The Law Society of Saskatchewan

RUSSELL MILTON PEET
APRIL 11, 2013
***Law Society of Saskatchewan v. Peet*, 2013 SKLSS 5**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF RUSSELL MILTON PEET,
A LAWYER OF PREECEVILLE, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

INTRODUCTION

1. Russell Milton Peet (the Member) is the subject of an amended formal complaint (Exhibit P-1) dated March 4, 2011 alleging three (3) counts of conduct unbecoming a lawyer (the Complaint). The original formal complaint, dated July 9, 2010, (P-10) included a third member of the Discipline Hearing Committee who subsequently could not serve.

2. The Discipline Hearing Committee (the Committee) in this matter was comprised of Evert van Olst, Chair, and Laura Lacoursiere. Counsel for the Law Society of Saskatchewan Investigation Committee (LSS) was Timothy Huber. Counsel for the Member was Bernard Stephaniuk.

3. The evidential hearing on the merits of the Complaint was held July 20, 2012. Written briefs were filed and oral arguments were presented and heard on August 17, 2012. The Discipline Hearing Committee (the Committee) reserved its decision on all counts.

4. The Committee rendered an earlier ruling on June 29, 2012 on the preliminary issue of delay raised by the Member. The Committee dismissed the Member's application for a stay of proceedings.

PRELIMINARY MATTERS AT THE HEARING

5. Counsel for the Member requested the Member's affidavit, filed in support for the preliminary application on delay, be filed at this hearing. Counsel for the LSS agreed, subject to the Member being available for cross-examination at this hearing. However, by the close of the

hearing the matter was left unresolved, and this Committee does not rely on the affidavit as part of the record of the hearing on the merits.

COUNTS IN THE COMPLAINT

6. Counts 1, 2 and 3 allege that the Member is guilty of conduct unbecoming a lawyer in that he:

a) Failed to reply promptly to communications from the Law Society of Saskatchewan with respect to complaints by D.D. and M.B.;

Reference Chapter XV of the *Code of Professional Conduct*

b) Failed to serve his clients, D.D. and the Estate of O.N., in a conscientious, diligent and efficient manner as follows:

i. i. Failed to provide prompt service to D.D. and the Estate of O.N.;

ii. Failed to respond to D.D.'s communications within a reasonable time.

Reference Chapter II of the *Code of Professional Conduct*

c) Failed to serve his clients, M.B. and the Estate of E.B., in a conscientious, diligent and efficient manner as follows:

i. Failed to provide prompt service to M.B. and the Estate of E.B.;

Reference Chapter II of the *Code of Professional Conduct*

ONUS AND STANDARD OF PROOF

7. To succeed, the prosecution in this case must prove its case on a balance of probabilities with evidence that is sufficiently clear, convincing, and cogent. The Committee must determine, based on the evidence before it, whether it is more likely than not that the alleged misconduct occurred.

FACTS AND FINDINGS

Count 3 - M.B. and Estate of E. B.

8. This count, in essence, deals with the Member's actions or inaction regarding the estate of E.B. which dealt with a holograph "will" and the instructions from family representatives A.B. and M.B. The estate was challenging in that there was a questionable "will" and further possible administration of another estate.

9. The following documents were filed and accepted as Exhibits by the Committee:

a) Undated handwritten "will" of E.B. (P-3);

b) Fiat of Mr. Justice Foley dated July 24, 2008 (P-4);

c) Law Society of Saskatchewan Complaint form and attachments completed by M.B. dated November 19, 2008 (P-5);

d) Affidavit of Applicant for Administration with Will Annexed, Application for Grant of Administration with Will Annexed, Schedule of Assets – Part I and II, Affidavit of Execution, Disclaimer of W.B., Disclaimer of M.B., Disclaimer of H.B., Affidavit of Applicant for Administration Re: Debts, Affidavit Proving Execution of a Holographic Will, undated handwritten will of E.B. (P-6);

e) Letter from the Member to M.B. dated March 11, 2009 (M-1);

f) Statement of Account from the Member dated February 27, 2009 (M-2)

10. M.B. testified that her brother, E.B., of Hudson Bay and Indian Head, passed away March 28, 2006. There were eleven siblings in the family. Six siblings were named in an undated holograph "will" that had been located in July, 2007.

11. Four of the siblings, including M.B. and A.B., saw the Member on July 19, 2007 requesting him to determine if the handwritten will was valid and to proceed with having the will probated. M.B. said the Member told them this would be done within a couple of months.

12. M.B. said she understood her sister, A.B., was the client of record. She also said she was aware the Member had subsequently inquired of other lawyers in Hudson Bay and Indian Head regarding other wills. She was aware there might be issues, as "the will was not dated".

