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 BONNIE WALD
a Member of The Law Society of Alberta

INTRODUCTION

1. On September 10, 2007 through September 12, 2007, a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Edmonton to inquire into the conduct of the Member, Bonnie Wald. The Committee was comprised of Carsten Jensen, Q.C., Chair, Donna Valgardson, Q.C. and Neena Ahluwalia. The LSA was represented by Lindsay MacDonald, Q.C. The Member was represented by her counsel, Dennis Groh, Q.C. The Member was present throughout the hearing.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1-4, consisting 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 Hearing Committee.

3. The Certificate of Exercise of Discretion was entered as Exhibit 5.

4. There was no objection by the Member's counsel or counsel for the LSA regarding the constitution of the Hearing Committee.

5. The entire hearing was conducted in public.

BACKGROUND AND CITATIONS

6. At the relevant time the Member was a sole practitioner in the Town of Ponoka. The citations against the Member arose from her representation of WW in a matter involving his mother MW, and the sale of a quarter section of her land. WW was involved in a complex family dispute involving his effort to obtain the land from his mother at a discounted price, in lieu of his inheritance, in circumstances where his mother's health and mental status were in decline.

7. The LSA alleged that the Member had had in fact represented both MW and WW, had acted while in a conflict of interest, had failed to advise MW to obtain independent legal

advice, and most seriously that she mislead the Court at an application for the appointment of a trustee regarding MW's estate. The Member faced the following citations:

> CITATION 1- IT IS ALLEGED that you acted while in a conflict of interest in connection with the sale of land by MW to WW, and that such conduct is conduct deserving of sanction.
>
> > Particulars are: continuing to act for MW after you realized that RW had registered a caveat regarding his lease before WW and [his wife] became the registered owners. You did so without independently evaluating whether the interests of MW would be fulfilled by so acting and you did so without making full and fair disclosure to her of the advantages and disadvantages of retaining independent counsel and without ensuring her continued consent to your continuing to act for her as well as for WW. "Consent" and "disclosure" are as defined in the Code of Professional Conduct in paragraphs 4(f) and 4(i) of the Interpretation section.
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> CITATION 2- IT IS ALLEGED that you failed to advise MW to obtain independent legal advice, and failed in your duty to an unrepresented party, and that such conduct is conduct deserving of sanction.
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> CITATION 3- IT IS ALLEGED that you breached your duty of care to MW while representing both MW and WW, and that such conduct is conduct deserving of sanction.
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> CITATION 4- IT IS ALLEGED that you failed to remit to MW funds to which MW was entitled, and that such conduct is conduct deserving of sanction.
>
> CITATION 5- IT IS ALLEGED that you mislead the Court at a hearing when ML was applying for the trusteeship of MW's estate, and that such conduct is conduct deserving of sanction.
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> CITATION 6- IT IS ALLEGED that you failed to properly represent your client in a conscientious and competent manner, to conduct the due diligence which would be requisite to this transaction by failing to conduct the title search and failing to insist that MW obtain independent legal advice, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

8. On the basis of the evidence entered at the hearing, and for the reasons that follow, the Hearing Committee found that Citations 2, 4 and 5 were proven and that the Member is guilty of conduct deserving of sanction in respect of those 3 citations. For the reasons that follow, Citations 1, 3 and 6 were dismissed.

9. After hearing evidence and submissions with respect to sanction, the Hearing Committee concluded that the Member shall serve a 45 day suspension, and shall pay the actual costs

of the hearing.

EVIDENCE

10. Exhibits 1-5 (the jurisdictional exhibits) were entered by counsel for the LSA with the consent of counsel for the Member.

11. During the course of the hearing, Exhibits 6-84 were entered into evidence.

12. The Hearing Committee heard oral evidence from Patricia MacNaughton, a member of the LSA and counsel for ML, being one of the daughters of MW. In addition, the Hearing Committee heard oral evidence from Angela Gallo-Dewar, an employee of the LSA who was previously a complaints resolution officer. The Hearing Committee also heard oral evidence from MP (another daughter of MW), from ML, and from WW. Finally, the Hearing Committee heard oral evidence from the Member.

THE WITNESSES

(a) The evidence of Patricia MacNaughton

13. Patricia MacNaughton is a member of the LSA, and she acted as counsel for ML, being one of the daughters of MW. Ms. MacNaughton's evidence is that she practices in the area of civil litigation, criminal law and estates in a smaller firm in Red Deer.

14. Ms. MacNaughton had been approached by ML to bring an application for trusteeship with respect to her aging mother MW as a result of her declining health and mental status. The application was initially scheduled to be heard on December 18, 2000. The Member, Ms. Wald, was acting on behalf of WW (ML's brother), who filed a Notice of Objection. A contested trusteeship application was heard before Justice Sirrs on February 9, 2000. ML was appointed sole trustee of her mother MW's estate at that hearing.

