

LAW SOCIETY HEARING

IN THE MATTER OF THE LEGAL PROFESSION ACT AND IN THE MATTER OF A HEARING IN REGARDING THE CONDUCT OF MARC LEVINE A MEMBER OF THE LAW SOCIETY OF ALBERTA

REASONS FOR DECISION

On June 21, 2007, a hearing committee panel comprised of Stephen Raby, Q.C. (Chair), John Prowse, Q.C. and Shirley Jackson, Q.C. convened at the Law Society offices in Calgary, Alberta to enquire into the conduct of Marc Levine (the "Member"). The Member was represented by Bruce Corenblum. The Law Society of Alberta was represented by Michael Penny. The Member was present throughout the hearing.

Jurisdiction and Preliminary Matters

Jurisdiction was established by Exhibits 1 through 4 inclusive. There was no objection to the composition of the Panel. No private hearing application was made and as such the hearing proceeded in public.

Citations

The Member faced a single citation as follows:

1. IT IS ALLEGED that you breached trust conditions imposed upon you by another member, and that such conduct is conduct deserving of sanction.

Evidence

The evidence in this matter consisted of an Agreed Statement of Facts executed by the Member and Counsel for the Law Society of Alberta dated June 20, 2007, which was entered as Exhibit 17, as well as the testimony of the Member. The Panel also had the benefit of reviewing Exhibits 6 through 16 in the proceedings.

This matter arose as a result of a personal injury matter where the client was initially retained by John Schneider, a practitioner in Canmore, Alberta. Sometime after a Statement of Claim had been filed by Mr. Schneider on behalf of the client, the client determined to transfer the file to the Member.

On March 15, 2004, Mr. Schneider delivered his file to the Member and provided a covering letter containing trust conditions as to the use of the file. (Exhibit 9 - TAB 1) Trust Condition No. 1 required the Member to immediately compensate Mr. Schneider for disbursements presently paid by his firm as detailed in a statement of account which was included with the letter. This payment was to be made "within seven days of receipt".

Trust conditions No. 3, 4 and 5 required the Member to promptly advise Mr. Schneider when the matter was settled or a Statement of Judgment issued, and that sufficient particulars of the final

disposition be given to Mr. Schneider in order to allow Mr. Schneider to render an account for his fees based on his contingency fee agreement with the client, it being Mr. Schneider's intention to share the contingency fee award with the Member on a pro rated and proportionate basis, depending on the time expended by the two offices. Mr. Schneider was also to receive a proportionate share of taxable costs.

Trust condition No. 6 indicated that no funds were to be disbursed to the client until notification of the disposition of the matter had been provided to Mr. Schneider and the Member was to withhold funds equivalent to the amount of fees under Mr. Schneider's contingency fee agreement and those funds would not be released without written consent.

Trust condition No. 7 required the Member to file a copy of a Notice of Change Solicitors.

Finally, trust condition No. 8 contained the usual provision indicating that if the trust conditions were not acceptable or the Member was unable to comply with same, then the file was to be immediately returned, unused and uncopied, to Mr. Schneider.

The trust letter had a place at the bottom whereby the Member was requested to confirm the receipt of the file and receipt of the trust conditions. It did not appear that the Member ever signed same.

The evidence disclosed that one of the difficulties in arranging for an acceptable split of the fees was that Mr. Schneider's contingency fee agreement (Exhibit 6 - TAB 1) required payment of 35% of the ultimate award, whereas the Member testified that his contingency fee agreement required payment of only 30% of the ultimate award.

