period and served within the limitation period, although an extension for serving on one party needed to be obtained, and was.

379. The matter then sat for approximately two years and no useful work was done on the file until the client made a complaint to the Law Society, which was referred to the member as a Section 53 complaint.

380. The member then swung into action and resolved the matter through negotiations with Edmonton transit and paid out the client.

381. Arising out of the circumstances the member is charged with failing to serve the client conscientiously (mostly arising out of the delay), failing to respond to the client's complaint, failure to follow the Rules of Court regarding the drafting of a Contingency Fee Agreement, failure to respond in a timely fashion to the Law Society and failure to co-operate with the Law Society (mostly in failure to provide the client file for review).

382. The matter proceeded to Hearing with Council for the Law Society and the member agreeing on an Agreed Statement of Facts, and the member testifying. The client did not testify.

**Citation 38 – Failure to serve the client conscientiously**

383. Although the member gave a general explanation that he had told the client that the sorts of personal injuries involved might take years to resolve, no explanation was given by the member concerning the approximate two year delay in dealing with the matter subsequent with the filing and the serving of the Statement of Claim. The member, for example, did not tender regular correspondence with the client or telephone calls enquiring as to the timeliness of the beginning of the settlement process.

384. It is apparent from the evidence that once the member turned his mind to settlement he was able to achieve a settlement within the client's settlement instructions within approximately eight months.

385. Further, at the conclusion of the matter there is no evidence of a comprehensive reporting letter to the client including which might have been the usual information such as copies of medical report, copies of the contingency fee agreement, copy of the calculation of the fee according to the Contingency Fee Agreement and a Statement of Receipts and Disbursements.

386. Indeed, the Statement of Receipts and Disbursements that was provided seems to have been drafted in response to the Law Society complaint, not a normal closing document for the client.

387. However, counsel for the Law Society did not seek a conviction on this citation. Consideration was given to the fact that the member's failure to contact the client is the subject matter of citation 39, and the fact that the member did reach a settlement, which satisfied his client. The Hearing Committee accepts the position of the Law Society and dismisses citation 38.

### **Citation 39 – Failure to respond to the complaint**

388. The member acknowledged that he did not respond to the complainant on a timely basis and did not keep her advised of the progress, or lack of progress on her matter. The member admitted his responsibility in respect of this citation.

389. The Hearing Committee accepts the member's admission, pursuant to s. 60 of the *Legal Profession Act*, and finds that the member failed to respond on a timely basis to communications from the Complainant that contemplated a reply, and that such conduct is conduct deserving of sanction.

**Citation 40 - Failure to follow the Rules of Court regarding contingency fee agreements**

390. The Rules of Court requires a contingency fee agreement to make specific written statements about the client's entitlement to party and party costs in an award if these costs are to be taken by the solicitor in whole or in part as a portion of the solicitor's fee. The member admits that his agreement is contrary to the *Rules of Court*.

391. The member was not able to produce a copy of either the contingency fee agreement with E.W., nor his customary contingency fee agreement in use at the time.

392. Further, the member's explanation of how the party and party costs were included in his fee bill and variously credited towards fees and disbursements was not clearly set out in the final billing to the client nor quite frankly was it intelligible to the Hearing Committee.

393. The Hearing Committee accepts the members admission respecting this citation, and finds that the member failed to comply with the *Rules of the Law Society* and the *Rules of Court* in rendering an account pursuant to a contingency fee agreement, and that such conduct is conduct deserving of sanction. .

**Citation 41 – Failure to respond to the Law Society**

394. The member admitted failure to respond to the Law Society's initial provision of a copy of the client's complaint March 27, 2008 [Exhibit 192] and reminders from the Law Society April 21, 2008 [194], May 6, 2008 [195], and May

26 [196]. The member sent a brief email on June 4 [197], a response on June 5, 2008 [Exhibit 198], and the Law Society asked for further detail in a letter dated June 6, 2008 [199].

395. The member admits to not responding to Exhibits 193 to 196, a span of two months.

396. Counsel for the Law Society concedes that the June 4 and 5 answers by the member were relatively complete although approximately two months late.

397. The Law Society asked for more detail June 19, July 8, July 21, August 1, August 19 and October 27, [Exhibits 201-207] and the member still failed to respond.

398. The member's defence at the hearing was that there was no need for further response as he had "dealt with" the matter by reporting to the client. The suggestion that the member can unilaterally decide that the request of the Law Society to follow up information is without merit is in direct contravention of his obligations under Chapter 3 of the Code of Professional Conduct.

