

Law Society of Alberta v. Sondermann

Law Societies Discipline Decisions

Law Society of Alberta

Hearing Committee S. Raby, Q.C. (Chair), N. Sieppert and P. Michalyshyn, Q.C.

Heard: May 31, 2005.

Report: June 22, 2005.

[2005] L.S.D.D. No. 54

IN THE MATTER OF the Legal Profession Act AND IN THE MATTER OF a Hearing regarding the conduct of Michael Sondermann, a member of the Law Society of Alberta

(54 paras.)

Appearances

James Conley, for the Law Society.

Diane Harms, for the member.

Decision of the Board delivered by S. Raby, Q.C. (Chair) and concurred in by N. Sieppert. P. Michalyshin, Q.C., delivered separate and dissenting reasons.

REASONS FOR MAJORITY DECISION

Jurisdiction and Preliminary Matters

1 1. A Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of Michael Sondermann on May 31, 2005. The Committee was comprised of Stephen Raby, Q.C. (Chair), Norma Sieppert and Peter Michalyshyn, Q.C. The LSA was represented by James Conley. The Member was represented by Diane Harms and the Member was present throughout the hearing.

2 2. Exhibits 1 through 4 consisting of the letter of appointment of the Hearing Committee, the Notice to Solicitor, Notice to Attend and the Certificate of Status of the Member, established jurisdiction of the Committee.

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

4 4. The Certificate of Exercise of Discretion was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing, therefor the hearing was held in public.

5 5. The Member originally faced three citations as follows:

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- (a) IT IS ALLEGED that you failed to respond to the complainant and thereby breached Chapter 4, Rule 5 of The Code of Professional Conduct, and that such conduct is conduct deserving of sanction.
- (b) IT IS ALLEGED that you failed to provide an accounting to the complainant's client and thereby breached Rule 125(b) of The Rules of the Law Society of Alberta, and that such conduct is conduct deserving of sanction.
- (c) IT IS ALLEGED that you failed to respond to the Law Society of Alberta and thereby breached Chapter 3, Rule 3 of The Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

At the hearing, LSA counsel sought to amend the citations by adding a fourth citation as follows:

- (d) IT IS ALLEGED that you misappropriated funds held in your trust account on behalf of a client and thereby breached Chapter 7, Rule 3 of The Code of Professional Conduct, and that such conduct is conduct deserving of sanction.

Counsel for the Member did not object to this amendment and accordingly, the application to amend the citations was granted.

Evidence

6 6. All Exhibits were entered by consent.

7 7. By consent of counsel, a Statement of Admission of Guilt was provided to the Hearing Committee and it was entered into evidence as Exhibit 14. The admission of guilt covers all 4 of the citations (including citation 4 whereby the Member admitted misappropriating the sum of \$22,500.00 from his client, the Estate of C.T.) and admitted that all of the citations were deserving of sanction. The Hearing Committee, upon review of the Statement of Admission of Guilt, determined that it was in a form acceptable to it and accordingly, the admission of guilt is deemed for all purposes to be a finding of this Hearing Committee that the conduct of the Member is deserving of sanction.

Evidence of the Member re: Sanction

8 8. The Member requested that he be given the opportunity to give evidence in respect of sanction. He did so under oath and answered cross-examination questions from counsel for the LSA.

9 9. The Member testified that there were no excuses for his behaviour and the only reason that he wished to testify was to offer an explanation for his actions and for the opportunity to apologize on the record to his former client, the complainant lawyer, the Hearing Committee and to members of the LSA in general.

10 10. The Member has been practicing since the mid-1990s, firstly at Ho MacNeil Jenuth. He left that firm to join Turnbull Boyes at a time, as he describes it, that that firm was starting to dissolve, and ultimately left with two of the practitioners at Turnbull Boyes, namely James Lawson and Theresa Glod. Their relationship however was an association of independent practices and the Member was accordingly required to keep his own separate trust account.

11 11. The Member indicated that his practice was focused on litigation and family law matters and that he had some initial success in carrying on such a practice. His counsel, Ms. Harms, had practiced with him and Turnbull Boyes and indicated that, during their period of association, the Member was in fact a competent lawyer in these practice areas.

