



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 David Coley, a Member of the Law Society of Alberta.

A. Jurisdiction and Preliminary Matters

1. A Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of David Coley on March 17, 2008. The Committee consisted of Neena Ahluwalia, QC, Chair, Peter Michalyshyn, QC and J.Roy Nickerson, QC. The LSA was represented by Michael Penny. The Member was represented by William Tatarchuk, QC.
2. Exhibits 1 through 4, consisting respectively of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, established the jurisdiction of the Committee and were admitted into evidence by consent.
3. There was no objection by the Member's counsel or counsel for the LSA regarding the membership of the Committee.
4. The Certificate of Discretion was entered as Exhibit 5. No request for a private hearing was received, and therefore the hearing proceeded in public.
5. Exhibits 6 through 22, contained in an exhibit binder provided to the Committee members and the parties, were admitted into evidence by consent. The following additional exhibits were also entered into evidence by consent:
 - Exhibit 23 – Agreed Statement of Facts and Admission of Guilt dated March 17, 2008 and signed by the Member;
 - Exhibit 24 – Letter of March 13, 2008 from R. Gregory Bush, Director, Lawyer Conduct, LSA to Michael Penny, counsel for the LSA, certifying that the member has no LSA discipline record as at the date of the letter; and
 - Exhibit 25 – Estimated Statement of Costs.

B. Agreed Statement of Facts and Admission of Guilt

6. The Agreed Statement of Facts and Admission of Guilt (Exhibit 23) states as follows:

Introduction and Citation

1. David Coley is a member of the Law Society of Alberta, having been admitted to

membership on June 12, 1978. At all times relevant to the citations he practiced with the firm, Coley, Hennessy & Cassis.

2. The citations are:
 1. It is alleged that you failed to respond on a timely basis to your client, M.S.'s communications which contemplated a response, and that such conduct is conduct deserving of sanction.
 2. It is alleged that you failed to serve your client, M.S., in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.
 3. It is alleged that you swore a false affidavit, and that such conduct is conduct deserving of sanction.

The Facts

3. Mr. Coley was retained by Mark Sandberg, the complainant, to complete the legal work in connection with the sale of his shares in 909998 Alberta Ltd. ("Corporation") back to the Corporation. The other shareholders of the Corporation were Mark and Robin Tamagi who, as a result of the transaction, would become the only shareholders of the Corporation.

[Exhibit 6]

4. Jeffrey Forester acted for the Corporation and the Tamagis on the transaction.

5. In May, 2006, Sandberg delivered an agreement ("Agreement") to Coley for review. The Agreement was with the Corporation, was dated February 1, 2006 and set out a purchase price for Sandberg's shares of \$25,000, payable in 50 installments of \$500 per month. Coley recommended that Sandberg obtain a promissory note for the purchase price, and require that the shares be held in escrow until such time as the price was paid in full.

[Exhibit 7, Tab 3]

6. On May 16, 2006, Coley wrote to Forester, requesting that “your client” sign a promissory note and hold the shares in escrow until the purchase price was paid. On May 23, 2006, Forester wrote back and agreed to these terms.

[Exhibit 19, Tabs 2 and 3]

7. In June and July, 2006, Sandberg left eight telephone messages requesting that Coley call him to report on the status of the transaction. Coley did not contact Sandberg until August 2, 2006, at which time he faxed the draft Agreement and transfer of shares to Mr. Sandberg. [Exhibit 16]

8. On August 2, 2006, Sandberg wrote to Coley, enclosing the signed Agreement and a signed transfer of shares. The affidavit of execution with regard to Sandberg’s signature was not completed. In the same letter, Sandberg asked for a personal guarantee from Tamagi.

[Exhibit 19, Tab 7]

9. Sandberg heard nothing for six weeks, so on September 19, 2006 he spoke to Coley’s assistant, and asked her to find out the status of the transaction. After receiving no response, Sandberg left further messages on September 22 and September 26, 2006.

[Exhibit 16]

10. On September 27, 2006, Coley sent the signed Agreement, and the draft promissory note (for the Corporation to sign) to Forester. Coley completed and swore the affidavit of execution for Sandberg’s signature, although he had not in fact witnessed Sandberg’s signing the Agreement. The affidavit was also false in its statement that Sandberg had signed the Agreement in Edmonton.

[Exhibit 19, Tab 9 and Exhibit 8, Tab 1]

11. On November 14, 2006, Forester delivered the Agreement and promissory note to Coley, both documents having been signed by Tamagi on behalf of the Corporation. Forester further confirmed that the shares would be held in escrow pending payment in full of the purchase price.

[Exhibit 10, Tab 1]

12. Sandberg had heard nothing from Coley's office so on November 17, 2006, he contacted Forester, and was told that the signed Agreement and promissory note had been delivered to Coley. On November 29, 2006 and December 6, 2006, Sandberg left further messages for Coley, who did not return these calls.

[Exhibit 6]

13. On December 7, 2006, Coley reported to Sandberg, mailing him signed copies of the Agreement and the promissory note, and enclosing his account.

[Exhibit 19, Tab 12]

Mr. Coley's Admission of Guilt

14. Coley admits that he is guilty of the following citations:

1. It is alleged that you failed to respond on a timely basis to your client, M.S.'s communications which contemplated a response, and that such conduct is conduct deserving of sanction.
3. It is alleged that you swore a false affidavit, and that such conduct is conduct deserving of sanction.

and acknowledges his conduct in regard to these citations is conduct deserving of sanction.
If of these facts are admitted, this 17th day of March, 2008.

