

LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act* (the "LPA"); and

IN THE MATTER OF a hearing (the "Hearing") regarding the conduct of
Patricia A. McMillan, a Member of the Law Society of Alberta

INTRODUCTION

- [1] On September 3, 2009, a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of Patricia A. McMillan, a Member of the LSA. The Committee was comprised of Dale Spackman, QC, Chair, James Eamon, QC, Member and Anthony Young, Member. The LSA was represented by Janet Dixon, QC. The Member was present at the Hearing and was represented by Dale O. Ellert. Also present at the Hearing was a Court Reporter to record the transcript of the Hearing and Nicole Woodward and Jocelyn Fraser, employees of the LSA, as observers.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

- [2] The Chair introduced the Committee and asked the Member and Counsel for the LSA whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.
- [3] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the LPA, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established jurisdiction of the Committee.
- [4] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(a) and Rule 96(2)(b) of the Rules of the LSA ("Rules") pursuant to which the Director, Lawyer Conduct of the LSA, determined that the persons named therein were to be served with a Private Hearing Application was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. The Chair inquired of Counsel for the Member whether he wished to make a Private Hearing Application and he declined. Accordingly, the Chair directed that the Hearing be held in public.
- [5] Exhibits 1 through 30 contained in the Exhibit Book provided to the Committee and the Member were entered into evidence in the Hearing with the consent of the Committee and Counsel for the LSA and Counsel for the Member.

- [6] At the commencement of the Hearing, Counsel for the LSA presented the Committee with a Statement of Facts agreed to by the Member on September 3, 2009, pursuant to which the Member indicated that she would be tendering an admission of guilt on Citation 2 referred to below. With the Consent of the Committee and both Counsel, the Statement of Facts was entered into evidence in the Hearing as Exhibit 31. The Statement of Facts is annexed as Appendix I to this Report.
- [7] The Discipline Record of the Member and the Estimated Statement of Costs were entered into evidence in the Hearing as Exhibits 32 and 33, respectively, with consent of the Committee and both Counsel prior to the sanctioning phase of the Hearing.

CITATIONS

- [8] The Member faced the following Citations:
1. IT IS ALLEGED that you prepared, commissioned and presented an affidavit to the Court in support of an application for a desk divorce and that [you] did not disclose facts material to the matters, in circumstances where there was a heightened duty to do so, and where you knew the affidavit would be relied upon, and therefore failed to be candid and failed in your duty as an officer of the Court, thereby misleading the Court, and that such conduct is conduct deserving of sanction.
 2. IT IS ALLEGED that you took unfair advantage of the Complainant given that he had no legal counsel between June 8, 2006 and June 20, 2006, and that such conduct is conduct deserving of sanction.
 3. IT IS ALLEGED that you failed to be candid in you response to the Law Society, and that such conduct is conduct deserving of sanction

SUMMARY OF RESULTS

- [9] In the result, on the basis of the evidence entered at the Hearing and for the reasons set out below, the Committee dismissed Citations 1 and 3 and accepted the admission of guilt of the Member on Citation 2. The Member was reprimanded and ordered to pay the actual costs of the Hearing, not to exceed those contained in the Estimated Statement of Costs (Exhibit 33). The reprimand administered by the Chair is annexed as Appendix II to this Report.

OPENING STATEMENT AND SUBMISSIONS OF COUNSEL FOR THE LSA

Admission of Guilt on Citation 2

- [10] Counsel for the LSA advised that the Member had tendered an admission of guilt on Citation 2, which was confirmed by Counsel for the Member. Counsel for the LSA indicated that she did not intend to call evidence or seek a finding of guilt on Citation 1 and Citation 3. After a brief adjournment, the Chair advised Counsel that the Committee wished to hear submissions from Counsel on Citations 1 and 3 before deciding whether to

dismiss those Citations and whether to accept the Statement of Facts and the admission of guilt on Citation 2.

