



The Law Society of Saskatchewan

MILES BAUMGARTNER

May 11, 2010

Law Society of Saskatchewan v. Baumgartner, 2010 SKLSS 1

**IN THE MATTER OF THE LEGAL PROFESSION ACT, 1990
AND IN THE MATTER OF MILES BAUMGARTNER,
A LAWYER OF REGINA, SASKATCHEWAN**

**DECISION OF THE HEARING COMMITTEE FOR THE
LAW SOCIETY OF SASKATCHEWAN**

Hearing Committee Members:

Susan B. Barber, Q.C. (Chair), Deb Schmidt (Public Bencher)

Counsel for the Member: Kirk Rondeau

Counsel for the Investigation Committee: Timothy F. Huber

INTRODUCTION

1. Miles Baumgartner (the "Member") is and was at all material times a practicing member of the Law Society of Saskatchewan (hereinafter the "LSS"). He was suspended on an interim basis by the Discipline Investigation Committee on June 2, 2009 and, as at the date of his hearing on April 9, 2010, remained suspended pending completion of the matter to be dealt with by the Hearing Committee.

2. The hearing was conducted on April 9, 2010 in Regina, Saskatchewan, by way of an Agreed Statement of Facts and Admissions. Submissions were then made by Counsel as to the appropriate penalty for the Member. In the circumstances, which will be addressed further in this decision, imposition of a penalty for the Member fell within the Hearing Committee's jurisdiction pursuant to Section 53 of *The Legal Profession Act, 1990* (the "Act").

3. The formal complaint against the Member alleges that he is guilty of conduct unbecoming a lawyer on the following grounds, that he:

- i. did fail to serve his clients, K&L G. in a conscientious, diligent and efficient manner, in that he failed to conclude their matter within a reasonable time, and further that he failed to respond to their repeated inquiries in relation to the status of the file;

- ii. did fail to serve his client, L.C. of Farm Credit Canada (FCC) in a conscientious, diligent and efficient manner, in that he failed to provide his final report or security documentation relating to a mortgage transaction within a reasonable time (approximately 11 months) or in accordance with their instructions;
- iii. did fail to, within a reasonable time, address trust accounting issues brought to his attention by John Allen, Law Society Auditor, specifically his failure to bill clients in a timely fashion and/or remove money from his trust account as soon as possible after he became entitled to it;
- iv. did fail to, within a reasonable time, provide a substantive response to the Law Society of Saskatchewan in relation to its complaint surround his trust accounting issues;
- v. did fail to, within a reasonable time, provide a substantive response to the Law Society of Saskatchewan in relation to the complaint of L&L G;
- vi. did breach an undertaking provided to the Law Society of Saskatchewan wherein he undertook to cease taking new files and matters;
- vii. did attempt to mislead the Law Society of Saskatchewan Auditor by back dating file opening dates;
- viii. did mislead the Law Society of Saskatchewan Practice Advisor, with whom he undertook to work to improve his practice, by misrepresenting the status of files; and
- ix. did mislead CIBC Mortgages Inc. in relation to various matters by stating that certain work had been done when it had not been.

FACTS

4. The agreed facts between the parties are as follows:

Complaint of K&L G.- Counts 1 and 5

5. On April 24, 2008, the Law Society received a complaint letter from K&L G. dated April 22, 2008. Mr. & Mrs. G. complained about the Member being dilatory in acting on their behalf as their real estate lawyer pertaining to the sale of two properties. The closing date for one of the properties was to be July 27, 2007.

6. Mr. G. tried to contact the Member on September 11, 2007 and he received no reply. He tried again to contact the member on April 15, 2008 by leaving a message on his answering machine and still he received no reply.

7. Mr. G. began to receive phone calls from one of the creditors regarding an unpaid phone account. This caused Mr. G. further concerns that the transactions had not been completed as contemplated. Mr. G. emailed the Member and again received no reply. As of the date of the complaint letter filed by K&L G., nine months after the closing date of the transactions, the Member had provided no reporting to his clients in relation to the transactions to show what was done and where their proceeds were disbursed and continued to be incommunicative.