399. The Hearing Committee finds that the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.

**Citation 42 – Failure to cooperate with the Law Society (provision of a file)**

400. M.D., on behalf of the Law Society, first asked Mr. Broda to deliver his file for review on May 26, 2008 [Exhibit 196] so that he could investigate the delay and potential overcharging by the member. Mr. Broda never did deliver

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the file. The member argued that this citation was duplicitous and that M.D. was simply interested in adding more citations. While the citation follows from the previous citation, citation 42 deals with a specific separate issue arising from Mr. Broda's failure to respond to the Law Society's specific direction to surrender the file, as opposed to a failure to respond in a timely manner to the correspondence sent to him. The member failed to cooperate with the Law Society by not providing the file, as requested, and such conduct is conduct deserving of sanction.

### **Citations 43, 44, 45 and 46 (Relating to D.D.)**

#### **Introduction**

401. Citations 43 to 46 relate to an estate matter. The citations allege the member failed to serve his client in a conscientious, diligent and efficient manner, that he failed to respond on a timely basis to communications from the Complainant that contemplated a reply, that he failed to respond in a timely manner to communications from the Law Society that contemplated a reply, and that he failed to cooperate with the Law Society by delaying in providing his file as requested, and that all such conduct is deserving of sanction.

402. At the conclusion of the hearing of evidence, counsel for the Law Society elected not to seek conviction on citation 43, given that citation 44 arises from the same defaults, and the member admits the elements of citation 44.

403. At the conclusion of the hearing of evidence, the member admitted, in respect of citation 44, that he failed to respond on a timely basis to communications from the Complainant that contemplated a reply, and that

such conduct is conduct deserving of sanction. The Hearing Committee accepts the member's admission.

### **Evidence**

404. The Agreed Exhibit Book was referred to and the member's statement of facts was entered with consent. The member gave evidence and was cross-examined by counsel for the Law Society.

### **Statement of Facts**

405. A summary of the member's statement of facts is set out below.

406. The member was retained by D.D., one of two executrixes, in August 2005, to assist in relation to probate and administration of an estate.

407. The estate held shares in a public corporation and on September 21, 2005 the member received instructions from the corporation's agent on how to transfer the shares.

408. The member prepared and had D.D. sign the application for probate October 7, 2005. The application was filed October 11<sup>th</sup> and the grant of probate was issued November 7<sup>th</sup>, 2005.

409. D.D. had followed up with the member on several occasions with requests to move matters along. D.D. complained to the Law Society on October 5, 2007 about how long the estate was taking to disburse, and about the member not returning phone calls. On October 23, 2007, the Law Society sent the member a formal demand for a response to D.D.'s complaint. The member did not respond.

410. The Law Society sent further letters, November 23<sup>rd</sup>, November 26<sup>th</sup>, December 10<sup>th</sup>, December 17<sup>th</sup>, and January 8<sup>th</sup>, 2008. The member replied on January 14, 2008.

411. On January 22, 2008, the Law Society requested a response to its initial letter of October 23, 2007.

412. After rejecting the documents several times, the public corporation accepted the member's documents and transferred the shares to the estate on March 7, 2008. The member advised the Law Society March 14, 2008 that the estate file was now completed.

413. The member reported to D.D. and the other executrixes with a request for instructions on disposition to which they responded with instructions to dispose of the shares and apply the proceeds to his account.

414. On May 28, 2008, the Law Society again requested a response to its initial letter of October 23, 2007.

415. On July 21, 2008, the Law Society requested the member's file and receiving no response, the Law Society issued an Investigation Order.

416. The Law Society ultimately received the file and on September 22, 2008, the Law Society sent the member a chronology of events with a request for the member to confirm its details. The member never responded.

417. The Law Society sent follow up requests to the member October 15, and October 27, to which the member did not respond.

## Testimony

418. The member testified that he was advised at the initial client meeting on August 29, 2005 that the assets of the estate included shares in a public corporation. The member wrote the corporation September 19, 2005 for information on how to transfer the shares and the corporation responded September 21, 2005 with instructions on what they required.

419. After the Grant of Probate was issued in November 7, 2005 nothing happened on the file until March 10, 2006 when one of the executrixes called the member wanting to move matters along.

