**IN THE MATTER OF THE LEGAL PROFESSION ACT, 1990**

**AND IN THE MATTER OF MEMBER A**

# RULING BY THE DISCIPLINE HEARING COMMITTEE ON THE COMPLAINT OF MS. Y

## A. INTRODUCTION

[1.] Member A (the "Member") faces an Amended Formal Complaint in this matter dated September 14, 2010 alleging six counts of conduct unbecoming a lawyer in relation to Ms. Y (the Ms. Y Complaint). The hearing on the merits of the Ms. Y Complaint was held on May 23, 24 and 25 2011. An earlier ruling on the preliminary issues raised by the Member of delay and duplicative charging was rendered by this Discipline Hearing Committee (the Committee) on March 3, 2011.

[2.] This ruling will deal with the issue of onus and standard of proof for the Ms. Y Complaint generally and the finding and reasons for the six counts of the Ms. Y Complaint.

[3.] The six counts of the Ms. Y Complaint are that the Member did:

1. enter into a contingency fee agreement with his client, Ms. Y, for services related to a matrimonial dispute, without having the form and content of the agreement approved by the Court;

2. was negligent in that he failed to exercise due diligence by entering into a contingent fee agreement with his client, Ms. Y, for services related to a matrimonial dispute, without having the form and content of the agreement approved by the Court;

3. enter into a contingency fee agreement with his client, Ms. Y, without ensuring that the said agreement stated that any party to the agreement may apply to the Court under Section 64(3) of *The Legal Professions Act, 1990*, for a determination as to whether or not the agreement is fair and reasonable;

4. either willfully or recklessly fail to follow the instructions of his client, Ms. Y, regarding the service of a formal Offer to Settle upon her husband, Mr. Y; and

5. was negligent in that he failed to exercise due diligence to ensure that the instructions of his client, Ms. Y, were followed regarding the service of a formal Offer to Settle upon her husband; and

6. place his or his firm's interests above those of his client, Ms. Y, by failing to serve a formal Offer to Settle upon Mr. Y.

[4.] The Committee finds the Member not guilty in relation to the six counts of the Ms. Y Complaint. What follows are the reasons for that finding.

## B. ONUS AND STANDARD OF PROOF

[5.] For all the counts in the Complaint, the Committee finds that the onus and standard of proof, the burden of proof in other words, is as stated by the Supreme Court of Canada in *F. H. v. McDougall* (2008) 3 S.C.R. 41 (*McDougall*). The prosecution in this case must prove its case on a balance of probabilities with evidence that is sufficiently clear, convincing and cogent. Though the Member urges that a higher onus is on the prosecution, and a lower onus, if any, on the Member as a result of *Law Society of Saskatchewan v. Shumiatcher* (1966) S.J. 226, we find that *McDougall* speaks definitively to the matter and that the burden of proof as outlined in it is more in keeping with the current case law and the focus of public protection in the field of professional regulatory discipline cases.

[6.] This burden on the prosecution is both as to the underlying facts that it wishes to establish and that those facts support the elements of each of the charges of conduct unbecoming.

## C. THE MS. Y COMPLAINT

[7.] A rough chronology of the counts follows, as was outlined in the preliminary ruling on delay. The chronology is somewhat useful to place the procedural background to this aspect of the Complaint in context.

[8.] Chronology

> (a) *February, 1999*, Ms. Y retains the Member, with a fee agreement (the agreement) with a "bonus fee" or "uplift" provision. The fact of the agreement, its conclusion and effect become the subject of future disputes.
>
> (b) *December, 2004*, the Court of Appeal dismisses Mr. Y's appeal on the merits of the issues between the Ms. Y and Mr. Y Issues regarding an offer to settle arise.
>
> (c) *August, 2005*, the Court of Queen's Bench rules on the agreement.

(d) *February, 2006*, Ms. Y's new counsel raises the possibility of a complaint with the Law Society.

(e) *December, 2007*, the Court of Appeal rules on the agreement following which the Law Society raises matters with the Member.

(f) *April, 2008*, Mr. Y provides the Law Society with a written complaint.

(g) *July, 2008*, Ms. Y provides the Law Society with a written complaint.

(h) *June, 2009*, matters are referred to the Investigation Committee.

(i) *June, 2010*, the Investigation Committee files its report.

(j) *July, 2010*, a Formal Complaint is issued.

(k) *September, 2010*, the Formal Complaint is amended.

(l) *January, 2011*, a Discipline Hearing Committee hearing is to be held.