13. M.B. was aware that her sister A.B. had phoned the Member in January or February 2008 for updates. A.B. advised M.B. the work was not done. In June 2008, A.B. (who lives in Ontario) asked M.B. (who lives in Regina) to take over contacting the Member. M.B. stated that the Member did not return many of her calls. The Member left a message indicating the matter "fell through the cracks". Eventually M.B. was able to speak to the Member who advised her he thought the family were looking for another will. M.B. advised the Member that according to the instructions of the July 2007 meeting, the Member was to proceed to request probate of the undated, handwritten "will".

14. It appears that the Member made an application to the court regarding the validity of the will. M.B received a copy of the Fiat of Mr. Justice Foley dated July 24, 2008 from her sister A.B. or by calling the Court. She said she did not receive it from the Member. The Fiat indicated the undated, handwritten "will" could not be probated as it stood for a number of reasons. In addition, the Fiat raised the issue of the intestacy of another brother's estate. The family met to discuss this. A.B was adamant about not being involved in administrating another estate of an estranged brother. In October, 2008, the Member forwarded copies of several documents, including letters of administration of the will, to the family members. M.B. indicated that there was an error in these documents, in that the name of the other brother who passed away was included. She contacted the Member requesting him to make the corrections. M.B. stated the Member never did this work.

15. As a result, M. B. filed a complaint on behalf of her family with the LSS on November 19, 2008. In February 2009, M.B. dismissed the Member and retained another lawyer to complete the estate.

16. A.B., who lives in Ontario, testified by telephone. E.B. was her twin brother and his death was unexpected. She was aware from family discussions that her brother E.B. had a will.

17. Once the handwritten "will" was discovered by another brother, A.B. and other family members met with the Member in July 2007. She said she instructed the Member, at this first meeting, to probate the will as soon as possible. She said the Member said it would be done and he "would get right on it".

18. Under cross-examination, A.B. said the Member advised them at the initial meeting of changes to the legislation about wills, but that the Member did not mention much about whether the will might be invalid. She did not recall the Member saying a brief of law needed to be prepared. She said this information did not change her instructions to the Member to proceed immediately to get the will probated.

19. A.B. signed several documents on July 19, 2007. Under cross-examination, she could not recall a subsequent meeting on July 23, 2007.

20. After the initial meeting, A.B. phoned the Member, by long distance call, several times. Two weeks after the initial meeting, the Member advised her "it was too soon to know". She said she waited three more weeks before phoning again. The Member said he had not heard anything. After the third phone call, A.B. said she assumed the Member had not sent the will for probate.

21. A.B. said her family members were calling her for updates. After a year, in June 2008, there was, in her opinion, no progress. She asked M.B. to take over dealing with the Member and the estate.

22. In July 2008, A.B. learned the will was not valid. She did not recall how she became aware of the court's decision. A.B. said this resulted in additional documents needing signatures by family members. A.B. did not want to be involved in the administration of the other brother's estate, as she did not know him well and had not had contact with him for many years. She said she telephoned the Member to tell him this.

Count 2 – D.D. and Estate of O.N.

23. Count 2, in essence, deals with the estate of O.N. and the Member's dealings with D.D., the principal with whom he took instructions and allegations of delay in completing the estate and communicating with his client. Initially, work on the estate proceeded expeditiously, but thereafter work and communication with the client stalled.

24. The following documents were filed and accepted as Exhibits by the Committee:

a) Letter of Authorization by an Executor to TD Canada Trust (P-7);

b) Letter of complaint from D.D. to Law Society dated October 29, 2008 (P-8);

c) Letter from the Member to D.D. dated May 16, 2007 (M-3);

d) Accounting for Estate of O.N. (Part I to VI) and Vendor's Trust Statement (M-4);

e) Deposit Account History May 1, 2007 to September 5, 2008 (M-5);

f) Statement of Account from Member dated May 16, 2007 (M-6).

25. D.D., who lives in Alberta, testified by telephone. Her father was O.N. who passed away in Preeceville in February 27, 2007. D.D. met with the Member several times in early March 2007 regarding her father's estate. She signed a letter of authorization to the bank on March 2, 2007 allowing the Member to enter O.N.'s safety deposit box, remove its contents and to close the box. She instructed the Member to file for probate, sell the house, and to distribute the estate to D.D. and her one brother who lived in Ontario.

26. D.D. was advised the letters probate were completed in April 2007, the house was sold in May 2007, and the Member paid the last utility bills. The Member wrote to D.D. May 16, 2007 to report on the estate and to request that D.D. complete a list of expenses paid from estate funds. He mentioned payment of Executor's fees. His letter said that with her reply he could complete the estate accounting before distribution of the amounts to the two beneficiaries, D.D. and her brother. On the same day, he wrote to D.D.'s brother indicating that once income tax matters were reviewed and all filing complete, the estate could be completed. Under cross-examination, D.D. agreed that from March 1 to May 16, 2007, the Member's work on the file was done in a

conscientious manner. On May 18, 2007, she received a fax from the Member regarding closure of the safety deposit box. On May 25, 2007, she contacted her brother's lawyer to update him.