8. On April 29, 2008, Donna Sigmeth, Complaints Counsel for the Law Society, forwarded the Member a copy of the K&L G. complaint letter by registered mail asking him for response. The letter was successfully delivered on April 30, 2008.

9. On May 12, 2008, the Member acknowledged receipt of Ms. Sigmeth's correspondence of April 29th which he indicated he received on April 30th. He indicated it was his intention to conclude matters and forward Mr. and Mrs. G. the document they required on or before May 20th and requested additional time to provide his response to the complaint.

10. On May 12, 2008, Ms. Sigmeth granted the extension of time to the Member to provide his response by May 20, 2008.

11. On May 21, 2008, Ms. Sigmeth received via fax a letter from the Member indicating that he had not received information as to the amount required to payout and discharge a builders' lien. The Member stated that he had:

"made a second request for the payout amount from the builders' lien holder's solicitor". He indicated that until he received the amount required to payout and discharge the builders' lien he was unable to finalize the documentation required by Mr. and Mrs. G. The Member indicated he must finalize both real estate sale transactions in order to properly respond to the complaint and requested additional time."

12. After receiving the Member's letter of May 21, 2008 Ms. Sigmeth spoke with Mr. G. and did a title search to ascertain who held the builder's lien in question and determined the identity of the solicitor for the builder's lien holder. Ms. Sigmeth spoke with the solicitor for the lien holder on May 26, 2008. It was determined that the solicitor for the lien holder had written to the Member on December 4, 2007, January 14, 2008 and February 20, 2008 asking for money to pay out the lien. The solicitor for the lien holder indicated that the first response he heard from the Member was on May 20, 2008, when the Member requested confirmation of the payout amount. The amount was confirmed and the Member forwarded funds sufficient to discharge the lien on May 22, 2008. The solicitor for the lien holder denies that he was asked for the payout figure by the Member prior to May 20, 2008.

13. On May 28, 2008 Ms. Sigmeth wrote to the Member yet again requesting a response to the complaint of K&L G.

14. On May 29, 2008 Mr. and Mrs. G received the net proceeds from the transactions amounting to \$2,854.87. Shortly thereafter on or about June 19, 2008 Mr. and Mrs. G received the final reporting documents in relation to the transactions from the Member. This reporting was nearly 11 months after the close of one sale and nearly 10 months after the close of the other sale transaction.

15. A substantive response was not received by the Law Society from the Member in relation to the complaint of K&L G, despite repeated requests from Ms. Sigmeth, until July 24, 2008.

Complaint of Farm Credit Canada - Count 2

16. On April 17, 2008, Ms. Sigmeth received a complaint letter from L.C., of Farm Credit Canada (FCC). The complaint indicated that the Member had not provided a final report and that they had not received the security documentation that the Member was required to provide in relation to a transaction that had closed in June of 2007.

17. The complaint of FCC was forwarded to the Member on April 29, 2008.

18. On May 12, 2008, the Member responded to Ms. Sigmeth indicating that it was his intention to complete the solicitor's report and forward same to FCC by or before May 15, 2008. He asked for an extension of time to Friday, May 16th to provide a response to the Law Society.

15. The Member ultimately provided a copy of the final report to FCC on or about May 15, 2008. The Member extended his apology to L.C. and FCC for the delay in providing the required documentation and blamed it on being overworked and failing to prioritize the matter.

Complaints of the Law Society Auditor- Counts 3, 4, 6 and 7

19. The involvement of the Law Society Auditor, John Allen, in this matter began on May 10, 2007 when he performed a random spot audit on the Member's firm. During this initial audit, various issues were identified. The issues were particularized in an Interim Trust Report.

20. A follow up review was completed by Mr. Allen on October 25, 2007. Mr. Allen prepared a report setting out what progress the Member had made since the May, 2007 spot audit. The Member showed progress in relation to some of the issues of concern. Unfortunately, other issues were not remedied.