(m) Meanwhile, in *November, 2008* and *February, 2009*, separated law suits are commenced by the Ms. Y's against the Member's firm.

(n) A preliminary ruling is issued by the Committee on delay and other procedural issues on March 3, 2011.

(p) The hearing on the merits of the counts is held on May 23, 24 and 25, 2011.

## C.1. The Facts

### C.1(a) The evidence by the prosecution

[9.] Ms. Y came to the Member in February, 1999, already in the midst of a bitterly contested matrimonial dispute, having been till then represented by Mr. R of Estevan. From February to June, 1999, she was charged some $10,000 for legal services rendered and disbursements incurred by the Member's firm. The fee charged was calculated on an hourly fee basis. Ms. Y's financial circumstances

were such that alternative fee arrangements needed to be considered to fund the litigation. Ms. Y and her husband each claimed that the other was obliged to pay in the $300,000 range. Following a pretrial conference, the Member wrote to his client by letter dated July 5th, 1999, stating:

> I told you that if you provided us with the funds for disbursements, we would gamble on getting paid our fees. I indicated since we would get nothing if we recovered nothing, we would gamble on the basis of getting a bonus of 60% of our fees if we were successful.
>
> This is not a contingency agreement, but a bonus fee agreement. There is case law on that issue. It all comes from Ontario where contingency agreements are illegal, but lawyers regularly enter into bonus fee agreements with their clients by which they are paid a certain amount per hour, and then if matters go in a certain way, they get a bonus based on the results. We have to agree on what is success. We will get our bonus if we are successful.
>
> 1. We will have succeeded if we do as well or better than the offer to settle, which we made at the Pre-Trial. You have instructed us to make that offer to settle formally and we will be doing so. Therefore, I enclose a copy of the proposed formal offer to settle and if you do as well as thus (sic) formal offer to settle or better, that will be our definition of success.
>
> 2. If we are successful, we will get 1.6 times our ordinary hourly rates from this time forward….

[10.] Ms. Y signed the letter indicating "I agree to the above fee structure. Please proceed." This appears to be after some time lag and some correspondence between her and the Member attempting to negotiate the terms of the fee agreement. She also reviewed and believes approved the offer to settle which was placed in "style of cause" form. In her view, if she was to receive $300,000 or more in the matrimonial dispute, the 1.6 times hourly rate bonus fee arrangement would apply. The arrangement appears to have envisioned that previous hourly rate would apply if there was recovery short of the "success" target, up to the amount recovered. She also believed that the offer to settle was subsequently served on counsel for her husband.

[11.] The litigation eventually went to trial resulting in a decision by Mr. Justice W. McIntyre dated March 15, 2004. Ms. Y was awarded an equalization payment of $320,699.87. She viewed this as "success". A subsequent appeal was dismissed. By any measure, the Member's firm's efforts to this point on behalf of Ms. Y were substantial. By letter dated January 4th, 2005, the Member billed her file based on the "bonus" fee agreement and charged $170,605.00 in legal fees.

[12.] Ms. Y was not pleased with the fee charged. She retained another firm to represent her in a challenge of the fees charged by the Member. On August 16th, 2005, Madam Justice A. Rothery delivered a decision (the Rothery decision). In summary, she upheld the bonus fee arrangement but awarded Ms. Y the entitlement of any costs awarded in the matrimonial litigation. Rothery J. chose to not fully consider the effect of Rules 1501 and 1502 of the Law Society of Saskatchewan, though she found the arrangement to be a "contingent fee agreement". The effect of the Rules that required pre-approval of the court and a statement in the agreement of the right to apply to the court to determine if the agreement is fair and reasonable was not ruled upon. She did however consider and review the entire fee agreement under the "fair and reasonable" test of section 64 of *The Legal Professions Act, 1990* (the Act.)

[13.] The Rothery decision was appealed by the Member's firm. The Law Society was an intervenor. In a decision dated December 4th, 2005, the Court of Appeal ruled on the issues under appeal. There was, as the appeal decision outlines, a "tangle of issues". These included whether the agreement was in fact and law a contingency agreement and the jurisdiction of the Law Society to enact Rules in this area. New evidence was entered as to whether the offer to settle had ever been served by the Member, further tangling matters. In the appeal decision, on the question of the serving of the offer to settle, Madam Justice Wilkinson wrote:

> However, the Member candidly admitted in argument that he had purposely refrained from serving the wife's Offer to Settle upon the husband for purely tactical reasons…Given the Member's frank

> admission before us that he deliberately refrained from serving the formal offer, the credibility of the evidence is not in issue….the Member's firm made a deliberate decision contrary to express instructions from the client, instructions incorporated as a term of the fee agreement. The decision was influenced exclusively by the firm's financial interests, not the client's…the Member undermined that process by making a calculated decision to forgo service of the wife's formal offer of settlement, a decision that was never communicated to his client….all that is material is the Member's acknowledgement that he deliberately ignored his client's express instructions and that he did so to protect the law firm's pecuniary interests, to the prejudice of the client's interest, in concluding an amicable settlement.