27. D.D. then said the Member asked her for some receipts and on July 9, 2007, D.D. faxed receipts regarding ambulance, cleaning, landfill fees and other expenses to him. On cross-examination, she admitted she sent copies of receipts, rather than a listing as the Member apparently requested. On July 9, 2007 there were outstanding questions regarding the car and house contents. By that time, D.D. thought the Member had all the information needed to complete the accounting for the estate.

28. On June 23, June 30, and July 9, 2008 D.D. left messages for the Member for updates. She spoke with the Member on July 22, 2008 and he advised her he was working on the accounting of the estate. She said he did not explain the delay. She spoke to the Member on July 29 and he left her a message the next day that documents were to be mailed.

29. D.D. said she called the Member August 11, 2008 and left messages indicating she had not yet received the documents. On August 15, 2008, D.D. received the first draft of the estate accounting with questions about the car and house contents.

30. D.D. spoke with the Member on August 29 regarding some errors on the accounting schedules. She faxed fifteen pages of material to the Member on September 1, 2008. Revisions were required for such things as interest received, utility payments, value of car and household contents. D.D. sent the Member T4A slips for the Death Benefit and the OAS statement. She spoke with the Member on September 16 and he said he would re-send the information.

31. D.D. left unreturned messages for the Member on September 30, October 2, 8, 15, and 17 2008. She filed a complaint with the LSS on October 22 and followed up with a letter of October 29, 2008. She indicated in this letter that the Member completed the estate tax return when she had not requested him to do so.

32. Under cross-examination, she agreed the Member mentioned income tax matters in his May 16, 2007 letter to D.D.'s brother. She said she did not hire anyone to do this tax return. When asked if she knew the information for this return was not available until 2008, D.D. said the issue was a lack of communication.

33. The Member sent revised accounting documents on November 20, 2008. He requested from D.D. a cheque for Revenue Canada for income tax filing. The Member sent the interim distribution cheques on December 5, 2008. D.D. asked the Member for her brother's authorizations on three occasions, before receiving the document in June 2009. D.D. said the Member did not complete the estate work. D.D. advised she completed the estate work in March 3, 2010.

Count 1 – communications with Law Society of Saskatchewan regarding complaints by D.D. and M.B.

34. Count 1 deals, in essence, with an allegation that the Member failed to respond in a prompt and timely manner to communications from the LSS regarding complaints by the principals involved in counts 2 and 3. The Member did eventually respond in writing to the LSS

regarding these various complaints but not within the 10 days identified in each of the LSS letters and with at least a 30 day and sometime greater than 60 day response time.

35. The following documents were filed and accepted as Exhibits by the Committee:

a) Affidavit of Melanie Hodges Neufeld, dated April 18, 2012, and copies of correspondence mentioned concerning M.B. and D.D. complaints (P-9);

b) Original Formal Complaint dated July 9, 2010 (P-10).

36. Melanie Hodges-Neufeld testified by telephone. She was Complaints Counsel at the time of the receipt of the complaints by the LSS. Counsel for the Investigation Committee had no questions of Ms. Hodges- Neufeld. Under cross-examination, Ms. Hodges-Neufeld agreed with the Member's counsel that the Member had responded in some fashion to her correspondence within a month or 30 days. She indicated he did not respond within the requested periods in her letters (usually 10 days).

37. In her affidavit, Ms. Hodges-Neufeld initially wrote the Member regarding the D.D. complaint on November 5, 2008 and the M.B. complaint on November 28, 2008. Ms. Hodges-Neufeld indicated that between the times she received a response and for her next request of the Member, she was reviewing the replies, and sending them, as needed, to the complainants and reviewing their replies. This period was sometimes 2.5 to 3 months.

38. The Member did not call any evidence on this or any of the Counts, nor did the Member testify himself regarding any of the Counts.

CODE OF CONDUCT PROVISIONS (those in effect at the relevant times)

39. Chapter XV of the *Code of Professional Conduct* states:

Responsibility to the Profession Generally

RULE

The lawyer should assist in maintaining the integrity of the profession and should participate in its activities.

Commentary – Guiding Principles

2. The lawyer has a duty to reply promptly to any communication from The Law Society of Saskatchewan.

40. Chapter II of the *Code of Professional Conduct* states:

Competence and Quality of Service

RULE

The lawyer should serve the client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which lawyers generally would expect in a competent lawyer in a like situation.

