The Law Society of Saskatchewan

DANIEL STEWART TAPP
October 20, 2011
***Law Society of Saskatchewan v Tapp*, 2011 SKLSS 1**

IN THE MATTER OF THE *LEGAL PROFESSIONAL ACT, 1990*
AND IN THE MATTER OF DANIEL STEWART TAPP,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

INTRODUCTION

1. The Hearing Committee conducted two hearings in Regina on May 13, 2011 with respect to four citations of conduct unbecoming against Daniel Stewart Tapp as alleged in the formal complaint dated the 27th of April, 2011 and marked as Exhibit P1-Tab 2.

2. At the outset of the Hearing, counsel for both parties stated they had no objection to the constitution of the Hearing Committee or any preliminary objections.

3. Counsel for the Investigation Committee filed an Exhibit Book with 14 Tabs, which was marked as P1 and entered as a full exhibit by consent.

4. Later in the proceedings, counsel for the member filed an Exhibit Book which eventually contained 56 Tabs, marked as D1 and entered as a full exhibit by consent.

5. Notwithstanding, that all four citations were contained in one Formal Complaint by consent of the parties, two separate hearings were held.

6. After completion of the evidence, the matters were adjourned for written argument. The arguments were delivered to the Committee on or about July 7, 2011. The Committee met on July 20, 2011 by conference call to reach its decision.

7. The Committee accepts that the standard of proof which must be met to establish liability in matters of professional misconduct is on a balance of probabilities; *F.H. v. McDougall*, [2008] 3 S.C.R. 41; Law Society of Saskatchewan v. Chornoby, [2010] L.S.D.D. 12.

CHARACTERIZATION OF OFFENCES

8. The Committee accepts that the proper characterization of the offences herein is that of strict liability.

COMPLAINT OF L.M.
COUNT #1

9. The first count of the formal complaint reads as follows:

> THAT Daniel Stuart Tapp, of the City of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he did:
>
> 1. Fail to treat his client, L.M. fairly when negotiating the terms of a contingency agreement. Reference *Code of Professional Conduct* Chapter XI, commentary 10, note 10.

10. Commentary 10, note 10, of the *Code of Professional Conduct* reads as follows:

> Unless prohibited by the Law Society of Saskatchewan, it is not improper for the lawyer to enter into an arrangement with the client for a contingent fee, provided such fee is fair and reasonable and the lawyer adheres to any rules relating to such agreements.
>
> Note 10 - Rule 95 of the Rules of the Law Society of Saskatchewan requires such agreements to be in writing with a copy to be delivered to the client and a copy on file with the lawyer. The term "fair" requires that the manner in which the agreement is created be fair, in the sense that the client fully understands its meaning and no undue advantage has been taken by the lawyer. The term "reasonable" relates to the appropriate quantum of remuneration, in the sense that the amount is justified where it reasonably relates to the service and the risk undertaken at the time of the agreement. See, *Speers v. Hagemeister* (1975), 52 D.L.R. (3d) 109 (S.C.A.); *Gokavi and Gokavi v. Lojek, Jones & Company* (1986), 49 Sask. R. 82 (Q.B.).
>
> [Note: Rule 95 of the current Rules of The Law Society of Saskatchewan does not deal with contingency agreements however, Rule 1501 requires agreements be in writing, signed by the parties with copies given to each party.]

FACTS

11. Mr. M. sustained multiple injuries as a result of a motor vehicle accident in 1999. In 2002, SGI discontinued his benefits. Mr. M. was unable to convince SGI to reinstate his benefits and therefore sought legal counsel.

12. After having been turned down by a number of lawyers, Mr. M. retained Mr. Tapp to represent him in his legal issues with SGI.

13. Mr. M. wanted Mr. Tapp to take the case on a contingency basis however Mr. Tapp was reluctant to do so and at that point was retained on an hourly fee basis. This relationship began in January 2003.

14. The issues with SGI did not resolve easily or at all. In April 2005, Mr. Tapp advised Mr. M. that he required approximately $17,000.00 to continue with the case.

15. Mr. M. did not have $17,000.00 as he was living on credit cards and was in dire financial circumstances. Therefore, on June 25, 2005 in an anticipation of a settlement, a contingency fee agreement was entered into (P1-Tab 9, D1-Tab 3).