[14.] The Court of Appeal, in the result, chose not to rule on the whether the original fee arrangement was a contingency agreement or whether the Law Society exceeded its statutory authority in passing Rule 1502(b). It did however refer the legal bill for taxation by the Local Registrar which assessment did occur and resulted in a decision by Mr. Justice Allbright on appeal of the taxation. The net result was the repayment of a significant amount of the fees to Ms. Y.

[15.] In cross-examination before this Committee, Ms. Y was invited to agree, in essence, that in spite of her views of the offer to settle, there remained issues of property distribution that continued to be communicated to the Member and his firm and that there were no specific instructions to serve the offer to settle.

**C.1(b) Argument on admissibility of Judgments and Non Suit application.**

[16.] During the course of the hearing on the Ms. Y counts, there was argument on the admissibility of and the use to which the various judicial judgments entered as exhibits could be put. The Committee ruled that the full effect of the judicial decisions would be the subject of a future ruling on the merits. Thus this will be addressed

below. In addition, a non-suit application in relation to some of the counts was brought at the conclusion of the prosecution's case. The Committee ruled that the threshold for the matter proceeding had been met by the prosecution and the Member then called evidence.

**C.1(c) The Member's evidence in defence**

[17.] The Member's legal assistant testified in defence. She has been a legal secretary at the Member's firm for 20 years. She recalled a telephone conversation with Ms. Y after July 5th, 1999 but before the acceptance of the fee arrangement where further personal items were sought by Ms. Y then were outlined in the offer to settle.

[18.] Lawyer 1, a lawyer at the Member's firm, was co-counsel at the matrimonial litigation trial before Mr. Justice McIntrye. Following the trial, he searched for the offer to settle that he had assumed had been served before the trial. His purpose was to determine if double costs, payable to the Member's firm pursuant to the fee arrangement, could be claimed. He was unable to confirm that it had in fact been served.

[19.] Lawyer 2 of the Member's firm also worked on the file. He was advised by memorandum from the Member dated October 12, 1999 that a letter to the Court on the fee arrangement had been sent. He was then instructed by the Member to "formulate the application for approval of the bonus fee agreement at the same time indicating that approval is not required but that out of abundance of caution we want to allow the Court an opportunity to agree or confirm our view that agreement is not required." He does not think such an application was in fact made by him.

[20.] The Member states that in 1999, at or after the first Pre-Trial Conference he was involved in with Ms. Y, the concept of a contingency agreement was raised by her. He states he had never participated in such an arrangement previously. He was aware of the Rules and of Ontario case law regarding bonus fee arrangements. He subsequently dictated the July 5th, 1999 letter attempting to outline in writing previous discussions with Ms. Y on the fee arrangement. As to the offer to settle, in spite of the language in the letter that "you have instructed us to make that offer…and we will be doing so…", he meant to get approval of the "draft" offer to settle from her.

[21.] The Member, in considering the bonus fee arrangement in 1999, stated that he had called an Ontario lawyer with the Law Society of Upper Canada to discuss the distinction between "contingency" agreements and "bonus" agreements. He also consulted the then Law Society of Saskatchewan website and its digests. He referenced various continuing legal education seminars and papers on fee arrangements. He concluded, among other things, that a contingency agreement required a "percentage of the action" and a stake in the litigation. Thus a bonus fee agreement was not covered by any of the Rules and was appropriate for the circumstances of the Ms. Y litigation.

[22.] To effect his plan on fees, the Member wrote to the Local Registrar on July 5th, 1999 enclosing the same dated letter to Ms. Y and asking for "some clearance by the Court" even though he asserted that the proposed arrangement with Ms. Y was not a contingency agreement. He received a reply dated August 9th, stating that the Local Registrar had discussed the matter with Madam Justice Dawson and that if and when the agreement was signed by the client an ex parte application could be made to confirm same. The Member then dictated the memorandum of October 12, 1999 to Lawyer 2 to, among other things, prepare and submit the application to the Court, now that Ms. Y had approved the fee arrangement. He states he was not aware that such an application was not made.