Commentary – Guiding Principles

7. Numerous examples could be given of conduct that does not meet the quality of service required by the second branch of the Rule. The list that follows is illustrative, but not by any means exhaustive:

a. failure to keep the client reasonably informed;

b. failure to answer reasonable requests from the client for information;

c. unexplained failure to respond to the client's telephone calls; …

e. informing the client that something will happen or that some step will be taken by a certain date, then letting the date pass without follow-up information or explanation; ...

8. The requirement of conscientious, diligent and efficient service means that the lawyer must make every effort to provide prompt service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

DECISION

Failure of the Member to Testify

41. The Member did not testify at the hearing on the merits and his affidavit in support of a preliminary application on delay was not, in the end, part of the record of the hearing on the merits. The Committee feels that, unlike criminal law prosecutions, in the field of proceedings regarding professional regulation, a member of a professional statutorily regulated entity should, in normal circumstances, be expected to testify to explain matters that deal with such matters as are involved in the counts in this prosecution. In particular, as the allegations relate to failure to reply to the LSS and to appropriately communicate with clients and perform diligently on particular client files, once some delay or failure to communicate is established by the prosecution, it would normally be expected that a member would testify to explain the delay or failure to communicate. This is based in part on the premise that delay can be reasonable and explainable. Presumably, in most cases, only the member can shed light on the reasonableness of delays in responding either to the LSS or to clients and to explain delays in diligent completion of client files.

42. Casey, in his text *Regulation of Professions in Canada*, comments in chapter 11.8 on the failure of a professional to testify. He states:

> In circumstances where the evidence presented by the professional organization has established a *prima facie* case, the failure of the professional to testify may result in the drawing of an adverse inference against the professional by the discipline tribunal.

43. In *Sheehan v. Edmonton* (1990) ABCA 22, the Alberta Court of Appeal had an opportunity to discuss this concept in the context of professional proceedings against police officers. It stated that in certain circumstances, the defendant should provide some explanation of his conduct or the presiding officer may come, in the absence of any explanation what so ever, to certain negative conclusions.

44. In the circumstances of these counts, it is submitted that there was a *prima facie* case established by the prosecution with respect to delay in work, failure to communicate with clients and failure to promptly respond to the LSS and that it is appropriate for the Committee to come to the conclusion that such was unreasonable absent any explanation by the Member. The Committee appreciates that such explanation may, in some circumstances, be met by admissions on cross examination or otherwise. In this particular case, the Committee does not believe that those alternative routes provided the Member with the ability to argue reasonable delay, diligent work or prompt response to the LSS.

Count 1 – communications from the Law Society regarding the Complaints of D.D. and M.B.

45. Regarding the D.D. Complaint, Complaints Counsel requested information within 10 days and received written replies as follows:

a) Request November 5, 2008, with 2 reminder letters, written response from Member dated November 26, 2008 (received December 4, 2008). Time – 1 month or 29 days;

b) Request March 2, 2009, with 2 reminder letters, written response from Member dated March 31, 2009 (received April 8, 2009). Time – more than 1 month or 37 days;

c) Request April 27, 2009, with 2 reminder letters following a telephone message, written response from Member dated June 1, 2009 (received June 1, 2009). Time – more than 1 month or 35 days.

46. Regarding the M.B. Complaint, Complaints Counsel requested a response from the member within 10 days and received replies as follows:

a) Request November 28, 2008, with at least 3 reminder letters following telephone calls, written response from Member dated February 6, 2009 (received February 6, 2009). Time – more than two (2) months or 70 days. The Member was ill and hospitalized during some of this period;

b) Request March 31, 2009, with at least 3 reminder letters following telephone calls, written response from Member dated March 31, 2009 (received April 6, 2009) with some of the information; written response from Member dated June 1, 2009 (received June 1, 2009). Time – 2 months or 62 days.

47. Counsel appeared to agree generally, and the Committee agrees, that the 10 day time limit for response imposed by the Complaints Counsel is, in and of itself, not determinative of a prompt and reasonable response to the LSS. What is a prompt and reasonable response can be informed by the 10 day time limit imposed unilaterally by Complaints Counsel but it is not determinative and the facts and circumstances of each case must be considered. In that context, that is whether a reply to the LSS was prompt and reasonable in the circumstances requires, in most cases, some explanation from the Member through his testimony.

48. In *The Law Society v. Werry*, the hearing committee stated at paragraph 9 the following:

> As a guideline three requests from a client, another lawyer or the Society, with a reasonable deadline to respond, should be sufficient to justify a complaint to the Society. Of course, it is understood that the requests have to be reasonable in terms of deadline and frequency. It is hard to lay down a firm rule because situations vary with the circumstances but it is possible to suggest a guideline for members. Again, if a member fails to respond to the third request for response given with reasonable timelines then the client or member being ignored should consider filing a complaint with the Law Society.