12 12. By his own admission, however, the Member soon discovered that he had no aptitude for the business side of law and as a result of being forced to administer his practice as a sole practitioner, had a great deal of difficulty

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with keeping his trust record reconciliations current, and billing his files. With respect to his trust account reconciliations, he indicated that his software program became non-operational and subsequent thereto, he kept his trust account records manually but only did so sporadically and ultimately ceased maintaining those records or submitting his Form S and Form T.

13 13. The Member indicated that as these administrative difficulties increased, so to did his unhappiness with the actual practice of law. He indicated that he now knows, that by 1999 he was suffering from acute depression which manifested itself in excesses. He drank to excess at times, ate compulsively (to the point that he put on 200 pounds), spent money that he did not have to excess and was at times suicidal.

14 14. The Member indicated that notwithstanding these difficulties, he attempted to outwardly maintain a façade that he was not having difficulties and hid his problems from his wife, his family and his friends. He admitted that his law practice was losing money and that he was living on the strength of a line of credit and that his bank had started calling to make enquiries as to repayment.

15 15. The Member indicated that when faced with his financial pressures, thoughts of suicide became prevalent but after a weekend of drinking and agonizing over unpaid bills, he wrote himself a cheque from the trust account of his client, the Estate of C.T. At the time, he had \$22,500.00 in trust from this client and he testified that within a month, he had paid himself the full \$22,500.00 by writing himself somewhere between 2 and 4 cheques. He indicated that the cheques were written manually to himself and that he created no paper trail or bogus accounts to conceal his actions.

16 16. The Member further testified that the moment he wrote the first cheque, he knew that he would ultimately be caught and that he would inevitably be before a Hearing Committee of the LSA. The Member testified that he has been haunted by guilt from the moment he first misappropriated the funds and frankly admitted that he did not have the personal strength to admit to the misappropriation until December of 2004.

17 17. By the spring of 2001, the Member testified that he was a physical and emotional wreck and at the end of an 8-week trial which was emotionally draining on him as it focussed on sexual abuse, he was to the point where his physical and mental condition was such that he could not practice law any longer. Between the end of that trial and September of 2001, he transferred all remaining files to other lawyers and testified that only approximately \$100.00 remains in his trust account, and that he doesn't really know who that belongs to. The Member is currently suspended, presumably due to non-payment of annual dues.

18 18. The Member confirmed that the audit staff of LSA had contacted him in 2002 or 2003 to deal with the filing of outstanding Form Ss and Ts and the filing of his final forms since he was no longer actively practicing. The Member admitted that he knew he needed to file these documents but could not bring himself to do so. The audit staff requested that he fax an authorization permitting the LSA to have access to his financial records and the Member indicated that he did in fact sign the authorization and faxed it back, but he has heard nothing further from the audit department with respect to his trust accounts. There was no evidence before the Hearing Committee of any findings from the Audit Department of whether there were any other issues with respect to the reconciliation of his trust accounts. The Member testified however, that he did not misappropriate anything more than the \$22,500.00 which is referenced in the Statement of Admission of Guilt. He further testified that he thought that while he was a sole practitioner, there would have been somewhere in the neighbourhood of \$3 million that had flowed through his trust account.

19 19. The Member testified that his misconduct caught up to him in the late fall of 2004 when these proceedings were commenced. After receiving notice of the impending conduct proceedings, the Member met with his former client and the complainant lawyer in the presence of Ms. Harms on December 22, 2004 where he apologized to both and offered to make restitution. Subsequently, he did make restitution of the principal amount together with an imputed interest amount. He testified that the restitution monies were received from his family and that the provision of these funds was a hardship to them.

20 20. The Member further testified as to his contact with physicians and psychiatrists in the period between 2001 and the date of the Hearing. He indicated that he had been diagnosed with acute depression, that he had been on depression medication, that the first depression medication he was on seemed to make matters worse to the point that he entered hospital as a suicide threat, that he went off depression medicine for a time and that currently he is back on depression medication. He testified that he has not had alcohol since 2002, but that overeating continues to be a problem for him.

21 21. The Member testified that he has not been gainfully employed since the spring of 2001 and essentially spends his time as a stay-at-home dad to two children aged 4 and 6 and that the sole family income comes from his wife. He indicated that his wife was starting up a business and that he was to play a part in that business but that the business was failing by reason of his inability to carry out his duties in that business. He continues to be under the care of physicians although he indicated that essentially his ability to access medical help has just about expired by reason of using up the balance of time available to him under his wife's benefit package, and the fact that the family has no further funds to expend for these purposes.

