

**THE LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT**

**IN THE MATTER OF THE *Legal Profession Act*,
and in the matter of a Hearing regarding the conduct of
GENEVIEVE MAGNAN, a Member of the Law Society of Alberta**

INTRODUCTION

1. On June 19, 2014, a Hearing Committee of the Benchers convened at the Law Society of Alberta office in Calgary for the purpose of conducting a hearing into the conduct of Genevieve Magnan. The Panel comprised Nancy Dilts, QC, Benchler (Chair), Sarah King-D'Souza, QC, Benchler, and Cal Johnson, QC, Benchler. The Law Society of Alberta ("LSA") was represented by Nicholas Maggisano. Ms. Magnan did not appear and did not have counsel.
2. Ms. Magnan faced proceedings on two citations:
 1. *It is alleged that you misled or attempted to mislead another lawyer, B.H., and that such conduct is conduct deserving of sanction.*
 2. *It is alleged that you misled or attempted to mislead the Court by suppressing documents which ought to have been disclosed, and that such conduct is conduct deserving of sanction.*
3. At the time of the hearing, Ms. Magnan was a suspended member of the LSA, the suspension having arisen as a result of other matters.

PRELIMINARY MATTERS

4. At the outset of the hearing, the Hearing Committee was advised that it was unclear whether Ms. Magnan would be present at the hearing. In fact, Ms. Magnan did not appear and did not arrange for counsel to appear on her behalf. Counsel for the LSA made submissions to the Hearing Committee as if a request had been made by Ms. Magnan for an adjournment of the proceedings, although no such request had been received.
5. Counsel for the LSA provided the Hearing Committee proof of service by registered mail of the notice documents respecting the hearing. The hearing date had been scheduled in December and formal notice of the hearing date had been sent by registered mail and receipt acknowledged in January 2014. The Hearing Committee was satisfied that Ms. Magnan had due and appropriate notice of the proceedings.
6. Additional evidence was provided to the Hearing Committee around whether Ms. Magnan was able and likely to attend the hearing. These communications, including emails the day prior to and the day of the hearing, confirmed efforts made by the LSA to assist Ms. Magnan to facilitate her attendance at the hearing. None of these communications, including emails the day prior and the day of the hearing, included a request from Ms. Magnan for an adjournment.
7. The day prior to the hearing, Mr. Maggisano received an email from Ms. Magnan indicating that Medicine Hat was likely to declare a state of emergency and that she was

preparing to evacuate and would be helping friends affected by flooding. She indicated she would not be able to attend the hearing. Further information provided to the Hearing Panel at the outset of the hearing confirmed that notwithstanding earlier concerns, no state of emergency was declared in Medicine Hat and, in fact, the LSA's sole witness, BH, had traveled from Medicine Hat to attend the hearing.

8. On June 19, 2014, the morning of the hearing, Ms. Magnan communicated with Mr. Maggisano indicating "I just want out of the LSA. Conducting hearings is just a waste of time and money." She also said "I am innocent of these charges and you know it. I am in a situation where I cannot defend myself and you are taking advantage." She did not request that the hearing be adjourned.

9. No application for an adjournment was before the Hearing Panel. The LSA was ready to proceed with the hearing as scheduled and its witness was present from Medicine Hat. While there was some indication from Ms. Magnan that she was not planning to attend and that she did not intend to make any submissions, her intentions were not clear. In all the circumstances, including the fact that the LSA witness was present and efforts had been made by the LSA to assist Ms. Magnan to attend the hearing, the Hearing Panel concluded that it was appropriate to proceed with the hearing.

SUMMARY OF RESULT

10. At the conclusion of the hearing, the Hearing Panel found Ms. Magnan guilty of conduct deserving of sanction with respect to both citations. The Hearing Panel was satisfied that both the documentary evidence and the witness's testimony demonstrated that Ms. Magnan misled or attempted to mislead counsel and the Court.

11. With respect to sanctioning, LSA counsel sought suspension of Ms. Magnan. Considering all factors relevant to sanctioning, the Hearing Panel concluded that there was insufficient basis to warrant suspension. The Hearing Panel concluded that Ms. Magnan should receive a reprimand and a fine of \$2,000. As Ms. Magnan was not present for any part of the proceedings, a reprimand was not issued at the time, but is contained in these written reasons. In addition, Ms. Magnan was ordered to pay the costs of the hearing as reflected in the Estimated Statement of Costs entered as Exhibit 17 in the proceedings in the amount of \$6,019.12. Ms. Magnan was given 90 days from service of the Statement of Costs to pay the fine and costs.

