IN THE MATTER OF THE *LEGAL PROFESSION ACT*
AND
IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
EDMUND MARK KEOHANE, A MEMBER OF THE LAW SOCIETY
OF ALBERTA

REPORT OF THE HEARING COMMITTEE

A. INTRODUCTION

1. On November 28, 2013 and January 24, 2014, a Hearing Committee, convened at the Law Society of Alberta (LSA) office in Calgary, Alberta, to inquire into the conduct of Edmund Mark Keohane (the Member). The LSA was represented by Mr. Tim Meagher (Mr. Meagher). The Member was represented by Mr. Sean Smyth (Mr. Smyth).

2. A Notice to Solicitor was issued on August 29, 2013.

B. JURISDICTION AND OTHER PRELIMINARY MATTERS

3. Exhibits 1 through 4, consisting of Letter of Appointment of the Hearing Committee, Notice to Solicitor, Notice to Attend, and Certificate of Status of the Member respectively establish jurisdiction of the Hearing Committee.

C. PUBLIC HEARING

4. The Hearing was held in public.

D. CITATIONS

5. Exhibit 2**,** being the Notice to Solicitor, lists three Citations:

    1. It is alleged that you failed to act in good faith when you altered a transfer of land and falsely endorsed on it that you did so with the consent of counsel for the vendor, and that such conduct is conduct deserving of sanction;

    2. It is alleged that you failed to act in good faith in the preparation and execution of documents, and that such conduct is conduct deserving of sanction; and

    3. It is alleged that you failed to respond in a timely manner to communications from another lawyer, and that such conduct is conduct deserving of sanction.

EVIDENCE

6. Testimony was heard from the complainant Mr. Scott, LLB (Mr. Scott) and the Member.

BACKGROUND

7. On August 6, 2010 an Offer to Purchase was completed between the purchaser and the vendor, indicating a purchase price of $4,400,000 with a closing date of November 30, 2010. Mr. Scott represented the Vendor, the Member represented the Purchaser.

E. CITATION 1 ANALYSIS

8. There is no evidence to support Citation 1 which alleges that the Member failed to act in good faith when he altered a Transfer of Land and falsely endorsed on it that he did so with the consent of Mr. Scott.

9. The Panel accepts the Member's evidence that it is the usual practice for a solicitor to make changes to the document as occurred in this case. The agreement between the parties was always that the title would be in the name of C.C. or in the name of C.C.'s designate. In this instance, C.C. chose to have the title placed in the name of a numbered company. Mr. Scott, in his March 15, 2011 2:34 PM email to the Member raised concerns that the "document" read that the name of the transferees had been changed with Mr. Scott's consent and that the Member was doing so as his agent. Mr. Scott advised that he had no recollection of giving the Member such consent. Whether or not, Mr. Scott gave his consent, it is the finding of the Hearing Committee that Mr. Scott's consent was implied and if it was not, consent was not necessary given that the contract allowed for title to be placed in the name of a designate of the Purchaser and Mr. Scott was aware and had been informed of that possibility.

10. Given the above, the finding of the Hearing Committee is that there is no evidence to support Citation 1. Citation 1 is hereby dismissed as the evidence is clear that the Member did act in good faith, when he altered the Transfer of Land. The Member did not falsely endorse the Transfer of Land, as Mr. Scott's consent was implied. In addition, the actions of the Member followed the usual protocol used in the circumstances of these matters.

F. CITATION 2 ANALYSIS

11. There is no evidence to support Citation 2, which alleges that the Member failed to act in good faith in the preparation and execution of documents.

12. The evidence shows that the Member, on December 12, 2010, emailed Mr. Scott, in compliance with Mr. Scott's trust conditions, his form of "undertaking to report an indemnity agreement" (**Exhibit 25**) executed by and identifying the Member's client's nominee, Numbered Company being XXXXXXX Alberta Ltd. The Hearing Committee agrees that the Member was under no obligation to provide drafts of security documents even though he did so, in part, at the request of Mr. Scott. It is the finding of the Hearing Committee that Citation 2 is unproven and is dismissed.