21. Specifically, the Member had failed to comply with Rule 940 requiring him to withdraw funds from trust as soon as possible after becoming entitled to them as fees. The initial audit revealed that the Member had allowed an estimated \$51,000 in fees to remain in trust after he had become entitled to them, with one account in the amount of \$500.00, dating back as far as April 2004. Approximately 56 accounts were involved. During the October review, Mr. Allen determined that the Member had made no progress in relation to this issue.

22. The period between the spot audit and the October 2007 review was marked by a general lack of response to Mr. Allen's requests for information. The Member repeatedly requested extensions of time rather than providing any substantive response to Mr. Allen's requests. The following is a breakdown of the correspondence exchanged during this period:

- i. July 24, 2007 - Letter from Mr. Allen to the Member outlining issues and requesting response by August 24, 2007;
- ii. August 27, 2007- Letter from the Member to Mr. Allen requesting an extension of response time to September 10, 2007;
- iii. September 18, 2007 - Letter from Mr. Allen to the Member requesting a response not later than September 25, 2007;
- iv. October 5, 2007- Letter from Mr. Allen to the Member stating that if response not received by October 12, 2007, matter would be forwarded to Complaints Counsel;

- v. October 12, 2007 - Letter from the Member to Mr. Allen with response to July 24, 2007 letter but reply did not address major issues - more time requested.
23. The follow up Trust Report of Mr. Allen, was signed by the Member on December 19, 2007.
24. By May, 2008, approximately 1 year since the initial spot audit, the Member had addressed many of the issues identified by Mr. Allen, with the exception of his failure to comply with Rule 940. One year after being directed to withdraw funds from trust as soon as he became entitled to them, the Member continued to have 43 accounts where he had not taken fees from trust to which he was entitled. The Member had stated that he did not have the time to issue Statements of Account due to his busy practice.
25. In the period from October 2007 to May 2008, the Member's delay in providing a substantive response to the Auditor's requests continued.
26. The following is a breakdown of the correspondence exchanged during this period:
 - i. December 19, 2007 - Letter from the Member to Mr. Allen requesting date of required response be changed from December 10, 2007 to January 21, 2008;
 - ii. January 22, 2008- Letter from the Member to Mr. Allen requesting extension to reply to trust report from January 21, 2008 to February 4, 2008;
 - iii. January 23, 2008- Letter from Mr. Allen to the Member approving extension request;
 - iv. February 5, 2008- Letter from the Member to Mr. Allen requesting extension to February 18,2008 due to water main break;
 - v. March 3, 2008 - Letter from Mr. Allen to the Member stating response due February 18,2008 not received to date;
 - vi. March 4, 2008 - Letter from the Member to Mr. Allen requesting extension to March 10, 2008;
 - vii. March 7, 2008- Letter from Mr. Allen to the Member approving extension to March 10, 2008 and stating no further extensions will be approved and "response must be complete and fully resolve issues identified";
 - viii. March 20, 2008 - Letter from Mr. Allen to the Member stating matter being referred to Complaints Counsel. Matter not referred since year end report due March 31,2008.
27. Ultimately, a recommendation to suspend the Member on an interim basis for lack of response was made by the Investigation Committee in April 2008. Only after the Member became aware of the intention to suspend did he provide his response to Mr. Allen. This response indicated that he was still not in compliance with Rule 940.
28. An interim suspension was avoided at that time due to the Member's response to Mr. Allen and the Member's execution of undertakings designed to address the problems still outstanding.

29. The undertakings of the Member were provided to the Law Society in July 2008. As part of these undertakings the Member was to cease taking on new clients and new matters until he addressed various professional standards concerns and his continued breach of Rule 940.

30. During visits to the Member's office on May 7 and May 19, 2009, John Allen determined that the Member had breached his undertaking to cease intake of new files and matters. In addition to the breach of undertaking, it was apparent that the Member attempted to mislead the Law Society by back dating file opening forms for new files to dates prior to his undertaking.