22 22. Tendered as Exhibits 15 and 16 are written statements from medical professionals who have been seeing the Member as to the Member's current prognosis. While those exhibits are somewhat positive, there is little doubt that the Member is not emotionally well and the Member candidly admitted that in his current state, he has little ability to be gainfully employed and certainly no ability to practise law.

23 23. The Member profusely and sincerely apologized to about anyone he could think of with respect to his actions in misappropriating the funds and in not properly dealing with his former client, the complainant lawyer and the Law Society when these matters arose. Further, he admitted that second only to misappropriating the funds in the first place, he was most sorry that he could not bring himself to admit his guilt to anyone until December of 2004 (although he did testify that at some time previous to that date, he had admitted his guilt to his sponsor in a Twelve Step Program).

24 24. The Member testified that he had an appointment with a medical professional late in the afternoon of the date of the Hearing which was being provided to him pro bono by such professional.

Submission of Counsel re Sanction

25 25. Counsel for the LSA argued for the sanction of disbarment. Counsel relied on the provisions of the Hearing Guide and the authorities set out therein for the proposition that absent very special circumstances, misappropriation of trust funds must result in disbarment as such sanction is the only sanction compatible with considering the best interest of the public and the Members of the LSA and given the harm to the standing of the legal profession generally which inevitably results from misappropriation of funds. Counsel for the LSA confirmed that the sanction of disbarment is not intended to punish the Member and it is not necessarily applied simply because there is a further actual risk to the public or there is a risk of reoffending. Disbarment is the norm in cases of misappropriation because it equally preserves public confidence and deters other lawyers from breaching the trust of their clients.

26 26. Counsel for the Member urged us to consider a suspension in lieu of disbarment by reason of the special circumstances of this matter. While counsel for the Member admitted that disbarment is clearly the norm for misappropriation of funds, she urged the Committee to exercise their discretion on the basis that disbarment as opposed to a suspension would likely pose an additional hurdle to the Member's successful return to some form of gainful employment, even as a non-lawyer.

Majority Decision on Sanction

27 27. The decision of the majority is to suspend the Member pursuant to Section 73(1)(e) of the Legal Profession Act. In doing so, the majority does not wish to impugn the dissenting view of Mr. Michalyshyn nor of the

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submissions by counsel for the LSA. The majority confirms that misappropriation of trust funds will, almost as a matter of course, result in disbarment for the reasons noted above.

28 28. However, in reaching the conclusion that a suspension was appropriate in these circumstances, the majority considered the following mitigating circumstances that are set out in the Hearing Guide. There is no question but that the conduct of the Member raises concerns about the protection of the public, maintaining public confidence in the legal profession and the injury caused by the conduct. Those matters are and should be of utmost importance. However, there are a number of other factors that also must be looked at and the majority comments on those factors as follows:

- (a) the number of incidents involved - while it is true that the evidence shows that it was more than one cheque that was written, the misappropriation occurred on one file, while at the time, there was some evidence that the Member had a number of other files with trust funds in them;
- (b) length of time involved - notwithstanding the Member's troubles, the Member's conduct was limited to a period of less than a month and did not reoccur;
- (c) the Member has no prior discipline record;
- (d) the majority feels that the risk of reoccurrence in this matter is extremely low (and would only come into play if the Member ever became well enough to practice law again) and this also appears to be the view of the dissent;
- (e) the Member's reaction to the discipline and process - in this case the Member acknowledged his wrongdoing, admitted his guilt, made a private apology to his former client and the complainant lawyer and a public apology before the Hearing Committee;
- (f) restitution has been made;
- (g) but for the Member's emotional difficulties, the little evidence that the Hearing Committee had before it was that the Member was of generally good character;
- (h) the Member clearly has and has had for some time serious emotional problems;
- (i) the Member has exhibited a cooperative attitude toward the proceedings;
- (j) once the disciplinary proceedings were commenced, they proceeded expeditiously; and
- (k) the Member has clearly shown his remorse at his actions.

29 29. In addition to the foregoing matters that are identified in the Hearing Guide, the majority looked at the current status of the Member and what the prospects were for his potential future as a practicing member of the Law Society. Even if he were disbarred, he could make application for reinstatement. Based upon the observations of the Hearing Committee and the testimony of the Member himself, he is a long way off from having the ability to practice law at the present time. The majority accordingly concluded that the suspension provisions of Section 73(1)(e) of the Legal Profession Act were sufficient public protection in the circumstances such that, combined with the mitigating factors outlined above, would be a suitable sanction in the circumstances.