420. One executrix called September 19, 2006 enquiring about the status of the estate.

421. A meeting was held with D.D. on September 27, 2006 about various items including the need to deal with the public corporation shares. Nothing had been done regarding the shares since September 21, 2005.

422. It was the member's evidence that the executrixes wanted to pay his account from proceeds of the shares. As a result, the member claimed he just let the shares sit knowing he could collect payment in due course. The member did not refer the panel to any letter or other communication with the client to support his claim.

423. D.D. had to remind the member to send estate documents to all executrixes, including the executrix in Whitehorse.

424. The member failed to deal with a dividend cheque relating to the shares before it became stale-dated.

425. The Law Society's letter of October 23, 2007 demanded a response from the member within 14 days.

426. The member sent a brief response to the Law Society on November 29, 2007 stating he would review his file that weekend and provide a complete response. The member did not provide a complete response.

427. The member sent a brief email to the Law Society on January 14, 2008. He stated he would provide a final and detailed response once the matter was complete. The member did not provide such a response.

428. The member sent another brief email to the Law Society on February 5, 2008. He stated his documents had been rejected by the public corporation but that it had now been corrected and that upon receipt of the transferred shares the file was complete.

429. The member finally transferred the shares to the estate March 7, 2008, approximately two and a half years from the date the corporation's agent first advised the member of what it required.

430. The Law Society requested the member's file in its letter of May 28, 2008. The member's testimony was that he refused to forward his file to the Law Society as he had not yet been paid and he therefore claimed a solicitor's lien over the file. The member stated he believed the client's were using the Law Society to negotiate a reduction in his account. The member never notified his clients that he was claiming a solicitor's lien on the file. The Law Society then took steps to issue an investigation order to compel the member to release the file.

431. The member emailed the Law Society on October 7, 2008 stating he was shorthanded and would work to get a reply sent to the Law Society over the long weekend. The Law Society followed up but the member did not provide the promised responses.

432. The member testified that his failure to respond was because he was still working on the file and was hoping to resolve the matter so that he could then tell the Law Society that the file was completed. The member testified that he felt his time was "better spent trying to resolve the problem rather than spend hours and hours reviewing the file, preparing a lengthy response, which was unsatisfactory in the sense that the matter was not yet concluded". The member also testified that he did not understand why the Law Society would still need a response since it had already seen his entire file and the client matters had been resolved to the client's ultimate satisfaction.

433. The member testified that he lost two staff members in October 2005 which he used on estate matters. This resulted in the member's slow down in servicing his clients. He was very busy at the time and didn't have adequately trained staff. He admitted that he personally didn't have the time required to get the work done.

### **Decision**

434. Counsel for the Law Society elected not to pursue conviction on Citation 43, which had alleged the member failed to serve his client in a conscientious, diligent and efficient manner. Accordingly, the Hearing Committee dismisses Citation 43.

435. **Citation 44** alleges the member failed to respond on a timely basis to communications from the Complainant that contemplated a reply. D.D. complained to the Law Society about how long it was taking the member to disburse the estate and the member's failure to return phone calls. The member failed to keep his client apprised of the circumstances surrounding the progress of the file, despite the client's attempts to reach him. Pursuant to the member's statement of admission of guilt of conduct deserving of sanction, the member acknowledged that he should have been more diligent in keeping his client informed of the matters pertaining to her file. The Hearing Panel finds that the member failed to respond on a timely basis to communications from the Complainant that contemplated a reply, and that such conduct is conduct deserving of sanction.

436. **Citation 45** alleges that the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply.

437. The Law Society wrote the member October 23, 2007 demanding a response to D.D.'s complaint within 14 days. Having received no substantive response, the Law Society was moved to send multiple follow-up letters. The member never did provide a substantive response to the Law Society. The member argued that when his client indicated that she was prepared to allow the member to continue acting, this was a mediated conclusion to the complaint. The Hearing Committee finds this argument to be an irrelevant contrivance. The member further answers the citation by advising that his lack of response was justified because he had nothing to report. This position is similarly a failure to answer his requirement to reply to the Law Society.

438. Lawyers are obligated under the Code of Professional Conduct, Chapter 3, to respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply.

439. The Hearing Panel finds that the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.

440. **Citation 46** alleges the member failed to cooperate with the Law Society by delaying in providing his file as requested.

441. Having not received a substantive response from the member to its demand for information of October 23, 2007, and subsequent follow-up letters, the Law Society was moved to request the member's file May 28, 2008 for purpose of examination so as to determine what had occurred on the file.