31. The Trust Report is endorsed by the Member as being true and correct and the contents re admitted by the Member.

Complaints Regarding the Law Society Practice Advisor and CIBC - Counts 8 and 9

32. Law Society Practice Advisor Roderick MacDonald Q.C. became involved with the Member to address various Professional Standards issues. During the course of his work with the Member, issues were brought to the attention of the Law Society which yielded Counts 8 and 9.

33. The particulars of the conduct identified by Mr. MacDonald are fully set out in Mr. MacDonald's Report dated May 22, 2009. The charge for misleading Mr. MacDonald arose when the Member knowingly misled Mr. MacDonald on February 10, 2009, in relation to the status of 45 CIBC Mortgages Inc. mortgage files. The Member admitted to his misleading Mr. MacDonald on May 21, 2009. The contents of the Report are admitted by the Member, save for the fact that there were 45 CIBC Mortgages Inc. mortgage files and not 46.

34. The Report of Mr. MacDonald also yielded a charge in relation to the Member misleading his client CIBC in relation to those same 45 mortgage files. Mr. MacDonald's review of the files revealed that the Member had on July 21, 2006 signed a certification to CIBC indicating that certain work had been completed in order to obtain an advance of the mortgage proceeds which he released to the Vendor shortly thereafter. In fact, the Member had not dealt with the deficiencies as per his certification.

DECISION

35. The Member entered a guilty plea on all counts, which plea was accepted by the Hearing Committee.

DETERMINATION OF PENALTY

36. As set out in the Agreed Statements of Facts and Admissions, the Member, as at the date of his hearing, had already been suspended for approximately ten months as a result of the interim suspension imposed by the Discipline Investigation Committee on June 2, 2009.

37. Based upon the evidence received by the Hearing Committee that the Member had been suffering from psychological issues for which he is now receiving treatment, Counsel for the Member and Counsel for the Investigation Committee jointly recommended that no further suspension is warranted and that the public can be adequately protected by the imposition of strict practice conditions. It was the view of Counsel for the Investigation Committee that the

conduct in question would normally warrant the imposition of a significant suspension in the range of six to twelve months and, accordingly, the suspension of ten months would serve the purpose, particularly in light of the meaningful mitigating factors.

38. Counsel for the Investigation Committee provided a Brief outlining the various authorities which would support a suspension in the range of six to twelve months. Mr. Rondeau, on behalf of the Member, submitted that a suspension of ten months is in the higher range of sentences and is a fair and reasonable outcome in the circumstances.

39. The Hearing Committee is prepared to accept the joint recommendation of Counsel, bearing in mind that these were serious violations of the Code by the Member but recognizing that there were mitigating circumstances in light of his psychological condition and in light of the fact that he has already served a lengthy suspension. It is, however, appropriate that the Member face significant practice conditions in order to ensure that this progress is monitored and that he has the supervision and counsel of another lawyer at the Bar in the event he resumes practice.

40. Although the Member was not required to address the panel he chose to do so and, in speaking, extended his heartfelt apologies to the LSS for his action or inaction, to his fellow members, to his clients and particularly to the parties involved in the formal complaints against him. He indicated that he would do his best to use the experience to learn, to improve his practice and to become a better Member of the LSS. He freely acknowledged that protection of the public and protection of the integrity of the practice of law is of the utmost concern to the LSS and indicated that he would do his best not to put himself in a position for this to occur again. On that basis, according to the parties, assuming the Hearing Committee is in agreement with the suggestion, imposition of penalty would then fall within the Committee's jurisdiction pursuant to Section 53 of the Act.