- [11] Counsel for the LSA advised that this matter arose as a result of the representation by the Member of the wife in a divorce and matrimonial property action. A Statement of Claim for Divorce and Division of Matrimonial Property was filed by the Member on behalf of the wife on January 27, 2006. There was a "flurry of activity" in the action between January 27 and June 9, 2006. Counsel submitted that there were contested issues and matters being disputed in the action.
- [12] On June 9, 2006, counsel for the husband served notice on the Member of ceasing to act.
- [13] On June 13, 2006, the Member went to Court on notice to the husband (the "Complainant") on a contested application relating to spousal support. The Court ordered the Complainant to pay spousal support of \$1,100 per month retroactive to March 1, 2006 (Exhibit 11, Tab 2).
- [14] Two days after the contested application, the Member treated the matter as an uncontested divorce by filing with the Court a Praecipe to Note in Default and a Default Judgement package and on June 26, 2006, the Court granted a default divorce judgement and also confirmed the spousal support order made on June 13, 2006 (Exhibit 6, Tab 1).
- [15] Counsel submitted that the Member was aware at all material times that the matter was contested and that the timing of the application for judgement took unfair advantage of the Complainant when he was not represented by counsel and that, accordingly, the admission of guilt by the Member on Citation 2 should be accepted by the Committee.

Citation 1

- [16] With respect to Citation 1, Counsel submitted that the affidavit giving rise to the complaint was a standard affidavit required by the divorce rules and the complaint of the Complainant surrounds the issue of when the parties became separated. This is a legal issue based on the facts and would require an analysis of the facts and the legal authorities on the issue of when separation occurred, which is not the role of this Committee.

Citation 3

- [17] With respect to Citation 3, Counsel submitted that the Member admits carelessness, but that there is no evidence of any deliberate attempt on the part of the Member to mislead the LSA in her response regarding the complaint.
- [18] Counsel referred the Committee to the last sentence in the second last paragraph on page 2 of Exhibit 11, being the letter of response to the complaint by the Member to the LSA dated October 24, 2006, which reads as follows:

There was no transcript of the Examination for Discovery conducted by Rob Harvie's ordered by myself, Mr. Harvie or Ms. [S].

This is the statement giving rise to Citation 3.

- [19] Counsel also referred the Committee to Exhibit 18 (Letter dated February 19, 2008 from the LSA to Verbatim Reporting Services, invoice dated June 15, 2006 from Verbatim Reporting Service to the Member and Letter dated June 20, 2006 from the Member to Verbatim Reporting Services enclosing payment of the invoice), Exhibit 20 (Letter dated March 4, 2008 from the LSA to the Member requesting, *inter alia*, further clarification regarding the transcript issue), Exhibit 21, paragraph 2 (Letter dated March 17, 2008 from the Member to the LSA responding to the request from the LSA for further clarification), Exhibit 22 (Letter dated March 31, 2008 from the LSA to the Member seeking further clarification regarding the transcript issue) and Exhibit 23 (Letter dated April 7, 2008 from the Member to the LSA responding to the request from the LSA for further clarification).

OPENING STATEMENT AND SUBMISSIONS OF COUNSEL FOR THE MEMBER

Citation 1

- [20] Counsel advised that the parties had originally commenced a divorce and matrimonial property action approximately ten years ago. With respect to Citation 1, the issue for the Complainant was the date of separation. Spouses can live separate and apart under the same roof and still be separated for the purposes of the *Divorce Act*. Counsel submitted that this was a legitimate issue in the proceedings and that, if there is a dispute on this issue, the test is a "subjective" one to be determined by the Court. Counsel submitted that there was nothing improper in the affidavit submitted as evidence in the proceedings by the Member.

Citation 2

- [21] Counsel submitted that had the Member written a letter to the Complainant advising of her intention to proceed to judgement, "we would probably not be here today".
- [22] Counsel submitted it was clear the Complainant was not prepared to pay spousal support. The original spousal support application was adjourned. At the application heard by Justice Langston on June 13, 2006, the Complainant was represented by counsel and the interim support order was granted. Counsel referred the Committee to the Official Transcript of the proceedings before Justice Langston on March 13, 2006 (Exhibit 28) and, specifically, lines 23 to 26 on page 11 as evidence of his proposition that the Complainant had no intention of paying spousal support. Counsel submitted that after the granting of the spousal support order by Justice Langston, nothing happened in the proceedings other than the application for divorce, which incorporated the interim support order.
- [23] Counsel quoted the dictionary definition of "advantage" and submitted that the advantage complained of was that the Complainant was not given an opportunity to file a defence. Counsel submitted that a defence had still not been filed to date and that the order of

Justice Langston was more beneficial to the Complainant than the final spousal support order that ultimately issued in the case.

