



**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 THOMAS CHIU, a Member of the Law Society of Alberta**

INTRODUCTION

1. On November 24, 2009 and February 5, 2010, a Hearing Committee of the Benchers convened at the Law Society office in Edmonton to inquire into the conduct of Thomas Chiu (the "Lawyer"). The Committee was Kevin S. Feth QC, Chair, John Higgerty, QC, and James A. Glass, QC. The Law Society of Alberta (the "LSA") was represented by Lois MacLean. The Lawyer was present for the Hearing and was represented by Stewart Baker, QC.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1, 2, 4 and 5, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Certificate of Status of the Lawyer, and the Certificate of Exercise of Discretion by the Director, Lawyer Conduct, established the jurisdiction of the Committee.
3. The Parties had no objections to the composition of the Hearing Committee to deal with this matter.
4. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. Neither the LSA nor the Lawyer requested a private hearing; consequently, the Hearing was held in public.

CITATIONS

5. The Lawyer initially faced the following citations:
 - a. It is alleged that you failed to serve your client in a conscientious, diligent and efficient manner, and that such conduct is deserving of sanction.
 - b. It is alleged that you failed to respond to your client on a timely basis, and that such conduct is conduct deserving of sanction.

- c. It is alleged that you failed to keep your client informed as to the progress of the client's matter, and that such conduct is conduct deserving of sanction.
6. The Parties made a joint application during the Hearing for the citation to be amended. Following discussions with the Hearing Committee, the Parties proposed and the Panel approved a consolidated amended citation, which in its final form reads as follows:
 - a. It is alleged that you failed to serve your client in a conscientious, diligent and timely manner, and that you failed to communicate with your client on a timely basis and that such conduct is conduct deserving of sanction.
7. The final citation concerned the Lawyer's failure to report to his client (identified here as R.F.) in a timely fashion about the settlement of litigation, his failure to place substantial client funds into an interest bearing trust account, his failure to effect the timely transfer of the settlement funds to his client, and a lack of timely follow up with his client's representative once the oversights came to light.
8. The client, R.F., has diminished capacity due to a brain injury. The complaint about the Lawyer's conduct was directed to the LSA by the client's mother (identified here as the "Complainant"). During the Lawyer's retainer, the Complainant served as R.F.'s representative.

SUMMARY OF RESULT

9. At the Hearing, the Lawyer verbally entered a Statement of Admission of Guilt on the consolidated amended citation, which was accepted by the Hearing Committee.
10. The Parties initially made submissions on sanction on November 24, 2009. However, the Lawyer requested an adjournment, so that he might be afforded an opportunity to make restitution to his client. With the consent of the LSA, the Hearing was then adjourned to February 5, 2010 at which time the Hearing Committee received the balance of the evidence and submissions about sanction.
11. The Hearing Committee imposed the following sanctions:
 - a. a reprimand;
 - b. a fine of \$1000;
 - c. a direction that the Lawyer pay one-half of the actual costs of the Hearing;
 - d. a direction that the Lawyer comply with the four recommendations in the Practice Assessment Report dated October 27, 2009.

EVIDENCE

12. A Binder containing Agreed Exhibits numbered 1 – 15 was entered by consent of the Parties at the start of the Hearing.
13. An Agreed Statement of Facts was entered as Exhibit 16. Paragraph 2 of the Agreed Statement of Facts, which contained the initial version of the citations, was subsequently amended to reflect the final version of the consolidated amended citation. The last sentence of the final paragraph of the Agreed Statement of Facts was deleted in accordance with that amendment.
14. During the course of the Hearing, Exhibits 17 – 22 were received into evidence.
15. The discipline record of the Lawyer with the LSA was entered as Exhibit 23, by consent of the Parties, and showed that the Lawyer had no prior disciplinary record.
16. Counsel for the LSA tendered an estimated statement of hearing costs, which was entered as Exhibit 24 by consent.
17. A letter dated October 27, 2009 from the Practice Review Department of the LSA and an attached Practice Assessment Report dated October 27, 2009 (the "Practice Assessment Report") were received collectively as Exhibit 25 by consent.
18. A letter dated January 28, 2010 from the Lawyer's counsel to the Complainant, informing the Complainant of her entitlement to retain legal counsel to make a claim against the Lawyer on behalf of R.F., informing the Complainant that the Lawyer had reported the Complainant's concern to the Lawyer's professional liability insurer, and providing the Complainant with contact information for the insurer, was received by consent as Exhibit 26.