DISPOSITION

41. Accordingly, after hearing submissions from Counsel on behalf of the Investigation Committee and from Counsel on behalf of the Member, for which we are grateful, the Hearing Committee orders:

42. THAT the Member shall only engage in the practice of law pursuant to the conditions contained herein. Should the Member fail to meet any of the following conditions, at any time, his license to practice law shall immediately be suspended. Such a suspension shall continue until compliance has been achieved or conditions varied to remedy any default by the Chair of the Discipline Committee of the Law Society of Saskatchewan. In order to return to practice, the Member shall be subject to the following terms and conditions:

- i. He shall at his own expense, secure and maintain a practice supervisor, approved by the Chair of Discipline, who is prepared to formally undertake responsibility for the following supervisory obligations:
- ii. That he or she will, on a monthly basis review the Member's trust and general account records, in advance of their being provided to the Law Society, to ensure

that he or she is personally aware of all monies received by the Member's firm in any matter on which the Member is retained and he or she will ensure there is no irregularity in the handling of any monies received by his firm and that all trust accounting rules are complied with;

- iii. That he or she will become familiar and remain familiar with the Member's practice and files. To achieve this objective, he or she will require the Member to provide a complete list, in writing, of open files including all open file statuses, on a monthly basis;
 - iv. That he or she will meet with the Member in person at least one per month to review his open file list in order to ensure public protection and quality of service;
 - v. That he or she will, from time to time, select and review random files to verify the status as indicated by the Member;
 - vi. That he or she will maintain copies of the written open file status lists and provide such file status lists to the Law Society upon request;
 - vii. That he or she will identify shortcomings in the Member's file and office management systems and assist the Member to remedy those shortcomings;
 - viii. That he or she will participate and cooperate with any Law Society staff who wishes to review practice management/professional standards issues as well as the audit and inspection of trust accounts;
 - ix. That he or she will immediately advise the Law Society of Saskatchewan of any irregularities, claims or potential claims, concerns or complaints respecting the Member; and
 - x. That he or she will immediately advise the Law Society of Saskatchewan of any intention to terminate the relationship with the Member and in that event provide 30 days notice to the Law Society.
43. He shall continue treatment by a registered psychologist, psychiatrist or registered counselor (Care Provider) as follows:
- i. The Member shall provide confirmation as to the identity of his current Care Provider;
 - ii. The Member shall continue to attend regularly scheduled appointments with his Care Provider until such time as these regular sessions are, in the opinion of his Care Provider, no longer necessary;
 - iii. The Member shall authorize and direct his Care Provider to report to the Law Society if the Member discontinues attending regularly scheduled appointments or misses two consecutive appointments;

- iv. The Member shall sign an Authorization and Direction allowing his Care Provider to communicate with the Law Society of Saskatchewan as required. It should be noted that the details of the Member's private sessions with his Care Provider are not to be disclosed to the Law Society, and any reporting should focus only on the Member's general attendance and prognosis;
- v. In the event the Member changes his Care Provider to another registered psychologist, psychiatrist or registered counselor, the Member shall forthwith advise the Law Society of the change and provide new authorizations with respect to the new Care Provider.

44. THAT these conditions shall remain in effect for a minimum of two years, after which time, the Member may apply in writing to the Chair of Discipline to vary or remove any or all of these terms and conditions of practice;

45. THAT the Member shall pay costs in the amount of \$7,500.00 to the Law Society of Saskatchewan;

46. THAT the costs are payable on or before April 9, 2012; and

47. THAT if further time is required for payment of the costs, an extension of time to pay may be granted on application by the Member to the Chair of Discipline prior to April 9, 2012.

DATED at the City of Regina, in the Province of Saskatchewan, this 11th day of May, 2010.

“Susan Barber, Q.C.”

“Deb Schmidt”

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated July 27, 2009, attached at Tab 1.

JURISDICTION

48. Miles Baumgartner (hereinafter “the Member”) is, and was at all times material to this proceeding, a practicing member of the Law Society of Saskatchewan (hereinafter the “Law Society”), and accordingly is subject to the provisions of *The Legal Profession Act, 1990* (herein after the “Act”) as well as the *Rules of the Law Society of Saskatchewan* (the “Rules”). Attached at **Tab 2** is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to section 83 of the Act confirming the Member’s status.

49. The Member was suspended on an interim basis by the Discipline Investigation Committee on June 2, 2009, and remains on suspended status pending completion of the current discipline matters.