G. CITATION 3 ANALYSIS

13. There is ample evidence to support the allegation that the Member failed to respond to Mr. Scott's communications in a timely fashion. In coming to the decision that Citation 3 is proven, the Hearing Committee referenced the Code of Conduct, paragraphs 39, 41, 47, 48, 49, 50, and 51.

Applying the LSA Code of Professional Conduct

> *Chapter 4, the Statement of Principle is that:*
>
> *"A lawyer has a duty to deal with all other lawyers honourably and with integrity."*
>
> *And I would ask you to look at Rule 5 of Chapter 4:*
>
> *"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."*
>
> *The commentary at page 4-5, states:*
>
> *"Responding promptly to telephone calls and correspondence and being punctual for appointments are important aspects of courteous professional dealings. Much of the delay and tardiness displayed by lawyers has no substantial justification .... Even in circumstances in which the information sought cannot or ought not to be provided, the lawyer is ethically obliged to courteously recognize the request."*

14. The Member testified that he was instructed not to negotiate with Mr. Scott. If so, then he at least owed Mr. Scott the courtesy of advising him that his instructions were: not to negotiate with Mr. Scott, not to reply to him on the issue of the guarantee and the promissory note, and that the clients were still working out the terms of that agreement. Lawyers have a professional obligation to "rise above the fray" of ill will between their clients.

Chapter 1, Rule 6,

> *"A lawyer must be courteous and candid in dealings with others."* The Member was not being courteous and candid in his dealings with Mr. Scott.
>
> *"A lawyer has an obligation to refrain from conduct that is rude, dishonest or misleading or that is otherwise inconsistent with the lawyer's professional standing. This obligation includes the duty to respond within a reasonable time, given all the circumstances, to telephone calls, correspondence and other communications".* (**Chapter 1, Commentary 6**)

15. Examples of the lack of response to Mr. Scott by the Member are set out below:

   i. On December 2, 2010, Mr. Scott emailed the Member stating: "Also, can you provide me with drafts of the documentation in relation to the $320,000 loan back?" (**Exhibit 35**)

   ii. On December 3, 2010, Mr. Scott emailed the Member stating: "There is nothing else, nor can there be, because it would violate my clients' financing arrangements." (**Exhibit 35**)

   iii. On December 3, 2010, Mr. Scott wrote to the Member: "Do your clients' financing arrangements preclude them from signing the personal guarantees?" Mr. Scott sent another email, also on Friday, December 3rd, (**Exhibit 12**) to the Member which was never answered. He also makes comments that: (as read) "If the registered owner is going to be a numbered company, then repayment of the loan must be guaranteed." "What is the name of the company to whom this property's going to be transferred?"

   iv. On December 4, 2010 the Member sent an email message to Mr. Scott. He does not tell him the name of the transferee, but he did state: "Any further securitization will require a reconsideration of the lending parameters." (**Exhibit 35**)

   v. On December 7, 2010 Mr. Scott sent an email to the Member asking for a response advising of the name of the transferee and reiterating his client's position that personal guarantees are required. The Member did not respond. (**Exhibit 13**)

   vi. On December 9, 2010 Mr. Scott sent a letter to the Member asking him to provide drafts the next day. The Member testified that he was puzzled by this request.

   vii. There is no evidence that the Member ever told Mr. Scott that he would not undertake to draft the security documentation. He did not tell him that he had instructions from his client to not negotiate. He did not give Mr. Scott the courtesy of a reply to the letter sent on December 9, 2010. Thus, Mr. Scott was left believing that the Member was going to prepare documents with a promissory note on the terms set out in this letter, and that he was going to provide guarantees, notions he did not dispel until January 31st, 2011.