15. Ms. MacNaughton and her client had cause for concern with respect to two quarter sections of land owned by MW, each of which had been appraised for approximately $200,000.00. One of the quarter sections had been sold to WW and his wife pursuant to an offer to purchase with a stated purchase price of $175,000.00. To Ms. MacNaughton's knowledge that purchase price had not been paid. When the title was transferred the consideration for the transfer was listed at $100,000.00. Ms. MacNaughton was unaware of any intervening matters that would have changed the purchase price. Further, the same land was subject to a lease in favour of RW, MW's other son.

16. Ms. MacNaughton testified that she was unaware where the purchase money was, and that she hoped it was in Ms. Wald's trust account. Ms. MacNaughton wrote to Ms. Wald on February 27, 2001 requesting the sale proceeds with respect to the land. No response was received. Ms. MacNaughton's evidence was that she followed up in writing and by telephone and did not get a response from Ms. Wald. However, on April 4, 2001 she did receive a 1 page fax, without a cover and undated, from Ms. Wald. That fax purported to be an amendment to the offer to purchase between MW and WW listing the purchase

price as $50,000.00. There was no explanation with respect to the further change in the purchase price, and Ms. MacNaughton's evidence was that she had no prior knowledge of it. At the time she received that fax MW was a dependent adult as a result of the Order granted by Justice Sirrs. Ms. MacNaughton also noted that the fax purported to be an amendment to a purchase agreement where the land had in fact already been transferred.

17. Ms. MacNaughton further testified that on May 3, 2001 an envelope was dropped off at her office by Ms. Wald's client WW. That envelope did not contain a covering letter, but it did contain a Merrill Lynch bank draft in the amount of $52,521.92. Ms. MacNaughton wrote to Ms. Wald on May 11, 2001 describing her receipt of this bank draft, and indicating that she did not recommend to the trustee that the draft be negotiated. It was in fact not cashed or returned.

(b) The evidence of Angela Gallo-Dewar

18. Ms. Gallo-Dewar testified that she is a 10 year employee of the LSA, and she is a lawyer. She started with the LSA as a complaints officer in 1997, and she held that position until October of 2006. She now works in the membership department.

19. Ms. Gallo-Dewar testified that the complaint in this matter came by telephone. Her practice in such a case was to take notes, and then enter information into the computer system. Original handwritten notes were shredded.

20. In this case the complainant was Ms. MacNaughton, who indicated that she acted for the trustee of MW, a dependent adult. Ms. Gallo-Dewar understood the complaint had to do with the funds from the sale of a parcel of land. She spoke with Ms. Wald and ML, and eventually she received correspondence from Mr. Groh as counsel for Ms. Wald. That correspondence initially satisfied Ms. Gallo-Dewar's concerns with respect to Ms. Wald's ethical obligations pursuant to the Code of Conduct. However, Ms. Gallo-Dewar eventually received further information from MP, and this matter was then sent for formal review.

21. During cross-examination Ms. Gallo-Dewar was asked about her computer notes from her discussion with Ms. Wald indicating that the Member had $50,000.00 in trust for MW, and $50,000.00 in trust for another one of MW's sons who was suffering from Alzheimer's Disease, being sale proceeds from the land. Ms. Gallo-Dewar acknowledged that she might have been told that the funds were "in trust", and not that they were specifically in the Member's trust account.

(c) The evidence of MP

22. MP testified that she was one of the daughters of MW, and that her mother went to an assisted living facility in March of 1999. She then went to the Stettler Auxiliary Hospital for a higher level of care starting in January of 2000.

23. MP had attended at Ms. Wald's office as a drop-in in early March, 2000. The purpose of that meeting was to discuss her concerns with respect to her mother, and specifically guardianship and trusteeship issues. She wanted to know if Ms. Wald would assist with

those matters if needed. MP was shown a note with respect to that visit, dated March 24, 2000, and apparently prepared by Ms. Wald. MP denied that the note accurately reflected the meeting she had with Ms. Wald, as she denied having spoken about her mother's land, and she was certain that she had actually been in the United States as at March 24, 2000.

24. In any event, MP did not retain Ms. Wald to deal with these matters.

25. MP testified that there had been a family meeting in May of 2000 involving herself, her mother MW, her sister ML, and her brothers RW and WW. The purpose of the meeting was to discuss MW's plans for distributing her land. The general consensus at the meeting was that WW would have one of the quarter sections for $100,000.00, and the other quarter section would be offered to the daughters or to RW for the same price. The appraised value of the land was approximately $200,000.00 per quarter section. This would provide the recipients of the land a net benefit of $100,000.00. The other children present would receive cash from the estate, with the end result that the siblings would each receive approximately $100,000.00 of value in land or in money.