- [24] Finally, Counsel advised that the Member admits that she should have allowed the Complainant an opportunity to file a defence before proceeding to judgement.

Citation 3

- [25] Counsel submitted that the statement by the Member that no transcripts were ordered was merely inadvertence on her behalf and that the misstatement was later rectified, so that nothing turned on this.

FURTHER SUBMISSION OF COUNSEL FOR THE LSA

- [26] Counsel for the LSA submitted that the ultimate result in the proceedings as referred to by Counsel for the Member were irrelevant to these proceedings and should be disregarded by the Committee, not having formed part of the investigation by the LSA.

ADJOURNMENT TO CONSIDER STATEMENT OF FACTS, ADMISSION OF GUILT ON CITATION 2 AND POTENTIAL DISMISSAL OF CITATIONS 1 AND 3

- [27] The Hearing was adjourned to allow the Committee to consider the Statement of Facts and the admission of guilt on Citation 2 and whether the Committee was prepared to dismiss Citations 1 and 3.
- [28] The Hearing was reconvened and the Committee advised that they were prepared to accept the Statement of Facts and the admission of guilt by the Member on Citation 2. The Committee dismissed Citation 1. The factual and legal issues relating to the Affidavit were contested. The Applicant believed she had been living separate and apart from the Respondent from a date with which the Respondent disagreed. The Committee concluded there was no evidence that the Member knew or ought to have known that the Affidavit was inappropriate, nor that the Affidavit was in fact inappropriate. The Committee asked for further submissions of Counsel on Citation 3.

SUBMISSIONS OF COUNSEL ON CITATION 3

- [29] Counsel for the LSA advised the Committee that she had discussions with Counsel for the Member during the adjournment which disclosed facts not included in the Exhibits and that it was acceptable to her that the Member be allowed to testify as to these facts.

TESTIMONY OF MEMBER

- [30] The Member was called as a witness by Counsel for the Member and was administered the oath by the Chair.

Examination by Counsel for the Member

[31] On questioning by Counsel for the Member, the Member testified that when she was preparing her response to the LSA regarding the complaint giving rise to these proceedings, she did not have her regular assistant. She testified that she did not think a transcript of the discoveries conducted by opposing counsel had been ordered. The Member admitted that she wasn't careful enough in preparing her response, but that nothing turned on the transcript.

Cross-Examination by Counsel for the LSA

[32] Counsel for the LSA referred the Member to Exhibit 11 (Letter dated October 24, 2006 from the Member to the LSA) and confirmed with the Member that at this time the matters in dispute in the action had not been resolved. Counsel inquired of the Member as to what effort she had made to confirm the assertion in the letter that no transcript of the discoveries had been ordered. The Member testified that she "had it in [her] head" that no transcript had been ordered. She picked up her file which was a "big brown file" with no transcripts in it.

[33] Counsel referred the Member to Exhibit 19, Tabs 1 and 2, being the invoice for the transcript and the letter from the Member forwarding payment. The Member testified that she had only reviewed the file containing this material only on receiving the letter from the LSA inquiring about her statement in the October 26, 2006 letter that there was no transcript.

[34] Counsel referred the Member to Exhibit 21, being the letter dated March 17, 2008 from the Member to the LSA responding to the letter dated March 4, 2008 from the LSA to the Member (Exhibit 29) inquiring about, inter alia, the Member's assertion that there was no transcript for the discoveries. Counsel asked why the Member felt compelled to point out, in referring to the transcript "that the Examination of [S] was a 'single party order'" and attaching correspondence referring to undertakings she would have received from the transcript? The Member testified that she was not reluctant to admit her mistake and thought her response was clear.

[35] On questioning by the Chair, the Member testified that she missed the invoice and the letter paying the invoice when she originally reviewed the file. The Member reiterated that she "had it in her head" that there was no transcript.

[36] Mr. Eamon asked why when the Member called for the file, she would not have obtained any binders that went with the file? The Member testified that they were short of space at the office and she didn't think the file would have reached the stage where there were binders. She testified that her files do not indicate on the file if there are binders that go with the file.

[37] On questioning by Mr. Young, the Member testified that invoices for disbursements on files are handled by her assistant who prepares a cheque for her signature, but that she signs "hundreds of cheques".

[38] Mr. Young inquired as to the nature of the practice of the Member. The Member testified that she has a "busy matrimonial practice" and takes the summers off.