16. The agreement provided, among other terms, that the member would receive 50% of all amounts recovered less all amounts paid in legal fees, if successful.

17. Mr. M. was unhappy with the agreement and each party for their own reasons agreed to renegotiate the contingency fee agreement in December 2005.

18. In April 2006, Mr. M. was awarded $7,991.52 for permanent scarring. The member provided Mr. M. with a cheque in the amount of $1,368.33. Mr. M. was unhappy with the amount he received, however he felt he could not complain or force the issue because he could not afford to lose Mr. Tapp's representation. As a result of this unhappiness Mr. Tapp and Mr. M. entered into a new verbal agreement.

19. In April 2006, the member sent a letter to Mr. M. (D1-Tab 7) proposing that the June 2005 agreement be amended to specifically exempt an award of solicitor/ client costs from the contingency fee. This had been previously agreed to, but had not been reduced to writing. Mr. M. did not sign the amendment.

20. As the parties had no written agreement regarding their April 2006 verbal agreement, on December 28, 2006 Mr. Tapp, sent a letter to Mr. M with a new contingency agreement (D1-Tab 8 & Tab 9). In the letter Mr. Tapp suggested he would assess a 50% fee on all future income replacement benefits. At that time, the trial of this matter was scheduled to commence in approximately 2 months (the trial actually ran from March 5 - March 16, 2007).

21. The December 28, 2006 contingency fee agreement was signed by the parties, although it is unclear exactly where. On January 8, 2007, Mr. M. struck his name off of the December 28, 2006, agreement.

22. Mr. M. was extremely disturbed and distressed by the December 28, 2006 letter and its introduction of the notion of a 50% fee on future income replacement benefits. A new agreement was signed on January 8, 2007 (D1-Tab 11). This new agreement was the same as the December 28, 2006 agreement, except that it provided that Mr. Tapp would receive a bonus of $5,000.00 in addition to his 50% contingency fee.

23. Mr. M. testified that the $5,000.00 came about as a result of Mr. Tapp insisting that he needed something for giving up the 50% fee on future income replacement. Mr. M. testified that

he agreed to the $5,000.00 because he had no other choice. He stated that Mr. Tapp knew the case, that he had the file, that the trial was scheduled, that Mr. M. could not afford to go to another lawyer, and that he felt that if Mr. Tapp withdrew, his case would be lost. At no time did Mr. Tapp expressly indicate that he would withdraw.

24. Mr. Tapp's testimony on these issues is that he had advised Mr. M. in June 2005, about future benefits being included in the agreement, that he never intended to take future benefits for the rest of Mr. M's life, that no Court would allow him to do so in any event and further that it was a bargaining position that he employed at the time.

25. On March 3, 2007 (two days before the trial was scheduled to begin), Mr. Tapp e-mailed Mr. M. asking among other things that Mr. M. agree to split any award of solicitor/client costs equally with Mr. Tapp. This proposal would have reversed the changes made which were first discussed in April 2006, and put in writing on December 28, 2006, and January 8, 2007. During the month of March, including periods before, during and after the trial, the member continued to negotiate with Mr. M with the objective of attempting to secure changes to the fee agreement that were more favourable for himself.

26. Of the numerous e-mails exchanged during this period of time the one dated March 13, 2007, is of particular interest. In this e-mail Mr. Tapp again proposes changes beneficial to himself. He concludes by stating that he will not do any work in relation to solicitor/client legal fees unless and until Mr. M. accepts the terms of the offer contained in this e-mail.

27. Mr. Tapp testified that he reinitiated negotiations because he was afraid that he had made a mistake in the January 8, 2007, agreement. He feared that unless the agreement was changed, the solicitor/client fees would be deducted from his 50% contingency fee. In the e-mails of March 3, March 4, March 13, March 19, March 20, and March 21, there is no mention of a problem with the January 8, 2007 agreement. The first mention of a problem appears to be the letter of March 22, 2007.