50. The Member is the subject of a Formal Complaint dated July 27, 2009. The Formal Complaint is comprised of nine counts. The Formal Complaint was served upon the Member on July 30, 2009. Proof of service of the Formal Complaint upon the Member is included at Tab 1.

51. The Member acknowledges the jurisdiction of the Hearing Committee appointed in relation to this matter to determine whether the complaints against him are well founded. The Member further acknowledges service of the Formal Complaint and the Notice of Hearing and takes no issue with the constitution of the Hearing Committee.

52. The Member has agreed to enter guilty pleas in relation to all counts set out in the Formal Complaint.

PARTICULARS OF CONDUCT

53. These proceedings arose as a result of a Law Society investigation in relation to complaints received from two clients as well as the Law Society Auditor and the Law Society Practice Advisor.

Complaint of K&L G. - Counts 1 and 5

54. On April 24, 2008, the Law Society received a complaint letter from K&L G. dated April 22, 2008. Mr. & Mrs. G. complained about the Member being dilatory in acting on their behalf as their real estate lawyer pertaining to the sale of two properties. The closing date for one of the properties was to be July 27, 2007. Attached at **Tab 3** is a copy of the complaint letter received from K&L G.

55. Mr. G. tried to contact the Member on September 11, 2007 and he received no reply. He tried again to contact the member on April 15, 2008 by leaving a message on his answering machine and still he received no reply.

56. Mr. G. began to receive phone calls from one of the creditors regarding an unpaid phone account. This caused Mr. G. further concerns that the transactions had not been completed as contemplated. Mr. G. emailed the Member and again received no reply. As of the date of the complaint letter filed by K&L G., nine months after the closing date of the transactions, the Member had provided no reporting to his clients in relation to the transactions to show what was done and where their proceeds were disbursed and continued to be uncommunicative.

57. On April 29, 2008, Donna Sigmeth, Complaints Counsel for the Law Society, forwarded the Member a copy of the K&L G. complaint letter by registered mail asking him for response. The letter was successfully delivered on April 30, 2008.

58. On May 12, 2008, the Member acknowledged receipt of Ms. Sigmeth's correspondence of April 29th which he indicated he received on April 30th. He indicated it was his intention to conclude matters and forward Mr. and Mrs. G. the document they required on or before May 20th and requested additional time to provide his response to the complaint.

59. On May 12, 2008, Ms. Sigmeth granted the extension of time to the Member to provide his response by May 20, 2008.

60. On May 21, 2008, Ms. Sigmeth received via fax a letter from the Member indicating that he had not received information as to the amount required to payout and discharge a builders' lien. The Member stated that he had "made a second request for the payout amount from the builders' lien holder's solicitor". He indicated that until he received the amount required to payout and discharge the builders' lien he was unable to finalize the documentation required by Mr. and Mrs. G. The Member indicated he must finalize both real estate sale transactions in order to properly respond to the complaint and requested additional time.

61. After receiving the Member's letter of May 21, 2008 Ms. Sigmeth spoke with Mr. G. and did a title search to ascertain who held the builder's lien in question and determined the identity of the solicitor for the builder's lien holder. Ms. Sigmeth spoke with the solicitor for the lien holder on May 26, 2008. It was determined that the solicitor for the lien holder had written to the Member on December 4, 2007, January 14, 2008 and February 20, 2008 asking for money to pay out the lien. The solicitor for the lien holder indicated that the first response he heard from the Member was on May 20, 2008, when the Member requested confirmation of the payout amount. The amount was confirmed and the Member forwarded funds sufficient to discharge the lien on May 22, 2008. The solicitor for the lien holder denies that he was asked for the payout figure by the Member prior to May 20, 2008.

62. On May 28, 2008 Ms. Sigmeth wrote to the Member yet again requesting a response to the complaint of K&L G.

63. On May 29, 2008 Mr. and Mrs. G received the net proceeds from the transactions amounting to \$2,854.87. Shortly thereafter on or about June 19, 2008 Mr. and Mrs. G received the final reporting documents in relation to the transactions from the Member. This reporting was nearly 11 months after the close of one sale and nearly 10 months after the close of the other sale transaction.