26. It was MP's understanding that the Member would be representing her mother and her brother WW on both sides of the land sale transaction. MP took the land transfer documents from Ms. Wald to her mother for execution in June, 2000, as MP was a Commissioner for Oaths. MP was also involved in dealing with corrections to those transfer papers. The transfer documents showed a purchase price of $100,000.00 for the quarter section being purchased by WW and his wife.

27. In cross-examination MP acknowledged that she may not have mentioned her mother's name during her initial meeting with Ms. Wald in March of 2000, and she doubts if she mentioned her brother's name. MP acknowledged that her mother was not with her during meetings with Ms. Wald, and that Ms. Wald did not, to her knowledge, ever meet her mother.

(d) The evidence of ML

28. ML is one of the daughters of MW. ML testified with respect to discussions involving her mother MW regarding the disposition of her two quarter sections of land. ML's evidence was that her mother's intention was for WW to get one quarter section for $100,000.00 in lieu of his inheritance. In other words, he was receiving a discount of $100,000.00 on the value of the land and giving up other claims on the estate.

29. ML testified with respect to a family meeting involving her mother MW and a discussion of these issues. WW was apparently upset about the proposed disposition of the land as he wanted both quarter sections. ML testified that her brother WW was aware of the lease on the land held by her other brother RW. However, the term of that lease may not have been clear to WW.

30. In cross-examination ML acknowledged that she had not ever met the Member up to the end of 2000. She also acknowledged that her mother MW had previously seen a lawyer with respect to the lease on the lands in favour of RW. ML also acknowledged that the

appraiser who had placed a value on the lands was not informed about the lease held by RW.

31. In cross-examination ML acknowledged being aware of litigation between her brothers WW and RW having to do with the lease on the lands and WW's efforts to take possession of the land notwithstanding the lease. ML testified that she was quite aware of the trouble in the family that was caused by the lease and the subsequent sale of the lands.

32. In cross-examination ML also testified as to the settlement agreement ultimately reached to deal with the disputes arising from the sale of the land to WW, the lease to RW, and the Member's involvement in these matters. Pursuant to that settlement agreement WW paid $70,000.00 to the estate of MW with respect to the purchase of the quarter section of land, and RW eventually surrendered his lease. The Member's insurer contributed a sum of money for the benefit of WW and RW.

(e) The evidence of WW

33. WW testified that he was one of the sons of MW. He acknowledged his attendance at the family meeting in May of 2000 to discuss the disposition of MW's lands. WW described that as a tension-filled meeting, and he acknowledged a disagreement between himself and his brother RW. WW testified that he did eventually agree to pay $100,000.00 for one quarter section, and he acknowledged that he understood that there was some form of lease in favour of RW for the same land. His understanding was that his sisters would deal with RW regarding that lease.

34. With respect to the initial purchase price of $175,000.00 listed in the documents, WW's evidence was that he was borrowing a sum from the bank in order to purchase the land. The amount that he was borrowing was 75% of $175,000.00, and that is how the larger figure came about. In other words, the $175,000.00 figure was listed on the transfer documents for banking purposes, and did not reflect the actual purchase price. WW's evidence was that the actual purchase price was understood to be $100,000.00, as agreed at the family meeting.

35. WW retained the Member as his counsel with respect to this transaction. He did not ask her to do a title search, and he understood that she was also acting for the bank. The Member prepared the offer to purchase, and title to the quarter section was transferred to his name. Prior to closing a title search was done, and that indicated a recent registration of a caveat for the lease in favour of RW. The Member expressed surprise with respect to that lease, and she indicated that she would attempt to deal with it.

36. With respect to the amendment in the purchase price from $100,000.00 to $50,000.00, WW's evidence was that this arose as a result of a discussion he had with his mother MW. WW had been removed from the quarter section by Court Order in the summer of 2000 as a result of litigation between himself and his brother RW. The Court had given RW possession of the lands pursuant to his lease. As a result, WW indicated that his mother agreed to a reduction in the purchase price, and that his happened before the

trusteeship application.

37. WW's evidence was that the mortgage proceeds had initially been held in the Member's trust account. However, in September of 2000 he requested those funds from the Member and he then invested them with a financial advisor at Merrill Lynch. The funds stayed there until March of 2002, at which point he took those funds out in cash and put the money in a safe.

38. In May of 2001 WW had taken a Merrill Lynch bank draft in the amount of $52,521.92 and dropped it off at Ms. MacNaughton's office. This apparently represented his view of the reduced purchase price, plus interest, and it was dropped off at Ms. MacNaughton's office after speaking with the Member. WW's intention was to see if this would resolve matters regarding the purchase price.