The following are matters of evidence that are salient in respect of the breach of the foregoing trust conditions:

1. The Member never did file a Notice of Change of Solicitors in respect of the action commenced by Mr. Schneider. The Member admitted that he could have done so very shortly after March 15, 2004, but indicated that in his mind, he had not agreed to accept the trust conditions until early June of 2004, at which time Mr. Schneider's Statement of Claim had expired. Fortunately, the limitation period had not expired and the Member solved the issue by simply filing a new Statement of Claim. The Member indicated that this made the trust condition requiring a Notice of Change Solicitors to be filed completely academic as Mr. Schneider's Statement of Claim had never been served on anyone and had now expired. Accordingly, the only person upon whom the Notice of Change of Solicitors would be served would have been Mr. Schneider himself.
2. On June 1, 2004, Mr. Schneider wrote to the Member indicating that he had received no correspondence from the Member and therefore was unclear as to whether the Member had agreed to be bound by the trust conditions set forth in the March 15, 2004 letter. (Exhibit 9 - TAB 2).
3. On June 7, 2004, the Member wrote to Mr. Schneider and "commented on Mr. Schneider's trust conditions" (Exhibit 9 - TAB 4). The Member paid the disbursement account of Mr. Schneider in the amount of \$473.05 but withheld the sum of \$367.18 as

the Member took the position that the withheld amount (a fee paid to a third party legal researcher retained by Mr. Schneider to advise on the quantum of the potential claim), was more properly legal fees and not a true disbursement. The Member also raised the difficulty of the issue of the sharing of fees as a result of the different percentage in the two contingency fee agreements and requested a statement of the hours worked by Mr. Schneider on the file. The Member suggested that the fees and taxable costs would be dealt with on the conclusion of the matter but that Mr. Schneider's hours would be required to be disclosed. The Member specifically indicated in this letter that if the terms of the letter were not agreeable to Mr. Schneider, then the Member should be advised and he would return the file to Mr. Schneider.

4. Mr. Schneider wrote back on July 6, 2004 (Exhibit 9 - TAB 5). Mr. Schneider took the position that the legal research was a valid disbursement. He suggested that if he were required to disclose his full fee break down immediately, then the fees should be paid immediately, but that he was prepared to address the matter of fees at the conclusion of the file either by way of a pro rata sharing or through taxation. The Member testified that he felt that, on the basis of this letter, he had come to an agreement with Mr. Schneider whereby the fee apportionment would be deferred to the conclusion of the file.
5. Although there was further correspondence between the Member and Mr. Schneider, no formal resolution of these issues ever seemed to occur.
6. On October 21, 2005, the Member advised Mr. Schneider in writing that the matter had been settled and that after payment of all relevant disbursements, the fees to be shared totalled \$4,926.27 (Exhibit 9 - TAB 19). This fee amount appears to be based upon the 30% contingency fee agreement which the Member had with the client. The Member testified that the amount of the fees and disbursements were retained in his trust account pending a resolution of the sharing of the fees with Mr. Schneider and that the balance of the funds were distributed to the client.
7. By letter of October 24, 2005 (Exhibit 9 - TAB 20), Mr. Schneider took the position that the Member should not have forwarded any of the settlement proceeds to the client until such time as the fee sharing arrangement was consummated between the Member and Mr. Schneider. Further, Mr. Schneider refused to discontinue the original action as had been requested by the Member.
8. In testimony, the Member confirmed that Mr. Schneider had never relinquished his claim to the legal research disbursement and that by taking conduct of the file without making such payment, he was in breach of Mr. Schneider's trust conditions.
9. The Member further confirmed that he had never filed a Notice of Change of Solicitors in respect of the original action commenced by Mr. Schneider and that this was a breach of the trust conditions. The Member stated that notwithstanding this breach, the matter was essentially academic when it was discovered that the original unserved Statement of Claim had expired.

