



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 B. GARETH PALFY
a Member of The Law Society of Alberta

INTRODUCTION

1. On October 16, 2006, March 12 -13 and 15, 2007 and April 5, 2007, a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary to inquire into the conduct of B. Gareth Palfy. The Committee was comprised of Carsten Jensen, Q.C., Chair, John Prowse, Q.C., and Morris Taylor. The LSA was represented by Garner Groome. The Member was present for the Hearing. The Member was represented by his counsel W.E. Brett Code.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1 through 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 jurisdiction of the Committee.
3. There was no objection by the Member's Counsel or Counsel for the LSA regarding the constitution of the Committee. Mr. Taylor's term as a lay bencher of the LSA ended during the Hearing, but he continued to serve as a Hearing Committee member pursuant to the ss. 66 of the *Legal Profession Act*.
4. The Certificate of Exercise of Discretion and several Affidavits of Service were entered as Exhibit 5.
5. The evidence of Mr. G.D., a Claims Manager with R..., was heard in private on the basis that his evidence involved references to the identities, personal information and private business dealings of R... customers. The balance of the Hearing proceeded in public.

BACKGROUND AND CITATIONS

6. The Member was admitted to the bar in 1997. He was employed with R... as a bodily injury examiner from 2003 until the end of July 2004, at which point his employment was terminated. During much of his employment with R... the Member was not an active member of the LSA.
7. Prior to the termination of his employment, in around January 2004, the Member met his old law school friend Mr. Branislav (Brad) Popovic by chance on the street near the Courthouse in Calgary. The Member offered to refer some conflict matters from his employment with R..., and by March 3, 2004 the Member had signed an Agreement with Mr. Popovic's firm by which the Member would begin an independent practice in association with that firm. The Member was reinstated to active practice with the LSA as of March 17, 2004.
8. Between March and the end of July 2004 the Member was transitioning from R... to his new private practice arrangement. The evidence is in conflict as to what R... knew about the Member's plans to move to private practice, and the reasons for their termination of his employment. In brief, the LSA alleges that the Member abused his position at R... by contacting two potential accident injury claimants who had not yet come forward involving R... insurance policies, and the LSA alleges he did so for personal gain.
9. In the first instance, involving SW, the Member is alleged to have referred this claimant to Mr. Popovic for independent legal advice in an effort to curry favour with his new firm, and for his own personal profit. The LSA variously alleges that SW does not actually exist, that the Member made false notations on R... files, and that he provided a false address for SW to Mr. Popovic. R... issued two cheques on the SW matter, addressed to Mr. Popovic's firm, at the Member's instance. SW "disappeared", as did his file at R... The cheques were returned to R... and were never actually cashed.
10. In the second instance the Member is alleged to have contacted DJG and encouraged him to advance a compensation claim against R... with the goal of the Member himself obtaining some of the funds payable to DJG. The LSA alleges that as part of this scheme the Member wrote and sent a letter on June 15, 2004, bearing Mr. Popovic's name, from Mr. Popovic's firm, to himself at R... (the "June 15, 2004 Letter"). The June 15, 2004 Letter sought to resolve the DJG claim for \$6,500, and advised R... that it could deal with DJG on the settlement directly. Mr. Popovic denies that he had any knowledge of the DJG matter or that he saw the June 15, 2004 Letter in advance. This is disputed by the Member. The address inputted into the R... computer system for delivery of the cheque was the personal address of DS, the Member's girlfriend, where the Member was residing at the time. The cheque was sent to that address by post, but was returned to R... uncashed. The LSA alleges that this was all part of a scheme though which the Member sought (unsuccessfully) to enrich himself at the expense of his employer.
11. Arising from this background, the Member faced the following citations:

Citation 1: IT IS ALLEGED that you engaged in an activity that is

incompatible with the best interest of the profession and justice system, and that such conduct is conduct deserving of sanction.

Citation 2: IT IS ALLEGED that you engaged in personal and professional conduct that brings discredit to the profession, and that such conduct is conduct deserving of sanction.

Citation 3: IT IS ALLEGED that you failed to uphold the law in your personal conduct, and that such conduct is conduct deserving of sanction.

Citation 4: IT IS ALLEGED that you failed to cooperate with the Law Society of Alberta, and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULT

12. In the result, on the basis of the evidence entered at the Hearing, and for the reasons set out below, the Hearing Committee found that Citations 1 and 4 were proven and that the Member is guilty of conduct deserving of sanction in respect of those two citations. For the reasons that follow, Citations 2 and 3 are dismissed.
13. The Hearing Committee has not heard any evidence or argument on the matter of sanction, and the Committee will reconvene on a date convenient to the parties for that purpose.

EVIDENCE

14. Exhibits 1 - 5 (the jurisdictional exhibits) were entered by Counsel for the LSA.
15. Exhibits 6 - 18 were entered in the direct examination of Mr. D. by Counsel for the LSA .
16. Exhibits 19 - 46 were entered by consent on March 12, 2007, being the second day of the Hearing, on the basis that the truth and weight to be given to individual exhibits in this group would be determined by the Hearing Committee in due course.
17. Exhibits 47 - 49 were entered during the cross examination of Mr. D. by Counsel for the Member.
18. Exhibits 50 – 57 were entered during the examination and cross-examination of the complainant, Mr. Brad Popovic, a Member of the LSA.
19. Exhibits 58 - 59 were entered during the examination and cross-examination of Mr. Greg Hopfauf, a senior auditor employed with the LSA.
20. Exhibit 60 was entered during the cross-examination of the Member by Counsel for the LSA.
21. Exhibit 61 was entered by consent. Exhibits 62 - 67 were entered during argument by Counsel for the Member, with the consent of Counsel for the LSA.

22. The Hearing Committee heard oral evidence from Mr. D., from DJG, from Mr. Popovic, from Mr. Hopfauf, from the Member and from DS.

THE WITNESSES

23. The Hearing Committee heard evidence with respect to a number of issues ancillary to the main allegations against the Member. This included evidence with respect to:
- The propriety of a bodily injury adjuster searching out potential claimants who had not come forward on their own;
 - Various loans taken by the Member, and the circumstances of his divorce and matrimonial property settlement;
 - Various different forms of signature used by the Member, with specific reference to the signature appearing on the June 15, 2004 Letter;
 - A missing R... paper file with respect to SW;
 - The Member's "moonlighting" and the reasons for his termination at R...; and
 - Whether the Member was on holidays just prior to his termination, and how long those holidays might have been.

For the reasons that follow the Hearing Committee has concluded that it is not necessary for us to resolve these disputes, that nothing turns on these issues, and the evidence with respect to these issues forms no part of the Hearing Committee's decision in this matter.

(a) THE EVIDENCE OF G.D.