39. In cross-examination WW acknowledged that the payment out of the funds from the Member's trust account to Merrill Lynch was pursuant to his instructions, and this was done so he would have control of the funds. WW apparently also wanted to be able to provide some money to another brother who suffered from Alzheimer's disease, and also directly to his mother in the event that no other solution could be found.

40. WW acknowledged that he had not told the Member about the lease in favour of RW because it was his understanding that the lease was not registered on title. WW understood that a lease for a term longer than 3 years had to be registered on title to be enforceable.

41. WW recalled the Member advising him that there were lawyers who could act for his mother MW on the land transaction, and that the Member had provided names to MP for that purpose.

42. WW indicated that as at the trusteeship application in February of 2001 before Justice Sirrs, the land purchase monies were in the Merrill Lynch account under his control. He considered that to be a trust account.

(f) The evidence of the Member

43. The Member testified on her own behalf. She indicated that she was called to the Bar in 1995. At the time in question she was a sole practitioner in Ponoka. She presently has an associate. The Member had worked for Alberta Justice up to 1997.

44. The Member testified that in March of 2000 MP came to see her without an appointment. The Member indicated that she maintained a miscellaneous file where she put notes from such meetings. She indicated that it was not her practice to take notes during meetings with a client, but that she would make her notes afterwards, from memory, when she had time. Those notes would then go into the miscellaneous file.

45. The "drop-in" note at issue in this case was made sometime following the meeting with MP. The date at the bottom, being March 24, 2000 was the date that she prepared and signed the note, not the date of the actual meeting. The Member's evidence was that she

cannot recall exactly when the meeting with MP took place. She did believe that it took place some time in early March.

46. In any event, the Member's evidence was that she understood there were two issues that MP had come to see her about. The first had to do with a son of MW who was going to buy a quarter section of land. The second concern had to do with MW's capacity. The names of MP's mother and brother were not recorded on this note.

47. The Member's evidence was that she never met MW, never spoke to her, and never wrote to her. Her evidence was that she did advise MP of the names of other lawyers who could represent her mother MW. Her evidence was that in fact no one had ever asked her to act for MW on the transfer of land to WW in this matter.

48. The Member indicated that WW came to her regarding the purchase of the quarter section of land from his mother. He already had a title search in hand, and he gave that to the Member. The Member acknowledged that she did not do a title search before the transfer, and on that point she indicated that "it was missed". In addition, her evidence was that she would normally prepare transfer documents "subject to" the last encumbrance on title that they would accept. That did not happen here. In the end result, the title transfer was registered notwithstanding a recent registration of the lease by RW. The Member indicated that this was a mistake in her office.

49. With respect to the purchase price the Member indicated that she knew that the actual purchase price was $100,000.00. However, the offer was prepared with the $175,000.00 amount for bank purposes. The Member acknowledged that she prepared the transfer documents.

50. The Member denied that she had ever indicated to MP that her mother MW did not need her own lawyer.

51. The cash to close on the land transfer transaction was $97,576.24. The Member indicated that a cheque was actually issued to MW for that amount, but the cheque was later marked void and those funds did not go to MW. The cheque had been placed in the pick up area of the Member's office for MW. However, the cheque was never picked up. When the Member became aware of the caveat on title with respect to the lease, the cheque was voided and the funds were not paid to MW.

52. The Member became aware of the dispute between the brothers WW and RW regarding the lease. After a Court Order was issued removing WW from the lands in question, the Member understood that her client was going to speak with his mother about getting a different deal. That was the origin of the amendment document which the Member prepared, with the dollar figure left blank. WW took that document and met with his mother, and it came back with the $50,000.00 figure inserted.

53. The Member was asked about the disbursement of the cash to close to Merrill Lynch, out of her trust account. This happened in late September of 2000. The Member indicated that the funds were directed to Merrill Lynch "in trust" for MW and her son with Alzheimer's disease. The Member indicated that she understood that WW would be

trustee of these funds for MW and his ill brother.

54. In the application before Justice Sirrs the Member indicated that the funds were in trust. Her evidence was that she had no intent to mislead the court. Her evidence was that she believed that the funds were in trust because they were with Merrill Lynch as described above.

55. The Member was asked about the settlement agreement resolving the civil litigation arising from all of these issues. The Member's insurers paid an amount as part of that settlement, and the Member indicated that was all as a result of her negligence with respect to not ordering a title search. The Member noted that she had not made an admission of liability in that settlement.