442. The member declined to send the file to the Law Society claiming a solicitor's lien. This prompted the Law Society to issue an investigation order to compel the member to release the file. The member argued that M.D., acting on behalf of the Law Society, was only seeking to add citations by requesting the file.

443. Section 53 of the *Legal Profession Act* permits the Executive Director to demand the member's file. The member was required to provide it. He failed to do so. The complaint could not be properly investigated without the file.

444. The Hearing Panel finds that the member failed to cooperate with the Law Society by delaying in providing his file as requested, and that such conduct is conduct deserving of sanction.

Citations 47, 48, 49 and 50 (Relating to T.L.)

**Introduction**

445. Citations 47 to 50 relate to a real estate matter. The citations allege the member failed to serve his client in a conscientious, diligent and efficient manner, that he failed to respond on a timely basis to communications from the Complainant that contemplated a reply, that he failed to respond in a timely manner to communications from the Law Society that contemplated a reply, and that he failed to cooperate with the Law Society by not providing his file as requested, and that all such conduct is conduct deserving of sanction.

446. At the conclusion of the hearing of evidence, counsel for the Law Society elected not to pursue conviction on citation 47, which had alleged the member failed to serve his client in a conscientious, diligent and efficient manner.

447. At the conclusion of the hearing of evidence, the member submitted a statement of admission of guilt of conduct deserving of sanction in respect to Citation 48. The Hearing Panel accepts the member's statement as having been submitted to the Executive Director pursuant to section 60 of the *Legal Profession Act* and finds the statement to be in an acceptable form.

448. The Agreed Exhibit Book was referred to and the member's statement of facts was entered with consent. The member gave evidence and was cross-examined by counsel for the Law Society.

## Statement of Facts

449. A summary of the member's statement of facts is set out below.

450. The member was retained by T.L. in connection with her sale of a condominium in Edmonton. The sale was complicated by an encumbrance against title, and could only close by the member holding back \$37,500.00 "pending resolution of Bankruptcy issue on title."

451. The sale closed July 20, 2007 and the member reported to T.L. on August 9, 2007.

452. T.L. complained to the Law Society January 31, 2008 because she had yet to receive the holdback amount, despite her belief that the encumbrance, giving rise to the holdback, was invalid.

453. The Law Society sent the member a formal demand under section 53 of the *Legal Profession Act* for a response. The member did not respond.

454. The Law Society sent a follow up letter on May 22, 2008, which the member did not respond to.

455. On June 5, 2008, the Law Society sent the member a further letter adding an additional request that the member deliver his file for review.

456. The member responded by email June 9, 2008 requesting an extension of time to respond, to June 30, 2008, which the Law Society agreed to. The member responded by email on June 30, 2008 but did not deliver up his file.

457. The Law Society sent the member a letter asking for an update on August 1, 2008. The member did not respond.

458. The Law Society sent a follow up letter to the member August 19, 2008 and the member provided an update email on August 20, 2008.

459. The Law Society sent the member a further letter asking for an update on September 22, 2008. The member did not respond.

460. The Law Society sent the member a further follow up letter October 28, 2008 and on December 19, 2008 sent, via email, another request for an update. The member did not respond.

### **Evidence**

461. T.L. disputed the validity of a \$37,500.00 encumbrance registered against her condominium as it related to bankruptcy of T.L.'s former spouse.

462. To permit T.L.'s sale to close, the encumbrancer gave the member a letter releasing its interest in the land. The release letter was sent to the member on condition the member hold back \$37,500.00 from the sale proceeds.

463. The member was to then settle or litigate the matter, leading to the release of the holdback funds to T.L..

464. It was later revealed that the Land Titles Office rejected the encumbrancer's form of release letter and would not discharge the encumbrance without a properly completed discharge. Purchaser's lawyer notified the member of this several weeks or months after the sale closed. The

member then followed up with the encumbrancer for a proper discharge. This took several months to obtain from the encumbrancer.

465. In the interim, T.L. moved to the United States. The member's evidence was that he did not have her email address to notify her of the status of matters.

466. T.L.'s complaint to the Law Society stated that the member knew she was moving and over the six months leading up to her complaint, had called the member many times without any return calls being made.

467. Upon learning of her complaint to the Law Society about the delays in finalizing the matter and the member's failure to report to her, the member contacted T.L. and explained the problems encountered. He received instructions from T.L. to continue working on getting the funds released.