Re-Examination by Counsel for the Member

- [39] On questioning by Counsel for the Member, the Member again testified that she "had it in her mind" that she had not ordered a transcript. The Member testified that her client did not have a lot of money and she didn't think she would have ordered at transcript in this case.
- [40] The Witness was dismissed.

SUBMISSIONS OF COUNSEL FOR THE LSA

- [41] Counsel for the LSA referred to Chapter 3, Rule 3 of the Code of Professional Conduct of the LSA (the "Code"), which reads as follows:
- A lawyer must respond on a timely basis and in a complete and appropriate manner to any communication from the Law Society that contemplates a response.*
- [42] Counsel submitted that the evidence is clear that the Member was careless in her response to the LSA. Counsel submitted that it is perplexing that the Member did not just admit that her original response was inaccurate regarding the transcript issue.
- [43] The Citation refers to failure by the Member to be "candid". Counsel reminded the Committee that they have broad discretion to find conduct deserving of sanction.
- [44] Counsel encouraged the Committee to find the Member not guilty of conduct deserving of sanction on Citation 3 as there is no evidence that the conduct was "wilful, deliberate or reckless" on the part of the Member. Although the conduct of the Member could not be said to be "trivial or technical", Counsel submitted that it falls short of conduct deserving of sanction.

SUBMISSIONS OF COUNSEL FOR THE MEMBER

- [45] Counsel for the Member submitted that the comments of the Member in her original response to the LSA relating to the transcript issue was a "throw away statement" which, if taken out of the response, nothing would rest on it. Counsel submitted that if there were intent to mislead, why would this be done in the context of an assertion that it was so easy to refute. Counsel submitted that there was no intent to mislead and that nothing turned on the transcript. The statement was categorised by Counsel as being "sloppy, an error, an oversight, a mistake and not an overt attempt to mislead".

DECISION ON CITATION 3

- [46] After a brief adjournment, the Committee dismissed Citation 3. The Member believed that she did not order transcripts and had no reason present to her mind that ought to have concerned her about the accuracy of her response. The circumstances support the Member's explanation, including that she had a very busy matrimonial practice at the time and was often travelling. She merely overlooked searching in another place for transcripts. Her oversight should not be equated with sanctionable conduct. The

Member's response to the Law Society when challenged with the mis-statement implicitly recognized that the original statement to the Law Society was not accurate. The Committee concluded that the evidence did not support sanctionable conduct in the Member's response to the Law Society.

SUBMISSIONS ON SANCTION FOR CITATION 2

[47] The admission of guilt by the Member on Citation 2 is for all purposes a finding that the Member is guilty of conduct deserving of sanction and the Committee invited submissions from Counsel on the appropriate sanction in this case.

Submissions of Counsel for the LSA

[48] Counsel for the LSA submitted the conduct record of the Member and the Estimated Statement of Costs, which were entered as Exhibits 32 and 33, respectively, in the Hearing with the consent of the Committee and Counsel.

[49] Counsel submitted that this was an appropriate case for a reprimand and an award of actual costs of the Hearing.

[50] Counsel submitted that the conduct of the Member was serious and that the Committee should not be distracted by the circumstances of the underlying matrimonial litigation. The Member failed in her duty to act professionally, which affects the reputation of the legal profession generally. The Member took advantage of her position as a lawyer, which affected and was taken note of by a member of the public. Counsel submitted that this is fundamental misconduct and the underlying litigation is not relevant. The Member put herself in the place of the adjudicator when not entitled to do so.

[51] Counsel submitted that there were aggravating factors when the Member took the step of treating a contested divorce action as a "shelf divorce" in the face of clearly contested proceedings on the issues of spousal maintenance and property. Counsel pointed out that the spousal support order that had been granted by the Court was clearly an interim order and that no reasonable lawyer could conclude that the complainant was satisfied with this order and cause it to be placed in the final order without notice to the complainant. There were cross-examinations on discovery, 44 letters exchanged before the interim support application, at which application the complainant appeared and contested the award. The application was not brought when the complainant was represented by counsel and the Member could have waited for the time for a defence to expire before applying for the final order, which demonstrates deliberation on the part of the Member to take advantage of the complainant when in a disadvantaged position.

[52] Counsel submitted that the Code sets a higher ethical standard for lawyers when the other party is un-represented and referred the Committee to the following provisions of the Code:

Chapter 1, Rule 6 A lawyer must be courteous and candid in dealings with others.