[23.] Regarding the offer to settle, the Member stated that he believed that the offer had been served, primarily to effect double costs to the firm. He states that before the Court of Appeal he had not fully reviewed the file, as it was now with new counsel, did not believe the Court would accept the new evidence and that it would not have affected any possibility of early settlement in the matrimonial litigation, in any event, as there was no likelihood of a settlement. He denies stating or admitting "candidly" or otherwise that he purposely refrained from serving the offer to settle. He further denies that he did so to protect his firm's interests. (See paragraphs 40, 43, 45 and 47 of the Court of Appeal judgment). He does admit that the reference to his position in paragraph 44 is correct. Otherwise, his position is that the Court of Appeal was in error as to what he stated and meant with respect to service of the offer to settle.

**C.2 The Applicability of Strict Liability**

[24.] The Committee accepts the applicability of the category of "strict liability" offences as established in *R. v. Sault Ste. Marie* (1978) S.C.J. 59 and as further applied in professional discipline matters by our Court of Appeal in *Law Society of Saskatchewan v. Merchant* (2009) SKCA 33. In the latter case, "conduct unbecoming" is the subject of an expansive definition and may be established through intentional conduct, negligent conduct or total insensitivity to the requirements of acceptable practice.

**C.3 The Contingency Fee Arrangement Allegations**

[25.] The relevant Rules regarding the allegations in counts one to three of the Ms. Y Complaint are:

Rule 1500. In this Part

> "Contingent fee agreement" means an agreement which provides that a member's remuneration for services to be provided for or on behalf of a client is contingent, in whole or in part, on the successful disposition of the matter in respect of which the services are provided.
>
> Rule 1501(2)(b) Every contingent fee agreement entered into by a member shall be in writing.
>
> (2) A member who enters into a contingent fee agreement shall ensure that the agreement:…..(b) states that any party to the agreement may apply to the Court under section 64(3) of the Act for a determination as to whether or not the agreement is fair and reasonable.
>
> Rule 1502. A member shall not enter into a contingent fee agreement:
>
> (b) for services which relate to a matrimonial dispute, unless the form and content of the agreement have been approved by the Court;

[26.] The Act states in section 64(3) that any member or person who has entered into a contract in writing for fees, other than on a fee for service basis, may apply to a Judge of the Court for a determination as to whether the agreement is fair and reasonable.

[27.] The definition of contingent fee agreement in the Rules leads, we believe, to the inevitable conclusion that the bonus fee arrangement or "uplift" provision in the agreement with Ms. Y was contingent, in whole or in part, on the successful disposition of the matter. The Member's firm could have received nothing, something, its hourly rate or a bonus depending on the outcome. We can come to the conclusion that the fee arrangement was contingent or partially contingent independently of the Rothery decision or other previous judicial determinations.

[28.] However, the real issue is whether the Member exercised due diligence in the circumstances. On this point we are prepared to say that only the "negligently" standard in count four causes us to pause. Though somewhat contradictory, the Member's testimony that he believed that this fee arrangement was not caught by the Rules, and that he attempted (through Lawyer 2) to address the Rules in any event, lead us to the conclusion that any intentional aspect of any of the Ms. Y counts regarding the fee agreement cannot survive the onus of proof on the prosecution.

[29.] On the negligence standard, we have come to the conclusion that due diligence was made out with respect to counts one and two of the Ms. Y. Complaint. Though one can always say in hindsight that more could have been done, and perhaps rightly that it should have been done, we are satisfied that the Member demonstrated sufficient due diligence in the fee agreement matter to avoid the "conduct unbecoming" definition.

[30.] With respect to count three of the Ms. Y Complaint, in the context of what we have stated above, this charge, is at best, a technical breach. The content of the fee agreement was sent to the Court. The ability to challenge the agreement, as was done, was not, in any shown material way, affected by the lack of notice or statement. If necessary, we are also prepared to say that the due diligence standard was met with respect to the Member's position that the arrangement was not caught by the Rules.

[31.] Thus we find the Member not guilty of counts one to three of the Ms. Y Complaint. We find it unnecessary to decide if the contingency fee arrangement Rules are *ultra vires* the Law Society as the Rules attempt to vest jurisdiction upon the Court.