468. The member took steps to negotiate, without success, the encumbrancer's release of interest in the holdback funds. The member prepared a form of affidavit, sworn by T.L., and set the matter down for a court application for March, 2009. The matter has been adjourned at the encumbrancer's request and has not yet been heard. As at the date of this Hearing, the member continued to hold T.L.'s \$37,500.00 in trust.

469. No written agreement existed that set out the terms of the trust as between the encumbrancer and the member or T.L.. The member nevertheless acknowledged that it had been his responsibility to take steps necessary to get the money released.

470. The member's evidence was that he was not required to provide a formal substantive response to the Law Society's request so long as he provided them with periodic updates that he was still working on the file. Once the file was concluded the member would then report to the Law Society.

471. The member admitted that there was a gap where he could have worked on the matter over the past two years.

472. The member did not produce any report, retainer letter or other correspondence, addressed to his client describing the possible steps that may be needed to get the money released nor the anticipated costs to T.L. to do so. The member indicated he would have explained this all verbally to his client.

473. The member admitted that while he should have reported to his client sooner, there had not been anything to report.

### Decision

474. Counsel for the Law Society elected not to pursue conviction on **Citation 47**, which had alleged the member failed to serve his client in a conscientious, diligent and efficient manner. Accordingly the Hearing Panel makes no finding in respect to **Citation 47**.

475. **Citation 48** alleges the member failed to respond on a timely basis to communications from the Complainant that contemplated a reply. The member failed to provide his client with updates, and did not respond to his client's phone calls for approximately six months. Pursuant to the member's statement of admission of guilt of conduct deserving of sanction, the member acknowledged that he should have responded to his client, on a timely basis.

The Hearing Panel finds that the member failed to respond on a timely basis to communications from the Complainant that contemplated a reply, and that such conduct is conduct deserving of sanction.

476. **Citation 49** alleges the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply.

477. Pursuant to its letter of May 2, 2008, the Law Society asked for a written response from the member within 14 days. Follow up letters were sent to the member over the following seven months. Although the member did request additional time to respond, in June, and did provide brief updates, a substantive response was never sent to the Law Society. The member's argument is his refrain that M.D., acting on behalf of the Law Society, should have treated the client's willingness to allow the member to continue to act as a mediated conclusion. Again, this argument attempts to divert attention from the legally imposed responsibility of the member, to an argument without relevance to the alleged misconduct.

478. Lawyers are obligated under the *Code of Professional Conduct*, Chapter 3, to respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a reply.

479. The Hearing Panel finds that the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.

480. **Citation 50** alleges the member failed to cooperate with the Law Society by not providing his file as requested.

481. Having not received a substantive response from the member to its May 2, 2008 request for information, nor subsequent follow-up letter of May 22<sup>nd</sup>, the Law Society requested the member's file on June 5, 2008 for purpose of examination so as to determine what had occurred on the file.

482. The member never did send his file to the Law Society. His failure to deliver his file impeded the Law Society's investigation into the member's alleged misconduct.

483. Section 53 of the *Legal Profession Act* permits the Executive Director to demand the member's file.

484. The Hearing Panel finds that the member failed to cooperate with the Law Society by not providing his file as requested, and that such conduct is conduct deserving of sanction.

#### **Citations 51 to 53 (Relating to S.V.)**

#### **Summary**

485. The member acted for S.V. in a divorce and matrimonial property action. The settlement involved payment of support and the transfer of portions of a previously matrimonial RSP. The matter was complicated by the ex-husband's bankruptcy and the client was unhappy with the delays.

486. The client made a complaint and arising out of the complaint, the member was charged with failing to serve the client conscientiously and diligently, failing to respond to the client in a timely fashion, and failing to respond to the Law Society of Alberta in a timely fashion.

487. The Hearing developed through the admission of an Agreed Statement of Fact [Exhibit 288], and the member testified. The client was not called.

### **Evidence**

488. The client's complaint had to do with delays inherent in the divorce, especially the receipt of support payments after the end of each month instead of in a timely fashion and delays in transferring RRSP's into her name.

489. The member explained that there was no practical solution to the complaint of support payments. The ex-husband was up-to-date in his payments but had paid them through Maintenance Enforcement, which took some time to send the money to the ex-wife.

490. Further, the client was unhappy with the delay in transferring securities into her RRSP. The member testified that this related to the bankruptcy of the ex-husband and the intransigence of the bankruptcy trustee.