   viii. On December 12, 2010, the Member sent Mr. Scott the executed Undertaking to Report and Indemnity Agreement. (**Exhibit 15**) The covering note has the subject, noted as, "Re: C.C. and S.H." The Member wrote: "Lorne, further to your trust conditions, please find attached a copy of the executed Undertaking to Report and Indemnity Agreement. I'll of course send you the original."

ix. The Member crossed out the name "C.C." and put in the numbered company's name, but did not extend Mr. Scott the courtesy of advising him in the covering email that he altered the agreement.

x. On December 13, 2010 Mr. Scott asked the Member the identity of the purchaser and requested copies of the security documents. The Member did not respond until January 31, 2011. In the meantime, Mr. Scott telephoned the Member, on the afternoon of December 13, 2010 and wrote a follow up email on December 14, 2010. After these communications, the Member and Mr. Scott had a telephone conversation on the afternoon of December 14, 2010. (**Exhibit 37**)

xi. Mr. Scott advised the Member that his failure to respond is upsetting his client, and they are on the verge of instructing him to take this matter up with the Law Society. "I don't want to do that, but I must hear from you." He asks him:

"What is causing the delay in registration, what is the identity of the purchaser, is it a numbered company, and where are the security documents for $320,000 for me to review?"

The Member did not answer the question asked, regarding the identity of the purchaser, and he did not answer the question about the security documents, until January 31, 2011.

"You have not responded to my email yesterday, nor my phone call today." (**Exhibit 37**)

xii. On December 22, 2010, the Member wrote to Mr. Scott advising him that the trust cheque will be picked up and delivered to Mr. Scott tomorrow, and that occurred. (**Exhibit 39**)

xiii. On January 6, 2011, Mr. Scott wrote to the Member stating: "Please be advised we are still waiting for the fully executed promissory note and personal guarantees with respect to the $320,000." (**Exhibit 18**) At this point the Member has not dispelled the notion that the promissory notes and guarantees were not coming. In January, Mr. Scott was still expecting to receive them.

xiv. On January 12, 2011, Mr. Scott wrote to the Member. (**Exhibit 19**) (It is obvious they had a telephone conversation.) Mr. Scott advises he is continuing to await the promissory note, and he sets out the terms which are the same terms as contained in his letter of December 9, 2010, except he makes a mistake, and he says that the loan will be paid out within one, instead, of five years. Mr. Scott believes the documents are coming on those terms.

xv. On January 25, 2011, Mr. Scott wrote to the Member stating: "As a follow-up to our telephone call yesterday, I confirm your advice that you are meeting with your clients tomorrow or Wednesday to get the promissory note and guarantees executed. You said you would email them to me and send the originals. Are you going to courier them? Mark, I am very anxious to get this matter cleaned up. The closing date was December 1, 2010, and it is now almost two months later." (**Exhibit 54**) On January 26, 2011, the Member sent an e-mail message to his client with attached forms of the promissory note and guarantee, for his client's review. (**Exhibit 52**)

xvi. On January 28, 2011, Mr. Scott wrote the Member, asking: "Where are my documents? I don't want this to get ugly." (**Exhibit 54**)

xvii. On January 31, 2011, for the first time the Member advised Mr. Scott that: "I prepared and provided documents to my clients last week. I understand that the details provided by you, and upon which the documents were prepared, do not coincide with my clients' discussions with your clients or with the amounts in respect of which my clients and your clients have agreed and in fact are currently transacting." (**Exhibit 54**) Thus, for the first time the Member advises Mr. Scott of his understanding that the clients have not come to terms on the underlying agreement about how the promissory note is going to be repaid.