24. G.D. testified that he was the Member's direct supervisor at R... His evidence was that the Member had settlement authority on bodily injury files in the \$30,000.00-\$50,000.00 range. The Member had authority to issue payment requests into R...'s computer system, with cheques being generated out of Toronto and mailed from there. A small percentage of cheques issued each day would be subject to a random cheque audit.
25. With respect to the SW matter, Mr. D. testified that the R... file is a "duplicate", and that is because the original file could not be located. The duplicate file simply contains printouts from the R... computer systems, and Mr. D. confirmed that there would likely be documentation that was on the original file that would not be on the duplicate.
26. Based on the duplicate file, Mr. D.'s evidence was that the Member made an entry in the R... system indicating that they had received notice from Mr. Popovic's office on January 16, 2004 purporting to represent SW. The entry goes on to say "Reviewed meds. Made offer of \$4,500.00, all inclusive. Offer accepted." A cheque was issued on the same date and forwarded to Mr. Popovic's office. On February 11, 2004 the cheque was returned, uncashed, and reversed on the R... system.

27. Again, based on the R... duplicate file, Mr. D. testified that the Member purported to have left one or two telephone messages for Mr. Popovic's firm and on April 23, 2004 a second cheque was issued for \$4,500.00 and again sent to Mr. Popovic's firm. That cheque happened to be pulled into the cheque audit process, the result of which was a note that some documentation was missing. As a result, the R... records indicate that Mr. Popovic sent a fax on April 26, 2004 requesting the settlement funds of \$4,500.00.
28. The R... records indicate that the second SW cheque was also returned on June 3, 2004 and reversed on the R... system. Mr. D. confirmed that the R... duplicate file does not contain any information with respect to the injuries apparently suffered by SW. In both direct and cross-examination, Mr. D. confirmed that R... files have from time to time gone missing.
29. With respect to the Claimant DJG, the first record on the R... system was an entry made by the Member on May 4, 2004 stating that the Member had received a telephone call indicating that the Claimant was represented by Mr. Popovic's office. On May 7, 2004, 3 days later, there is a note placed on the system by the Member indicating "received proposal for \$10,000.00, settled for \$8,500.00." A cheque was issued in that amount, but that cheque was returned to R... uncashed. The R... system indicates that the Member entered a note on June 9, 2004 as follows "Apparently, they do not represent him anymore. Ok to reverse cheque." There was no documentation on the file with respect to that.
30. Mr. D.'s evidence was that two days after the first DJG cheque was cancelled on the system, a second cheque was issued in the amount of \$6,500.00 payable to DJG directly. The R... system confirms that cheque was issued on June 16, 2004, and that is the date on the cheque itself. The supporting documentation for that cheque was apparently the June 15, 2004 Letter. However, that letter appears to have been sent by fax by the Member to R..., from Mr. Popovic's office, on the early morning of June 17, 2004. The cheque had been sent to DJG at a Calgary address belonging to DS. As noted above, DS was the Member's girlfriend at the time and he was living with her at that address in the summer of 2004.
31. Mr. D. gave hearsay evidence as to the relationship between the Member and DS. There was an objection taken to that evidence. However, the subsequent evidence of the Member and of DS herself confirmed that evidence.
32. Mr. D. testified that R... did not ever locate DJG, and eventually their file was closed without any payment being made to him.
33. Mr. D. testified that R... was concerned about the unusual payments and cancelled cheques outlined above, and as a result he pulled all of the Member's files for the last 6 months of the Member's employment to conduct a review. Nothing unusual was found. Finally, Mr. D. confirmed that all SW and DJG cheques issued by R... were returned uncashed, and that R... suffered no financial loss as a result of the Member's activities with respect to these claimants.

(b) THE EVIDENCE OF DJG

34. DJG's evidence was that he lives in Edmonton, and he has been living in the same home for 6 or 7 years. He works as a welder having received his journeymen ticket in around 1989. DJG was a passenger in a motor vehicle involved in an accident in May 2003. His evidence was that he was a little sore and stiff as a result of the accident, but he toughed it out without any medical attention.
35. DJG testified that he did not contact any insurance company about his injuries. However, he was contacted by the Member who informed him that he was entitled to damages for pain and suffering. DJG's evidence was that the Member told him that he could get "\$5,000.00 for the pain and suffering." DJG testified that he told the Member that he had not been seriously injured and had not sought medical attention. He also thought that the limitation period had expired after one year. DJG testified that the Member told him that everything was "legal." DJG decided to advance a claim.
36. DJG testified that he followed up with the Member at least once by telephone to find out the status of his claim. At some point the Member called DJG and told him that he could only get him \$3,500.00, "and that was it." DJG indicated that would be acceptable. He did not have any further discussions with the Member, but he did try calling back and was told that the Member no longer worked there. He did not pursue this matter further because he "figured it was a useless cause." He did not ever receive any money from the Member or from R.
37. DJG did testify that he signed something for the Member and returned it to him. He was not sure what that was. DJG denied ever having any contact with Mr. Popovic or his firm.
38. DJG was asked about the first cheque issued with respect to his claim in the amount of \$8,500.00. He denied any knowledge of that cheque or that amount. DJG was then shown the June 15, 2004 Letter which indicated that he was agreeable to accept \$6,500.00, rather than \$8,500.00 as previously indicated. DJG denied any knowledge of that letter or those amounts, and he noted that the last conversation he had with the Member involved a discussion about him receiving \$3,500.00.
39. DJG denied any knowledge of the Calgary address of DS, which was where the \$6,500.00 cheque was sent. He denied any knowledge of DS, and indicated that he had never lived in Calgary.
40. On cross-examination DJG was asked about the difference between the \$5,000.00 and \$3,500.00 amounts described to him by the Member. He acknowledged that the difference might be as a result of the lawyer (the Member) "getting his share". DJG was unsure on this point, but he did have an understanding that the Member would be paid. In examination by members of the Hearing Committee, it was clear that DJG was confused about the Member's role. He understood that the Member was a lawyer, and eventually he did understand that he was working for the insurance company.

(c) THE EVIDENCE OF BRAD POPOVIC

41. Brad Popovic is the Complainant in this matter. Mr. Popovic gave evidence that his firm is an association of independent practices. Mr. Popovic knew the Member from law school. In early 2004 Mr. Popovic ran into the Member in downtown Calgary, near the Courthouse, and he learned that the Member was working at R... and that he wanted to begin practicing law once again. That led to some discussions, and eventually to a lease agreement dated March 3, 2004. Following the execution of that lease the Member began to transition from R... to Mr. Popovic's firm.
42. The lease agreement, which was marked as an exhibit, involved the payment of a monthly fee by the Member to Mr. Popovic's firm. Mr. Popovic and other members of his firm planned to refer files to the Member and to work with him on other matters. The plan was for the Member to be an independent practitioner within Mr. Popovic's firm, and the Member was allowed to list himself on the firm's letterhead.
43. Mr. Popovic's evidence was that the Member spoke to him early on about the possibility of referring unrepresented claimants from R... to him for independent legal advice. That led to a discussion about SW, and Mr. Popovic agreed to take on that matter. Mr. Popovic's evidence was that he later decided that it would not be appropriate to take other such referrals as the Member was transitioning from R... to his office.
44. Mr. Popovic's evidence was that the relationship between the Member and Mr. Popovic's firm deteriorated as a result of the Member not being in the office frequently enough, and because of various client concerns. In addition, there were the issues giving rise to this complaint. As a result, the relationship between the Member and Mr. Popovic's firm was terminated by the Member, with the firm's consent, in mid-November 2004.
45. With respect to SW, Mr. Popovic wrote a letter dated April 26, 2004 addressed to the Member at R... requesting that R... forward the proposed settlement funds in the amount of \$4,500.00 on the basis that Mr. Popovic would seek instructions from SW on that matter. Mr. Popovic's evidence was that he drafted that letter upon the Member's request, and on the understanding that he would then advise SW as to his opinion whether that settlement would be appropriate. Mr. Popovic acknowledged receiving the funds from R..., but he was unable to reach SW and so the funds were returned. SW did not appear for a scheduled appointment, and there may have been difficulties with his English. A limitation date was approaching, and Mr. Popovic testified that he therefore filed a Statement of Claim in SW's name as a precautionary matter. Information necessary to file the Statement of Claim was obtained from the Member. The Statement of Claim was not served.
46. In cross-examination Mr. Popovic acknowledged having agreed to assist SW, and he acknowledged having received two cheques with respect to the SW matter, the first being in January, and the second in April of 2004. Mr. Popovic also acknowledged having received medical reports with respect to SW from the Member.
47. Counsel for the Member suggested to Mr. Popovic in cross-examination that he had been very upset about the difficulties associated with the SW matter, and he suggested that was a motivation for Mr. Popovic's complaint against the Member. Mr. Popovic denied this.