Commentary C.6, second paragraph

If the lawyer is dealing on a client's behalf with a non-represented person, the duty of candour requires special efforts to clarify the lawyer's role...

Chapter 1, Rule 7 A lawyer's position must not be used to take advantage of any person or situation.

Commentary C.7, Second Paragraph:

With regard to third parties, the taking of an unfair advantage equates to conduct that a normal person, acting reasonably, would consider to be dishonourable...

Chapter 4

Commentary C.2, fifth paragraph

When dealing in a professional capacity with a non-lawyer representing another person, or with a person not represented by counsel, a lawyer has the same general duties of honesty, courtesy and good faith that are owed to professional colleagues. In addition, a lawyer may have special duties if the person is unrepresented...

Counsel submitted that the conduct of the Member was in direct contravention of the foregoing provisions of the Code and demonstrate dishonourable conduct and a taking of advantage of the Complainant.

Counsel submitted that no weight should be given to the fact that the client of the Member was entitled to a divorce and that this matter is about the perception of the public.

[53] Counsel referred the Committee to the Hearing Guide at paragraph 60, setting forth the general factors to be taken into account in the sanctioning process. In particular, Counsel referred to the need to maintain the public's confidence and the integrity of the profession and submitted that any reprimand must be strong and a clear denunciation of the conduct at issue.

[54] Counsel further referred the Committee to paragraph 61 of Hearing Guide setting forth the specific factors to be taken into account in the sanctioning process and, in particular, paragraphs a) and b) thereof, which read as follows:

61. *More specific factors may include the following.*

a) *The nature of the conduct:*

(i) *Does the conduct raise concerns about the protection of the public?*

- (ii) *Does the conduct raise concerns about maintaining public confidence in the legal profession?*
 - (iii) *Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties to the court, other lawyers or the Law Society)*
 - (iv) *Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?*
- b) *Level of intent: the appropriate sanction may vary depending on whether the member acted intentionally, knowingly, recklessly or negligently. In some cases, the need to protect the public or maintain the public confidence in the legal profession may require a particular sanction regardless of the state of mind of the member at the time.*

[55] Counsel submitted that some information had been introduced as to the nature of the Member's practice which she submitted as probably not relevant to the issue of sanctioning.

SUBMISSIONS OF COUNSEL FOR THE MEMBER

- [56] Counsel for the Member indicated that he agreed with Counsel for the LSA that the appropriate sanction in this case is a reprimand.
- [57] Counsel submitted that the Member should have sent a letter to the Complainant of her intention to proceed with the divorce judgment and that the Member acknowledges this. Counsel acknowledged that the conduct of the Member may "have a tendency to give the public a dim view of how lawyers do things". Counsel disagreed that there was an intention to take advantage of the Complainant in this case and that it was the intention of the Member to merely bring the matter to a conclusion. He pointed out to the Committee that any order for spousal support can be varied on application to the Court.
- [58] Counsel submitted that no steps were taken in the actions of his client to address property issues, that the divorce was non contentious and that the issue of support had already been dealt with by the interim order of the Court.
- [59] Mr. Young pointed out that a final order for support has more import with respect to review than an interim order.
- [60] Mr. Eamon inquired as to what led the Member to engage in the conduct giving rise to the Citation. Counsel indicated that there was no serious issue in this case on the grounds for divorce and that the course of conduct of the parties had led to their separation. Counsel submitted that spousal support became a non-issue once agreement was ultimately reached on the division of matrimonial property and indicated that the client of the Member received a portion of the Complainant's pension.

[61] Mr. Young requested that Counsel speak to mitigating factors in this case. Counsel submitted that the conduct of the Member is at the low range of the scale of severity and a "one-time event" that will not be repeated. Counsel agreed that paragraph 61 a)(ii) applies in these circumstances (see above). Counsel submitted that a reprimand and costs would be a sufficient sanction in this case.

FURTHER SUBMISSIONS OF COUNSEL FOR THE LSA

[62] Counsel for the LSA again stressed that the underlying litigation should be irrelevant in the Committee's consideration of this matter and that the Committee should disregard the comments of Counsel for the Member relating thereto. Counsel submitted that the characterization of Counsel for the Member of the difference in the interim and final order for spousal support is wrong and that there are "legal" consequences here that go to intention. Counsel further pointed out that it is not possible to obtain an order regarding the division of matrimonial property by a default/desktop divorce process.