**C.4 The Offer to Settle Allegations**

[32.] In this area we are caught up in somewhat of a dilemma. The Member has alternatively been adamant that the offer to settle was served (his stated assumption at the time and as averred in his subsequent affidavit dated July 12, 2005), and then presented his apparent defence at the hearing that Ms. Y was still considering and instructing on various matters to be part of the offer, and was thus an evolving proposed offer. Then, we have the reported statements of the Member to the Court of Appeal that he intentionally refrained from serving the offer for certain tactical reasons. There appear to be three possible scenarios, all of which the Member might have believed to be true, that is that he did believe the offer was served at the time; was willing however to try alternative defences at the hearing; and, finally, was extemporizing before the Court of Appeal.

[33.] This may be the result of the type of person or practice that the Member is or conducted. It is here again that the onus on the prosecution comes into play for determining the matter before us. We find that that it has not been established that the proven failure to actually serve the offer to settle in these circumstances is conduct unbecoming. We accept as not proven, or that due diligence does not require, the completion of the instructions as alleged in this case in order to avoid a finding of conduct unbecoming. The count charged is not an absolute liability offence. We stop at the consideration that the offer to settle was to be served, but was not. We think that the rest of the context may reflect negatively on the Member but not to the extent that he be found, on an objective basis, to be guilty of conduct unbecoming. This is so based on the Member's initial assertions of his belief that the offer was served, but tainted somewhat by the defence led at the hearing.

[34.] This leaves the question of the Court of Appeal's "findings" and the third scenario. We accept that in most cases where a court has found certain facts, or attributes statements to a party or counsel, that it is open, if not incumbent, on a hearing committee such as ours to adopt those findings or attributions. We accept that such decisions are inherently reliable public documents. We take however, the

following points made on behalf of the Member: (1) that there is room for the Court of Appeal to have misheard or misinterpreted the Member's submissions, (2) there is no transcript or public record of the proceedings to review, (3) the finder or attributor cannot be asked or expected to supply its own record, independent of its decision, or otherwise account, (4) that no other counsel or other persons present were asked to comment on the attributed statements, (5) the findings or attributions are not part of the final, formal judgment roll. Of concern for us as well is the application of fairness in the use of previous litigation (see *Toronto v. CUPE* (2003) 3 S.C.R. 77 at paragraph 52.).

[35.] On a balance of probabilities, we find that the Member did state to the Court of Appeal the comments attributed to him by the Court. He was likely extemporizing at the time. To this extent the Member was misleading the Court. We find that the Member had earlier believed that the offer to settle had been served. Thus his statements to the Court of Appeal were untrue at the time they were made. However, the Member is not charged with misleading the Court and may well have not intentionally meant to deceive the Court, though it hardly speaks well of him. As well, even if untrue, the statements cannot be used as evidence against him particularly where he is not charged with the offence of misleading the Court.

[36.] Thus we find the Member not guilty of counts four to six of the Ms. Y Complaint.

## D. CONCLUSION

[37.] In coming to the conclusion we do on the Ms. Y Complaint, we do not diminish the obvious frustration and anguish Ms. Y experienced throughout the matrimonial litigation and the aftermath litigation regarding her dealings with the Member. Though she ultimately obtained a good result in both the former and the

latter, it was not without protracted proceedings and the inevitable toll such would take on her.

[38.] In a cosmic sense, the present proceedings of misconduct allegations had to be held. Judicial comment on the fee arrangement and the offer to settle process almost guaranteed that the Law Society had to proceed. Though, as well cosmically, the entire matter could be characterized as a tempest in a teapot of typical family law litigation but with the involvement of the somewhat larger than life family law litigator that the Member obviously was at the time.

[39.] In the end result, there were assumptions made by the Member. That the offer to settle had been made and that there was an "out of abundance of caution" court application made on the fee arrangement. There were "he said/she said" elements of what occurred in argument before the Court of Appeal. There were elements of blaming others for things not done. However, also in the end result, there is the question of whether any of this would have occurred or been prosecuted had the protagonist been someone other than the Member.

[40.] Ultimately, on the facts presented to this Committee, we cannot find, with the onus of proof to be placed on the prosecution, that there was willful or negligent conduct by the Member reaching the threshold of conduct unbecoming on the Ms. Y Complaint.

DATED the 12th day of December, 2011.

"Evert van Olst"
Evert van Olst, Chair

"Reg Watson"
Reg Watson Q.C.

"Lorne Mysko"
Lorne Mysko

**EDITED FOR PUBLICATION**