- Counsel for the Member also suggested to Mr. Popovic that he had contradicted himself in various statements to the Law Society by not immediately acknowledging that he had agreed to take on the SW matter. However, it was clear from the record of Mr. Popovic's meetings with Mr. Hopfauf that this issue was in fact first raised by Mr. Popovic himself.
48. Mr. Popovic recalled receiving a further cheque for \$8,500.00 in the matter of DJG. His evidence was that he did not know what that cheque was for, and so he returned it to R...
 49. Mr. Popovic testified that in September of 2004 he had a discussion with an adjuster at R... about DJG. The adjuster called him to ask where she could forward the settlement funds, and whether Mr. Popovic had contact information for DJG. Mr. Popovic testified that he advised the adjuster that he did not know anything about DJG, and that lead to the adjuster forwarding to him a copy of the June 15, 2004 Letter bearing his name. Mr. Popovic testified that he called the adjuster back and advised her that was not his letter, and that he did not have a file for DJG. Mr. Popovic testified that he was concerned about the June 15, 2004 Letter having been sent in his name.
 50. As a result, Mr. Popovic testified that he spoke with the Member and asked him whether he knew of any file pertaining to DJG. Mr. Popovic testified that the Member's response was "no". Mr. Popovic then put the June 15, 2004 Letter to the Member. Mr. Popovic's evidence is that the Member was then apologetic and acknowledged having sent the letter. All of this took place somewhere in September 2004. According to Mr. Popovic, the Member then asked Mr. Popovic to "help him out", and the Member offered to "pay more rent" to resolve the matter. Mr. Popovic instead made a complaint to the LSA.
 51. Mr. Popovic denied that the signature on the June 15, 2004 Letter was his signature, and he expressly and repeatedly denied any prior knowledge of DJG or any authority on the part of the Member to communicate on Mr. Popovic's behalf regarding DJG.
 52. Mr. Popovic testified that he urged the Member to contact the LSA, and that lead to a letter from the Member to the LSA dated September 15, 2004 in which the Member acknowledged that he had sent the June 15, 2004 Letter without first showing it to Mr. Popovic. Mr. Popovic took exception to that letter insofar as it implied that the Member had ever spoken to Mr. Popovic about the DJG matter in advance of sending the June 15, 2004 Letter.
 53. Counsel for the Member cross-examined Mr. Popovic about apparent discrepancies in his statements regarding the Member's start date with his firm. However, the evidence, acknowledged by Mr. Popovic, makes it clear that the lease was signed in March of 2004, and this lead to a rather long transition period where the Member was not always in the office.
 54. Mr. Popovic also acknowledged that the lease agreement with the Member was not ever amended, and that agreement allowed the Member to use Mr. Popovic's firm's letterhead. However, Mr. Popovic testified that at some point the Member did begin to use his own letterhead on correspondence. Mr. Popovic was unable to recall the date on which this occurred.

55. Mr. Popovic endured an aggressive and difficult cross-examination designed to impeach his motives as a complainant and his credibility as a witness. With the exception of very minor and easily explained inconsistencies, Mr. Popovic's evidence was consistent with the written record and with his own prior statements. Mr. Popovic appeared to be careful to avoid inferences and conclusions about matters outside of his direct knowledge, and he appeared genuinely distressed about having to report the Member to the LSA.

(d) THE EVIDENCE OF GREG HOPFAUF

56. Greg Hopfauf testified that he is a senior auditor employed with the LSA. He was involved in the investigation of the Member, and in that capacity he interviewed Mr. Popovic on October 20, 2004. He also conducted a recorded interview of the Member on October 13, 2004, the transcript of which became an exhibit in these proceedings. That interview was not completed because of the Member's schedule, and it was agreed that the interview would resume the next day. However, the Member wrote to Mr. Hopfauf on October 14, 2004 indicating that he was unable to meet with Mr. Hopfauf because he had a two day trial starting the next day. The Member did propose some further dates later in October. However, Mr. Hopfauf wrote to the Member on October 14, 2004 providing notice that an investigation order had been issued on October 12, 2004 in relation to a compliant received from Mr. Popovic. The Member responded on October 15, 2004 indicating that he wanted a copy of the interview transcript prior to his next meeting with Mr. Hopfauf. The subsequent correspondence indicates a number of attempts by Mr. Hopfauf to arrange a further meeting with the Member, all of which were unsuccessful.
57. On January 31, 2005, Mr. Hopfauf attended unannounced at the Member's business address and found the Member having lunch. Mr. Hopfauf asked the Member a few questions and delivered a letter asking the Member to arrange to continue the interview which had started on October 13, 2004. That further interview was scheduled for February 9, 2005 for 2:00 p.m. at the LSA offices in Calgary. At 1:19 p.m. on February 9, 2005 the Member faxed a letter to Mr. Hopfauf cancelling that appointment. His letter indicated that he would call Mr. Hopfauf the next day to reschedule. That apparently did not occur.
58. The subsequent records indicate attempts by Mr. Hopfauf to contact the Member on February 15, March 7 and March 8, 2005. In addition, Mr. Hopfauf delivered a letter to the Member's office on March 8, 2005, which letter again requested a further meeting and mentioned the possibility that the Member might be cited with a charge of non cooperation with the LSA. That did not lead to a response, and Mr. Hopfauf again went to the Member's business address on March 24, 2005, but the office was closed. Mr. Hopfauf left a letter for Mr. Palfy on that date reiterating some of the history and posing a number of specific questions. One of those questions was whether DJG in fact exists. The Member finally responded on April 3, 2005. In that response he denied that he had been "non cooperative" and he indicated that DJG does exist.
59. In cross-examination Mr. Hopfauf was asked whether he had advised the Member prior to the interview of October 13, 2004 that there was an official order of investigation. He

was not able to recall specifically, but he indicated that his practice would have been to advise the Member of that. He did not advise the Member that he could bring counsel to the meeting, although he acknowledged that he understood prior to the interview that the Member potentially faced LSA citations. Mr. Hopfauf acknowledged not providing Mr. Popovic's letter of complaint to the Member in advance of that interview. Mr. Hopfauf acknowledged that at some point during the investigation he came to the conclusion that DJG did not actually exist.