28. There are numerous other letters and e-mails exchanged which clearly show continuing and ongoing negotiations until the trial and appeal were concluded. Ultimately Mr. M. brought an application in Court of Queen's Bench against Mr. Tapp that resulted in a ruling that there was in fact no enforceable contingency fee agreement between Mr. M. and Mr. Tapp. Consequently, Mr. Justice Currie assessed Mr. Tapp's fees on the basis of quantum merit.

ANALYSIS AND DECISION

Credibility of the Witnesses

29. The member's counsel urged us to find Mr. M. was not a credible witness. We were unable to come to that conclusion. While it is true that Mr. M. appeared to be either wrong or mixed up in regard to various factual and legal matters, this was to be expected given the length of time that had elapsed and given his lack of legal knowledge. Even on the date of the Hearing, Mr. M continued to cling to beliefs that were clearly in error. Notwithstanding Mr. M's

mistaken views, we find that Mr. M. was truthful on matters of substance, keeping in mind his obvious interest in the outcome of the proceedings.

30. We likewise found Mr. Tapp to be believable, keeping in mind his obvious interest in the outcome of the case and his beliefs regarding Mr. M.'s behaviour.

31. In any event, the versions given by the witnesses did not differ substantially and we have resolved issues of importance on which there was contradiction based not so much on credibility but on external evidence which tended to support one version or the other. For instance, one of the differences involved was the issue of when the 50% contingency fee on future benefits was first discussed. Mr. Tapp testified that he explained this to his client in 2005. Mr. M. says that he learned of it in the letter of December 28, 2006. We accept that Mr. M.'s recollection in regard to this matter is correct. If this matter had been thoroughly discussed and explained in 2005 there would have been no necessity to introduce it into the letter of December 28, 2006. Further, Mr. M's act of striking out his name from the December 28, 2006, agreement, tends to support his evidence in this regard.

32. It is our view that the differences between the parties arise not so much as a factual matter, but because of totally different points of view as to what was agreed to at any particular time.

UNDUE ADVANTAGE

33. The issue to be decided is whether or not Mr. Tapp took undue advantage of Mr. M. in the negotiations leading up to the January 8, 2007, agreement and thereafter.

34. Mr. Justice Currie found that there had been undue advantage in the creation of the January 8, 2007, agreement and set the agreement aside. When Mr. Justice Currie issued his decision, the letter of April 2006 and the agreement of December 28, 2006, were not before the Court, although it appears that the letter of December 28, 2006, must have been (See paragraph 14 of the Judgment, P1-Tab 14). In the absence of the two above noted documents, the Court concluded that no negotiations had taken place between December 2005, and December 2006; as we now know, this was not correct.

35. As a result of the foregoing, this Committee is of the view that we cannot rely on the decision of Mr. Justice Currie in regard to liability in this case. However, we do accept Mr. Justice Currie's observations which did not depend upon the omitted or missing information.

36. For the reasons set out below, this Committee finds that in the negotiation leading to the January 8, 2007 agreement, Mr. Tapp used undue influence:

i. While the letter of 2006 reflects negotiations were taking place, it was not a binding agreement;

ii. No agreement was in place until the December 28, 2006, agreement was signed;

iii. The letter of December 28, 2006, however, completely undermines the December 28, 2006 agreement as it indicated in writing, for the first time, that Mr. Tapp intended to take 50% of Mr. M's future benefits. This caused Mr. M to repudiate the agreement;

iv. The Committee accepts Mr. M's testimony indicating he felt compelled to sign the January 8, 2007 agreement, giving Mr. Tapp a $5,000.00 bonus for the reasons set out in paragraph 23 herein;

v. While there had been ongoing negotiations, as of a little more than 2 months before the commencement of the trial there still was no valid agreement;

vi. The Committee's view of the negotiations is reinforced by subsequent events as evidenced by the member's repeated efforts to change the agreement to further benefit himself;

vii. It is the Committee's view that Mr. Tapp and Mr. M where not in negotiation positions of equality. While Mr. Tapp did not at anytime say that he would withdraw, and may in fact never have intended to imply he would, it was reasonable in the circumstances for Mr. M to fear such an event might occur.

viii. The Committee agrees with and adopts the reasons of Mr. Justice Currie in paragraph 62 - 65 of his decision (P1 - Tab 14).