49. Though the above quoted paragraph from Werry appears to apply to requests for response from a client, another lawyer/member or the Society, it is this Committee's view that such "guideline" as discussed in Werry is only appropriate for requests dealing with a request from a client or another lawyer/member. The LSS itself, in our view, should be in a different category. It may be that the Werry panel misspoke with respect to including the LSS in the guidelines regarding the three requests. The above quoted paragraph goes on, in discussing a third request, to mention the client or member being ignored. It does not again mention the LSS. It is the Committee's view that a guideline for three requests from the LSS for response is not a reasonable guideline and if such was intended by the Werry panel, we reject it.

50. The reasons for the LSS being subject to a stricter standard in our view is obvious. Interestingly, the *Werry* decision at paragraph 8 provides a summary of the rationale:

> Failure to respond to a client puts the reputation of the member and the entire profession in a bad light. Failure to respond to a committee of the Law Society and a representative appointed by that committee jeopardizes the Society's ability to carry out its legislated mandate and in turn affects the reputation of all members…

51. Chapter XV of the Code deals specifically with the duty to reply promptly to the LSS. This obligation is at the heart of the regulation of the profession, a cornerstone of the right to self-govern.

52. The Committee finds that in the circumstances of this particular Member, and with reference, but not sole reliance on, his failure to testify, that he is guilty of failing to promptly reply to communications from the LSS as alleged in count 1.

Count 2 – Complaint of D.D. and Estate of O.N.

53. The Member received instructions regarding the Estate of O.N. on March 1, 2007. From March 1, 2007 to mid-May 2007, the Member's work on the file was conducted in an acceptable manner.

54. On May 16, 2007, the Member asked D.D. for a list of expenses paid from estate funds. D.D. sent copies of some receipts on July 9, 2007. Over 13 months later, she received the first draft of the accounting of the estate on August 15, 2008. She provided the Member the balance of information needed on September 1, 2008. Although the Member asked for a "listing" of expenses, the number of receipts she provided did not appear, by this Committee, to be onerous for the Member to compile the listing. She received the revised accounting documents on November 20, 2008, almost three months after she submitted the information. D.D. indicated the Member did not complete the work on the estate. Rather, she did herself.

55. During June to October 2008, D.D. left many telephone messages for the Member, about 10, which were not returned. The failure to return phone calls and failure to complete the accounting for the estate work on the file in a timely manner are indicators of service that is below that required and expected for competent lawyers in this situation and are without any explanation from the Member at the hearing.

56. The income tax matter was mentioned in the Member's May 16, 2007 letter to D.D.'s brother but was not specifically mentioned in the letter of the same date to D.D. The issue regarding the estate tax returns appears to be one of failing to keep the client reasonably informed.

57. In summary, though the Member appeared to be quite diligent with respect to the O.N. estate at the outset, there was an unexplained period over one year whereby there was poor, if any, communication with the client and no appreciable work advanced on finalizing the estate. Again with the lack of any explanation from the Member at the hearing on this failure to communicate and the delay, and in applying Chapter II of the Code, the Committee comes to the conclusion that the member is guilty of conduct unbecoming with respect to the allegations in Count 2.

Count 3 – Complaint of M.B. and Estate of E.B.

58. The Member received instructions to process E.B.'s "will" for probate on July 19, 2007. After several phone calls from A.B. and M.B., the will was sent for probate in July 2008 – almost one year after the initial meeting with the Member. The will was determined to be invalid in a Fiat dated July 24, 2008. Additional documents to administer E.B.'s estate were needed.

The Member prepared the forms and sent them on October 30, 2008. There were factual errors and mailing issues with the forms. The Member did not complete the work on this estate. Another lawyer was retained in February 2009. The work was completed in June 2009.

59. The failure to return phone calls, the failure to complete the application for probate and failure to complete the additional documents in a timely manner are indicators of service that is below that required for competent lawyers in this situation and was without explanation from the Member at the hearing. The apparent inconsistencies between the testimony of A.B. and M.B. are immaterial to this broad issue.

60. Indeed, it goes beyond an indication of sub-standard service and indicates a failure of the Member to provide prompt service and response to numerous attempts by D.D. to contact the Member. Again, this was an unexplained failure to respond and complete work.

61. In light of the above, the Committee finds the member guilty of conduct unbecoming with respect to the allegations in Count 3.