491. The member testified that he engaged the Bankruptcy Trustee, the ex-husband's lawyer, and the ex-husband himself in an attempt to resolve these matters. It may have been helpful for the member to instruct his client that they were doing things, as reasonably practicably, as the situation allowed and that further expense such as more telephone calls, more letters, or more Court Applications might not be financially efficient. Indeed, in an appropriate case it might be seen that a failure to communicate with a client in such a fashion and put choices before her (for example proceed slowly, practically and relatively cheaply versus many, expensive court application). However in this case, the

counsel for the Law Society does not seek a conviction, as he is of the view that  
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the member's conduct on this file does not reach the level of sanctionability. The Hearing Committee agrees. **Citation 51** is not made out, and is dismissed.

**Citation 52 – Failure to respond to the client**

492. As mentioned above, in an appropriate case, the failure to give the client legal advice out of which she could make choices in the conduct of her litigation might be considered to be a failure to respond to a client. However, in this case, it is not clear what specific communications by the client were such as to contemplate a reply. The client was not called to testify. The member testified as to her contact with him and his staff. In the absence of reliable evidence establishing specific communications contemplating a reply, the Hearing Committee finds that this citation is not made out and dismisses this citation.

**Citation 53 – Failure to respond to the Law Society of Alberta in a timely fashion**

493. The member admitted at the Hearing that by this time he had received several Section 53 requests from the Law Society and that at the time he thought that the Law Society was sending the Section 53 requests without regard for an appropriate attempt to mediate the differences between the member and the client.

494. At the Hearing the member did accept the authority of the Law Society of Alberta or its properly delegated employees to require a response and his responsibility to give such a response. The member also admitted that the Law Society could have used more information in responding to this client's complaint.

495. The member's defense was that this was a matter that did not need a formal section 53 letter and that a client mediation would suffice. The Hearing Committee reiterates that the member cannot unilaterally decide which requests of the Law Society are appropriate to respond to.

496. The Hearing Committee finds that the member failed to respond in a timely manner to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.

### **Citations 54, 55 and 56 (Relating to trust account Rules)**

#### **Introduction**

497. Citations 54 to 56 relate to the trust account Rules of the Law Society.

498. The citations allege the member failed to follow accounting rules and failed to rectify his accounting rule deficiencies in a diligent or timely manner, that the member failed to cooperate with the auditors and investigators in a complete, appropriate and timely manner, and that the member accepted cash in excess of \$7,500.00, and that all such conduct is deserving of sanction.

499. At the conclusion of the hearing of evidence, the member submitted a statement of admission of guilt of conduct deserving of sanction in respect to Citations 54 and 56. The Hearing Panel accepts the member's statement as having been submitted to the Executive Director pursuant to section 60 of the *Legal Profession Act* and finds the statement to be in an acceptable form.

500. At the conclusion of the hearing of evidence, counsel for the Law Society elected not to pursue conviction on Citation 55, which had alleged the member failed to cooperate with the auditors and investigators in a complete, appropriate and timely manner.

501. The Agreed Exhibit Book was referred to, and additional exhibit [Tab 362] and the member's statement of facts were entered with consent. The member gave evidence and was cross-examined by counsel for the Law Society.

### **Statement of Facts**

502. The citations arise from the complaint of the Law Society.

503. On August 1, 2006, the Law Society began the process of auditing the member's trust account, pursuant to Rule 130 of the Rules of the Law Society.

504. On August 1, 2006 the Law Society's auditor met with the member at which time the member disclosed that he had not reconciled his trust account since November 30, 2005. As a result, the audit could not proceed at that time.

505. On January 4, 2007, the Law Society wrote to the member in part to require the member to deliver his trust reconciliations for 2006 to the Law Society. At that time, the member maintained two trust accounts; his original account at the CIBC (the old account) and a new account at TD Bank, which account he opened on the direction of the Law Society.

506. On January 8, 2007, the member replied, providing his accountant's rough notes for the October, 2006 reconciliation of the old account, and explaining that he was waiting for the bank statements with regard to the December, 2006 reconciliation.

507. On January 15, 2007, the Law Society responded noting that the November 2006 reconciliation of the new account due January 2, 2007 had still not been received.

508. On January 16, 2007, the member delivered the November 30, 2006 reconciliation of the new account to the Law Society and the Law Society acknowledged receiving it by letter dated January 28, 2007 but noted that the December 2006 reconciliation was due by January 30, 2007.