CONCLUSION

37. Having found undue influence in negotiations leading to the January 8, 2007 agreement, it follows that Mr. Tapp was in breach of Chapter 11 of the *Code of Profession Conduct*. This conduct, plus his continued attempts, prior to, during, and subsequent to the trial, to change the agreement to benefit himself is inimical to the best interest of the public, the profession as a whole, and tends to harm the standing of the legal profession in general, and is therefore conduct unbecoming to a solicitor. Mr. Tapp is found guilty of count #1 in the formal complaint.

COMPLAINT OF S.C.
ALLEGATIONS 2, 3 & 4 OF THE FORMAL COMPLAINT

38. The member is charged as follows:

THAT Daniel Stuart Tapp, of the City of Regina, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he did:

2. in the absence of a valid retainer agreement and without having earned sufficient fees or incurred sufficient disbursements, fail to deposit monies received or held in trust by him for or on account of his client, S.C., into a mixed or separate trust account as required by the Rules of the Law Society of Saskatchewan;

   Reference Law Society of Saskatchewan Rule 910

3. Charge or accept a fee in relation to his client, S.C., which was not fully disclosed, fair and reasonable;

   Reference Chapter XI of the *Code of Professional Conduct*

4. Appropriate funds from his client, S.C., that he held in trust or otherwise without the express authority of the client and contrary to the Rules of the Law Society of Saskatchewan.

Reference Chapter XI of the *Code of Professional Conduct*

FACTS

39. On July 6, 2009, Ms. C. spoke with the member via telephone, twice, about retaining him in relation to a child custody matter. The member impressed upon Ms. C. that the matter was time sensitive and she needed to act quickly. Each of the two conversations lasted approximately 10 minutes. Ms. C. also had another telephone conversation with a staff member of Mr. Tapp's.

40. The entirety of the work product the member provided to John Allen consisted of two pages of hand written notes dated July 6, 2009. One page relates to a phone call between Ms. C. and Mr. Tapp. The other page relates to a phone call between Ms. C. and one of Mr. Tapp's staff members. These documents are located at P1-Tab 7. There are some brief notations regarding the case, however, according to Ms. C. most of the conversation appears to have been about how payment would be made.

41. The conversation between Ms. C. and the member yielded a fee arrangement requiring her to pay $1,100.00 immediately as a deposit, with further installments thereafter. The agreement was not in writing nor reduced to writing. The total payment was supposed to be $5,500.00 as a flat rate. Ms. C. made her initial payment on July 7, 2009. In accordance with directions from the member's office, Ms. C. deposited the payment directly into the member's general account.

42. Prior to the deposit being made, but on the same day, the member's office generated an invoice and the receipt both dated July 7, 2009, in the amount of $1,100.00.

43. The July 6, 2009, telephone conversations between the member and Ms. C. was the last time that Ms. C. spoke with the member about her legal matter. After July 6, 2009, the member left on vacation. The first appointment for Ms. C. to actually meet the member was scheduled for three weeks later. The appointment was ultimately cancelled by the member and delayed indefinitely. When Ms. C. expressed concern about the delay, the member advised her that as she had expressed a lack of confidence in him, he would no longer continue with their solicitor/client relationship. He terminated the relationship on July 27, 2009. When Ms. C. asked for her money back she was informed that her deposit was non-refundable. Ms. C. never met the member in person until the date of the hearing of this matter.

44. The second time the member had personal contact with Ms. C in regard to this file was on July 27, 2009, when he advised Ms. C. in writing that he intended to withdraw. (See D1-Tab 6)

45. The only other activity on the file appeared to be periodic contacts between Ms. C. and the member's office staff regarding the provision and filling out of blank documents which Ms. C. was instructed to fill out, as well as a few more phone calls and e-mail exchanges between the member's staff and Ms. C.

46. Ms. C. ultimately applied to have the member's bill taxed and an agreement was reached to settle the matter in the amount of $500.00. As part of the process Mr. Tapp produced a description of services, a copy of which is marked as Exhibit P1-Tab 52. This document was not provided to Ms. C. prior to the application for taxation.