64. A substantive response was not received by the Law Society from the Member in relation to the complaint of K&L G, despite repeated requests from Ms. Sigmeth, until July 24, 2008.

Complaint of Farm Credit Canada – Count 2

65. On April 17, 2008, Ms. Sigmeth received a complaint letter from L.C., of Farm Credit Canada (FCC). The complaint of (FCC) is attached at **Tab 4**. The complaint indicated that the Member had not provided a final report and that they had not received the security documentation that the Member was required to provide in relation to a transaction that had closed in June of 2007.

66. The complaint of FCC was forwarded to the Member on April 29, 2008.

67. On May 12, 2008, the Member responded to Ms. Sigmeth indicating that it was his intention to complete the solicitor's report and forward same to FCC by or before May 15, 2008. He asked for an extension of time to Friday, May 16th to provide a response to the Law Society.

68. The Member ultimately provided a copy of the final report to FCC on or about May 15, 2008. The Member extended his apology to L.C. and FCC for the delay in providing the required documentation and blamed it on being overworked and failing to prioritize the matter.

Complaints of the Law Society Auditor – Counts 3,4,6 and 7

69. The involvement of the Law Society Auditor, John Allen, in this matter began on May 10, 2007 when he performed a random spot audit on the Member's firm. During this initial audit, various issues were identified. The issues were particularized in an Interim Trust Report. Attached at **Tab 5** is the Interim Trust Report of Mr. Allen dated May 11, 2007 and signed by the Member on May 14, 2007.

70. A follow up review was completed by Mr. Allen on October 25, 2007. Mr. Allen prepared a report setting out what progress the Member had made since the May, 2007 spot audit. The Member showed progress in relation to some of the issues of concern. Unfortunately, other issues were not remedied.

71. Specifically, the Member had failed to comply with Rule 940 requiring him to withdraw funds from trust as soon as possible after becoming entitled to them as fees. The initial audit revealed that the Member had allowed an estimated \$51,000 in fees to remain in trust after he had become entitled to them, with one account in the amount of \$500.00, dating back as far as April 2004. Approximately 56 accounts were involved. During the October review, Mr. Allen determined that the Member had made no progress in relation to this issue.

72. The period between the spot audit and the October 2007 review was marked by a general lack of response to Mr. Allen's requests for information. The Member repeatedly requested extensions of time rather than providing any substantive response to Mr. Allen's requests. The following is a breakdown of the correspondence exchanged during this period:

- i. July 24, 2007 – Letter from Mr. Allen to the Member outlining issues and requesting response by August 24, 2007;
- ii. August 27, 2007 – Letter from the Member to Mr. Allen requesting an extension of response time to September 10, 2007;
- iii. September 18, 2007 – Letter from Mr. Allen to the Member requesting a response not later than September 25, 2007;
- iv. October 5, 2007 – Letter from Mr. Allen to the Member stating that if response not received by October 12, 2007, matter would be forwarded to Complaints Counsel;
- v. October 12, 2007 – Letter from the Member to Mr. Allen with response to July 24, 2007 letter but reply did not address major issues - more time requested.

73. The follow up Trust Report of Mr. Allen, signed by the Member on December 19, 2007 is attached hereto at **Tab 6**.

74. By May, 2008, approximately 1 year since the initial spot audit, the Member had addressed many of the issues identified by Mr. Allen, with the exception of his failure to comply with Rule 940. One year after being directed to withdraw funds from trust as soon as he became

entitled to them, the Member continued to have 43 accounts where he had not taken fees from trust to which he was entitled. The Member had stated that he did not have the time to issue Statements of Account due to his busy practice.