509. On February 15, 2007, the member replied by email outlining his explanation for being unable to provide the trust account reconciliation for the old account.

510. On March 30, 2007, the Law Society performed a review of, among other things, the member's trust transactions and on April 2, 2007 the Law Society followed up with a letter confirming discussions with the member.

511. On October 2, 2007 the member's trust reconciliations of the old account were completed and sent to the Law Society and the Law Society was able to commence the actual audit.

512. On August 11, 2008 the Law Society issued its audit report. That report disclosed, among other things, that the member had received \$15,700 in

cash from a client as part of the purchase price in a real estate transaction, which the member was closing.

### **Evidence**

513. Prior to his attendance at the member's office on August 1, 2006 to conduct an audit, the member had not previously disclosed to the Law Society his inability to reconcile his trust account.

514. The Law Society requested the member to freeze his trust account but the member refused.

515. An application was brought before the Law Society on October 19, 2006 for the member's suspension under Section 63 of the *Legal Profession Act*. The member was not suspended but several conditions were imposed on the member; including a condition that the member open a new trust account, refrain from paying any money out of the old trust account except to client beneficiaries, and to provide monthly reconciliations of the new account to the Law Society.

516. The new account was actively used for transactions while no new transactions were run through the old account. The balance in the old account was slowly depleted as files were closed and funds were paid out of it. The member's accountant attempted to reconcile the old account.

517. In response to a request from the member, the Law Society wrote the member January 4, 2007 to advise that the member was not permitted to transfer funds from the old account to the new account to assist the member in

closing files. The member transferred funds out of the old account at the end of February, 2007 despite the Law Society's direction not to.

518. In January 2007 the member's old account had not yet been reconciled.

519. On January 15, 2007, the Law Society wrote the member asking for the November, 2006 reconciliation of the new account which was to have been submitted to the Law Society within 30 days of month end. The Law Society asked that it be submitted by noon on January 16, 2007. The member complied and provided paperwork for the new account, which had been open for two months, showing it was reconciled to within \$0.03.

520. The member was hospitalized February 12<sup>th</sup>, 2007. He notified the Law Society of this and that such occurrence would delay his response to issues that arose during his meeting with the Law Society earlier that same day.

521. In February 2007, and prior to reconciling the old account, the member transferred about \$1.1 million from his old account to his new account, contrary to the conditions imposed by the Law Society. The member also transferred approximately \$79,000.00 out of the old account to a separate account on account of fees, contrary to the conditions imposed by the Law Society.

522. It was the member's evidence that his inability to reconcile his old account was due in large part to his practice outgrowing his manual accounting system. Contributing factors that prevented his timely reconciliation included, departure of staff member that routinely performed the reconciliation, inability to retain staff to competently perform the reconciliation function,

several assistants with different handwriting making entries onto the manual system, and staff misplacing the manual ledger cards.

### **Rule 130 Audit**

523. Following the member's reconciliation of his old account, a Rule 130 audit was conducted. The auditor's report was issued August, 2008 and confirmed that as at the commencement of the audit on August 1, 2006 the member's trust account had not been reconciled for seven months, contrary to the Rules.

524. The report also indicated two trust shortages arose in 2006: a shortage of \$85,000 for 51 days, and a shortage of \$112,885 for 19 days. Both were real estate files and the member failed to report the shortages to the Law Society.

525. The member testified that the two trust shortages arose as he had relied on correspondence from two different lenders claiming they had each deposited money to the member's trust account. The member wrote cheques on his trust account believing the deposits had been made when in fact they had not. The member contacted the Practice Adviser at the Law Society regarding the shortfall and was told to cover the shortfall with the member's own funds and to report the shortfall to each of the Law Society's Director of Audit and to the Practice Advisor. The shortage was corrected when the two lenders ultimately deposited funds to the member's trust account. The member did not report the shortfall. The member testified that he had wanted to first get his trust account reconciled before reporting the shortfall.

526. The audit revealed that the member had, contrary to the Rules, accepted in excess of \$7,500 cash from a client as part of a real estate transaction. The member's trust journal and the trust ledger card did not reflect that he had received any cash from the client nor distinguished the deposit of cheques versus cash, as is required by the Rules.

