



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 Carol Lyn Berger, a Member of the Law Society of Alberta.

A. Jurisdiction and Preliminary Matters

1. A Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of Carol Lyn Berger on September 6, 2007. The Committee consisted of Douglas R. Mah, QC, Chair, Hugh Sommerville, Q.C., Committee member and Rodney Jerke, QC, Committee member. The LSA was represented by Lois J. MacLean. The Member was present and was represented by Philip Lister, QC.
2. Exhibits 1 through 4, consisting respectively of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor with acknowledgement of service, the Notice to Attend with acknowledgement of service and the Certificate of Status of the Member, were admitted into evidence by consent. Exhibit 1A is a second letter of appointment of the Hearing Committee, indicating that Rod Jerke, Q.C. replaced Wayne Jacques as a Committee Member hearing this case. Exhibit 1A was also admitted by consent. The admission of these documents established the jurisdiction of the Committee.
3. There was no objection by the Member's counsel or counsel for the LSA regarding the membership of the Committee.
4. The Certificate of Exercise of Discretion was entered as Exhibit 5. No request for a private hearing had been received and therefore the hearing proceeded in public.
5. Exhibits 1 through 5 aforesaid, along with Exhibits 6 through 27, were contained in an exhibit binder provided to the Committee members and the parties. Exhibits 6 through 27 were also admitted into evidence by consent. During the course of the hearing, the following additional exhibits were also entered into evidence by consent:
 - Exhibit 28 – Agreed Statement of Facts and Admission of Guilt dated August 28, 2007 and signed by the Member;
 - Exhibit 29 – letter of August 24, 2007 from R. Gregory Bush, Director, Lawyer Conduct, LSA to Lois MacLean, counsel for the LSA, certifying that the Member has no LSA discipline record as at the date of the letter;
 - Exhibit 30 – estimated Statement of Costs; and
 - Exhibit 31 – proposed reinstatement conditions.

B. Citations

6. As indicated in the Notice to Solicitor (Exhibit 2), the Hearing Committee is inquiring into two citations:

“It is alleged that you failed to respond in a timely manner to communications from the Complainant, the Legal Aid Society, and that such conduct is conduct deserving of sanction.

It is alleged that you failed to respond in a timely manner to communications from another lawyer that contemplated a reply, and that such conduct is conduct deserving of sanction.”

7. During the hearing, upon application by LSA counsel with no objection from counsel for the Member, it was requested that the Hearing Committee consolidate the two citations to read as follows:

“The Member failed to respond in a timely manner to communications from the Complainant, the Legal Aid Society, and to communications from another lawyer that contemplated a reply, and that such conduct is conduct deserving of sanction.”

C. Agreed Statement of Facts and Admission of Guilt

8. The Agreed Statement of Facts and Admission of Guilt (Exhibit 28) states as follows:

1. Ms. Berger was admitted as a member of the Law Society in 1992. She remained an active member until March, 2006 at which time she transferred to the inactive list. She was an active member at all times relevant to this complaint.
2. Ms. Berger faces two citations:
 - a) the Member failed to respond in a timely manner to communications from the Complainant, the Legal Aid Society, and that such conduct is conduct deserving of sanction.
 - b) the Member failed to respond in a timely manner to communications from another lawyer that contemplated a reply, and that such conduct is conduct deserving of sanction.

Facts Relating to the First Citation

3. Ms. Berger was appointed by the Legal Aid Society to act on behalf of three clients on family law matters. The clients were:

- G.L.	Certificate C
- B.C.	Certificate C
- J.S.W.	Certificate C
4. On July 6, 2004, Mr. L. wrote a letter of complaint to the Legal Aid Society regarding the conduct of his file. Legal Aid forwarded that letter to Ms. Berger on July 14, 2004, with a cover letter requesting a reply to Mr. L.’s concerns. (*Exhibit 6, Tab 3*)
5. On August 23, 2004, the Legal Aid Society wrote to Ms. Berger indicating that they had not received a response and asking for a reply by the end of August. (*Exhibit 6, Tab 4*)