60. DJG was ultimately located, apparently due to the efforts of counsel for the Member, and Mr. Hopfauf did interview DJG prior to DJG giving evidence at this hearing. At DJG's request that interview was not recorded. However, Mr. Hopfauf's notes did become an Exhibit in this Hearing.

(e) THE EVIDENCE OF THE MEMBER

61. The Member gave evidence in this matter on his own behalf. He indicated that he obtained his law degree at the University of Wales in the United Kingdom. He was called to the Alberta Bar in 1997. The Member knew Mr. Popovic from law school, and he ran into him in January 2004 near the Courthouse in Calgary, and they went to the local Starbucks to catch up with each other. The Member advised Mr. Popovic that he was at R... as an adjuster, and his evidence was that he asked Mr. Popovic whether he was interested in receiving referrals of unrepresented claimants. The Member indicated that Mr. Popovic replied that he was interested, although he would have to look at each matter individually. The Member indicated that the first matter he referred to Mr. Popovic was with respect to the claimant SW, and the second matter was with respect to the claimant DJG.
62. The Member testified that, during his employment with R... in Calgary as a bodily injury adjuster, he had between 150 and 300 files open at any one time. A file would consist of a hard copy or paper file, as well as a computer log where contacts with claimants and third parties were recorded. The Member testified that he was a non-practicing member of the Law Society during his employment with R... in Calgary until March of 2004, at which point he became a practicing member. He indicated that his role at R... was to work as an insurance adjuster, similar to other bodily injury adjusters, and he did not provide legal advice to R...
63. The Member testified that his expectation was that he would transition from R... to Mr. Popovic's firm in a short time after the beginning of March, 2004. However, his evidence was that he did not receive the referrals that he expected from the firm, and so the transition time took longer than he expected. The Member was then terminated at R... and accordingly began full time practice with Mr. Popovic's firm.
64. With respect to SW, the Member's evidence was that he had arrived at a figure of \$4,500.00 as an appropriate settlement amount, and he had sent a bundle of documents (including medical information) over to Mr. Popovic. The Member confirmed that there was no written documentation with respect to his communications with Mr. Popovic regarding SW.

65. The Member further testified that the first cheque for \$4,500.00 went out to Mr. Popovic in January, 2004. That cheque was returned uncashed, and the Member understood that Mr. Popovic was having a difficult time reaching SW. The Member advised that he then requested and received a letter from Mr. Popovic dated April 26, 2004 requesting the proposed settlement funds in the amount of \$4,500.00 on the basis that Mr. Popovic would seek instructions. The Member testified that letter was the support for the second R... cheque issued in the SW matter, although that cheque was dated 3 days earlier, being April 23, 2004. That cheque was again returned to R... The Member's evidence was that Mr. Popovic advised him that he needed to file a Statement of Claim to preserve a limitation date on the SW matter as he was unable to reach the claimant. According to the R... computer log, the Member's last involvement with the SW matter was on June 25, 2004.
66. With respect to the DJG matter, the Member testified that in April or May of 2004 he suggested to Mr. Popovic that this was another potential referral for him. The Member indicated that he had contacted DJG after looking at a police report on the file which suggested that he was a potential claimant. The Member indicated that he introduced himself to DJG as being an adjuster working at R..., and he suggested that DJG speak to Mr. Popovic or other counsel. The Member indicated that at some point he told Mr. Popovic his view that the DJG matter was worth approximately \$8,000.00-\$8,500.00, and that an offer from DJG in the range of \$10,000.00-\$12,000.00 would be appropriate as a place to start. The Member indicated that he understood that there was an agreement with Mr. Popovic that Mr. Popovic would take the DJG matter as a referral, and that Mr. Popovic would request a cheque for \$8,500.00 and forward it to Mr. Popovic's law firm.
67. The Member confirmed that in his initial discussion with DJG he was told that his injuries were minor and that DJG had not missed any work. The Member denied advising DJG that his claim was worth \$3,500.00 or \$5,000.00, and he denied speaking to DJG about contingency fee arrangements. The Member indicated that his evaluation of the DJG claim was based on the settlement of a similar claim for another passenger in the same vehicle.
68. In any event, the Member indicated that he requested a cheque in the amount of \$8,500.00 in early May of 2004. The R... computer log entry for May 4, 2004, made by the Member, suggests that the Member had received a call from Mr. Popovic indicating that his firm represents DJG. The log indicates that a cheque was issued May 7, 2004. The log for that date also indicates "rec proposal for 10k, settled for 8,500.00". The cheque was made payable to Mr. Popovic's firm, but it was returned and reversed on the system on June 9, 2004. The Member's R... computer log entry for that day says "apparently they do not rep him anymore, ok to reverse cheque".
69. In cross-examination the Member acknowledged that his R... log entry for May 7, 2004 indicates that the DJG matter settled for \$8,500.00, rather than there being an offer for that amount for consideration by the claimant. The Member also acknowledged that there is no note with respect to DJG then subsequently agreeing to accept \$6,500.00 rather than \$8,500.00. Notwithstanding the log entry, the Member testified that he is unsure whether DJG ever knew of the "offer" for settlement at \$8,500.00. In addition,

the Member acknowledged advising Mr. Hopfauf in his interview of October 13, 2004 that he spoke to DJG about accepting \$6,500.00, although that discussion is not noted anywhere in the R... computer log. The Member described that as an “oversight”.

70. In examination by the Hearing Committee the Member was asked about the DJG matter and the reduction from \$8,500.00 to \$6,500.00. The Member acknowledged that this kind of reduction would have had to have been approved by DJG, who was after all the claimant. The Member was asked whether the authority for this reduction was documented anywhere. He acknowledged that it was not documented in the R... computer log, and that his discussions with DJG were in his capacity as an adjuster with R... The Member acknowledged that he took information apparently received from DJG in his capacity as an adjuster over to Mr. Popovic’s firm and used it as the basis for the June 15, 2004 Letter prepared by himself and sent to his own attention at R... under Mr. Popovic’s name.

71. The evidence of the Member was that he sent the June 15, 2004 Letter, purportedly from Mr. Popovic, to R... The Member acknowledged writing and signing that letter, the full text of which is:

As discussed, we confirm that you may deal directly with [DJG] on this matter. And we confirm that he is agreeable to accept \$6,500.00 not \$8,500.00 as previously indicated. We apologize for any inconvenience this may have caused.

If agreeable please forward the funds to [DJG] directly.

Thank you for your attention to this matter.

72. The Member testified that this letter was prepared so that R... would have something to advance a settlement cheque against. As Mr. Popovic was not going to represent DJG, his evidence was that the number was reduced to \$6,500.00 as that would be a better settlement for R... and consistent with DJG’s expectations.