527. The member testified that he represented a purchaser of real estate who attended at his office late on a Friday to drop off the purchase money. The member was absent at the time and the client left three bank drafts plus \$15,700 cash with his assistant. While the member thought he would have to complete forms under federal money laundering legislation at his bank when he made the deposit, he was not aware handling the cash would also offend the Law Society's Rules. The member personally attended his bank to make the deposit later that same day. Although he asked to be provided with any necessary forms for him and his client to complete, the bank did not require any such forms and so the member simply deposited the cash to his trust account.

528. The audit revealed that trust reconciliations had not been properly completed, that the member had not filed his Form S and Form T for the year ended June 30, 2007, and that the member's trust receipt journal had not been properly maintained, all contrary to the Rules. The member did not identify the method of receipt of trust funds as to cash, bank draft or certified cheque, as was required.

529. The audit also revealed the member's general receipts journal had not been properly maintained. The member had not identified the method of receipt of general funds as to cash, bank draft or certified cheque, contrary to the Rules.

530. During the course of the audit it was also detected that the member's GST filings were nine months behind, contrary to the Rules.

531. The audit indicated the member had not deposited trust funds expeditiously into his trust account. The member had endorsed trust cheques and passed them on to third parties rather than depositing them in his account, contrary to the Rules.

### Decision

532. **Citation 54** alleges the member failed to follow accounting rules and failed to rectify his accounting rule deficiencies in a diligent or timely manner.

533. The member failed to reconcile his trust account for a period of almost two years (November 30, 2005 to October 2, 2007). It was not until the auditors had arrived at the member's office to conduct an audit that the member first disclosed that he had not reconciled his trust account for some time.

534. Rule 122(2)(j) requires a comparison, dated and signed by the member, to be prepared within 30 days of the month end, showing any differences between the total of the member's trust accounts and the total of all unexpended trust balances as per the trust ledger accounts, together with reasons for such differences.

535. The member also failed to report as required under the Rules, two trust shortages totaling approximately \$197,000. One shortage was for 51 days, and the other for 19 days. The member had not filed his Form S and Form T for

the year ending June 30, 2007. The member's trust receipt journal had not been properly maintained to show whether payments had been made via cash, bank draft or certified cheque. Nor was the member's general receipts journal properly maintained, the member having failed to identify whether payments were made via cash, bank draft or certified cheque. The member's GST filings were nine months behind. The member had also endorsed trust cheques and passed them on to third parties instead of depositing them to his trust account.

536. The Rules relating to lawyer's trust accounts and other accounts are important for the protection of clients, to ensure funds deposited with a lawyer are safe and completely accounted for. Mr. Broda had failed to reconcile his trust account for nine months and then took an additional year to complete that reconciliation.

537. Pursuant to the member's statement of admission of guilt of conduct deserving of sanction, the member acknowledged that he failed to reconcile his trust account on a monthly basis.

538. The Hearing Panel finds that the member failed to follow accounting rules and failed to rectify his accounting rule deficiencies in a diligent or timely manner, and that such conduct is conduct deserving of sanction.

539. Counsel for the Law Society elected not to pursue conviction on **Citation 55**, which had alleged the member failed to cooperate with the auditors and investigators in a complete, appropriate and timely manner. The position of the Law Society was that while the member could have resolved the issues more quickly, the evidence did not reach the level of a failure to

cooperate. Accordingly the Hearing Panel makes no finding in respect to **Citation 55.**

540. **Citation 56** alleges that the member accepted cash in excess of \$7,500.00.

541. The audit conducted by the Law Society revealed that the member had received \$15,700.00 in cash from a client as part of the purchase price in a real estate transaction, which the member was closing.

542. Rule 125.1 prohibits a member from accepting cash in excess of \$7,500.00. Pursuant to the member's statement of admission of guilt of conduct deserving of sanction, the member acknowledged having received \$15,700.00 in cash from a client.

543. The Hearing Panel finds that the member accepted cash in excess of \$7,500.00, contrary to the Rules, and that such conduct is deserving of sanction.

DATED this 3<sup>rd</sup> day of November, 2009.

Brian Peterson Q.C. (Chair)

Fred Fenwick Q.C.

Scott Watson Q.C.

**DECISION ON SANCTION**

On March 03, 2010 the Hearing Committee reconvened to decide the appropriate sanction. After hearing evidence and argument the Hearing Committee directed the member be disbarred and pay the actual costs of the hearing, set as \$31,748.20. The Hearing Committee will be providing written reasons for its decisions. The reasons will be published when released.