47. All other evidence is as set out in the exhibits of the Investigation Committee and the member.

RELEVANT RULES

Rule 900 - "trust funds" means any monies received by a lawyer, in his/her capacity as a lawyer, which are not intended to immediately become property of the lawyer and include:

a) Funds from a client for services to be performed or for disbursements to be made on behalf of the client; or . . . .

Rule 910(1) - subject to subrule(2) - a member who receives trust funds shall forthwith deposit the funds in trust either into:

a) A mixed trust account described in Rule 911; or a separate trust account described in Rule 912 . . . .

Rule 920 - a member may deposit into a general account only those funds received in connection with the member's practice of law, which are not trust funds.

Rule 940(1) - a member shall not withdraw . . . . unless there are sufficient funds held in that account . . . . and:

c) the funds are properly payable to the member in respect of a liability of the client to the member for fees, disbursements or other expenses; . . . .

Rule 1500 - "retainer agreement" means an agreement which provides that a member is retained by a client to act on the client's behalf for one or more matters or generally for a specified period of time for a fee paid by the client in advance of any services performed by the lawyer, but does not apply to money paid to a member in trust which is intended to be drawn upon to pay fees and disbursements in accordance with Part 13 of these Rules.

Rule 1504(1) - every retainer agreement entered into a by a member shall be in writing . .

ISSUE #1 - PAYMENT OF $1,100.00 "TRUST FUNDS"

48. Notwithstanding, the issuance of what purports to be a statement of account for services rendered dated July 7, 2009, with accompanying letter (P1-Tab 5), the Committee finds that the $1,100.00 deposit was in fact "trust funds".

49. The reasons for the above findings are as follows:

i. According to the evidence of Ms. C. there was no agreement between the parties for Ms. C. to pay the member at a rate of $500.00 an hour. Ms. C. stated that the agreement was for a fixed fee in the amount of $5,500.00 with an immediate payment of $1,100.00. As a result, Mr. Tapp was not authorized to generate an invoice and pay himself at a rate of $500.00 per hour without the specific instructions of Ms. C.;

ii. In her testimony, Ms. C. repeatedly used the word "deposit", not payment on account. She specifically stated that she did not know Mr. Tapp would be taking the money on the same date that she deposited the funds;

iii. There was no intention or agreement between parties that when the $1,100.00 was deposited it would immediately become the property of Mr. Tapp. The most telling evidence in this regard is Mr. Tapp's letter of July 27, 2009 (P1-Tab 6). In the first paragraph Mr. Tapp's states . . . . "demanded that I return your retainer." In the second paragraph he sets forth the agreement . . . . "I requested $5,500.00 payable in advance as is my usual practice." "You could only afford $1,100.00 but said you would talk to a family member" . . . . "you paid the $1,100.00 on or about July 7, 2009 but no the postdated cheques for the balance owing. I made it clear to you that all deposits are non-refundable". In the third paragraph: "your deposit is non-refundable". Nowhere does Mr. Tapp justify the keeping of the $1,100.00 because it was a payment for fees already earned. Rather, he refuses to refund the deposit, because, in his view, the deposit was non-refundable; and

iv. The $1,100.00 was not paid pursuant to a valid written retainer agreement.

ISSUE #2 - DOES MR. TAPP COME WITHIN RULE 940(1)(b) or 940(1)(c)

50. It is the finding of the Committee that the funds were not properly payable to Mr. Tapp because insufficient work had been performed. The only work performed by Mr. Tapp, prior to the issuance of the invoice for $1,100.00 were two brief telephone attendances and the receipt of an e-mail from Ms. C. For this work he charged $350.00. The rest of the work performed was apparently done by Mr. Tapp's staff (D1-Tab 52). Incredibly, the amount of work that Mr. Tapp billed for totaled $1,100.00; the exact amount that Mr. C. had been able to deposit. The only way that Mr. Tapp could have calculated the $1,100.00 that he claimed was owed was to charge $500.00 per hour for every minute of staff time. It is the finding of the Committee that the invoice dated July 7, 2009 (which does not itemize any specific service), was generated by Mr. Tapp to justify the direct deposit to his general account. Furthermore, the invoice states as follows "for any and all services rendered with the above noted matter to date as per agreement" as already indicated the only agreement was for a flat fee arrangement.