56. Under cross-examination the Member was asked in detail about her submissions to Justice Sirrs at the trusteeship application. She acknowledged that she had not mentioned to the Court the amendment agreement reducing the price to $50,000.00, notwithstanding a number of questions from the Court where that would have been relevant. The Member acknowledged that she had disagreed when Justice Sirrs had indicated that no money had passed for the purchase of this land. The reason for her disagreement was her understanding that WW had placed the cash to close "in trust" with Merrill Lynch. The Member did acknowledge that she eventually became aware that WW had the cash to close under his control, as he was able to take that money out of Merrill Lynch and put it in cash in a safe.

57. The Member stated that she had no instructions to disclose WW's discussions and agreement with his mother MW regarding a reduction in the purchase price to $50,000.00 as a result of the lease on the lands to RW. For that reason Justice Sirrs was not advised of that amendment.

58. In cross-examination the Member again denied that she had ever acted for MW, and she thought that MW's daughter MP would get her mother any necessary legal advice. The Member appeared to have the view that independent legal advice was something she was only obligated to advise or arrange if she had actually taken on the representation of MW and a conflict arose.

59. The Member acknowledged that she was in a conflict when she discovered her own potential negligence as a result of having not done a title search. However, she did not get off the file. The nature of the conflict was not apparent to her at that time.

60. In cross-examination the Member was asked about the drop-in note of March 24, 2000 arising from the meeting between the Member and MP. The Member was asked to agree that the note contained a great deal of detail for a note that was purportedly made after the fact. However, the Member insisted that the note was an accurate representation of her meeting with MP, albeit made somewhat later.

FINDINGS OF FACT AND ANALYSIS

61. The citations against the Member require the Hearing Committee to determine whether

the Member was acting for both WW and MW in the land transaction giving rise to this matter. The Hearing Committee must determine whether the Member ought to have advised MW to obtain independent legal counsel. The Hearing Committee must also consider whether the Member failed to remit to MW funds to which she was entitled. The Hearing Committee must determine whether the Member mislead the Court at MW's trusteeship hearing. Finally, the Hearing Committee must decide whether the Member failed to properly represent WW. In each case, the Hearing Committee must decide whether the Member's conduct is conduct deserving of sanction. Each of these questions will be considered in turn.

(a) Did the Member act for both MW and WW in the land sale transaction?

62. The Hearing Committee does not find, on a balance of probabilities, that the Member was representing both MW and WW on the transaction involving the sale of a quarter section of land from MW to WW. We note the conflict in evidence with respect to this matter. Specifically, MW's daughter MP did understand that the Member would be representing both her mother and her brother. However, MW's daughter ML gave evidence that her mother had previously seen a different lawyer with respect to the lease on the lands in favour of RW. WW did not understand that the Member, his counsel, was also acting for his mother MW on the land transaction. The Member denied representing MW, and there was no documentary evidence before the Hearing Committee that would support a contrary view.

63. In coming to this conclusion the Hearing Committee specifically does not approve of the Member's office practices, note-keeping or client reporting, all of which were deficient in this matter, and all of which contributed to the difficulties that ultimately arose.

(b) Did the Member fail to advise MW to obtain independent legal advice?

64. The Hearing Committee concluded, on a balance of probabilities, that the Member did fail to advise MW to obtain independent legal advice. In this manner the Member failed in her duty to an unrepresented party.

65. The Member's evidence on this point was that she had provided names to MP of other lawyers who could represent her mother MW. This was supported by the drop-in note dated March 24, 2000. However, this was not followed up with any correspondence, and MP denied this occurred. The Hearing Committee is not prepared to place any weight on the Member's drop-in note, made so long after the fact and from memory, on this point.

66. The Member indicated that she believed that MW's daughter MP would get her mother any necessary legal advice. The Hearing Committee did not find any reasonable basis for the Member to hold that belief. The Hearing Committee found the Member's communications with MW, through WW and MP, to be wholly unsatisfactory. This was particularly true after the problem of the RW lease and the reduction in the purchase price became issues.

67. The Hearing Committee was concerned that the Member did not believe she had any obligation to advise MW to get independent legal advice, as MW had never been her

client. The Hearing Committee notes that the Law Society of Alberta Code of Professional Conduct deals with this issue explicitly. Chapter 1, Rule 6 indicates that a lawyer must be courteous and candid in dealings with others. The commentary to this rule makes it clear that:

> If a lawyer is dealing on a client's behalf with an unrepresented person, the duty of candor requires special efforts to clarify the lawyer's role. In particular, it is necessary to explain that comments and information offered by the lawyer are likely to be partisan in nature and that the lawyer is not acting in the interests of the unrepresented person.