SUMMARY OF FACTS

19. The Lawyer has been a member of the LSA since 1991. The citation arises from a file in which the Lawyer acted for R.F. in litigation brought against her.
20. The material facts are largely found in the Agreed Statement of Facts (Exhibit 16), the most relevant portions of which are reproduced here:
 - "4. *In September, 1996 [R.F.] suffered a brain injury in a motor vehicle accident. She was a passenger in a vehicle owned by the [Complainant] and driven by an uninsured individual.*
 5. *In 2001, the [Complainant] retained Walter Mis to act on behalf of [R.F.] to pursue her claim for damages.*

6. *In April, 2002 Mr. Mis succeeded in settling the claims against both the [Complainant], as the registered owner of the vehicle, and the uninsured driver of the other vehicle. A third party, Mr. A.O., operating as W..., commenced an action against [R.F.] claiming a fee of \$98,000 for allegedly having assisted her in an AISH claim.*
7. *Mr. Mis advised [R.F. and the Complainant] that it was appropriate for another lawyer to deal with the dispute over the W..., and he recommended that [R.F.] and her mother [the Complainant] retain new counsel.*
8. *On June 11, 2003, Mr. Chiu was retained by [R.F.] to resolve the claim of A.O. and W....*
- ...
10. *On September 9, 2003, the member negotiated a Consent Order with the solicitors for O. and W..... It provided that \$98,000 from the money held in trust for [R.F.] was to be paid to the Clerk of the Court and that the balance of any monies held by Canadian Western Bank for the benefit of [R.F.] were to be paid to Mah & Chiu for disbursement to [R.F.] or upon her directions. The Order also provided that any funds held by Walter Mis were released from the action.*
11. *Pursuant to the Order, Mr. Mis sent to Mr. Chiu the balance of the settlement proceeds from his trust account amounting to \$59,249.46 including interest earned of \$4,833.10 (which was interest earned while the funds were in trust with Mr. Mis).*
12. *On March 23, 2004, Mr. Chiu wrote to [R.F.] informing her that he had received the sum of \$59,249.46, and he forwarded to her a T5 Statement of Investment Income. (Exhibit 9)*
13. *The funds were forwarded to the member from Mr. Mis by courier on October 9, 2003, with a letter confirming that the total amount which had been in his trust account was \$157,749.46, including interest earned. (Exhibit 10)*
14. *In October, 2004, the claim of A.O. and W... was resolved.*
15. *On October 26, 2004, the Clerk of the Court forwarded to Mah & Chiu the sum of \$95,108.31 as the O./W... claim had been settled. The funds were releasable to [R.F.] at that time.*
16. *That amount was deposited into Mr. Chiu's trust account. (Exhibit 11)*

17. *The letter of complaint from [the Complainant] (which is dated June 5, 2008), indicates that she had communications with Mr. Chiu in the spring and summer of 2004 with respect to a possible transfer of real estate...*
18. *[The Complainant's] complaint letter indicates that they made some unsuccessful attempts to contact Mr. Chiu, but that they were not able to speak to him directly until March, 2008 when [the Complainant] attended at Mr. Chiu's office...*
19. *Mr. Chiu's letter of August 20, 2008 to the Law Society acknowledges that he made no efforts to contact the [Complainant and R.F.] between October 2004 and March 2008. He indicates that he was waiting to hear from them. (Exhibit 14)*
20. *There is some confusion as to the discussions between [the Complainant] and Mr. Chiu in March, however it appears that Mr. Chiu advised [the Complainant] that he had in his trust account the sum of \$138,183.75, and that the funds could be released to her.*
21. *Mr. Chiu's letter to the Law Society of August 20, 2008 indicates that he was very busy with real estate files at the time and that he discussed with [the Complainant] his concern as to when he would be able to report to her. His letter indicates that "she commented to me that it would be ok to report to her when I am able and that her main concern was to find out the whereabouts of the money which I again reassured her was all in my trust account".*
22. *Mr. Chiu went on to state "...[the Complainant] mentioned some details of a land deal that she has requested me to complete. She mentioned that there was a contract and so I spent much of my free time looking for this contract in the file and elsewhere. I looked everywhere in the office without success. I simply do not recall seeing this contract that [the Complainant] mentions at all. This certainly caused some delay in my ability to report to the client in the time frame that I suggested. I wanted to provide a complete and accurate reporting to the client. Since our meeting, the client did not call me at all to inquire as to the progress of my reporting to her so I had no idea she wanted me to do so by March".*
23. *On June 4, 2008, [the Complainant] contacted the Law Society and provided a complaint letter dated June 5, 2008.*
24. *On June 9, 2008 the Law Society contacted Mr. Chiu by telephone and asked that he fax copies of his trust ledger showing that the funds were on deposit...*