COUNT #2

51. In relation to Count #2 the Committee finds as follows:

i. There was no valid retainer agreement;

ii. The $1,100.00 was trust funds;

iii. The member had not earned $1,100.00 in fees and/or disbursements;

iv. The member failed to deposit the $1,100.00 into a trust account as required.

52. The Member is therefore found to be in breach of Rule 910(1) of the Rules of The Law Society of Saskatchewan.

COUNT #3

53. In relation to Count #3, the Committee finds the fee charged and accepted on July 7, 2009, was not fully disclosed, fair, and reasonable, for the following reasons:

a) The invoice provided does not disclose any relevant information about what services were provided, the hourly rate at which the services were provided, or even who provided the services. If anything, the invoice is misleading as it refers to the "agreement", which was not for an hourly rate of $500.00;

b) The member charged Ms. C. $500.00 per hour for routine matters performed by a legal assistant and accounting staff; and

c) According to the information provided many months later, Mr. Tapp personally spent only .7 hours on the matter and charged $1,100.00.

54. Taking into account the considerations outlined in Chapter 11, Commentary 1, of the *Code of Professional Conduct*, it is the Committee's view that the fee charged was so disproportionate to the services provided that it entered into an element of undue profit. The Committee therefore finds that the member was in breach of Chapter 11 of the *Code of Professional Conduct* as amplified in commentary 1 and 3.

COUNT #4

55. Having found that the $1,100.00 deposit was trust funds, and further that the funds were not payable to the member as earned fees, the sole issue to be decided in relation to this allegation is whether the member had express authority to appropriate the funds.

56. As it has already been noted, there was no written agreement between the member and Ms. C. Ms. C. testified that she did not know that Mr. Tapp would be taking the funds on the same day that they were deposited. Ms. C. was directed to deposit the funds into a bank account number that she was provided by the member's staff. Ms. C. would not have been aware of the difference between a trust account and a general account. The Committee concludes that there

was no express authority to appropriate the funds, and therefore, the member was in breach of Chapter 11 the *Code of Professional Conduct*.

CONCLUSION

57. Having found that the member was in breach of the Rules and the *Code of Conduct* as above indicated, the Committee is of the view these breaches are inimical to the best interests of the public and the members of The Law Society of Saskatchewan. The member is therefore found guilty of conduct unbecoming a solicitor in relation to Counts #2, #3 and #4.

58. The Hearing Committee refers the sentencing of Mr. Tapp to the Discipline Committee of The Law Society of Saskatchewan.

DISCIPLINE SENTENCING DECISION

INTRODUCTION

1. On May 13, 2011 the Hearing Committee of the Law Society of Saskatchewan held a Hearing with respect to four complaints of conduct unbecoming a solicitor against Daniel Stewart Tapp (the "Member"). The Committee was comprised of Peter Hryhorchuk, Miguel Martinez and Thomas Healey. The Hearing Committee delivered written reasons for its decision on August 15, 2011, and found that the Member was guilty of conduct unbecoming a solicitor in relation to all four counts.

2. The Discipline Committee (the "Committee") convened a hearing on sentence on October 20, 2011 in Regina.

SUMMARY OF RESULTS

3. The Committee accepted the joint submission on sentencing and ordered that:

i. the Member be suspended for a period of 45 days in relation to count 1; and

ii. the Member be suspended for a period of 15 days in relation to counts 2, 3 and 4 and that the 15 day suspension shall run concurrent to the 45 day suspension;

iii. the Member pay costs.

BACKGROUND

4. The formal complaints, the evidence and the findings with respect to the complaints is set out in the written reasons of the Hearing Committee. The following is a brief summary of these matters:

Count #1 -Complaint of L.M.

5. The Member represented L.M. in a claim for damages for injuries sustained in a motor vehicle accident in 1999. Initially the Member represented L.M. on an hourly fee basis. L.M. was unable to pay for the Member's services on such basis, and the Member reluctantly agreed to handle the matter on a contingency fee basis. A written Contingency Fee Agreement was entered into. As the matter progressed, the Member negotiated a number of changes to the Contingency Fee Agreement. The Hearing Committee concluded that the Member had used undue influence in negotiating the changes to the Contingency Fee Agreement and that the Member was in breach of Chapter 11 of *The Code of Professional Conduct* and was guilty of Count #1 in the formal complaint.

