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 ANDREW GEISTERFER
a Member of The Law Society of Alberta

## INTRODUCTION

1. On September 25, 2008, 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, Andrew Geisterfer. The Committee was comprised of Carsten Jensen, Q.C., Chair, Neena Ahluwalia, Q.C. and Norma Sieppert. The LSA was represented by Garner Groome. The Member was represented by his counsel, Patrick J. McAllister. 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. The Certificate of Exercise of Discretion was entered as Exhibit 5. These exhibits were entered into evidence by consent.

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

4. The entire Hearing was conducted in public.

## BACKGROUND AND CITATIONS

5. At the relevant time the Member practiced on his own in an office on the South side of Edmonton. The Member practiced almost exclusively doing real estate transactions, and in the summer of 2005 his practice was very busy. The first citation against the Member arose from his involvement with a realtor, KK, who indicated in the spring of 2005 that he would be prepared to send real estate business to the Member's office. KK then contacted the Member in early June 2005 and indicated that he would be forwarding funds to the Member's office to be disbursed as instructed. The Member did receive funds, but he did not receive details or paperwork regarding the purported transaction.

6. Unknown to the Member, the funds belonged to AC, a real estate client of KK, who was not a client of the Member. The funds were forwarded to the Member, and then out of his trust account, as part of a scheme to deprive AC of the funds. It is common ground that the Member was not in any way a deliberate party to that scheme.

7. The remaining citations against the Member arise from a completely separate transaction involving an unauthorized release of holdback funds arising from the purchase of a duplex where there was a dispute as to deficiencies.

8. At the opening of the hearing, the LSA proposed, and counsel for the Member accepted, an amendment to Citation 3. The Hearing Committee accepted this proposal, and after amendment the citations against the Member were as follows:

> CITATION 1- IT IS ALLEGED that you engaged in conduct that brought discredit to the profession by:
>
> (a) Failing to advise AC on a timely basis of the forgery of a letter purportedly written by you; and/or
>
> (b) Participating in inappropriate behaviour, including without limitation:
>
> (i) Failing to determine any legitimate rationale for funds to be paid into and out of your trust account under the circumstances; and/or
>
> (ii) Participating in a joke which caused AC to believe that you had funds in your trust account to the credit of AC when such was not the case,
>
> and that such conduct is conduct deserving of sanction.
>
> CITATION 2- IT IS ALLEGED that you breached an undertaking given to James H. Song, another member of the Law Society, and that such conduct is conduct deserving of sanction.
>
> CITATION 3- IT IS ALLEGED that on a single real estate transaction you deliberately misled two members of the Law Society in another firm, and that such conduct is conduct deserving of sanction.

9. The Member provided an Agreed Statement of Facts which he signed on the date of the Hearing. The Agreed Statement of Facts outlined facts relevant to Citation 1, without providing any admission of guilt regarding that Citation. The Agreed Statement of Facts provided facts relevant to Citations 2 & 3, and the Member admitted guilt regarding his conduct on those citations.

10. The Hearing Committee reviewed the Agreed Statement of Facts and asked questions of counsel for the LSA and counsel for the Member regarding that agreement. The Panel

then found the proposed Agreed Statement of Facts to be acceptable to it. Accordingly, the Member's conduct with respect to Citations 2 & 3 is deemed to be conduct deserving of sanction pursuant to Section 60 (4) of the *Legal Profession Act*. The Agreed Statement of Facts was marked as Exhibit 6, by consent.

**EVIDENCE**

11. As noted above, Exhibits 1-5 (the jurisdictional exhibits) and Exhibit 6 (the Agreed Statement of Facts) were entered into evidence by consent.

12. Exhibits 7-17, all relevant to Citation 1, were entered into evidence by consent.

13. Exhibits 18-23, all relevant to Citations 2 & 3, were entered into evidence by consent.

14. The Hearing Committee heard oral evidence from the Member.

15. At the conclusion of the evidence of the Member, the Hearing Committee heard argument as to whether the conduct of the Member with respect to Citation 1 was conduct deserving of sanction. The Hearing Committee then adjourned the hearing on the basis that it would provide written reasons with respect to the Member's conduct regarding Citation 1, and specifically whether that conduct was conduct deserving of sanction.

**SUMMARY OF RESULT**

16. On that basis of the evidence received at the hearing, and for the reasons that follow, the Hearing Committee finds that Citation 1 is proven and the Member is guilty of conduct deserving of sanction with respect to Citation 1. As indicated above, Citations 2 & 3 are admitted, and the Member's conduct with respect to those Citations is deemed to be conduct deserving of sanction. The Hearing Committee will reconvene to hear evidence and argument with respect to the question of sanction on all Citations.