30 30. While it is the understanding of the majority that by virtue of the wording of Section 73(1)(e), the Hearing Committee has no jurisdiction to deal with the conditions of lifting the suspension and that those conditions are entirely to be determined by the Practice Review Committee at the time of such application (if it were to ever occur), the majority was comforted by the fact that given the record in these proceedings, presumably the Practice Review Committee would not consider an application for reinstatement until there was very significant medical evidence that the emotional difficulties encountered by the Member were fully resolved or effectively under control and that should the medical issues be resolved, there would be some restrictions on the Member's control of trust funds should an application for the lifting of the suspension be ultimately successful.

31 31. Accordingly, by a two to one majority, it is ordered that the Member stand suspended pursuant to the provisions of Section 73(1)(e) of the Legal Profession Act.

32 32. By reason of the admission of guilt with respect to the misappropriation of trust funds, a referral to the Attorney General is ordered.

33 33. It is ordered that the exhibits and proceedings will be available to the public, although reference to the specific client names will be deleted to protect solicitor/client privilege. In this regard, Exhibits 6, 8 and 9 will be removed from the public record by reason of the numerous references to the client and Exhibit 13 will be sanitized.

34 34. It is ordered that costs in the estimated sum of the \$2,637.55 shall be paid by the Member within one year of the date of the hearing and in any event are to be paid prior to any application to lift the suspension pursuant to Section 73(1)(e) of the Legal Profession Act.

35 35. It is ordered that the Member shall forward the remaining funds in his trust account to the audit department of the LSA and the Hearing Committee accepted his undertaking in this regard. There being no other ongoing client matters in respect to the practice of the Member, no further custodianship orders or directions were required.

DISSENTING REASONS FOR DECISION OF P. MICHALYSHYN, Q.C.

Jurisdiction and Preliminary Matters

36 Jurisdiction was established by Exhibits 1-4. There was no objection to the composition of the committee.

37 No application was made for the hearing to be held in whole or in part in private. The Hearing was therefore properly constituted and proceeded in public.

Citations

38 The Member originally faced 3 citations as set out in Exhibit 2. In summary, it was alleged the Member failed to respond to the complainant (a lawyer), failed to account to the complainant's client, and failed to respond to the Law Society.

39 By agreement of the parties, a fourth citation was added that Mr. Sondermann misappropriated trust funds and that such conduct is deserving of sanction.

Admission of Guilt

40 All Exhibits were entered by consent including Exhibit 14, a Statement of Admission of Guilt. The Hearing Committee reviewed the Exhibits and found that the admission of guilt to all four citations was in a form acceptable to the Committee. The Member's conduct in this matter was thereby deemed to be conduct deserving of sanction. The Member also gave evidence before the Hearing Committee.

41 Briefly stated, the Member admits the failures to respond and to account (citations 1-3) and that he misappropriated trust funds (citation 4) in the sum \$22,500 from his client the Estate of C.T. The misappropriations occurred during a 3-4 week period by way of 2-4 cheques written in hand by the Member to himself. The misappropriations occurred in mid-1999 after funds were received by letter dated January 6, 1999. The Member ceased practicing law in September, 2001.

Sanction

Facts

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42 The Member testified that he offered no excuses for his behaviour, in particular the misappropriation which he candidly described as a theft. Before the Hearing Committee he profusely and without doubt sincerely apologized to his former client, to the complainant lawyer, and to other members of the Law Society.

43 At the time of the misappropriation the Member was a young lawyer, some 3-4 years at the bar. He practiced litigation including family law as a sole practitioner in association with the firm of Lawson Glod. He maintained his own trust account. The Member described some initial success as a litigator. Before long however he came to realize he was unhappy with the practice of law. Despite a façade that he enjoyed practice, he began abusing alcohol, ate excessively, was depressed and was at times suicidal. He was a profligate spender while living hand-to-mouth and accumulating debt. He hid his problems from his wife, family and friends. He was a poor businessman and administrator. Before the Hearing Committee he admitted his incompetence in keeping records and managing his law practice.