Count #2, #3 and #4 -Complaint by S.C.

6. In July of 2009 the Member received a $1,100.00 deposit from S.C. The deposit was received in the context of S.C. retaining the Member in relation to a child custody matter. Following payment of the deposit, there was little contact between the Member and S.C. The Member terminated the relationship approximately three weeks after receiving the deposit. S.C. requested the return of her deposit and was advised by the Member that it was non-refundable.

7. Count #2 charged that the Member failed to deposit monies held in trust by him for or on account of his client S.C. into a mixed or separate trust account as required by the rules of the Law Society of Saskatchewan. With respect to this Count, the Hearing Committee found as follows:

i. there was no valid retainer agreement;
ii. the $1,100.00 was trust funds;
iii. the Member had not earned $1,100.00 in fees and/or disbursements;
iv. the Member failed to deposit the $1,100.00 into a trust account as required.

8. Count #3 charged that the Member did "charge or accept a fee in relation to his client, S.C., which was not fully disclosed, fair and reasonable." With respect to this Count, the Committee found that the fee charged by the Member was so disproportionate to the services provided that it entered into an element of undue profit and that the Member was in breach of Chapter 11 of *The Code of Professional Conduct* as amplified in commentaries 1 and 3.

9. Count #4 charged that the Member appropriated funds from his client, S.C. that he held in trust or otherwise without express authority of the client and contrary to the rules of the Law Society of Saskatchewan. With respect to this count, the Hearing Committee found that the deposit was trust funds and was not payable to the Member as earned fees. The Hearing

Committee concluded there was no express authority to appropriate the funds and therefore the Member was in breach of Chapter 11 of *The Code of Professional Conduct.*

SUBMISSIONS ON SENTENCE

10. Counsel for the Investigation Committee and counsel for the Member made a joint submission on sentence. However, both counsel made both written and oral submissions in support of the joint submission.

Submissions on behalf of the Investigation Committee

11. With respect to the L.M. matter, counsel for the Investigation Committee submitted that the circumstances of this case were very similar to the circumstances in *Law Society of Saskatchewan* v *Segal*, [1999] LSDD No 20. In that case the member received a 45 day suspension and was required to pay costs. Both the findings of conduct unbecoming and the penalty imposed were upheld by the Saskatchewan Court of Appeal. It was submitted that the *Segal* case was a significant indicator of the appropriate penalty for the Member's conduct in relation to the L.M. complaint.

12. With respect to the S.C. matter counsel for the Investigation Committee submitted that precedents dealing with excessive billing indicated a range of sentences from reprimand to a two year suspension. It was submitted that in light of the very small amount of money concerned the Member's conduct could be placed in the more lenient end of the range of penalties in these type of cases. It was submitted that a 15 day suspension was appropriate.

SUBMISSIONS ON BEHALF OF MEMBER

13. With respect to the L.M. matter, counsel for the Member also pointed to the similarities with the facts in the *Segal* case, and submitted that *Segal* was a compelling indicator that the joint submission was within the reasonable range.

14. With respect to the S.C. matter, counsel referred to a decision of the Law Society of British Columbia in *Law Society of British Columbia v Andres-Auger,* [1994] LSDD No. 127. It was submitted that the facts in that case were quite similar and the member in that case received a fine of $1,700 and was ordered to pay costs of $6,000 which were substantially less than the actual costs of the hearing Counsel submitted that the joint submission called for a sentence that is substantially greater than what was imposed for similar circumstances in *Andres-Auger*. As such, the joint submission was well within the range of reasonable sentences with respect to Counts 2, 3 and 4.

15. With respect to both matters, counsel indicated the Member understood and accepted the decision of the Hearing Committee, was remorseful, and apologized for his mistakes. He also pointed out these proceedings had adversely affected his reputation.