**CITATION 1- THE KK MATTER**

17. It is common ground that the Member met a realtor by the name of KK in late May or early June of 2005, and KK indicated to the Member that he would be prepared to send business to his office. The Member was then contacted by KK on or around June 7, 2005, and he was told that KK would be forwarding $63,000.00 to his office for his subsequent distribution to two individuals. The Member understood that the funds belonged to KK.

18. On June 7, 2005, the Member wrote to the two individuals who were to receive the funds. He indicated that he understood that KK would be providing his office with the funds for distribution.

19. The Member did not receive any documentation from KK as to the business transaction associated with the funds. He did not receive any explanation of the transaction, and he did not provide any apparent legal services with respect to the movement of the funds.

20. The Member actually received $100,000.00 from KK, rather than the $63,000.00 previously discussed. The funds came by way of an Alberta Treasury Branch ("ATB") bank draft made payable to "River City Law Group", being the Member's firm.

21. The Member's evidence is that he prepared a letter to KK on or around June 16, 2005, which stated as follows:

> "I confirm that pursuant to your instructions, my office received from you the sum of $100,000.00 on Tuesday, June 14, 2005. Upon receipt, we deposited the same into our trust account. I also confirm that you have advised that these funds were to be paid out in their entirety to your real estate investors."

22. The funds were paid out by the Member accordingly. The Member's evidence was that he asked for paperwork from KK more than once, and that he told KK that he was uncomfortable with these transactions, but completed them anyway.

23. The Member had on June 7, 2005 received an e-mail from one of the individuals designated to receive the funds, and that individual purported to be the branch manager for a local bank. Further, the Member's evidence was that he spoke with a lawyer at another firm, and this lawyer was apparently representing the other individual designated to receive the funds. The Member's evidence was that these facts did add some legitimacy to the transactions, in his mind.

24. Unfortunately, the funds belonged to AC, a real estate client of KK, who thought he was purchasing a house. AC had provided a cheque to KK dated June 14, 2005, drawn on to the ATB and payable to the River City Law Group. The memo line on the cheque indicated "deposit for home purchase", and included a municipal address in Edmonton. KK had received that cheque from AC, and he attended at the ATB and convinced the ATB to accept the cheque in return for a bank draft for the full amount payable to River City Law Group, with no memo line attached. It was this bank draft that the Member received, and which he believed to be KK's funds.

25. It is apparent from the evidence that KK deceived AC into issuing a cheque, thinking he was purchasing a home. KK then deceived the ATB into exchanging that cheque for the bank draft, which did not reference AC or the intended purpose of the funds. KK then provided the bank draft to the Member, and deceived the Member into believing that the funds were his own, and he instructed the Member to distribute those funds to two individuals who the Member believed to be real estate investors of some sort. The funds were essentially laundered through the Member's trust account, and the Member was apparently used as a dupe in these transactions.

26. In mid-June of 2005 AC was apparently becoming concerned with respect to his funds. KK then provided him with a forged letter dated June 24, 2005, purportedly from the Member and on the Member's letterhead, with no addressee, the text of which read as follows:

> Dear Sir:

Re: Real Estate Fund AC

FYI: The sum of $100,000 dollars is being held in trust for AC for the downpayment of Real Estate property located at [ municipal address removed ].

27. It is common ground that the Member was unaware of discussions between KK and AC, and did not participate in preparing the forged letter.

28. On June 27, 2005 AC called the Member's office and spoke with his assistant and then with the Member directly about the forged letter. AC eventually faxed a copy of the letter to the Member, who realized that it was not his letter and that it was a forgery. The Member confirmed to AC that he had no files opened in his name.

29. The Member's evidence was that he was very concerned, and so he contacted KK directly. The Member's evidence is that he was angry with KK, who came to his office the same day. KK apologized for the forged letter, but he explained that he and AC were childhood friends. He said that he was playing a joke on AC to make him believe that he had won $100,000.00 towards the purchase of a home, and that he and some friends were having a party for AC that weekend where all would be revealed. The Member agreed to do nothing for the moment, and his evidence was he then became busy in his practice and did not follow up with this matter until the end of July, 2005.

30. On July 28, 2005 the Member telephoned AC and advised him that he did not have his funds in trust, and that AC should retain legal counsel. He advised AC for the first time that the letter of June 24, 2005 was a forgery, and was not authored by him. AC has commenced litigation against various parties in an effort to recover his funds.

31. The position of the LSA was that there was no legal purpose for the funds in question to flow through the Member's trust account, as the Member provided no legal services with respect to those funds. The LSA acknowledges that the Member had disbursed the funds on KK's instructions before he knew that he was unwittingly involved in a fraud. The LSA takes the position that the Member ought to have advised AC immediately on learning of the forged letter, and that it was inappropriate for the Member to allow funds to move through his trust account without determining a legitimate rationale for the transactions, and that it was inappropriate for the Member to participate in the supposed "joke" which KK had advised him he was playing on AC.