CONCLUSION

62. For the reasons set forth above, the Committee finds that the Member is guilty on Counts 1, 2 and 3.

"Evert Van Olst"
Evert van Olst, Chair

"Laura Lacoursiere"
Laura Lacoursiere

DISCIPLINE SENTENCING DECISION

INTRODUCTION

63. On April 11, 2013 before a sentencing committee composed of the Benchers of the Law Society of Saskatchewan, the Member appeared for the purpose of being sentenced with respect to findings of conduct unbecoming which had been previously made by a Hearing Committee. The Hearing Committee rendered its decision on September 5, 2012 and determined that the Member was guilty of conduct unbecoming in that he:

i) failed to reply promptly to communications from the Law Society of Saskatchewan with respect to complaints by D.D. and M.B.;
ii) failed to serve his clients, D.D. and the Estate of O.N., in a conscientious, diligent and efficient manner as follows:
    (a) Failed to provide prompt service to D.D. and the Estate of O.N.;

(b) Failed to respond to D.D.'s communications within a reasonable time.

iii) failed to serve his clients, M.B. and the Estate of E.B., in a conscientious, diligent and efficient manner as follows:

(a) Failed to provide prompt service to M.B. and the Estate of E.B.

64. The decision of the Hearing Committee is annexed to this decision at Tab 1.

65. At the sentencing hearing, the Investigation Committee of the Law Society of Saskatchewan was represented by Mr. Timothy F. Huber. The Member was represented by Mr. Ian McKay, Q.C. The Member was present for the sentencing. Briefs were provided by both parties and the Investigation Committee provided a supplemental Brief with respect to the introduction of additional evidence at the sentencing hearing. The Sentencing Committee thanks counsel both for the Briefs and for their presentations which were of assistance to the Committee in arriving at its decision.

66. The sentencing hearing was chaired by Mr. Robert R. Heinrichs. Following the chairperson's inquiry, both parties indicated that there were no objections to the composition of the Sentencing Committee and there were no preliminary motions or objections to the sentencing proceeding.

FACTS

67. The facts are set out in the attached Hearing Committee report. To provide context for the decision of the Sentencing Committee the relevant facts may be summarized as follows:

i) The Member was retained to act on two estate files, E.B. and O.N. In both cases the Member did not act with any degree of promptness and did not reply to any communications from his client.

ii) In addition, the Member failed to respond to inquiries from the Law Society during the complaints process.

iii) The Member did not testify at the Hearing Committee phase. Additional factual material was submitted during the sentencing phase, which was not evidence before the Hearing Committee and is not to be treated as evidence before this sentencing.

iv) The Member has been found guilty of conduct unbecoming as set forth in these reasons. It appeared the Member was providing additional information to provide context to the findings. The Sentencing Committee is obligated to accept the findings of fact as made by the Hearing Committee.

PRIOR RECORD

68. The Member has acquired a rather lengthy discipline record. The discipline history was set forth in the Brief provided by the Investigation Committee and was not disputed by the Member. That discipline history is as follows:

i) December 9, 1999-

Count #1	- failure to reply with undertakings; - fail to treat a fellow lawyer with courtesy and good faith in that he failed to provide an accounting of trust monies received and disbursed within a reasonable time;
Count #2	- fail to respond to the Law society;
Count #3	- fail to treat the Court with courtesy;
Count #4	- fail to properly represent clients in estate matters (unreasonable and unexplained delay);
Count #5	- fail to properly represent clients in estate matters (unreasonable and unexplained delay);
Count #6	- fail to respond to correspondence from the Public Trustees;
Count #7	- fail to properly represent clients in estate matters (unreasonable and unexplained delay); - failed to return phone calls and correspondence; - misled executor as to the conduct of the file;
Count #8	- fail to treat a fellow lawyer with courtesy and good faith; - misleading fellow lawyer regarding progress of file; - breach of undertaking; and, - failure to respond to correspondence.

Outcome – 3 month suspension held in abeyance pending successful completion of Professional Standards programming, $3,000.00 fine, and costs of $5,497.37;

ii) December 5, 2002

- fail to comply with undertaking given to provide an accounting in an estate matter.

Outcome - $5,000.00 fine and costs;

iii) December 9, 2004

- fail to reply promptly or at all to the Law Society (7 separate counts);
- breach of undertaking;
- fail to deal in good faith with another lawyer;
- fail to provide competent service;

- fail to deliver legal file to successor counsel in a reasonable time (2 separate counts); and
- dilatory practice (2 separate counts).

Outcome – 6 month suspension, practice supervision condition, and costs of $9,244.05.

iv) October 27, 2008

- dilatory practice (estate matter).

Outcome - $7,500.00 fine, $4,323.00 costs.

SUBMISSIONS OF COUNSEL

69. The Investigations Committee recognized that the Member's conduct in this case would normally be regarded as being at the lower end of the scale for violations by a Member of the Law Society. The Investigation Committee accepted that in the absence of a lengthy record, the Member would have been faced with a lower sentence than was being sought in this matter. As a result of the lengthy record, the Investigation Committee sought a six month suspension from practice together with costs in the amount of $16,216.80.