68. In addition, Chapter 11, Rule 5 indicates that a lawyer dealing with an opposing party who is not represented must advise the party that the lawyer is acting only for his own client, and must advise the party to retain independent counsel. The commentary makes it clear that the lengths to which a lawyer must go in ensuring a party's understanding of the matters referred to in the rule will depend on all relevant factors, including the party's sophistication and relationship to the lawyer's client and the nature of the agreement in question.

69. In this case, MW was clearly a vulnerable party in a difficult transaction involving a conflicted family. That was particularly so after the issue of the RW lease came to light. On all of the facts of this case, the Member ought to have clearly recommended to MW that she obtain independent legal advice, and the Member ought to have taken steps to ensure that MW was aware of and understood this recommendation.

(c) Did the Member fail to remit to MW funds to which she was entitled?

70. The Hearing Committee finds, on a balance of probabilities, that the Member failed to remit to MW funds to which she was entitled. Specifically, the Member failed to remit the purchase price for the disputed quarter section of land, or any portion of that price, to MW. This was so notwithstanding that her client WW obtained title to the land. The Member permitted her client to obtain complete control over the cash to close, and as a result she lost any ability to ensure that MW would receive the funds to which she was entitled.

71. We noted the Member's argument that funds never became owing to MW on this transaction as MW did not provide clear title to the land because the land was encumbered by the lease in favour of RW. However, the Hearing Committee notes that WW ended up with title to the land and all of the money. MW received nothing during her lifetime, and her estate was only paid much later, and then only after litigation. The Hearing Committee had no difficulty in concluding that the Member was obliged to ensure that the purchase money, or at least the undisputed portion of the purchase money, be paid to MW much earlier.

(d) Did the Member mislead the Court at MW's trusteeship hearing?

72. The ordinary standard of proof in proceedings such as this one is "a fair and reasonable preponderance of credible testimony…on a balance of probabilities" as outlined in

Ringrose v. College of Physicians and Surgeons of Alberta.[1] However, there is authority that a higher degree of probability, or more cogent evidence may be required where deceit is alleged, as such allegations may result in the most serious sanctions against the Member.[2]

73. The allegation that the Member mislead the Court on MW's trusteeship application is the most serious of the citations against the Member. The Hearing Committee is cognizant of the higher standard of proof applicable with respect to this allegation, as the citation deals with deceit.

74. The Hearing Committee finds that the Member did mislead the Court at MW's trusteeship hearing. Specifically, the Member permitted the Court to proceed while labouring under a misunderstanding with respect to the purchase price for the quarter section of land sold by MW to WW. The Member was aware of the amending agreement which purported to reduce the sale price to $50,000.00. However, notwithstanding specific questioning from the Court with respect to the documentation underlying the sale transaction, the Member did not advise the Court of this document. Further, the Member was specifically asked by the Court whether the money was in a trust account. The Member responded "the money is there, Sir." The Hearing Committee concludes that the Member could have been, and had an absolute obligation to be frank with the Court on these points. The Hearing Committee concludes that the Member's statements with respect to these issues, taken together, were misleading and did in fact mislead the Court.

75. In coming to this conclusion the Hearing Committee has reviewed the entire transcript arising from the proceedings before Justice Sirrs in detail, and as a whole. The Hearing Committee is aware that the trusteeship application did not directly deal with the sale of MW's lands. However, the sale of the land and the lease were both relevant to MW's capacity and to the application.

76. It was argued on behalf of the Member that her submissions to the Court were technically accurate in that the amendment agreement was "part" of the offer to purchase, and the Member did refer to the offer to purchase before the Court. Further, the Member's answer that "the money is there" was argued to be technically correct in that the money was in the Merrill Lynch account which the Member and her client apparently believed to be a trust account. The Hearing Committee does not accept that a lawyer's duty of candour to the Court could be so narrowly construed. It is plain and obvious from a reading of the transcript as a whole that the Court would have considered a reduction in the purchase price by way of an amendment to the purchase agreement to be significant, and similarly that the Court was concerned to know whether the purchase price was in the Member's trust account, or at least in some other lawyer's trust account. The Hearing Committee concludes that a Merrill Lynch investment account under the control of WW could not in any way be thought of as a trust account as contemplated by Justice Sirrs' question.

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[1] *Ringrose* v. *College of Physicians and Surgeons of Alberta*, [1978] 2 W.W.R. 534 (Alta. C.A.).

[2] *Harrison* v. *The Law Society of Alberta*, 2005 ABCA 265.

77. The Hearing Committee notes that Chapter 10, Rule 14 of the Code of Professional Conduct states quite clearly that "a lawyer must not mislead the Court, nor assist a client or witness to do so." The commentary to the Rule makes it clear that this extends to an indirect misrepresentation, and that a lawyer must not respond to a question from the Court in a technically correct manner that creates a deliberately misleading impression.