32. The Member's position is that he was not in any way culpable in these matters, that AC was never his client, that he was under an obligation to follow KK's instructions, and that the fraud on AC was in any event complete before the Member became aware of the forged letter.

33. The first question to be considered by the Hearing Committee is whether it is conduct deserving of sanction for the Member to receive and disburse funds, through his trust account, in circumstances where the Member did not know the purpose of the movement of funds, and where the Member was not providing legal services with respect to those funds.

34. The Hearing Committee must also consider the Member's delay in dealing with this matter once he became aware of the forged letter. That delay is referenced in two places in Citation 1, being the failure of the Member to advise AC on a timely basis of the forgery of the letter, and participating in a "joke" which caused AC to believe that the Member had funds in his trust account to AC's credit when that was not the case.

35. Each of these issues will be addressed in turn.

**(a) The Use of The Member's Trust Account**

36. Citation 1 expressly suggests that the Member engaged in conduct that brought discredit to the profession by participating in inappropriate behaviour, which included failing to determine any legitimate rationale for funds to be paid into and out of his trust account as instructed by KK.

37. It is common ground that the Member did not provide legal services with respect to the funds received from KK, and he did not obtain from KK any cogent explanation as to the transactions involving those funds or the Member's intended role in those transactions. He simply received and disbursed those funds as instructed by KK.

38. The Hearing Committee is concerned that the Member allowed his trust account to be used in this way notwithstanding his own professed discomfort, and notwithstanding his receipt of an unexplained bank draft with the funds originating from an unexplained source, to be handled by him as instructed by KK as part of an unexplained transaction. The Hearing Committee has reached this view having regard to the fact that the Member did seek explanations from KK, without success, and notwithstanding the evidence regarding the email from one investor, and the discussion with counsel for the other investor.

39. Having said that, it is accepted that the Member did not know that the funds in question belonged to AC, and in fact he did not know of AC's existence when he received the funds from KK, and when he disbursed the funds on KK's instructions. Neither the *Rules* of the LSA, or the *Code of Professional Conduct*, prohibit a member from using his trust account to facilitate the business of his clients, even in circumstances where no legal services are provided.

40. This was also noted by the Hearing Committee of the LSA in their report in *Law Society of Alberta v. Larson* dated January 30, 2008. In *Larson*, the Member acted for a real estate promoter, and in that role he received from his client certain lending documents and funds. He deposited the funds to his trust account, and then paid the funds over to his client at his client's request. He did not ever act for the investors. The Hearing Committee in *Larson* noted that the funds were dealt with in accordance with the agreement between the investor and the lawyer's client. The investors lost their money and complained with respect to the lawyer.

41. In *Larson*, the Hearing Committee reviewed a number of authorities, and concluded that the Member acted in accordance with his client's instructions, and that lawyers do not become guarantors of investments in favour of third parties. Accordingly, Mr. Larson

was not guilty of conduct deserving of sanction in failing to return the investment funds to the complainant or to make inquiries of the complainant concerning those funds. The Hearing Committee did go on to express concern about the role of the Member in that case. The Hearing Committee stated, at paragraph 44:

> While the Member did not breach any duties to the unrepresented and incautious investor, we question why the Member became involved in receiving and disbursing funds when he was providing no real or substantial legal services in connection with the matter. Lawyers should not allow their names to be used in circumstances where they have no real role in the provision of legal services, and where unrepresented individuals are involved. Trust accounts should not be used as deposit accounts for the aggregation and payment out of money from investors in circumstances where the lawyer had no real connection with the provision of legal services with respect to the investment.

42. We agree. In this case the Member was imprudent and incautious with respect to his trust account, and his receipt and disbursement of funds from KK. However, he is not guilty of conduct deserving of sanction with respect to the use of his trust account as instructed by KK.

43. The Hearing Committee urges the LSA to review its Rules regarding the operation of trust accounts, and to provide clarity for members and for the public on the use of lawyers' trust accounts in cases where the member is not providing legal services to a client.

**(b) The Delay in Dealing With the Forged Letter**

44. Citation 1 alleges that the Member engaged in conduct that brought discredit to the profession by failing to advise AC on a timely basis of the forgery of a letter purportedly written by him, and participating in inappropriate behaviour by participating in a joke which caused AC to believe that he had funds in his trust account to AC's credit, when that was not the case.

45. These two parts of Citation 1 arise from the same facts. Specifically, the Member was contacted by AC on June 27, 2005, which caused him to speak with KK and to come to an understanding that KK had forged a letter to AC in the Member's name. The Member understood that this had been done by KK to make AC believe that the Member had funds for AC in his trust account, when that was not the case. KK had explained to the Member that this was part of a joke he was playing on AC.