70. The Member represented that his conduct fell at the lower end of the scale and submitted that the appropriate sentence should be a fine for dilatory practice and the failure to respond to the Law Society. In addition to his submissions that the breaches were minimal, the Member relied upon two factors in advancing his submissions for a fine on these matters. The first factor dealt with the delay which had been experienced from the time these matters arose until sentencing. The second factor dealt with the Member's absence of any discipline infractions since the time of these events back in 2008 and the corresponding changes which the Member had made to his practice.

ANALYSIS

71. The fundamental purpose of the Law Society of Saskatchewan and therefore the function of this Sentencing Committee is to ensure that the public is protected in matters dealing with Members of the Society. In arriving at this protection, the Sentencing Committee in its decisions must be mindful of the necessity of maintaining public confidence in both the integrity of the profession and of the ability of the profession to govern its own members. As a result, the sentence which is imposed in this matter must account specifically for all factors with respect to this Member using as a backdrop the function of the Committee as provided.

72. The Committee recognizes that but for the Member's record, the matters for which the complaint have been rendered, would be at the lower end of the spectrum for disciplinary matters involving Members of the Law Society. However, the Member's lengthy discipline record must be considered when addressing an appropriate sentence on the matters presently before this Committee. In this manner, the fundamental principles of fairness and equality are being observed in the deliberations.

73. However, the Committee also recognizes that the mere presence of a record does not automatically result in an increased penalty. The nature of the prior record must be considered as must the conduct presently before this Committee. However, the previous matters also include other more significant failures, including:

i) Failure to comply with Undertakings;
ii) Failure to treat lawyers with courtesy and good faith;
iii) Failure to treat the Court with courtesy; and,
iv) Failure to comply with an Undertaking.

In the view of the Sentencing Committee, this type of conduct is much more significant than the conduct which has been found against the Member in the present case and accordingly the record, while relevant, is of limited assistance in resolving the appropriate sentence to be delivered now.

74. Aside from the previous record, there do not appear to be any other significant aggravating factors with respect to this Member. The Investigation Committee submitted that there were no significant mitigating factors to be applied in this matter.

75. The Member suggested mitigating factors might include the following. There was no financial loss or financial exposure to the clients with which the Member had been dealing. It appears this is the case. There was no suggestion made that the delay resulted in a loss.

76. In addition, the Member submits that the absence of other disciplinary matters since approximately 2008 is a factor to be considered as mitigating and to be observed in his favour.

77. Finally, the Member submits that the extensive delay in the prosecution of this matter is a mitigating factor which ought to be considered by the Sentencing Committee when arriving at an appropriate decision. More will be said with respect to this issue when reviewing the relevant authorities.

78. In support of the lengthy suspension, the Investigation Committee proffered the decision of *Walsh v. The Law Society of Manitoba*, as an appropriate precedent to consider and apply to the facts of the matter before this Sentencing Committee. In *Walsh*, that Member also had a significant prior record, and following their review of the behaviour, the Hearing Committee in *Walsh* directed that the Member receive a six month suspension, together with a significant fine in the amount of $25,000.00 plus costs of the matter.

79. In *Walsh* the Member was found to have failed to serve his client; to have failed to show courtesy and good faith to another lawyer; and, to have failed to be honest and candid with his client. Mr. Walsh had an extensive discipline record.

80. It is noted that in *Walsh* there was an element of financial detriment to the client. That element is not present in the case before this Committee.

81. The Investigation Committee also relied upon the decision of *The Law Society of Upper Canada v. Taylor*. That decision involved a Member who had failed to provide information to the Law Society and had failed to maintain his books and records appropriately. The Member had an extensive, virtually uninterrupted record spanning over a considerable number of years. The Committee in that case accepted the suspension of five months based on a joint submission as between the Member and Investigation Committee.

82. Finally, the Investigation Committee relied upon the trilogy of *Law Society of Saskatchewan v. Hardy, LSDD 04-2004, Law Society of Saskatchewan v. Hardy, LSDD 10-2006,* and *Law Society of Saskatchewan v. Hardy, LSDD 5-2007,* decisions from this jurisdiction "culminating in the 2007 decision of a 30 day suspension by the Sentencing Committee."

83. In support of no suspension, the Member referred this Committee to the decision of *McLean v. The Law Society of Saskatchewan, 2012 SKCA 7,* and urged the Committee to consider the reasoning of the Court of Appeal in arriving at their decision to impose a suspension of 30 days based on the precedents available in Saskatchewan.

84. In addition, the Member urged the Committee to consider the lengthy delay which had been experienced between the laying of the complaints in these matters and the ultimate sentencing now being administered. It is noted that an application was made by the Member to the Hearing Committee to have the complaints dismissed as a result of delay. The Hearing Committee heard submissions preliminary to the hearing of the evidence on the complaints and rendered a decision dismissing the Member's application and directing that the complaints proceed forth.

85. The issue for this Sentencing Committee is whether any weight should be given to the delay as a mitigating factor in favour of the Member or whether the delay should not be considered in any respect.