78. The Hearing Committee accepts that the Member felt a conflict between her duty of candour to the Court and her duty to maintain her client's confidences. At the time of the trusteeship application the Member did not have instructions to advise the Court with respect to the amendment agreement reducing the purchase price to $50,000.00 as a result of the lease to RW. However, Chapter 10, Rule 16 of the Code of Professional Conduct deals directly with this issue in circumstances where the Court requests information from a lawyer. The Member had the option of declining to respond to Justice Sirrs' questions with respect to the amendment agreement on the basis that to do so would contravene her obligations of confidentiality or would be detrimental to her client's interests. However, a lawyer who chooses to respond to the Court "must do so in a complete and truthful manner." The Hearing Committee finds that the Member chose to respond to Justice Sirrs' questions, and she failed to do so in a complete and truthful manner.

(e) Did the Member fail to properly represent WW?

79. WW has not made a complaint against the Member. The evidence makes it clear that WW has settled his civil claims as against the Member arising from her conduct in these matters. The Hearing Committee finds that the evidence does not disclose any failures by the Member with respect to WW that go beyond simple negligence.

DECISION AS TO CITATIONS

(a) CITATION 1

80. Citation 1 alleges that the Member acted while in a conflict of interest in connection with the sale of land by MW to WW, and that such conduct is conduct deserving of sanction. This citation is dismissed. As indicated above, the Hearing Committee does not find, on a balance of probabilities, that the Member was acting for MW in these matters.

(b) CITATION 2

81. Citation 2 alleges that the Member failed to advise MW to obtain independent legal advice, and failed in her duty to an unrepresented party, and that such conduct is conduct deserving of sanction. The Hearing Committee finds the Member guilty, on a balance of probabilities, with respect to this citation. As indicated above, the Member had positive obligations in dealing with an unrepresented party, and she clearly failed to meet those obligations. The Hearing Committee finds this to be conduct deserving of sanction.

(c) CITATION 3

82. Citation 3 alleges that the Member breached her duty of care to MW while representing both MW and WW, and that such conduct is conduct deserving of sanction. This citation

is dismissed. As already indicated, on a balance of probabilities the Hearing Committee finds that the Member was not acting for MW in these matters.

(d) CITATION 4

83. Citation 4 alleges that the Member failed to remit to MW funds to which MW was entitled, and that such conduct is conduct deserving of sanction. The Hearing Committee finds the Member guilty, on a balance of probabilities, with respect to this citation. The Hearing Committee had no difficulty in finding that the Member was under a positive obligation to pay to MW the purchase money for the quarter section of land, or at least the undisputed portion of those funds. The Hearing Committee finds this to be conduct deserving of sanction. The Hearing Committee notes with regret that this matter was not resolved within MW's lifetime.

(e) CITATION 5

84. Citation 5 alleges that the Member mislead the Court at a hearing when ML was applying for the trusteeship of MW's estate, and that such conduct is conduct deserving of sanction. The Hearing Committee was cognizant of the higher standard of proof applicable with respect to this citation, as outlined above. Having regard to the transcript of the application before Justice Sirrs as a whole, the Hearing Committee finds the Member guilty with respect to this citation. Specifically, the Hearing Committee finds that the Member failed to disclose the purchase price amending agreement to the Court, and she failed to disclose that the purchase price was not in fact in her trust account. These statements were misleading and did in fact mislead the Court, and the Hearing Committee finds the Member's conduct at this application to be conduct deserving of sanction.

(f) CITATION 6

85. Citation 6 alleges that the Member failed to properly represent her client in a conscientious and competent manner, to conduct the due diligence which would be requisite to this transaction by failing to conduct the title search and failing to insist that MW obtain independent legal advice, and that such conduct is conduct deserving of sanction.

86. The Hearing Committee has previously found that the Member was representing WW and not MW with respect to the sale of land transaction. The Hearing Committee finds that the Member's failures with respect to her client WW do not go beyond simple negligence, and her conduct with respect to WW is not conduct deserving of sanction.

87. The second part of this citation deals with MW and the question of independent legal advice. The Hearing Committee finds that this portion of Citation 6 is subsumed within Citation 2.

88. In the circumstances, the Hearing Committee declines to find the Member guilty under Citation 6, and this citation is dismissed.

SANCTION

89. The Hearing Committee heard from counsel for the LSA and counsel for the Member with respect to the question of sanction. The Hearing Committee noted that the Member has no disciplinary record. The Hearing Committee had regard to all of the general factors to be taken into account on the question of sanction as listed at paragraph 60 of the Hearing Guide. Specifically, the Hearing Committee had in mind the following general factors:

    (a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.

    (b) Specific deterrence of the Member in further misconduct.