EVIDENCE AND FINDINGS

12. At the time of the matters giving rise to the complaints, Ms. Magnan was a sole practitioner in Medicine Hat, Alberta and was counsel for LD in an application for interim custody respecting the infant V. LD was V's biological mother. The complainant, BH, is a lawyer practicing in Medicine Hat and in these matters represented the director of Child, Youth & Family Services in the interim custody application. RR, also a lawyer in Medicine Hat, represented the parties JB and KC who were seeking interim custody of the infant V.

13. During the course of highly contentious proceedings before Judge Oishi in Provincial Court, it became evident to BH that notwithstanding Ms. Magnan's assurance that she had provided opposing counsel with her expert's entire file, certain pages of the file, including information BH considered to be material to issues before the court, had been omitted from the copies provided to both BH and RR. Proceedings were adjourned with a clear indication on the

record that BH would review Ms. Magnan's expert's original file and determine which pages were omitted from the copy provided by Ms. Magnan to BH and to RR.

14. BH described what he did to compare his copy of the file with the expert's file. BH took reasonable and appropriate steps to satisfy himself as to the procedure followed within the expert's office to copy the file and concluded that the omission did not occur within the expert's office but occurred after the file was provided by the expert to Ms. Magnan. Given the advice he received from the expert, this was a reasonable conclusion.

15. Approximately 50 pages were not provided to counsel. There is no dispute that some of those documents were properly held back as privileged; however other documents, including a handwritten note from Ms. Magnan's client to the expert, were producible, relevant and arguably damaging to Ms. Magnan's client.

16. BH attended before the Hearing Committee to give evidence on behalf of the LSA. The Hearing Committee found BH to be measured, reasonable and considered. In recalling events, he was assisted by a memo to file entered into evidence as Exhibit 15 that was created by him on June 4, 2010 when the matter of the missing documents arose. His evidence before the Hearing Committee was entirely consistent with that memo and also consistent with excerpts from the transcripts of the proceedings before Judge Oishi. The Hearing Panel accepted BH's evidence as credible and an accurate portrayal of events.

17. BH's evidence about how the omissions were discovered and the response from Ms. Magnan at the time led him to the belief that Ms. Magnan had vetted the file and removed certain documents, including documents that were producible and relevant.

18. Ms. Magnan's response to the discovered omission both at the time it was identified during the Provincial Court proceedings and in her response to the LSA contains numerous inconsistencies. Initially she seemed to suggest she did not have the missing report. In another instance, she suggested that the documents were properly redacted on a claim of privilege. And in yet another instance, she suggested she instructed her office manager to provide counsel with the entire file. Judge Oishi, in reasons respecting an application brought by RR's clients for costs against Ms. Magnan personally, made the following observations regarding Ms. Magnan's response to the allegation that she failed to provide a complete copy of her expert's file to opposing counsel:

Ms. Magnan obtained a complete copy of Dr. B's file and ostensibly provided it to opposing counsel without revealing that some of the pages had been omitted. Once this omission was discovered by other counsel and revealed to the court, Ms. Magnan provided explanation in part by blaming staff who did the photocopying and in part by stating that some of those pages were considered to be privileged information and she, therefore, believed she had the right to withhold them on behalf of her client, LD, to whom they related.

Having heard her explanations and witnessing her demeanour as she made them, I considered her actions and explanations perhaps suspect.

19. Particularly with respect to Ms. Magnan's responses to the LSA, in addition to demonstrating the inconsistencies noted above, her responses are inflammatory and at times inappropriate and she tries to deflect attention from the issue.

FINDINGS OF THE HEARING COMMITTEE

20. The citations brought against Ms. Magnan mirror two provisions of the Code of Professional Conduct (the “Code”) in place at the time of the complaint and governing lawyer conduct. Chapter 4, Rule 1 says:

A lawyer must not lie to or mislead another lawyer.

Chapter 10, Rule 14 says:

A lawyer must not mislead the court nor assist a client or witness to do so.