73. The Member’s evidence with respect to the June 15, 2004 Letter is in direct conflict with the evidence of Mr. Popovic. The Member testified that he had discussed DJG with Mr. Popovic, that Mr. Popovic had agreed to take on DJG as a client, and that Mr. Popovic was well aware of the DJG claim. With respect to the June 15, 2004 Letter, the Member testified as to his belief that he had showed that letter to Mr. Popovic prior to sending it on Mr. Popovic’s behalf to himself at R... The Member was unable to say why he did not clearly sign the letter as being “for” Mr. Popovic, rather than putting an indecipherable and potentially confusing signature on that letter.

74. The Member was asked about his various statements as to whether Mr. Popovic had any advance knowledge of the June 15, 2004 Letter. The Member testified that he had initially been convinced by Mr. Popovic that Mr. Popovic had never seen that letter before it was sent. He later came to believe that he might have shown Mr. Popovic that letter in advance as that would have been his ordinary practice. In cross-examination the Member acknowledged sending a letter dated June 26, 2005 to the LSA where he indicated his belief that he had “implied authorization” from Mr. Popovic to forward the

- June 15, 2004 Letter. In that letter to the LSA the Member did not suggest that he had “actual” authorization.
75. In cross-examination the Member also acknowledged that he did not actually remember showing Mr. Popovic the June 15, 2004 Letter in advance, and he acknowledged sending a letter to the LSA on September 15, 2004 where he stated “I drafted a letter on his [Mr. Popovic’s] behalf and in error did not show it to him before forwarding it. I had intended to show it to him, but have no idea why I did not. My practice would be to get his approval.”
 76. Further, the Member acknowledged that in his interview with Mr. Hopfauf of October 13, 2004, and in respect to the June 15, 2004 Letter, he indicated “I should have shown this to Brad beforehand...um...I didn’t, and I don’t know, if I didn’t because I was, ah, I don’t know...I, I have thought about it since and, and, completely forgot about it...um...I didn’t intend anything, you know, ah, I didn’t intend Brad to have any repercussions or anything like that.”
 77. The Member was asked to respond to Mr. Popovic’s suggestion that the Member had begged him not to call the LSA regarding the June 15, 2004 Letter. The Member denied that, but he did indicate that he suggested a meeting with Mr. Popovic and his partner to discuss matters, and that opportunity was not afforded to him.
 78. In the context of the June 16, 2004 cheque to DJG, which was sent to DS’ address, the Member testified that DS is and was his girlfriend and that he had been with her since Christmas of 2003. He confirmed that his girlfriend’s address was the same as the address where the June 16, 2004 cheque for \$6,500.00, payable to DJG, was sent. The Member confirmed that he was living with DS at that address in June of 2004. He also confirmed that he received mail at that address when he was living there with DS.
 79. The Member’s evidence was that DS did not ever tell him that she had received an envelope from R... The Member was asked repeatedly about why the June 16, 2004 cheque for \$6,500.00 was sent to DJG at the address of DS, where he was living. He was unable to answer the question beyond saying that he did not have an explanation for that. It was clear from the Member’s evidence that it was his responsibility as an adjuster to enter information into the R... computer, including the delivery address for cheques that he was requesting. In the case of the June 16, 2004 cheque the Member acknowledged that he must have entered DS’ address into the computer system, although he had no explanation for that.
 80. The Member was asked about his interactions with Mr. Hopfauf of the LSA. He acknowledged that Mr. Hopfauf had introduced himself as an investigator for the LSA. The Member met with Mr. Hopfauf on October 13, 2004, although he complained in his evidence that he did not have the benefit of counsel at that meeting, had not seen a letter of complaint in advance, and that he had not been told that he was the subject of an investigation order. The Member acknowledged that his letter to the LSA on the day following his interview with Mr. Hopfauf, being October 14, 2004, he referenced the “complaint of Mr. Popovic”, and he referenced Mr. Hopfauf’s advice that there was an

“official order of investigation”, and he asked for an explanation of what that entails. The Member acknowledged that he was aware prior to his interview with Mr. Hopfauf that Mr. Popovic had phoned the Law Society, and he assumed that Mr. Hopfauf was investigating that inquiry or complaint. The Member also acknowledged in cross-examination that he did eventually receive a copy of Mr. Popovic’s letter of complaint

81. The Member complained that Mr. Hopfauf’s questioning on October 13, 2004 was aggressive; that it was in the nature of an interrogation or cross-examination, and that it went from being friendly to being unfriendly. He testified that he felt intimidated and bullied. As a result, he became less inclined to cooperate with Mr. Hopfauf. In addition, between October 2004 and March 2005 the Member indicated that he believed that Mr. Hopfauf would complete his investigation by speaking to DJG, and that would deal with the matter. The Member also testified that he was moving offices in December of 2004. This was all provided as an explanation for the Member not responding to Mr. Hopfauf during this period.
82. The Member did see Mr. Hopfauf in late January 2005, when Mr. Hopfauf came by the Member’s office unannounced. A meeting was scheduled for February 9, 2005 at 2:00 p.m., but the Member cancelled that meeting at the last moment without providing a reason. The Member did not respond to a number of inquiries following that date, and up to March 24, 2005, and he indicated by way of explanation that he felt like he was being “hounded or pursued”. The Member went on to say that he felt that he cooperated with the LSA in the best manner that he could.
83. The Member testified in cross-examination that, when he was interviewed by Mr. Hopfauf on October 13, 2004, he had no idea that Mr. Popovic was denying any knowledge whatsoever of DJG. He indicated that he was surprised by this. However, in questioning by the Hearing Committee the Member acknowledged that this contradicted his statement to Mr. Hopfauf in the interview of October 13, 2004 where he stated his understanding of Mr. Popovic’s claim that he did not know DJG, that he had not spoken with DJG, and that he was not interested in the file.
84. The Member acknowledged that the interview of October 13, 2004 with Mr. Hopfauf was not completed, and that it had ended with an agreement to resume the following day. However, the Member wrote to Mr. Hopfauf on October 14, 2004 indicating that he was unable to continue with the interview as he had a two day trial starting the next day, being October 15, 2004. In cross-examination the Member indicated that he had forgotten about his two day trial and that he was unable to continue with the interview for that reason.
85. During the evidence of the Member an issue arose whether Mr. Hopfauf as an investigator for the LSA had used an overly aggressive tone of voice with the Member in the interview of October 13, 2004. The Member indicated in his evidence that Mr. Hopfauf had taken that approach. The Hearing Committee had before it a transcript of that interview. A tape of the interview was available, although it had not been heard by counsel for the Member, counsel for the LSA, or the Hearing Committee in advance of the Hearing. Counsel for the Member and counsel for the LSA listened to the tape during

a recess in the proceedings. That led to a letter from counsel for the LSA to the Hearing Committee, sent with the approval of counsel for the Member, which included the following:

“Now having had the benefit of hearing the tape both counsel agree that the tone of Mr. Hopfauf’s questioning during the interview was not the aggressive tone of voice affected by Mr. Code during his re-examination of Mr. Palfy. Mr. Code advises he has instructions not to advance the tone of voice used in the interview as an issue in these proceedings. Accordingly, I will not require that the tape be entered into evidence.”