75. In the period from October 2007 to May 2008, the Member's delay in providing a substantive response to the Auditor's requests continued. The following is a breakdown of the correspondence exchanged during this period:

- i. December 19, 2007 – Letter from the Member to Mr. Allen requesting date of required response be changed from December 10, 2007 to January 21, 2008;
- ii. January 22, 2008 - Letter from the Member to Mr. Allen requesting extension to reply to trust report from January 21, 2008 to February 4, 2008;
- iii. January 23, 2008 – Letter from Mr. Allen to the Member approving extension request;
- iv. February 5, 2008 - Letter from the Member to Mr. Allen requesting extension to February 18, 2008 due to water main break;
- v. March 3, 2008 - Letter from Mr. Allen to the Member stating response due February 18, 2008 not received to date;
- vi. March 4, 2008 - Letter from the Member to Mr. Allen requesting extension to March 10, 2008;
- vii. March 7, 2008 - Letter from Mr. Allen to the Member approving extension to March 10, 2008 and stating no further extensions will be approved and “response must be complete and fully resolve issues identified”;
- viii. March 20, 2008 - Letter from Mr. Allen to the Member stating matter being referred to Complaints Counsel. Matter not referred since year end report due March 31, 2008.

76. Ultimately, a recommendation to suspend the Member on an interim basis for lack of response was made by the Investigation Committee in April 2008. Only after the Member became aware of the intention to suspend did he provide his response to Mr. Allen. This response indicated that he was still not in compliance with Rule 940.

77. An interim suspension was avoided at that time due to the Member's response to Mr. Allen and the Member's execution of undertakings designed to address the problems still outstanding.

78. The undertakings of the Member were provided to the Law Society in July 2008. As part of these undertakings the Member was to cease taking on new clients and new matters until he addressed various professional standards concerns and his continued breach of Rule 940. Attached at **Tab 7** is a copy of the signed undertaking of the Member dated July 25, 2008.

79. During visits to the Member's office on May 7 and May 19, 2009, John Allen determined that the Member had breached his undertaking to cease intake of new files and matters. In addition to the breach of undertaking, it was apparent that the Member attempted to mislead the Law Society by back dating file opening forms for new files to dates prior to his undertaking. Attached at **Tab 8** is a Trust Report of John Allen dated May 25, 2009 wherein the breaches of

undertaking and misleading are particularized. A further document setting out the methodology used for determining that the undertaking had been breached is included at **Tab 9**. The Trust Report is endorsed by the Member as being true and correct and the contents are admitted by the Member.

Complaints Regarding the Law Society Practice Advisor and CIBC – Counts 8 and 9

80. Law Society Practice Advisor Roderick MacDonald Q.C. became involved with the Member to address various Professional Standards issues. During the course of his work with the Member, issues were brought to the attention of the Law Society which yielded Counts 8 and 9.

81. The particulars of the conduct identified by Mr. MacDonald are fully set out in Mr. MacDonald's Report dated May 22, 2009. The charge for misleading Mr. MacDonald arose when the Member knowingly misled Mr. MacDonald on February 10, 2009, in relation to the status of 45 CIBC Mortgages Inc. mortgage files. The Member admitted to his misleading Mr. MacDonald on May 21, 2009. The particulars of how the Member misled Mr. MacDonald are set out fully in the Report of Mr. MacDonald dated May 22, 2009 attached at **Tab 10**. The contents of the Report are admitted by the Member, save for the fact that there were 45 CIBC Mortgages Inc. mortgage files and not 46.

82. The Report of Mr. MacDonald also yielded a charge in relation to the Member misleading his client CIBC in relation to those same 45 mortgage files. Mr. MacDonald's review of the files revealed that the Member had on July 21, 2006 signed a certification to CIBC indicating that certain work had been completed in order to obtain an advance of the mortgage proceeds which he released to the Vendor shortly thereafter. In fact, the Member had not dealt with the deficiencies as per his certification.

DISCIPLINE HISTORY

83. The Member has had one prior finding of conduct unbecoming a lawyer. Attached at **Tab 11** is a copy of the Discipline Decision relating to that matter from March 20, 2000.

INTERIM SUSPENSION

84. The Member was suspended on an Interim basis on June 2, 2009 after his breaches of undertaking to the Law Society came to light. A Trustee was appointed in relation to his practice and remains in place.