    (c) Incapacitation of the Member (through disbarment or suspension).

    (d) General deterrence of other members.

    (e) Denunciation of the conduct.

    (f) Rehabilitation of the Member.

    (g) Avoiding undue disparity with the sanctions imposed in other cases.

90. With reference to these general factors, the Hearing Committee was must concerned about the need to maintain the public's confidence in the integrity of the profession, and that concern arises directly from the Member misleading the Court at the trusteeship hearing involving MW.

91. The Hearing Committee also had regard to a number of specific factors arising from the conduct of the Member, including concerns about the protection of the public, and the ability of the legal system to function properly. On this latter concern the Hearing Committee noted that the Member's misrepresentation to the Court involved a breach of duty to the Court, and a breach of duty to other lawyers and to members of the public.

92. The Hearing Committee had regard to a number of comparable decisions, including the decision in *Philion v. Law Society of Alberta*.[3] In *Philion*, the Alberta Court of Appeal upheld the findings of the Law Society on the merits, but imposed a 6 month suspension in substitution for the 1 year suspension directed by the Benchers. In the *Philion* decision the Member had been found guilty of conduct deserving of sanction in swearing a false Statutory Declaration. The Court of Appeal reduced the suspension to 6 months as that was an appropriate sanction under the hearing and sanction regime in place at the time of the Member's offence.

93. The Hearing Committee also considered the decision in *Law Society of Alberta v. Arends*.[4] In *Arends* the Member was found guilty of misleading the Court. A reprimand

[3] *Philion v. Law Society of Alberta* [1999] A.J. No. 71 (C.A.).
[4] *Law Society of Alberta v. Arends* [1998] LSDD No. 17.

was ordered, and the Member was directed to pay a portion of the hearing costs. *Arends* was also a decision made prior to the implementation of the new Hearing Guide.

94. Counsel for the Member emphasised the length of time between the incident in this case and the hearing, and the fact that the Member had learned a lesson and that there was little or no likelihood of recurrence. Counsel for the Member urged the Hearing Committee to find that a reprimand was an appropriate sanction in this case. In addition, Counsel for the Member referred to a supportive character reference from a Justice of the Court of Queen's Bench, and to the fact that the Member had voluntarily engaged in the LSA's Practice Review process to improve any deficiencies in her practice.

95. Keeping in mind all of the matters outlined above, it was the Hearing Committee's view that a suspension is a necessary and proper sanction in circumstances where a member has been found guilty of misleading a Court. The proper functioning of our judicial system demands that courts have confidence in the representations and submissions made by counsel. Where a judge questions a member with respect to matters not in evidence, the member must scrupulously adhere to the requirements of the Code of Professional Conduct. It is not acceptable for a member to mislead a Court, and that principle extends to submissions that might be argued to be technically correct, but which would nevertheless leave the Court labouring under a misapprehension with respect to the facts.

96. In this case the Member's misrepresentations to the Court amounted to a breach of her obligations to the Court, to fellow lawyers, and to the members of the public who were involved in this case and had an interest in its outcome. The consequences to MW's family were severe, and the Member's misrepresentations contributed to a very difficult family litigation matter being unnecessarily protracted.

97. In addition, the Hearing Committee found the Member guilty of conduct deserving of sanction in failing to advise MW to obtain independent legal advice, and in failing to remit to MW funds to which she was entitled. These are also serious matters.

98. In all of the circumstances of this case, the Hearing Committee finds that a suspension of 45 days is an appropriate sanction. The Hearing Committee was of the view that a longer suspension would have been warranted if it was not satisfied that the Member's misleading of the Court arose from her relative inexperience, and from confusion regarding her duties to the Court on the one hand, and her duty to maintain her client's confidences on the other. The Hearing Committee understands that this occurred in a high pressure Court application, where the Member thought that the primary topic was something else, and where all of the participants were interjecting comments throughout. The Hearing Committee considers that the Member is very unlikely to reoffend.

99. In addition to a 45 day suspension, the Hearing Committee directs that the Member pay the actual costs of the hearing. The Hearing Committee directs that the Member's suspension commence December 17, 2007. The Member is granted 60 days from her receipt of the actual costs of the hearing to pay those costs.

CONCLUDING MATTERS

100. As the entire hearing was conducted in public, and as the Exhibits contain sensitive and privileged family information, the Hearing Committee directs that the Exhibits (other than the jurisdictional exhibits) not be made available to the public. The jurisdictional exhibits (exhibits 1 - 4) will be available to the public.

101. There will be no notice to the Attorney General.

Dated this 1st day of November, 2007

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Carsten Jensen, Q.C., Bencher
Chair

_____
Donna Valgardson, Q.C., Bencher

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Neena Ahluwalia, Bencher