21. The crux of each Chapter 4, Rule 1 and Chapter 10, Rule 14 is integrity, one of the fundamental principles underlying the Code and the profession generally. In the Preface to the Code, it provides:

Two fundamental principles underlie this Code and are implicit throughout its provisions. First, *a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession.* Second, a lawyer’s conduct should be above reproach. (emphasis added)

22. Much has been written on the importance of integrity not only as foundational to the profession but to our system of justice. It also goes squarely to the question of public confidence in the profession.

23. The Hearing Committee did not have the benefit of Ms. Magnan’s presence in the hearing room to be able to assess her credibility or test her evidence or version of events. However, notwithstanding Ms. Magnan’s absence, the Hearing Committee had sufficient evidence before it, including various transcripts of the proceedings before Judge Oishi, BH’s file note prepared at the time the documents were found missing and the testimony of BH, on which to determine whether Ms. Magnan had misled or attempted to mislead counsel and the court. There was remarkable consistency amongst these three sources of evidence, permitting the Hearing Committee to conclude from all of the evidence that Ms. Magnan attempted to mislead counsel and the court with respect to the production of her expert’s file.

24. Ms. Magnan had a positive obligation to inform both counsel and the court that documents had been removed from the expert’s file and to state the basis upon which those documents were removed. That course of conduct would have maintained the integrity of the justice system. She did not do so. In fact, she permitted both counsel and the court to believe, for a time, that the entire file had been provided when clearly it had not. When she was confronted by the omission and then following, her responses were at times inconsistent, and very often inappropriate and inflammatory.

25. The *Legal Profession Act* (R.S.A. 2000, c. L-8) sets out the general definition of conduct deserving of sanction:

49(1) For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, that

(a) is incompatible with the best interests of the public or of the members of the Society; or

(b) tends to harm the standing of the legal profession generally,

is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

26. The commentary to the Code in Chapter 4 provides some assistance as to the concept of misleading:

The concept of "misleading" includes creating a misconception through oral or written statements, other communications, actions or conduct, failure to act or silence.

In all the circumstances, the Hearing Committee concluded that Ms. Magnan attempted to mislead both counsel and the court with respect to her expert's file. Ms. Magnan is therefore guilty of conduct deserving of sanction with respect to both citations.

SANCTION

27. In determining an appropriate sanction, the Hearing Committee is to take a purposeful approach. The overarching purpose of the sanctioning process is to protect the public, preserve high professional standards, and preserve public confidence in the legal profession: *Law Society of Alberta v. Mackie*, 2010 ABLS 10. The purpose of sanctioning is not to "punish offenders and exact retribution": *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie (at page 26-1).

28. Ms. Magnan's disciplinary record was entered as an Exhibit in the proceedings showing that Ms. Magnan has no previous disciplinary record.

29. LSA counsel advised that notice had been provided to Ms. Magnan that the LSA would seek suspension of the member if found guilty on the citations. LSA counsel argued that suspension was warranted as the conduct brought into question Ms. Magnan's integrity and her responses to the LSA brought into question her governability. LSA counsel argued that suspension was warranted both to ensure the protection of the public and to maintain public confidence in the profession. Suspension would also serve the purpose of general deterrence to the profession and the denunciation of Ms. Magnan's conduct.

30. The *Legal Profession Act*, Section 72(1) requires that a Hearing Committee, on finding a member guilty of conduct deserving of sanction, disbar, suspend or reprimand the member.

31. When deciding how the public interest should be protected through the sanction process, the Hearing Committee is invited to take into account various factors, including a) the nature and gravity of the misconduct, b) whether the misconduct was deliberate, c) whether the misconduct raises concerns about the lawyer's honesty or integrity, d) the impact of the misconduct on the client or other affected person, e) general deterrence of other members of the profession, f) specific deterrence of the particular lawyer, g) whether the lawyer has incurred other serious penalties or other financial loss as a result of the circumstances, h) preserving the public's confidence in the integrity of the profession's ability to properly supervise the conduct of its members, i) the public's denunciation of the misconduct, j) the extent to which the offensive conduct is clearly regarded within the profession as falling outside the range of acceptable conduct, and k) imposing a penalty that is consistent with the penalties imposed in similar cases. In addition, the Hearing Committee considers mitigating circumstances that may temper the sanctions that may be imposed including the lawyer's conduct since the misconduct, the lawyer's prior disciplinary record, the age and experience of the lawyer and whether the lawyer

entered an admission of guilt, thereby showing an acceptance of responsibility: *Law Society of Alberta v. Elgert*, 2012 ABL 9.