25. *Mr. Chiu's letter to the Law Society indicates that he faxed the ledger card that same day. The ledger card confirmed that the funds were in Mr. Chiu's trust account. The records further confirmed that the trust account was a non-interest bearing trust account, and accordingly no interest had been earned from 2004 to 2008.*
26. *On June 12, 2008, Mr. Chiu issued a cheque to [R.F.] in the amount of \$138,183.75...."*
21. The Lawyer acknowledged at the outset of the Hearing that he failed to properly serve his client, but did not admit guilt on the citations as originally worded. Before the conclusion of the Hearing, the Lawyer tendered a Statement of Admission of Guilt on the consolidated amended citation.

ADDITIONAL EVIDENCE

22. During the Hearing, testimony was provided by the Complainant and the Lawyer.
23. The Complainant testified that she knew a settlement offer had been tendered on behalf of her daughter by the Lawyer in 2004, but did not know the outcome of the offer. She believed that the legal process would be slow, and that the Lawyer would follow up when the matter was settled and settlement funds were available, so thought nothing of the passage of years, or the absence of any reporting from the Lawyer. She tried to contact the Lawyer by telephone "once or twice", but only reached his voicemail. The "first time" she didn't leave a message. In a letter to the LSA dated June 5, 2008 (Exhibit 12), the Complainant stated that she subsequently left a message for the Lawyer to call, but that he never did.
24. In 2007, the Complainant sent at least one letter to the Lawyer asking about the status of her daughter's matter, but received no response.
25. By early 2008, the Complainant was worried, concerned that the Lawyer and her daughter's money might have disappeared.
26. In approximately February 2008, the Complainant sent a registered letter to the last known address for the Lawyer, which was returned by the post office as undeliverable. She then tried a second time, but again the letter was returned marked "undeliverable", suggesting that the Lawyer had moved.
27. The Complainant began to contact other lawyers, asking about what she should do. She was advised to contact the LSA.
28. In approximately late February 2008, the Complainant contacted the LSA to obtain an updated mailing address for the Lawyer, and then sent another registered letter to the Lawyer. Within approximately one week of mailing that letter, she received a telephone message from the Lawyer informing her that he

29. During the first week of March 2008, the Complainant went to the Lawyer's office without an appointment and waited to see him. They then briefly met. The Lawyer explained that he had moved "two or three times" since 2005, that he had R.F.'s file and the settlement funds, but that he needed time to locate the file. He noted that the matter had settled in 2004. He indicated that he expected to provide a letter of accounting and the settlement funds by the end of the month. The meeting appears to have ended amicably.
30. The Complainant did not hear from the Lawyer for several more weeks. There was no evidence before the Hearing Committee that she tried to contact the Lawyer again to follow up.
31. In approximately May 2008, the Complainant spoke with a representative of the LSA, who invited her to submit a complaint letter about the Lawyer, which she did by letter dated June 5, 2008.
32. A representative of the LSA then contacted the Lawyer on June 9, 2008, communicating the Complainant's concern and requesting a copy of the trust ledger card. The Lawyer immediately complied and thereafter contacted the Complainant to arrange for the transfer of the settlement funds. The Complainant picked up the settlement funds on June 12, 2008.
33. The Lawyer testified that R.F.'s matter was settled in October 2004. He believed that the Complainant was made aware of the settlement, although his memory was that he told her that certain steps needed to be taken to formally conclude the settlement process. He provided no record or memory of the Complainant subsequently being told that the settlement process was completed and the funds available for transfer to the client.
34. The Lawyer believed that transfer of the funds to the client needed to await the Complainant's efforts to resolve certain issues with AISH. The Lawyer's understanding from the Complainant was that immediate delivery of the settlement funds might compromise R.F.'s entitlement to AISH, or result in reduced AISH payments. He was not retained to deal with that issue and therefore waited for the Complainant to investigate and resolve it. As he did not know how long it might take to address the issue, he did not place the settlement funds into an interest bearing trust account. His thinking appeared to be that the AISH issue would be resolved in short order and that placing the funds in an interest bearing term deposit was either unnecessary or would restrict his ability to make a timely transfer of the funds once the AISH issue was resolved.
35. The Lawyer did not follow up with the Complainant about the AISH issue, nor did he confirm in writing that the litigation was fully settled and that he was