DECISION

16. In considering the joint submission on sentence, the Committee considered the Saskatchewan Court of Appeal decision in *Rault v The Law Society of Saskatchewan,*

[2009] SKCA 81. That case involved a member's appeal of the decision of this Committee to reject a joint submission on sentence. The appeal was allowed and the Court of Appeal substituted the penalty agreed to by the parties in the joint submission. In *Rault* the Court of Appeal addressed the issue of whether this Committee is required to consider the joint submission and accord a measure of deference to it in determining penalty. The Court referred to the principles applied in the public law field of criminal law with respect to joint submissions on sentencing, and stated at paragraph 13:

> "In summary, those principles establish that there is an obligation on a Trial Judge to give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable; or contrary to public interest; and it should not be departed from unless there is good or cogent reasons for doing so."

17. The Court also referred to a policy formally adopted by the Law Society of Upper Canada that discipline committees accept joint submissions except where the committee concludes that a joint submission is outside a range of penalties as reasonable in the circumstances. The Court concluded, at paragraph 19, that:

> "Joint submissions on sentence should be considered by the discipline committee in a principled way similar to the jurisprudence in criminal matters and as applied by discipline committees in [other] provinces ..."

18. While the Law Society of Saskatchewan does not have any formal policy on joint submissions, it is clear that there is a duty on the Committee to consider the joint submission. The Committee is not bound to accept the joint submission, however, the joint submission should be accepted unless the resulting sentence is:

i. unfit or unreasonable; or
ii. contrary to the public interest.

19. Deference to the joint submission requires that the resulting sentence should not be found to be unfit or unreasonable if it is within a range of penalties that could be considered reasonable in the circumstances.

20. If the Committee should decide to reject a joint submission, it must do so on a principled way and provide good and cogent reasons why it considers the resulting sentence is unfit or unreasonable, or contrary to public interest, in the particular circumstances.

21. An issue of procedure was also raised in the Court of Appeal in *Rault.* That issue was whether the discipline committee was required to grant counsel an opportunity to make further submissions when it determined that it would not accept the joint submission on penalty. The Court of Appeal found it unnecessary to deal with this issue. However, the Committee accepts that such practice should be adopted. In this case counsel were

advised that if the joint submission was not accepted, it would grant counsel an opportunity to make further submissions before making a final decision.

22. The Committee did have some concern whether this is an appropriate case for the sentence on the two complaints to run concurrent. Under the Criminal Code, consecutive sentences are warranted unless there is a reasonably close nexus between the offences in time and place as part of a continuing criminal operation or transaction. In other words, sentences for criminal offences should only be concurrent if the offences have been committed as part of a continuing operation in a relatively short period of time (see *Hatch*, [1979] NSJ No 520, 31 NSR (2d) 110 at 113 (NSCA)). There is no policy reason for departing from these principles in the context of sentencing members of the Law Society for disciplinary offences under *The Legal Professions Act.*

23. In this case, the two separate matters giving rise to the Member's sentencing emanated from two different complaints and the matters giving rise to the complaints were not proximate in time. As a result, the two complaints could not be said to be part of the same transaction or endeavour nor could they be characterized as having a reasonably close nexus. Accordingly, in the absence of the joint submission, this Committee would likely have imposed consecutive sentences on the two complaints. However, in this case if the sentences run consecutively the suspension would be for a total of 60 days. Running concurrently the suspension is for a total of 45 days. The difference being only 15 days, it cannot be said that the joint submission was unfit or unreasonable on this ground.

24. The Committee is of the view that the joint submission on sentence is within the range of penalties which could be considered reasonable and fit in the circumstances of the case and is not contrary to the public interest. It is, as submitted by both counsel, consistent with sentences imposed in similar circumstances. Accordingly, the Committee accepts the joint submission on sentence.

ORDER

25. For the reasons stated herein the Committee accepts the joint submission and orders the following:

i. that the Member shall be suspended for a period of 45 days in relation to the L.M. complaint;
ii. that the Member shall be suspended for a period of 15 days in relation to the S. complaint and that this 15 day suspension shall run concurrent to the suspension imposed in relation to the LM. complaint;
iii. that the Member's suspension shall commence on December 15, 2011;
iv. that the Member shall pay costs in the amount of $11,425.25 to the Law Society of Saskatchewan on or before February 1, 2012.