xviii. On February 8, 2011, Mr. Scott wrote to the Member and said: "Please advise, at your very earliest, as to the status of Personal Guarantees and Promissory Note" (**Exhibit 20**). February 10, 2011, the Member responded stating: "I'm scheduled to meet with the clients on Monday." (**Exhibit 40**)

xix. On February 16, 2011, the Member wrote to Mr. Scott advising that his clients could not make the scheduled meeting. He was rescheduled to meet with them on Friday February 18th. (**Exhibit 21**) On February 21 2011, Mr. Scott wrote to the Member asking: "Did you have your meeting on Friday?" (**Exhibit 21**). On February 21, 2011, the Member responded: "Yes, we had a meeting. I will forward the documents to you next Monday." (**Exhibit 21**)

xx. By March 1, 2011, Mr. Scott was still waiting for the documents and requesting that they be forwarded. Mr. Scott wrote to the Member stating: "Have you forwarded the documents? Please do so." (**Exhibit 21**)

xxi. At the end of the day, when the information does come in March, it adds insult to injury to Mr. Scott, and it's discourteous to Mr. Scott, because it's the same question he's been asking since December. Mr. Scott wrote to the Member on March 15th, 2011 (**Exhibit 21**), asking him: "Can you advise me how and when I gave you the consent to change the name of

transferee?" The Member never responded to Mr. Scott. The expected response, if there had been verbal authorization, would be: I told you this in a telephone conversation of December 14th or some date.

xxii. Two weeks later, on March 14, 2011, Mr. Scott wrote to the Member, stating: "Where are the documents? "I will refer the matter to the Law Society if I don't receive them next week." (**Exhibit 21**) On Monday, March 14th, the Member wrote to Mr. Scott, stating: "The documents were to have been delivered last week, but we forgot to provide them to the UPS agent. They should be there tomorrow."

xxiii. On March 15, 2011 Mr. Scott sent an email message to the Member advising that he has no recollection of giving consent to alter the transfer, and he asked the Member to "advise how and when I gave the consent." (**Exhibit 21**) The Member never answered that question.

xxiv. On March 18, 2011, Mr. Scott wrote to the Member. It is clear Mr. Scott is not pleased with the security documents. He states the promissory notes and guarantees are not acceptable, and he asks the Member how he wishes to correct them. (**Exhibit 24**) The Member never answered this letter.

16. We agree with LSA Counsel that a failure to respond or a failure to respond in a timely fashion is something that could cause anxiety, uncertainty, and ill will between lawyers and between clients. We agree that this failure to respond shows a lack of respect and a lack of consideration for Mr. Scott, and is contrary to the Code of Conduct.

17. The Member's evidence was clear that he did not see the need to respond to Mr. Scott in a timely fashion. It appears from the evidence that the Member was under instructions from his clients not to communicate with Mr. Scott at certain times during the course of the file. The impression left with the Hearing Committee is that the Member does not care about the professional responsibility to respond to Members of the LSA.

LSA Code of Conduct

18. Page 1, the preface of the Code, the third full paragraph reads:

> *"The legal profession is largely self-governing and is therefore impressed with special responsibilities. For example, its rules and regulations must be cast in the public interest, and its members have an obligation to seek observance of those rules on an individual and collective basis. However, the rules and regulations of the Law Society cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider legislation relating to lawyers, other legislation, or general moral principles in determining an appropriate course of action.*
>
> *Disciplinary assessment of a lawyer's conduct will be based on all facts and circumstances as they existed at the time of the conduct, including the willfulness*

and seriousness of the conduct, the existence of previous violations and any mitigating factors."

Interpretation

(3) *"**Assessing conduct**: (a) Conduct deserving of sanction: Under the Legal Profession Act, the Law Society has broad powers to declare conduct to be deserving of sanction and is not limited to disciplining violations that are expressly or impliedly referred to in this Code.*

However, the Law Society's primary concern is with conduct that reflects poorly on the profession or that calls into question the suitability of an individual to practice law. Disciplinary assessment of conduct will therefore be based on all facts and circumstances as they existed at the time of the conduct. A trivial or technical breach of this Code without significant consequences is unlikely to be sanctioned. A lawyer's intentions and the willfulness of conduct are also relevant."