46. The Member apparently accepted this explanation for a time, and did not follow up with AC for approximately 1 month. At that point, the Member finally told AC that the letter was a forgery, that he did not have funds in trust for him, and that he should retain legal counsel.

47. Counsel for the Member has urged us to dismiss this complaint on the basis that AC was never the Member's client, and that the Member therefore had no obligation to advise him of anything. This is undoubtedly true, to a point. However, the Member eventually did advise AC of the forged letter, which finally allowed AC to begin to pursue his

various remedies.

48. The Member's counsel has also urged us to conclude that the Member was obliged to follow KK's instructions. This is also true, to a point. Lawyers are not obliged to follow instructions that facilitate a crime or a fraud. The *Code of Professional Conduct* provides guidance in this area, and specifically we note that Chapter 9, Rule 11 provides that:

> A lawyer must not advise or assist a client to commit a crime or fraud.

49. On learning of the letter forged by KK, purportedly on the Member's letterhead, the Member had an obligation to ensure that he was not assisting his "client" in the commission of a crime or fraud. KK's explanation with respect to the supposed "joke" being played on AC was completely incredible, and should not have been accepted at face value by the Member, under any circumstances.

50. On learning of the forgery of this letter, it was not acceptable for the Member to do nothing for approximately 1 month. He had a positive obligation to act. A number of options were open to the Member. He could have spoken with the Practice Advisor at the Law Society. The forged letter was on the Member's letterhead; the Member could have called the police. It was simply not acceptable for the Member to do nothing for approximately 1 month. We note that the Member did eventually advise AC of the forged letter, for which he is not being criticized, and our concern is with respect to the delay in acting.

51. Counsel for the Member urged us to take a different view given that the fraud on AC was complete by the time the Member learned of the forged letter. However, AC lost valuable time in pursuing KK for his lost funds as a result of the Member's inaction. In any event, the Member's delay in this case should not be judged solely against the eventual consequences to AC, which were obviously unknown to the Member at the time. We find that the Member's delay brought discredit to the profession, and was inappropriate behaviour by the Member, and is conduct deserving of sanction.

### (c) Conclusion on Citation 1

52. In the end result, we find that the Member is guilty of conduct deserving of sanction in that he participated in inappropriate behaviour, including participating in a joke causing AC to believe that the Member had funds in his trust account to AC's credit, when that was not the case. We have concluded that the Member had a number of options open to him on learning of the forged letter. He ought to have selected one of those options earlier, rather than waiting for 1 month to advise AC of the forgery.

## CITATION 2 AND CITATION 3- THE DUPLEX DEFICIENCIES

53. The Member acted for the purchaser of a duplex in the city of Edmonton, and another solicitor, JS, acted for the vendor, with a closing in early June 2004. Prior to closing a number of deficiencies were identified, and JS agreed that the Member would retain a $10,000.00 holdback in trust until the deficiencies were corrected.

54. The deficiencies were not corrected to the purchaser's satisfaction, and eventually the purchaser advanced a claim in excess of the holdback amount. The Member sought JS's approval to release the holdback to his client. That approval was not forthcoming as the vendor wanted a release of all claims, which was not acceptable to the purchaser.

55. Notwithstanding the lack of approval from JS or his office, the Member released the holdback funds to his client in July 2004. Subsequent correspondence from the Member to JS's office suggests that the holdback funds remain in trust.

56. In 2005 the purchaser replaced the holdback funds in the Member's trust account, pending a small claims trial on the deficiencies. The purchaser eventually obtained a judgment in small claims court on the deficiencies in October 2005.

57. The Member acknowledges being in breach of the condition with respect to the holdback amount, and he indicates that he "succumbed to the emotional state of his client". In oral evidence the Member indicated that he did not have a good explanation for releasing the holdback funds to his client, and he knew he should not have done it.

**CONCLUDING MATTERS**

58. As noted above, the Hearing Committee finds that Citation 1 is proven and the Member is guilty of conduct deserving of sanction with respect to Citation 1. Citations 2 & 3 were admitted, and the Member's conduct with respect to those Citations is deemed to be conduct deserving of sanction.

59. The Hearing Committee will reconvene to hear evidence and argument with respect to the question of sanction on all Citations.

Dated this 18th day of February, 2009

_____
Carsten Jensen, Q.C., Bencher
Chair

_____
Neena Ahluwalia, Q.C., Bencher

_____
Norma Sieppert, Bencher

**DECISION ON SANCTION**

On June 17, 2009 the Hearing Committee reconvened to decide the appropriate sanction. After hearing evidence and argument the Hearing Committee directed the member be reprimanded, pay fines totalling $9,000 and actual costs of the hearing, estimated at the time to be in excess of $9,900. The Hearing Committee will be providing written reasons for its decisions. The reasons will be published when released.