86. In arriving at its decision on delay, the Hearing Committee stated as follows:

i) The Member is free to assert the effect of delay on any appropriate penalty, should he be found guilty of the charges against him. The decisions in *Christie v. The Law Society of British Columbia (2010) BCJ 687* and *Wachtler v. College of Physicians and Surgeons of Alberta (2009) ABCA 130* may be instructive in this regard.

87. This Committee must accept the decision of the Hearing Committee in its finding that the delay experienced was not unreasonable and the complaints must proceed. However, on the basis of *Wachtler*, this Committee determines that it is able to consider the extent of delay as a factor on sentencing.

i) 46. There is good reason why unexplained, lengthy delays can sometimes be accounted for at the penalty stage. In any administrative proceeding where someone is at risk of sanction for the manner in which they conducted themselves professionally, the allegation of misconduct has to weigh heavily on that person. He or she is entitled to have the misconduct investigated and a hearing held within a

> reasonable time, so that he or she can carry on with the provision of professional services to the public. Not all people charged with professional misconduct are guilty. In some cases, the form of proven misconduct falls short of that which was alleged. In those instances, it becomes unconscionable for a body to take years to investigate and prosecute, during which time the uncertainty of the outcome weighs on the accused professional. Moreover, regardless of attempts to keep matters confidential before results are made known, no system provides for perfect confidentiality, meaning that a cloud of suspicion might also descend on the professional while the prosecuting body conducts its leisurely process…
>
> ii) 49. It is also important to impress upon disciplinary bodies that there will be consequences for undue delays. Delay becomes the norm when it has no consequence. One alleged benefit of administrative processes is that they avoid the formalities of Court process in the interest of speedy justice. A seven year process is hardly speedy. Simply telling those responsible for professional discipline that they must do better or, worse, turning a blind eye to delay leads to more delay. The Council only addressed the issue of delay in considering the question of prejudice in the context of Hearing fairness. It did not consider delay to be a factor that needed addressing at the penalty phase of its decision. We conclude that the failure to consider delay in imposing a penalty, in the circumstances of this case, was an unreasonable exercise of the Council's discretion.

88. This Committee takes from that decision that delay is a live factor to be considered at the sentencing phase even though it has been determined not to be unreasonable in the circumstances. In this case, the Committee is considering the delay as a factor mitigating the sentence.

89. The delay experienced in this case is approximately five years during which the Member has been dealing with these matters. On the material before it, the Sentencing Committee is unable to determine whether either party should be considered to be at fault for the delay, or parts thereof, as evidence was not tendered in this regard at the hearing. However, the Committee has determined that the fact of this lengthy delay is a matter which this Committee is entitled to consider when weighing its decision on the ultimate sentence to be applied.

90. In addition to this factor, and, with the advantage now of hindsight, this Committee understands that the Member has been without disciplinary concerns since these matters arose in 2008. The Member indicated to the Committee that the change occurred because the nature of his practice has changed. He is no longer accepting litigation matters and his practice has focused on solicitor matters. In the result, he is in a better position to monitor and handle his practice responsibilities. This recent history of a good record coupled with the Member's recognition of his shortcomings and his movement to remedy those shortcomings bodes well for the Member's future and are factors to be considered when arriving at a decision.

91. The final matter to be considered by this Committee is the application of progressive discipline when dealing with Members who have been before the Law Society previously and who are now to be disciplined again. The Sentencing Committee recognizes that progressive

discipline is to be applied with respect to those Members who are repeat offenders and that increasing sentences must be administered to reflect both the gravity of the behaviour and to ensure the public's protection.

DECISION

92. The Member has been convicted of two separate counts of Conduct Unbecoming. The background facts disclose a relatively minor cause of conduct. However, the Member's failure to respond in a timely fashion to the requests of the Law Society is not something which this Committee views as a mere oversight. It is trite to re-affirm that to fulfill its regulatory mandate, the Law Society must have the full and complete cooperation of its Members.

93. The lengthy delay and the subsequent lack of disciplinary action are factors considered in favour of a lesser penalty on the facts of this case. This is not to say that the delay is seen as anything other than an extreme passage of time for which the Member has had to deal with these matters.

94. The prior record of the Member compels this Committee to impose a sentence recognizing the principle of progressive discipline but not applying such weight to it that it ultimately outweighs all of the other factors discussed in this decision.

95. In the result, this Committee determines that the Member shall be sentenced to a suspension for a period of 30 days and that he be directed to pay the costs of these proceedings in the amount of $16,216.80. The payment of these costs is to be made on or before December 31, 2013 or such further period as may be directed by the Chairperson of Discipline upon application by the Member. The date for commencement of the suspension shall be determined by the Chairperson of Discipline in consultation with the Member, but shall commence no later than October 1, 2013.