44 Things came to a head in 1999. The Member told of being at his office on a weekend after midnight, drinking and agonizing over unpaid bills. He wrote himself a cheque from the client's trust account. It was the first of between 2-4 such transactions over a 3-4 week period totaling \$22,500. The Member testified before the Hearing Committee that as he wrote the cheque he knew he would be caught. He believed inevitably he would end up before the Law Society. He testified that even as he entered the bank to deposit the cheque he was fully aware of the gravity of his actions. After the misappropriations the Member kept no monthly trust account reconciliations. He testified that he created no "paper trail" to conceal his actions.

45 The Member testified he was haunted by guilt virtually from the moment he first misappropriated the funds. Since leaving practice in September, 2001 -- roughly two years after the mid-1999 misappropriations -- he has been without remunerative employment.

46 The Member's misconduct did not catch up to him until the late fall, 2004. At that time he received notice of impending conduct proceedings. Only after that contact, the Member on December 22, 2004 met with his former client and the complainant lawyer, apologized to both, and made restitution including interest.

47 (The Member had earlier contact from the Law Society in about 2002 or 2003; he was contacted by telephone by Edmonton law society staff, in response to which he faxed an authorization permitting the society to have access to his financial records. The Member knew he was obliged to complete Form Ts regarding the state of his trust account. Such forms were not submitted at least for 1999 and thereafter, as a result of which the misappropriations were not disclosed. He had no further contact with the society before these conduct proceedings.)

48 In the more than five years between mid-1999 and the fall, 2004 the Member admitted he had his "head in the sand" with regard to the misappropriation of trust funds. While wracked with guilt, he was unable to admit his misconduct or attempt restitution. This same apparent paralysis caused the Member to ignore repeated inquiries from both the complainant lawyer and the Law Society. It was in evidence before the Hearing Committee that at least by December, 2003 the complainant lawyer was seeking an accounting from the Member regarding the \$22,500. All correspondence from the complainant went unanswered. On May 10 and June 8, 2004 the Law Society's complaints manager inquired of the Member regarding his failure to respond. At that point the issue of misappropriated trust funds was not on the table. The complaints manager's inquiries went unanswered.

Submissions of the parties

49 Counsel for the Law Society argued for the sanction of disbarment. Counsel relied on authorities set out in the Hearing Guide for the proposition that absent special circumstances disbarment will follow theft of trust funds.

50 Counsel for the Member acknowledged the many cases in which disbarment follows misappropriation, with or without special circumstances. In arguing for a suspension, counsel pointing to the mitigating factors of the admission of guilt; the in-person restitution and apology both to the Member's former client and to that client's

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lawyer; and the fact that the Member had already punished himself and his family by his misconduct. Counsel referred to the Member's momentary lack of judgment which led to the misappropriation. Going forward, disbarment versus suspension would likely pose an additional hurdle to the Member's successful return to remunerative work even as a non-lawyer.

Dissenting decision on sanction

51 Owing to considerable mitigating circumstances more fully set out elsewhere the majority of the Hearing Committee chooses to suspend the Member pursuant to s. 73(1) of the Legal Profession Act.

52 Notwithstanding those mitigating circumstances, the dissenting view is that the misconduct herein and particularly the misappropriation must result in disbarment. Aggravating factors include that the misappropriation occurred over a 3-4 week period and a series of 2-4 transactions; at issue was not a momentary lack of judgment and integrity -- the Member's poor judgment and lack of integrity was in issue the entire five-plus years he deceived both his client and the law society; an aspect of his deception was his failure to respond to the complainant lawyer, his client, and the Law Society and, though not forming a Citation before the Hearing Committee, his failure to file Form T which if completed honestly would have forced disclosure of the trust thefts.

53 Section 49(1) of the Legal Profession Act establishes that conduct deserving of sanction is that which is incompatible with the best interests of the public or of members of the society, or which tends to harm the standing of the legal profession generally.

54 The intention is not to punish the Member. There is also little evidence that the Member poses any further actual risk to the public: the risk of re-offending is remote even with a suspension, and there is at least some evidence of rehabilitation. However, none of this outweighs the harm to the reputation of the legal profession should the Member's theft from his client not attract the society's most severe sanction of disbarment. As urged by counsel for the Law Society and as noted by Gavin McKenzie Lawyers & Ethics: Professional Responsibility and Discipline, at 26-46, disbarment is the norm in cases of misappropriation in that in addition to protecting the public, it uniquely preserves public confidence and deters other lawyers from breaching the trust of their clients.