86. That letter was marked as Exhibit 61 in these proceedings.

(f) THE EVIDENCE OF DS

87. DS was called as a witness by the Member. Her evidence was that in the summer of 2004 she was the owner of the property bearing the address where the June 16, 2004 cheque for \$6,500.00, payable to DJG, was sent. The Member was living with her at the time. DS testified that she received her mail in a locked mailbox in her neighbourhood, and she had the only key. DS denied that the Member had a key to the locked mailbox.

88. DS did not recall receiving any mail from R..., and she specifically did not recall receiving the envelope containing the \$6,500.00 cheque. DS described a return mailbox where she would place any mail that was in her box that was not addressed to her. She would typically simply write on the envelope and return the mail accordingly. DS was able to identify her handwriting on the R... envelope, and the words “does not live at this address wrong name”, but she does not recall this envelope. In the ordinary course, DS testified that incorrectly addressed mail would not make it into her home as she would deal with it right at the locked mailboxes.

89. DS testified that she had an understanding when she lived with the Member that he worked for an insurance company. She denied knowing specifically that it was R..., and she indicated that the Member’s mail did not come to him at her address.

FINDINGS OF FACT AND ANALYSIS

90. The citations against the Member revolve around two general propositions advanced by the LSA. The first proposition is that the Member was engaged in a fraudulent scheme during his employment with R... That scheme involved identifying two potential claimants, being SW and DJG, who had not advanced claims on their own. The scheme involved making false notations on R... files, and in the case of DJG placing himself on both sides of the file and sending a misleading and deceitful letter (being the June 15, 2004 Letter). The LSA alleges that this was all done in an unsuccessful effort by the Member to enrich himself at the expense of R... through the use of Mr. Popovic’s name and his office.

91. The second basic proposition is that the Member failed to cooperate with the LSA in its investigation into these matters.

92. The Hearing Committee considered these allegations, in light of the citations against the Member, in turn.

(a) THE SW MATTER

93. In considering the citations with respect to the SW matter, the Hearing Committee was mindful that the burden of proof throughout is on the LSA, and there is no burden of proof on the Member. The Hearing Committee notes that Section 49 (1) of the *Legal Profession Act* provides as follows:

49 (1) for the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that:

(a) is incompatible with the best interests of the public or the members of the Society, or

(b) tends to harm the standing of the legal profession generally,

is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

94. The 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. There is no sliding scale standard of proof depending on the seriousness of the charges². However, there is some authority that a higher degree of probability, or more cogent evidence may be required in cases where fraud or deceit is alleged, as such allegations may result in the most serious sanctions against the Member³.

95. Keeping in mind the burden and the standard of proof, and the very serious allegations made as against the Member, the Hearing Committee finds that the evidence does not establish conduct deserving of sanction arising from the Member's involvement in the SW matter. The evidence does not establish that the Member was involved in the disappearance of the SW file at R... There was no evidence that the Member provided false information with respect to SW to Mr. Popovic. While the LSA clearly has doubts about the existence of SW, there was no evidence with respect to any real efforts to locate him in order to resolve this question.

96. The Hearing Committee was concerned about some of the Member's R... log entries with respect to SW, and the Hearing Committee was also concerned about the obvious conflict of interest questions raised by this matter. However, keeping in mind the seriousness of the allegations, the Hearing Committee did not find a "fair and reasonable preponderance of credible testimony...on a balance of probabilities" that would lead to a conviction with respect to any of the citations arising from the SW matter. The Hearing Committee did not have regard to any of the evidence with respect to the SW matter in

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

² See: *K.V. v. College of Physicians and Surgeons of Alberta* (1999), 74 Alta. L.R., (3rd) 373 (C.A.)

³ *Harrison v. The Law Society of Alberta*, 2005 ABCA 265.

considering the allegations of the LSA with respect to the DJG matter.

(b) THE DJG MATTER

97. It is clear that the Member contacted DJG in order to have him bring forward a claim to R... The Hearing Committee accepts that DJG was confused as to the role of the Member in contacting him. The Member's R... log entry for May 4, 2004 suggests that the first contact with Mr. Popovic's office regarding this matter was initiated by Mr. Popovic, but the Member's evidence at the Hearing was that he had brought this matter to Mr. Popovic's attention as a potential referral. There is nothing in the log that would lead any reader to conclude that the Member had arranged for outside legal counsel for DJG.
98. The log entry for May 7, 2004 suggests that R... had received a proposal for \$10,000.00, and the matter had been settled for \$8,500.00. This is inconsistent with the Member's evidence at the Hearing regarding the settlement process on this file, and it is inconsistent with the June 15, 2004 Letter written by the Member to himself, and purportedly signed by Mr. Popovic, which reduces the settlement to \$6,500.00. The Hearing Committee concludes that the Member's R... log entries with respect to the DJG matter were false and were intended to deceive.
99. Further, the June 15, 2004 Letter is on its face deceptive and false. The Letter was sent by the Member (at Mr. Popovic's firm) to himself (at R...) in order to support a cheque requisition. Anyone at R... reviewing that letter would assume that it had been sent by Mr. Popovic. As the signature on the letter was illegible, even the use of the word "for" below the signature and above Mr. Popovic's name would still have left the letter seriously misleading.
100. In addition, the Hearing Committee finds that the Member did not discuss the DJG matter with Mr. Popovic at any time prior to the June 15, 2004 Letter coming to light, and more specifically the Member did not show the June 15, 2004 Letter to Mr. Popovic in advance of sending it to himself. In making this finding the Hearing Committee accepts the evidence of Mr. Popovic on these points in preference to the evidence of the Member. The Hearing Committee did so having regard to the decision in *Law Society of Upper Canada v. Neinsteen*⁴, wherein an Ontario Appeal Panel found that in assessing the credibility of contested evidence a three step analysis should be followed:
 - (a) If the Panel believes the evidence of the Member, assuming it is exculpatory, the particular must be dismissed;
 - (b) If the Panel disbelieves the testimony of the Member, but the Member's evidence leads the Panel to conclude that they cannot find clear and convincing proof of the particular, based on cogent evidence, the particular must be dismissed. In so doing, the Member's evidence must be considered in the context of the evidence as a whole; and
 - (c) Even if the Panel disbelieves the Member's evidence in its entirety, the Panel

⁴ *Law Society of Upper Canada v. Neinsteen*, [2005] L.S.D.D. No. 3, Docket: 2003-00085.

must ask itself, on the basis of the evidence it does accept, and disregarding the Member's evidence, whether the facts substantiating the particular were made out by clear and convincing proof, based on cogent evidence. If not, the particular must be dismissed.