Chapter 1, Rule 3:

"A lawyer must not act in a manner that might weaken public respect for the lawyer or justice system or interfere with its fair administration."

And Rule 6:

"A lawyer must be courteous and candid in dealing with others."

And the commentary to Rule 3, a:

"Society expects that the legal profession will play a leading role in protecting the integrity of the justice system and ensuring that it functions property. A lawyer's behavior is incompatible with this role if it encourages public disdain or disregard for the administration of justice."

19. The commentary to Rule 6 states:

"A lawyer has an obligation to refrain from conduct that is rude, dishonest or misleading or that is otherwise inconsistent with the lawyer's professional standing. This obligation includes the duty to respond within a reasonable time, given all the circumstances.... "

Chapter 3:

"A lawyer must refrain from personal or professional conduct that brings discredit to the profession."

And the commentary:

> *"Because of a lawyer's quasi-official position in society, the personal and professional behavior of a lawyer may attract more attention than that of a non-lawyer and may directly or indirectly influence the public's perception of the justice system and the profession. It follows that a lawyer has a responsibility to avoid even the appearance of impropriety, and to act in a manner that encourages the confidence, respect and trust of society."*

20. In the commentary, found at Chapter 4-3, G.2 it is stated that:

> *"Good relations among members of the bar are important from several perspectives. They contribute to the effective and expeditious dispatch of clients' business while enhancing working conditions for lawyers. To the extent that dealings among counsel are observed by the public, polite and professional conduct fosters respect for lawyers on an individual and collective basis. Conversely, rude or offensive behavior reflects adversely on the lawyer involved, the profession and the administration of justice."*

21. The Member breached the above referenced Rules.

22. What is also disturbing to the Hearing Committee is the exchange of emails between the Member and Mr. Scott between March 14 and 15, 2011. In the March 14, 2011 11:25 AM email, Mr. Scott requests the promissory note and the guarantees, attaching the correspondence exchanged between him and the Member. Mr. Scott reveals his frustration at the Member's failure to deliver the documents. Mr. Scott advises that if the documents are not in his hands "this week I will refer this file to Law Society for review". The Member responds, by e-mail, on March 14, 2011 at 5:40 PM: "again, with all due respect, I couldn't care less who you refer the matter to". It is concerning to the Hearing Committee that a member of a self-regulated profession would not care that a fellow member of the Bar would report him to the LSA. This raises a concern regarding the governability of a member. The Member testified that he was frustrated at the communications he was receiving from Mr. Scott. Regardless of the frustration of the Member, it is inappropriate to respond to a fellow Member of the LSA in the manner in which the Member did on this occasion.

H. DECISION REGARDING SANCTION

23. Looking at the totality of the evidence in relation to Citation 3, it is the unanimous finding of the Hearing Committee that the Member failed to respond in a timely manner to communications from Mr. Scott and that such conduct is conduct deserving of sanction. Citation 3 is proven and deserving of sanction.

I. SANCTION

24. After hearing submissions on sanctions, the Panel determined that a reprimand is the appropriate sanction under the circumstances.

I. COSTS

25. Counsel for the LSA offered an Estimated Statement of Costs (the Cost Estimate) in the amount of $7,357.87 to be finalized at a later date.

26. After hearing from both counsel, the Panel ordered the Member to pay costs of $5,000 and to pay all costs within 30 days from receipt by him of the final statement of costs.

J. CONCLUDING MATTERS

27. The Exhibits in these proceedings shall be available to the public with redaction of client names to protect solicitor-client privilege.

28. There shall be no Notice to the Profession.

29. There shall be no referral to the Attorney General.

30. There shall be no referral to Practice Review.

DATED this 2 day of June, 2014.

ROSE M. CARTER, QC
Chair

BRETT CODE, QC
Member

CAL JOHNSON, QC
Member