[63] Counsel submit that there still does not exist satisfactory evidence as to why the Member engaged in the conduct at issue. The only explanation provided is in the second paragraph on page 2 of the Member's letter of October 24, 2006 to the LSA (Exhibit 11), where she states "I applied to note Mr. [S] in default as he did not file a Counterclaim for Divorce and did not oppose any of the relief or dispute any of the information in the Statement of Claim." Counsel reiterated that it remains open to the Committee to find that the Member intentionally proceeded to gain an advantage over the Complainant.

FURTHER SUBMISSIONS OF COUNSEL FOR THE MEMBER

[64] Counsel for the Member submitted that if the matter is distilled to its simplest component, all concerns would disappear if the Member had sent a letter to the Complainant indicating her intentions.

DECISION AS TO SANCTION

[65] The Committee adjourned to consider the appropriate sanction.

[66] The Committee accepted the submissions of Counsel that the appropriate sanction in this case is to issue a reprimand to the Member.

[67] In making its decision on sanction, the Committee was mindful of the seriousness of the conduct of the Member giving rise to Citation 2 and the general and specific factors to be considered as set forth in paragraphs 60 and 61 of the Hearing Guide. In particular, the Committee refers to paragraphs 60 a) and e) and paragraphs 61 a), (i), (ii) and (iii) of the Hearing Guide, which read as follows:

60 a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern itself.

60 e) Denunciation of the conduct.

61 a) *The nature of the conduct:*

- (i) *Does the conduct raise concerns about the protection of the public?*
- (ii) *Does the conduct raise concerns about maintaining public confidence in the legal profession?*
- (iii) *Does the conduct raise concerns about the ability of the legal system to function properly?*

[68] The Conduct deprived a member of the public, representing himself in the legal proceedings, of the fundamental rights of notice and to be heard by the Court before a decision was made. In light of the Complainant's suggestion to the Court that it shove the interim support decision into a body part, no lawyer could be mistaken that the Complainant contested the suit. However, the Committee was not satisfied that the evidence supported an inference of dishonest intention on the part of the Member or intent to breach the applicable standards. The Member explained by letter that she applied to note in default because she believed the Complainant did not oppose the relief sought. That belief was wrong, but without the benefit of cross-examination of the Member on the point or other evidence, the Committee cannot conclude that the Member did not hold this belief at the time or acted with dishonest intent. In the circumstances, the Committee concludes that the evidence does not rise above error of judgment. The Committee was further satisfied that the conduct will not recur, and that integrity is not in issue.

[69] The Member will be required to pay the actual costs of the Hearing, not to exceed the amount set forth in the Estimated Statement of Costs (Exhibit 33), to be paid within two months of the Actual Statement of Costs being provided to Counsel for the Member.

[70] The Chair administered the reprimand, which is annexed as Appendix II to this Report.

[71] With the concurrence of Counsel, the Committee ordered that the Exhibits will be made available to the public with the names of clients redacted.

[72] The Committee ordered that there be no Notice to the Profession and no referral to the Attorney General in this matter.

[73] The Hearing was terminated.

DATED this 16th day of December, 2009.

Dale Spackman, QC (Chair)

James Eamon, QC (Member)

Anthony Young (Member)

APPENDIX I

STATEMENT OF FACTS

IN THE MATTER OF THE LEGAL PROFESSION ACT

**IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF PATRICIA McMILLAN
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

STATEMENT OF FACTS

1. Patricia McMillan is a member of the Law Society of Alberta having been admitted to membership on June 21, 1985. At all times relevant to these Citations she was practicing with the firm Peterson & Purvis LLP in Lethbridge, Alberta.
2. In October 2006 the Law Society received a complaint against Ms. McMillan from FS. FS was in matrimonial litigation with his wife SS. Ms. McMillan was representing SS.
3. Citations were directed at the conclusion of the formal review of the complaint. Ms. McMillan intends to tender an admission of guilt on the following citation and makes these admissions of fact in support of her admission of guilt:

CITATION 2

IT IS ALLEGED THAT you took unfair advantage of the Complainant given that he had no legal counsel between June 8, 2006 and June 20, 2006, and that such conduct is deserving of sanction.