101. The Hearing Committee is cognizant of the fact that the highest degree of care is required in assessing credibility to determine a particular of misconduct. This is especially so given the serious nature of the allegations against the Member in this case.
102. The Hearing Committee does not disbelieve all of the evidence provided by the Member. There are a number of areas where the Member's evidence differs from the evidence of Mr. Popovic. In some cases those differences are irrelevant to the findings that this Hearing Committee is required to make. In other cases, the differences may be attributable to the normal failings of human memory and the passage of time. The Hearing Committee has not simply preferred Mr. Popovic's recollection to that of the Member with respect to DJG.
103. However, with respect to the critical questions flowing from the DJG matter, and in particular whether Mr. Popovic was ever aware of DJG prior to seeing the June 15, 2004 Letter, the Hearing Committee can only conclude that the Member's evidence on these points was untrue. Mr. Popovic was careful not to draw inferences or reach conclusions beyond his actual knowledge of the facts. He was adamant that he had no knowledge of DJG prior to the June 15, 2004 Letter coming to light, and that he was not involved in that matter. His evidence was in no way shaken despite an intense and aggressive cross-examination on these issues.
104. The deceptive log entries made by the Member, and the deceptive and misleading June 15, 2004 Letter, support the Hearing Committee's conclusions. The Member's evidence with respect to the June 15, 2004 Letter, and his recollection of Mr. Popovic's knowledge of it, changed over time. The Member testified that he thought he had showed Mr. Popovic the letter before it was sent, but that he eventually became convinced that he may not have done so. The Member acknowledged that he had written to the LSA indicating his belief that he had "implied authorization" from Mr. Popovic to send the letter, and he acknowledged sending a letter to the LSA on September 15, 2004 where he indicated that he had been in error in not showing the letter to Mr. Popovic in advance. A similar statement was made to Mr. Hopfauf in the interview of October 13, 2004. The Hearing Committee had regard to these inexplicable inconsistencies in reaching its conclusions regarding the credibility of the Member on these points. In short, the Hearing Committee found clear and convincing proof, based on cogent evidence, that Mr. Popovic was not in any way aware of the DJG matter prior to the June 15, 2004 Letter coming to light.
105. The Hearing Committee was also called upon to reach a conclusion with respect to the inconsistency between the evidence of DJG and the Member regarding the telephone discussions about DJG's potential recovery as a claimant against R... DJG was not a sophisticated witness, but he impressed the Hearing Committee as being entirely forthright and lacking any particular motivation with respect to this proceeding. DJG

clearly recalled being advised by the Member at various times that he might receive \$5,000.00 or \$3,500.00, and he denied any knowledge of the \$8,500.00 or \$6,500.00 amounts discussed by the Member. This evidence was contradicted by the Member who denied advising DJG with respect to those lower amounts or speaking to him about contingency fee arrangements.

106. Having regard to the analysis in *Neinstein*, the Hearing Committee accepts the evidence of DJG with respect to this matter, and the Hearing Committee finds convincing proof based on cogent evidence that the Member discussed the lower amounts with DJG. In reaching this conclusion the Hearing Committee notes the complete lack of R... log entries made by the Member with respect to discussions that he had with DJG. The Hearing Committee has already found that two log entries made by the Member regarding DJG were deceptive and misleading, as was the June 15, 2004 Letter. In all of these circumstances, on this question the evidence of DJG is preferred over the evidence of the Member.
107. A further concern raised by the LSA with respect to the DJG matter had to do with the entry of the address of DS, the Member's girlfriend, into the R... computer system as the destination for the cheque issued by R... on June 16, 2004. The Hearing Committee notes the Member's evidence that he did collect mail at the address of DS when he was living with her at the relevant time. This evidence was contradicted by DS. However, the Member had no explanation whatsoever for using what amounted to his personal address as a destination for this R... cheque. In the context of all of the other evidence, the Hearing Committee finds that this was a deliberate act on the part of the Member.
108. In the end result, the Hearing Committee finds with respect to the DJG matter that the Member made deceptive log entries, he sent a deceptive and misleading letter from himself (at Mr. Popovic's firm) to himself (at R...), and that he entered his own address into the R... computer as the destination to receive a settlement cheque. He did so after having spoken to DJG about settlement numbers lower than the numbers reflected in the R... records as being under consideration, the implication being that the Member would keep a share of those funds for himself. The Hearing Committee finds that this was all in furtherance of a scheme devised by the Member to enrich himself, at the expense of his employer, by negotiating and settling this matter with himself, while dealing directly with the claimant, who was effectively promised an amount lower than R... was going to pay.
109. The scheme did not come to fruition. This may have been because the Member's employment with R... was terminated. It may have been because of a lack of cooperation by DS. The scheme may have failed because DS returned the cheque without the Member's knowledge, or perhaps because the Member had a change of heart.
110. It is not entirely clear how the Member intended to bring this scheme to its fruition. In the end result that does not matter. The basic outline of the scheme is clear, and the scheme involved deception by the Member with an intent to enrich himself at the expense of his employer, while misleading a member of the public and taking advantage of the kindness of a professional colleague.

(c) FAILURE TO COOPERATE WITH THE LSA

111. The evidence clearly establishes the failure of the Member to cooperate with the LSA. Mr. Hopfauf interviewed the Member on October 13, 2004, but that interview was not completed. That date marked the end of cooperation by the Member with the LSA for a period of some months.
112. In late January 2005 Mr. Hopfauf attended unannounced at the Member's business address. A few questions were asked and answered and a continuation of the interview was booked. The Member cancelled that meeting at the last moment. Mr. Hopfauf persisted through February and March of 2005 in his efforts to meet with the Member. The Member finally responded in writing on April 3, 2005. The unfinished interview was never completed.
113. The Member's explanations with respect to his failure to cooperate include his belief that Mr. Hopfauf would simply interview DJG and conclude his investigation, and the Member's feelings of intimidation. The Hearing Committee finds these explanations to be entirely without merit. The Member testified that he knew he had an obligation to cooperate with the LSA, and the Hearing Committee finds that he completely failed to do so between early November 2004 and April 3, 2005. Mr. Hopfauf had sent the Member the transcript arising from the October 13, 2004 interview by way of letter dated November 9, 2004, as the Member requested. The Member has no real justification for his failure to cooperate from that date forward.

JURISDICTIONAL ARGUMENTS

114. Counsel for the Member advanced two jurisdictional challenges in his final oral argument. Specifically, the Member challenged the jurisdiction of the Hearing Committee, or otherwise encouraged the Hearing Committee to acquit, on the basis that the LSA investigation into the conduct of the Member was faulty. As an alternative argument, counsel for the Member suggested that the Hearing Committee lost jurisdiction during the course of the hearing when it was determined that DJG did in fact exist. These arguments were each considered by the Hearing Committee.

(a) THE INVESTIGATION

115. It was argued for the Member that Mr. Hopfauf had failed to show Mr. Popovic's complaint letter to the Member prior to the interview of October 13, 2004. In addition, Mr. Hopfauf did not advise the Member that he faced potential citations with respect to the false letter, being the June 15, 2004 Letter. Further, the Member complained that the interview of October 13, 2004 turned into a cross-examination, although the argument advanced (and the evidence of the Member) with respect to the tone of voice of Mr. Hopfauf was abandoned during the course of the Hearing, as previously noted.
116. Counsel for the Member complained about non compliance by the LSA with Rule 85(2) of the Rules of the Law Society of Alberta. That Rule provides as follows:

85(2) If a complaint or other information brought to the attention of the

Executive Director under subrule (1) is not then in writing, the Executive Director shall

(a) in the case of a complaint, attempt to obtain the complaint in writing and, if the attempt fails, prepare a memorandum summarizing the complaint as accurately as possible on the basis of the complainant's oral statements and any records submitted by the complainant,

(b) in the case of other information, prepare a memorandum summarizing the other information on the basis of the oral statements or records received by the Executive Director, and

(c) subject to subrule (3), furnish to the member a copy of the complaint or memorandum.