36. In approximately late 2005 or the beginning of 2006, the Lawyer and his long time law partner were exploring the end of their business relationship, which eventually resulted in the Lawyer moving to new office space. The Lawyer did not inform his clients of the move, believing that his former law partner would forward client messages and correspondence to him. That was a practice followed at the Lawyer's firm when other lawyers had departed in the past. In retrospect, the Lawyer believes that not all messages and correspondence were forwarded, which probably explains why he did not respond to the Complainant's earlier letters.
37. The Lawyer testified that he did not receive the voice messages left by the Complainant in 2007, and that he did not receive her letters, except for the final letter of February 2008, to which he responded by voice message left for the Complainant. That was then followed by the March 8, 2008 meeting at his new office.
38. The Lawyer's understanding of the March 8th meeting was that the Complainant was concerned that the settlement funds were safe, which he assured her was the situation. The Lawyer told her that he could "probably" prepare an accounting of the trust funds and make the funds available by the end of March. However, the Complainant then told him that there was an outstanding issue about the purchase of real estate for R.F., and that he held documents about that proposed transaction. The Lawyer could not recall the proposed real estate transaction, and informed her that he would need to look for the real estate documents and that he would get back to her. His impression was that the Complainant did not feel that immediate action was necessary.
39. The Lawyer spent considerable time looking for the real estate documents, but was unable to find them or a real estate file. He had a busy practice, including numerous real estate files requiring prompt attention, and therefore did not follow up with the Complainant for several weeks. He wanted to ensure that his final reporting to the client and the Complainant was comprehensive, including an accounting of the trust funds and a full response about the real estate documents.
40. The Lawyer did not communicate again with the Complainant until contacted by the LSA in June 2008, following which he immediately arranged for the trust funds to be available for pick up by the Complainant.
41. The Lawyer acknowledged before the Hearing Committee that his failure to place the client's funds in an interest bearing trust account, or to at least seek instructions about that possibility from the Complainant, was a "mistake".

42. The Lawyer also accepted that he should have been more "proactive" in contacting his client or the Complainant about the completion of the settlement process and the status of efforts to resolve the AISH issue.

FINDINGS RELATED TO THE ADMISSION OF GUILT

43. In accordance with Section 60 of the *Legal Profession Act*, the Lawyer verbally tendered to the Hearing Committee a Statement of Admission of Guilt to the consolidated amended citation, and invited the Hearing Committee to accept that admission of guilt.
44. The Law Society governs the profession in the public interest. To protect the public, lawyers are expected to be conscientious and diligent in protecting their clients interests, including the safe-keeping of money entrusted to the lawyer. The safety of trust funds is not limited to securing the funds in a financial institution, but also extends to protecting those funds against the erosion of value caused by inflation. While it is not necessary for trust funds to be placed in an interest bearing account in every circumstance, or to explore that possibility with the client in every situation, the circumstances here (including the substantial amount of funds and the uncertainty about how long the funds would be held) were such that the Lawyer should have explored that possibility with the Complainant on behalf of the client. The potential loss to the client was not inconsequential.
45. A lawyer's obligation to conscientiously and diligently serve his client also requires timely and meaningful reporting to the client, or as here, the client's representative. The absence of such reporting contributed to a breakdown in communication between the Lawyer and the Complainant, potentially compromising opportunities the client had to invest or otherwise utilize her funds for her betterment. Needless anxiety and a search for the Lawyer were occasioned on the Complainant. The client's and the Complainant's confidence in the legal profession were undermined.
46. A lawyer has a further duty to respond to specific client inquiries in a timely fashion. While the Hearing Committee accepts that the Lawyer did not receive the voice messages and letters left by the Complainant prior to the February 2008 registered letter, we find that the Lawyer was neglectful in not taking steps to ensure that his client was properly notified about the change in his address, telephone number and other contact information. The circumstances here demonstrate the problems and harm that can result from the failure to do so.
47. The Lawyer compounded the harm by not addressing the client's situation in a timely way after meeting with the Complainant on March 8, 2008. While he engaged in a search for the real estate documents, nothing prevented him from making a timely accounting for and transfer of the trust funds before the end of March 2008. Those steps were not dependent on the real estate transaction. Nor

48. Accordingly, the Statement of Admission of Guilt was accepted.

SANCTION AND COSTS

49. In determining an appropriate sanction, the Hearing Committee is guided by the public interest, which seeks to protect the public from acts of professional misconduct.