4. On January 27, 2006 Ms. McMillan filed a Statement of Claim for Divorce and Division of Matrimonial Property on behalf of the wife, SS. The husband, FS, was personally served with the Statement of Claim on the same day.
[Exhibit 11, Tab 1]
5. FS retained Robert Harvie to represent him in the matter. Mr. Harvie did not file a response to the Statement of Claim. The parties to the action and their counsel had a “four way” meeting. Ms. McMillan felt that the meeting largely concluded the issues outstanding and drafted Minutes of Settlement which were sent to Mr. Harvie. All of this occurred prior to April 12, 2006.
[Exhibit 11]

6. By letter dated April 24, 2006 Mr. Harvie made a formal offer of settlement regarding some of the property issues.
[Exhibit 6, Tab 6]
7. An Examination for Discovery was held on May 31, 2006.
[Exhibit 12, Tab 1; pages 32 - 33]
8. From February 6, 2006 through June 9, 2006 the litigation proceeded on a very active basis, with in excess of forty letters being exchanged by counsel.
9. In early June Ms. McMillan restored the application of S.S. for spousal support to the chambers list for June 13, 2006, on notice to Mr. Harvie.
10. On June 9, 2006 Mr. Harvie served a Notice of Ceasing to Act on Ms. McMillan together with outstanding undertakings from the Discovery. Ms. McMillan returned the Notice of Ceasing to Act, with service acknowledged, on June 12, 2006.
[Exhibits 25 f& 26]
11. On June 13, 2006 Ms. McMillan attended Chambers and proceeded with the application for interim spousal maintenance. FS appeared without counsel and proceeded with the application, making representations on his own behalf. An Order for spousal maintenance in the sum of \$1,100, retroactive to March 1, 2006 was made by Justice Langston.
[Exhibit 11, Tab 2]
12. On June 15, 2006 Ms. McMillan prepared and filed a Praeceptum to Note in Default and a Default Judgment package.
[Exhibit 11, Tab 3]
13. F.S. was not given any notice of the intention of Ms. McMillan to proceed by default to obtain a Divorce Judgment.
14. On June 26, 2006 a Divorce Judgment issued.
[Exhibit 13, Tab 1]
15. Ms. McMillan did not serve F.S. with the Divorce Judgment. Ms. McMillan relied on the practice of the Clerk's Office to send a copy of the Divorce Judgment directly to the Respondent for uncontested desk divorces.
16. FS retained new counsel June 28, 2006.

17. A settlement was reached regarding all outstanding matters in January 2007 which included a resolution of the outstanding matrimonial property issues by payment of the sum of \$67,000 to FS and the spousal support Order was vacated and the arrears of support struck out, upon consent, by Order of Mme. Justice Martin.

[Exhibit 15 and related Tabs]

ALL OF THESE FACTS ARE ADMITTED THIS 3rd DAY OF SEPTEMBER, 2009.

Patricia McMillan

APPENDIX II

LAW SOCIETY OF ALBERTA

CONDUCT HEARING
PATRICIA MCMILLAN
SEPTEMBER 3, 2009

REPRIMAND ISSUED BY THE CHAIR

The Panel was not satisfied on the evidence that there was an intention on the part of the Member to take advantage of the Complainant or to breach the obligations of the Member to advise the Complainant of the actions she intended to take. However, the very act of the Member obtaining default judgment in the circumstances constitutes conduct deserving of sanction, as has been admitted by the Member.

In considering our decision on sanction, we did not consider the circumstances of the underlying litigation, nor did we consider the anticipated outcomes at the time of the conduct at issue or the actual outcomes.

The conduct of the Member in this case should be considered serious misconduct and a clear breach of the standards of ethics and professionalism which is demanded by the public and the legal profession.

In considering the general factors enunciated in the Hearing Guide to be taken in consideration to determine the appropriate sanction, we agree with Counsel for the Law Society that there must be a clear denunciation of the conduct in question. The Code of Conduct applicable to lawyers in Alberta places high standards of ethics on lawyers in all circumstances, but particularly in circumstances where the opposing party is unrepresented. Even if the Complainant had been represented at the time, the conduct of the Member would not have met those ethical standards.

A lawyer must not take unfair advantage of a person or situation, nor act in a manner that might weaken public respect for the justice system. Both of these have occurred here.

The conduct of the Member deprived the Complainant of his fundamental right to be heard by the Court before final judgment was rendered. The conduct of the Member led to this result, which is unacceptable.