117. The short answer to this position is that the complaint of Mr. Popovic was provided to the Member, although apparently not until after the October 13, 2004 interview. In any event, the Member was aware during that interview that Mr. Popovic had made a complaint, as his letters of both September 15 and October 14, 2004 to Mr. Hopfauf referred to the "complaint of Mr. Popovic" in the reference lines.

118. Counsel for the Member also complained about non compliance with Rule 85(4) of the Rules of the Law Society of Alberta. That Rule provides as follows:

85(4) When the Executive Director in the course of a review of a matter under section 53 of the Act initially notifies the member that the member is required to answer an inquiry or to furnish records pursuant to section 53(3)(a) of the Act in relation to that matter, the Executive Director shall inform the member that the answer or records are required for the purposes of a review under section 53 of the Act related to the member's conduct.

119. The evidence discloses that the LSA notified the Member by letter dated October 14, 2004 that an Investigation Order had been issued on October 12, 2004 to investigate the Member's conduct pursuant to section 53(3)(b) of the *Legal Profession Act*. A number of requests for information followed that letter. Many of those requests were ignored by the Member. Those requests did not specifically reference section 53 of the Act. However, the Member was clearly aware of a section 53 review being conducted by the LSA at least from the date of his receipt of the LSA's letter of October 14, 2004.

120. The Hearing Committee finds that the actions of the LSA in investigating the Member, including the matters complained of by the Member, were fair and reasonable to the Member throughout. If the Hearing Committee is incorrect on this point, and there was some unfairness in the investigative process, the Hearing Committee finds that any such unfairness was completely and entirely cured as a result of the Hearing process conducted by this Hearing Committee, and so it cannot be said that there was any real or substantial prejudice to the Member⁵.

121. The Hearing Committee notes that it provided great latitude to counsel for the Member in the manner in which he lead evidence, in his cross-examinations, and the Hearing

⁵ *Histed v. Law Society (Manitoba)*, [2006] 10 W.W.R. 624 (Man C.A.).

Committee even permitted exhibits with respect to the LSA investigation process to be entered during closing argument. The Hearing Committee finds that the Member had a full and fair opportunity to be heard with respect to all of the citations against him.

(b) LOSS OF JURISDICTION

122. It was argued on behalf of the Member that the Hearing Committee lost jurisdiction during the course of the Hearing when it became apparent to the LSA that DJG did in fact exist, contrary to Mr. Hopfauf's earlier assumptions. The Hearing Committee heard that the LSA became aware of this fact as a result of information provided by counsel for the Member. The Hearing was adjourned at the request of counsel, although the Hearing Committee did not know the reason for that adjournment. DJG was then interviewed by Mr. Hopfauf, and when the Hearing resumed Mr. Hopfauf and DJG were both called as witnesses by the LSA.
123. The nature of the Member's argument in this respect is that the section 53 report provided by the LSA to the Conduct Committee referenced the doubts of the Investigator, Mr. Hopfauf, as to whether or not DJG did in fact exist. The Conduct Committee issued four citations against the Member, and it is now argued that the actual existence of DJG was a new fact of such significance that the jurisdiction of the Hearing Committee was lost, and the matter ought to have been referred back to the Conduct Committee for its consideration as to whether the existing citation should proceed, be modified or dropped, or whether new citations should be issued. The Member complains that his right to be heard at the Conduct Committee level with respect to the existence of DJG was lost. The Member argues that the existence of DJG resulted in the investigation in this matter being re-opened, and a new investigation report ought to have been provided to the Conduct Committee, in order for it to carry out its responsibilities.
124. The Hearing Committee rejects these jurisdictional challenges. There is nothing in the *Legal Profession Act* or the Rules of the Law Society of Alberta which would require the Hearing Committee to remit a matter back to the Conduct Committee based on the discovery of a new fact, even if that new fact is significant and contradicts something referenced in the section 53 report to the Conduct Committee. The Hearing Committee notes that the *Legal Profession Act* provides it with the authority to discontinue a hearing into the conduct of a member if it is satisfied during the hearing that the circumstances of the conduct do not justify the continuation of the proceedings (section 62). The Hearing Committee can also amend citations during a Hearing (section 65). While neither of these steps occurred in this case, these provisions suggest that significant new facts might come to the attention of the Hearing Committee during the course of the Hearing without a loss of jurisdiction.
125. Further, it appears that the Hearing process in this case was entirely successful with respect to the jurisdictional issue complained of by the Member. The existence of DJG was in fact discovered, apparently as part of the preparation for the Hearing, and DJG was located and gave evidence. Further, the Member could not be prejudiced as a result of learning of the existence of DJG, because he was the one person involved in this matter who must have known from the beginning that DJG was a real person. The

Hearing Committee concludes that the Hearing was procedurally fair to the Member in all of the circumstances having full regard to the discovery of the existence of DJG during the Hearing process.

DECISION AS TO CITATIONS

126. Counsel for the LSA acknowledged that there is no citation specifically dealing with the obvious conflict of interest that the Member found himself in when referring matters from R... to Mr. Popovic's firm, and when the Member negotiated with himself on the DJG matter. The LSA proceeded on the basis that the Member's conduct, including those conflicts, were all in furtherance of a scheme, or part of the deception associated with the June 15, 2004 Letter, and the Hearing Committee proceeded to consider the citations accordingly.

(a) CITATION 1

127. The Hearing Committee found on the evidence that the Member's activities with respect to the DJG matter were all in furtherance of a scheme devised by the Member to enrich himself, at the expense of his employer, while misleading a member of the public and taking advantage of a colleague. The Hearing Committee finds that this is activity incompatible with the best interest of the profession and justice system, and that it is conduct deserving of sanction.

(b) CITATIONS 2 & 3

128. Counsel for the LSA acknowledged that the same facts give rise to citations 1, 2 and 3. The Hearing Committee was urged by counsel for the LSA to not convict on citation 2 if we found conduct deserving of sanction with respect to citation 1.

129. Citation 3 is based on the same essential facts, but a conviction here would require the Hearing Committee to make a finding that the Member failed to uphold the law in his personal conduct, and that such conduct is conduct deserving of sanction. As the Hearing Committee has made a finding against the Member with respect to citation 1, the Hearing Committee declines to convict on citation 3. Whether the Member failed to uphold the law is, in the circumstances, a matter best determined in another forum.

(c) CITATION 4

130. The Hearing Committee found on the evidence that the Member failed to cooperate with the LSA, and that such conduct is conduct deserving of sanction. The Hearing Committee notes that the legal profession in Alberta is self governing, and this status requires the cooperation of all of its members in the LSA investigative process, which cooperation was woefully lacking in this case.

CONCLUDING MATTERS

131. The Hearing Committee directs that the Hearing in this matter resume at a time and place convenient to the parties so that the Hearing Committee might receive evidence and hear

argument with respect to the question of sanction.

Dated this 22 day of May, 2007

Carsten Jensen, Q.C., Bencher
Chair

John Prowse, Q.C., Bencher

Morris Taylor, Lay Bencher