10. The Member testified that he did not conclude that trust condition No. 6 obliged him to hold the entirety of the settlement funds pending a resolution of the fee issue, but rather that he was only required to hold the entirety of the fees. He suggested that any other conclusion was not realistic as this would put the client out of pocket while two lawyers fought over their fees. The Member however did admit that trust condition No. 6 likely required him to withhold the fees on the basis of the 35% contingency fee contemplated in Mr. Schneider's condition fee agreement as opposed to the 30% that was actually withheld, being the percentage under the Member's contingency fee agreement.
11. The issue of the sharing of the fees was ultimately resolved in May of 2007 whereby the Member paid to Mr. Schneider the sum of \$3,500.00 which Mr. Schneider claimed should be his share of the fees. The Member paid same from his general account and continued to hold the fee amount in trust pending completion of this hearing.
12. The Member testified that he essentially had no ability to negotiate or even propose a fee sharing arrangement to Mr. Schneider in the absence of Mr. Schneider providing him with a breakdown of the time Mr. Schneider spent on the file, something that was never formally provided by Mr. Schneider notwithstanding numerous invitations on the part of the Member for Mr. Schneider to do so.

Decision as to Guilt

The Hearing Panel accepted the admission of guilt of the Member as set forth in the Agreed Statement of Facts. The Panel concluded that trust conditions No. 1 and 7 as outlined above were clearly breached.

The Panel had some difficulty with the position that trust condition No. 6 had been breached. The Panel was of the view that this condition did not require the Member to withhold the entirety of the settlement funds but only the amount of the fees, but was satisfied that there was likely a breach thereof based on the fact that the trust conditions required fees to be withheld on the basis of Mr. Schneider's 35% contingency fee arrangement rather than the 30% contingency fee arrangement that the member had negotiated with the client. Counsel for the Law Society confirmed that trust conditions 4, 5 and 6 were not particularly clear and that had separate citations been issued with respect to the various trust condition breaches, he may well not have pursued a citation based upon a breach of trust condition No. 6.

Submission re Sanctions

Mr. Penny, on behalf of the Law Society of Alberta, indicated that a breach of a trust condition was a serious matter indeed, but that there were mitigating circumstances in respect of the conduct of the Member. In addition to the uncertainty surrounding the alleged breach of trust condition No. 6. Mr. Penny also submitted that the client was in no way prejudiced as a result of the dispute between the Member and Mr. Schneider and in fact the Member had gone to some length to ensure that the client was not harmed in any way at all, and that the client had been charged a fair fee. Further, Mr. Penny submitted that the Member took the high road in the ultimate manner in which the fees were shared and that it appeared that the Member had accepted a lower fee than what was ultimately paid to Mr. Schneider, although the Member

clearly had done the majority of the work on the file. While normally a breach of trust condition would result in at least a fine being imposed, Mr. Penny submitted that as a result of the mitigating factors, payment of costs and reprimand would be a sufficient sanction under the circumstances. Mr. Corenblum concurred but suggested that the costs should be reduced given the mitigating circumstances.

Decision As To Sanction

The Panel essentially concurred with the submissions of Mr. Penny. The Panel confirmed that in their view, a breach of a trust condition was a very serious matter in that a breach thereof erodes the underpinnings of public faith in the manner in which lawyers conduct their business on behalf of their clients, and that any erosion of that faith was a serious matter that required sanctioning. The Panel however was satisfied that the mitigating factors outlined above were compelling such that a reprimand and costs was an appropriate sanction. The panel further indicated that they would be remiss if they did not comment on their disapproval of the manner in which Mr. Schneider conducted himself throughout the matter, based on the evidence before the Panel. However, the Panel noted that notwithstanding how unreasonable trust conditions may be, nor how unjust the result of compliance with same may be, this in no way diminishes the responsibility of a Member of the Law Society of Alberta to fully comply with trust conditions which are accepted.

The Panel fixed the costs at the lesser of: (i) the actual costs of the hearing as ultimately determined; and (ii) the sum of \$1,700.00.

Payment of the aforesaid costs are to be paid in full within thirty (30) days of the date of delivery of the Final Statement of Costs.

No referral to the Attorney General is required in this matter.

No separate notice to the profession is required in respect of this matter.

The Chair delivered the reprimand to the Member.

This decision, the evidence and the exhibits in this hearing are to be made available to the public, with the name of the Member's client to be redacted therefrom wherever it appears.

Dated this 21st day of June, 2007.

Stephen Raby, Q.C.

John Prowse, Q.C.

Shirley Jackson, Q.C.