“original signed”

David Coley

C. Decision as to Citations

7. The Hearing Committee determined that the Agreed Statement of Facts and Admission of Guilt [Exhibit 23] were in an acceptable form. Mr. Penny submitted that no evidence was being called on Citation 2 and invited the Committee to dismiss that citation. The Hearing Committee did so.
8. Consequently, it is deemed for all purposes to be a finding of the Hearing Committee that the conduct of the member, as stipulated in citations 1 and 3, is conduct deserving of sanction.

D. Evidence and Submissions Respecting Sanctions

9. LSA counsel, Mr. Penny, in speaking to sanction, made the following submissions:
 - The member, Mr. Coley has no discipline record.
 - In this case, the LSA is seeking a fine in the amount of \$5,000.00, a reprimand and costs.
 - The issue before the committee is one of integrity of the member. In cases involving integrity, the Law Society usually imposes suspensions. In mitigation of this matter, the offence relates to what could be characterized as a “transactional affidavit”. There was a lapse of judgement by the member with respect to the attestation of the witness signature. It must be kept in mind that other people rely on these transactional affidavits to conduct business in a timely and efficient manner. It is of utmost importance that care be taken in their execution.
 - Mr. Penny referred the panel to *Law Society of Alberta v. Bittner*, [2002] L.S.D.D. No. 52. In that case, a fine of \$2,500.00 and costs of the hearing were imposed in relation to similar type of citations.

- It was submitted that it was necessary for the Committee to strongly denounce this conduct to deter other members.
10. The member's counsel made the following submissions with respect to sanction:
- Mr. Coley is 57 years old with 4 children and a number of grandchildren. He was admitted to the bar in 1978.
 - His practise is comprised of 90% real estate transactions and the rest corporate and commercial work.
 - With respect to the incident before the Committee, the Member met with Mr. Sandberg in early May of 2006. The documents that Mr. Sandberg had with him were dated February 2, 2006. Mr. Coley immediately corresponded with counsel for Mr. Tamagi and red flagged a concern regarding the transaction to take place.
 - During the months of July and August of 2006, Mr. Coley was extremely busy with his real estate practice.
 - On August 2, 2006 Mr. Coley faxed materials to Mr. Sandberg and the materials were faxed back. Mr. Coley phoned the client on the same day to confirm his signature on the documents. He did however take (in Mr. Tatarchuk's words) "a shortcut".
 - Mr. Coley is no stranger to affidavits; executing many in a week. Mr. Tatarchuk submitted that Mr. Coley made one error of judgment prompted by guilt over inactivity on the file.
 - Mr. Tatarchuk distinguished Bittner on the basis that Mr. Bittner made no effort to confirm the signature and that it involved a false affidavit and a false land transfer.
 - Upon the Law Society getting involved, Mr. Coley's immediate response was to accept responsibility.
 - It was submitted, on behalf of the member, that the Committee consider a fine less than what was ordered in the Bittner case.

E. Decision Regarding Sanction

11. The Chair thanked both counsel and the member for allowing the proceedings to take place in an expeditious manner.
12. Mr. Coley has been a member of the Law Society of Alberta for over 30 years. We understand that each week, numerous affidavits are prepared in his office. Considering his experience, the Committee is concerned that he took "shortcuts" in preparing affidavits that are relied upon by other members and the public to conduct legal affairs in a timely manner.

13. The Committee is also satisfied by Mr. Coley's response to the Law Society in that he took his error seriously and is determined not to repeat it.
14. In determining the sanction, the Committee was mindful of the *Bittner* case. We would adopt the remarks of that committee in paragraph 21 of the case:

“The committee considered the notion of general deterrence and in particular whether a suspension in this case was necessary to send the appropriate message to others who may be of like mind. The Committee did not feel that a monetary penalty, in this case, was inconsistent with the need for general deterrence. *Indeed if any member were to interpret this decision as a license to swear false Affidavits they would do so at their peril because a suspension can generally be expected for such conduct.* (Emphasis added). On the other hand, there must be room for exceptions in appropriate cases and the Committee was satisfied that this was an appropriate case.”

15. In the *Bittner* matter, it was apparent to that Committee that the member, who had been at the bar for just over three years, “ha[d], to some extent struggled in an isolated practice without the benefits of early career monitoring. He was naive to place his trust in the hands of Mr. M (his client).”
Mr. Coley, on the other hand is an experienced, senior practitioner. His conduct arose from sense of guilt over inactivity on a file and was prompted by expediency.
16. The Hearing Committee made the decision that sanction consist of the following:
 - a reprimand;
 - a fine of \$5000.00; and
 - actual costs of the hearing.
17. The Chair then issued the reprimand.

G. Concluding Matters

18. There will be no referral to the Attorney General.
19. There will be no notice to the profession.
20. With regard to time to pay, the fine shall be paid within 60 days. Cost will be paid within sixty days from the date of receipt of the costs invoice by the member's counsel.

21. There will be no redaction of any information from the Law Society file or the transcript.

Dated this 27th day of May, 2008.

Neena Ahluwalia, QC – Chair and Bencher

Peter Michalyshyn, QC – Bencher

J. R. Nickerson, QC – Bencher