50. In *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

"In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practise his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practise, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science."

51. Various factors may be taken into account when deciding how the public interest should be protected, including: a) the nature and gravity of the proven misconduct, including the number of times it occurred; b) whether the misconduct was deliberate; c) whether the misconduct engages the respondent lawyer's honesty or integrity; d) the impact of the misconduct on the client or other person affected; e) general deterrence of other members of the legal profession; f) specific deterrence of the respondent lawyer from engaging in further misconduct; g) punishment of the offender; h) whether the offender has incurred other serious penalties or financial loss as a result of the circumstances; i) preserving the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members; j) the public's denunciation of the misconduct; k) the extent to which the offensive conduct is clearly regarded within the profession as falling outside the range of acceptable conduct; and l) imposing a penalty that is consistent with the penalties imposed in similar cases.

52. In addition, the Hearing Committee considers mitigating circumstances that may temper the sanctions to be imposed, including: a) the respondent lawyer's attitude since the misconduct occurred; b) the prior disciplinary record of the offender, including whether this is a first offence; c) the age and inexperience of the lawyer; d) whether the individual has entered an admission of guilt, thereby showing an acceptance of responsibility; e) whether restitution has been made to the person harmed; and f) the good character of the offender, including a record of professional service.
53. In the present case, the Lawyer by his admission of guilt and testimony before this Hearing Committee demonstrated that he understands the errors he committed, and that he is contrite.
54. On September 22, 2009, a practice assessment of the Lawyer was completed by representatives of the Law Society's Practice Review Committee. In a report dated October 27, 2009, the assessors concluded that the Lawyer is a "thoughtful and careful person who enjoys the practice of law", and that he "aspires to meet and exceed the standards of competence set out and described in Chapter 2 of the Code of Professional Conduct." Certain recommendations were put forward by the assessors to assist the Lawyer in committing to practices that will avoid a recurrence of the circumstances giving rise to this complaint.
55. The Lawyer has practiced for approximately 18 years and has no prior disciplinary history
56. The Hearing was adjourned for two months so that the Lawyer could explore the possibility of making restitution to his client for any loss suffered as a result of not transferring the trust funds more promptly or placing the funds in an interest bearing trust account. On the resumption of the Hearing, the Lawyer informed the Hearing Committee that he had provided a letter to the Complainant, through his legal counsel, explaining that she is entitled to retain legal representation to advance a claim against the Lawyer, that the Lawyer had reported the matter to his professional liability insurer, and providing the contact information for the insurer.
57. While the Lawyer's communication provides the Complainant with some information about the client's potential claim, it does not make the client whole. Restitution remains outstanding. The client is still exposed to the uncertainty and inconvenience of a legal claim, including the potential cost of legal representation. The Lawyer was therefore encouraged by this Hearing Committee to make matters right with his client. His ethical and professional obligations compel him to take that step, and that must not be deferred to the care of his professional liability insurer.
58. Having regard for the sanctioning principles outlined above, the Hearing Committee made the following Orders:

- a. An Order that the Lawyer be reprimanded;
- b. An Order that the Lawyer pay the Law Society a fine of \$1000;
- c. An Order that the Lawyer pay the Law Society one-half of the actual costs of the Hearing;
- d. An Order that the fine and the costs be paid within 30 days of the date on which the Lawyer is provided with notice of the actual costs of the Hearing;
- e. An Order pursuant to s. 72(2)(a) of the *Legal Profession Act* directing the Lawyer to comply with the four recommendations for his practice stated on page 8 of the Practice Assessment of Thomas Chiu dated October 27, 2009, which is part of Exhibit 25 in this proceeding; for the third and fourth recommendations on page 8 of the Practice Assessment Report, the Lawyer is to incorporate those recommendations into his general practice, subject to reasonable exceptions as permitted by the standards of a reasonably competent and professional lawyer in this jurisdiction.

CONCLUDING MATTERS

59. In the event of any request for public access to the evidence heard in these proceedings, the Exhibits and the transcript of proceedings shall be redacted to protect the identity of the Lawyer's client, and any information subject to proper claims of privilege.
60. There was no referral to the Attorney General.
61. No Notice to the Profession was directed.
62. The Chair delivered a reprimand, which expressed denunciation for the conduct of an experienced member of the Bar whose neglect failed his client, the profession, and the public interest.

Dated this 8th day of February, 2010.

KEVIN S. FETH, QC, Bencher, Chair

JOHN HIGGERTY, QC, Bencher

JAMES A. GLASS, QC, Bencher