32. In considering all of these factors, the Hearing Committee concluded that Ms. Magnan's conduct, while of serious concern, did not warrant suspension and therefore imposed a reprimand, plus fine and costs. Unlike disbarment or suspension, a reprimand does not limit a member's right to practice. It is, however, a public expression of the profession's denunciation of the lawyer's conduct and is to deter future misconduct by the member and within the profession: *Law Society of Alberta v. Westra*, 2011 CanLii 90716.

33. The Hearing Committee concludes that Ms. Magnan receive a reprimand and be ordered to pay a fine of \$2,000. In imposing this sanction, it should be noted that of concern to the Hearing Committee was the fact that Ms. Magnan did not appear at the proceedings (notwithstanding the offer of support and assistance to permit her to do so) and did not appear to place importance on the proceedings, that she failed to demonstrate any responsibility or remorse for her conduct and instead attempted to impugn the actions of others, and that her underlying conduct raises concerns about integrity, bringing into question the reputation of the profession generally. The Hearing Committee is further concerned about Ms. Magnan's governability given the nature of her responses to these allegations to the LSA and her various and sometimes conflicting versions of how the omission occurred. Mitigating in favour of a reprimand and fine over a suspension was Ms. Magnan's clear disciplinary record.

34. Counsel for the LSA tendered an Estimated Statement of Costs. The Hearing Committee orders that Ms. Magnan pay the costs of the hearing of \$6,019.12 as set forth in the Estimated Statement of Costs.

35. As a result, having regard to all of the factors discussed above, the Hearing Committee makes the following order:

- a) Ms. Magnan shall receive a reprimand to be delivered by the Chair of the Hearing Committee in the written reasons;
 - b) Ms. Magnan is ordered to pay a fine of \$2,000;
 - c) Ms. Magnan is order to pay costs of the proceedings in the amount of \$6,019.12;
- and
- d) Ms. Magnan shall have 90 days from service of the Costs Order to pay the fine and the costs.

REPRIMAND

36. Ms. Magnan, a preeminent rule of professional conduct is that lawyers must discharge all duties owed to their clients, the court, the public and other members of the profession with integrity. Integrity is a cornerstone of not only of our profession, but of our legal system. It is the basis upon which the public places its confidence in our profession as a whole.

37. Integrity is essential to the effective operation of our legal system. Counsel must be able to rely on assurances from other counsel. Not only does it protect a lawyer's reputation, integrity in dealing with members of the profession allows for efficient and effective conduct of proceedings in their client's interest. When before the court, it is without question that Judges must be able to rely upon the integrity of the lawyers who appear before them.

38. As a member of our profession, you are expected to exhibit conduct that is beyond reproach, to be forthright and forthcoming, to honour the integrity of the justice system and to operate within it to preserve that integrity. To do otherwise is to not only harm your own reputation with other members of the profession and the judiciary, but to harm the reputation of lawyers generally. Lawyers who, by their conduct, demonstrate a lack of integrity are likely to lose their right to practice.

39. In the facts before us, Ms. Magnan, this was not a matter of a momentary lapse of judgment. You failed to address and correct your conduct during the Provincial Court proceedings and then again as you responded to the LSA. As a Hearing Committee, we are concerned with your demonstrated lack of accountability. You contrived a series of explanations to cover your action, blamed others, and inappropriately attempted to deflect attention from your conduct. You failed to demonstrate remorse or to apologize to opposing counsel or the court for your conduct. The Hearing Committee sees a pattern of behaviour and is particularly concerned that you, Ms. Magnan, do not see that pattern for yourself.

40. As a Hearing Committee, we hope you reflect on these words and upon these issues and on the importance of acting with integrity and preserving the integrity of the justice system.

CONCLUDING MATTERS

41. In the event of any request for public access to the evidence heard in these proceedings, the Exhibits and the transcript of proceedings shall be redacted to protect the identity of the Member's former clients, and any information subject to proper claims of privilege.

42. No referral to the Attorney General is directed.

43. There shall be no Notice to the Profession.

Dated at Calgary, Alberta this 28th day of August, 2014.

Nancy Dilts, QC - Chair

Sarah King-D'Souza, QC – Bencher and Member

Cal Johnson, QC – Bencher and Member