6. On Oct. 29, 2004, the Legal Aid Society wrote to Ms. Berger indicating that they had not received a response to the previous two letters, and asking for a reply by November 15th. (*Exhibit 6, Tab 5*)
7. On Nov. 17, 2004, the Legal Aid Society wrote to Ms. Berger indicating that they had not received a response to the previous three letters, and asking for a reply by Nov. 30th. The letter was copied to the Law Society of Alberta. (*Exhibit 6, Tab 6*)
8. On Dec. 21, 2004, the Legal Aid Society wrote to the client, G.L., advising that they had not had a response from Ms. Berger, and that they were “dealing with the Law Society in an attempt to get a response ...”. The letter further indicated that they were writing off the amount billed by Ms. Berger on the L. file, and the amounts paid to date by Mr. L. would be applied to the bill of the new lawyer assigned to the file. (*Exhibit 6, Tab 8*)
9. In the meantime, the Law Society had written to Legal Aid in reply to the copy of the November 17th letter (from Legal Aid to Ms. Berger) to enquire as to whether it was Legal Aid’s intent to make a complaint. (*Exhibit 6, Tab 7*)
10. On Dec. 23, 2004, Legal Aid replied to the Law Society indicating that they had only intended to provide notice of a possible complaint, but indicated that if no response was received from Ms. Berger to the Nov. 17th letter, a formal complaint would be lodged. (*Exhibit 6, Tab 9*)
11. In May of 2005, Legal Aid received a letter of complaint from B.C., who had also been represented by Ms. Berger under Legal Aid coverage. Legal Aid forwarded the complaint to Ms. Berger by letter dated May 30th, and asked for a reply. Legal Aid’s letter and the accompanying complaint from Mr. C. are *Exhibit 6, Tab 10*.
12. In June of 2005, Legal Aid received a letter of complaint from J.S.W., who had also been represented by Ms. Berger, under Legal Aid coverage. Legal Aid forwarded the complaint to Ms. Berger by letter dated June 23rd, and asked for a reply. Legal Aid’s letter and the accompanying complaint from Ms. S.W. are *Exhibit 6, Tab 11*.
13. On August 17, 2005, Legal Aid wrote to Ms. Berger advising that they had not received a response to any of the 4 letters regarding Mr. L., or to the letters regarding Mr. C. and Ms. S.W. The letter from Legal Aid indicated that if Ms. Berger failed to respond to this letter by Sept. 5th, a formal complaint would be made to the Law Society. (*Exhibit 6*)
14. The August 17th letter was copied to the Law Society. In response to that letter, Mr. Hillborn of the Law Society wrote to Ms. Berger on August 23rd, asking for a response within a reasonable time. (*Exhibit 8*)
15. On Sept. 7th Ms. Berger responded to Legal Aid with respect to the L. file. The letter provided basic information as to the conduct of the file, but did not address the substance of Mr. L. complaint, or the failure by Ms. Berger to respond to Legal Aid’s previous letters. Ms. Berger’s letter is *Exhibit 10*.
16. On Sept. 26th, Legal Aid wrote to Ms. Berger. The letter does not directly acknowledge receipt of the letter from Ms. Berger, but advised that in light of the “clients’ concerns and the length of time and quality of your responses to our inquiries” the L. and C. files were being forwarded to the Roster Committee of the Legal Aid Society. (*Exhibit 11*) The Roster Committee has the authority to remove lawyers from the list of lawyers eligible to act on Legal Aid files.

17. On Sept. 30th, Ms. Berger wrote to Legal Aid advising that she would voluntarily remove herself from the Legal Aid Roster. She indicated that she was in the process of billing her Legal Aid files, and hoped to be finished by December of that year. (*Exhibit 12*)
18. On October 14th Legal Aid wrote to Ms. Berger advising that the Roster Committee had directed that the L. and C. complaints be referred to the Law Society, as they were concerned with respect to the complaints which had been received, and the lack of response from Ms. Berger to Legal Aid. (*Exhibit 13*)
19. On Oct. 21st Legal Aid wrote to the Law Society confirming the complaint. (*Exhibit 14*)
20. On Dec. 7th the Law Society wrote to Legal Aid to advise that the complaint had been referred for review by a Manager of Complaints, meaning that it was being dealt with as a formal complaint file. (*Exhibit 15*)
21. On Dec. 9th the Law Society formally asked Ms. Berger for her response to the complaints. (*Exhibit 16*)
22. On Jan. 13, 2006, Ms. Berger provided her formal response to the Law Society. She dealt in some detail with the individual circumstances on each file, and provided copies of some relevant documents. In her last paragraph she indicated that it was “her intention to embark on a new career outside of the practice of law”. (*Exhibit 18*)
23. On Jan. 16th, the Law Society wrote to Ms. Berger summarizing the history of the correspondence, and asking her to address the issue of why she had failed to respond to Legal Aid in a timely manner. (*Exhibit 19*)
24. On Jan. 30th, Ms. Berger responded to the Law Society. (*Exhibit 20*) She indicated that:

I take full responsibility for not responding to Legal Aid. It is out of frustration that I was being put in a position of having to defend legal aid accounts that have already been taxed once by the taxation officer and are labor intensive to itemize and compile under the correct tariff item. I am doing large portions of legal aid files on a pro bono basis and being only able to claim a portion of my hours spent on the files at much less than half a private retainer fee.

Facts Relating to the Second Citation

25. Ms. Berger acted for M.M., the plaintiff/wife, in a divorce action. The husband was represented by other counsel, but transferred the file to Mr. MacDonald in May, 2004.
26. Prior to Mr. MacDonald’s involvement, a Special Chambers application had been heard on April 28, 2004 dealing with access, child support and spousal support. An Order was made verbally, but the form of Order was not signed or entered at the time.
27. On Nov. 9, 2004, Mr. MacDonald wrote to Ms. Berger noting that no Order had been filed with respect to the Special Chambers application, and he asked that she provide a proposed form of Order to him. He attached a copy of the Clerk’s notes for reference. (*Exhibit 21, Tab 1*)
28. On Dec. 2nd, Mr. MacDonald again wrote to Ms. Berger asking for a form of Order. (*Exhibit 21, Tab 2*)
29. On Dec. 15th, Mr. MacDonald wrote to Ms. Berger asking for a reply to his two previous letters. (*Exhibit 21, Tab 3*)

30. On Jan. 10, 2005, Mr. MacDonald wrote to Ms. Berger asking for a reply by Jan. 17th, failing which he would be “compelled to ask the Law Society to investigate why you are not answering my correspondence”. (*Exhibit 21, Tab 4*)
31. On Jan. 17th Ms. Berger provided a draft form of Order to Mr. MacDonald by fax. (*Exhibit 21, Tab 5*)
32. On Jan. 20th Mr. MacDonald faxed a letter to Ms. Berger confirming that the form of Order was acceptable, and asked that an original copy be forwarded to him for signature. (*Exhibit 21, Tab 6*)
33. On March 2nd Ms. Berger sent Mr. MacDonald the form of Order for his signature. (*Exhibit 21, Tab 7*)
34. On March 31st Mr. MacDonald returned the form of Order with his approval endorsed. (*Exhibit 21, Tab 8*)
35. On April 15th Mr. MacDonald faxed a letter to Ms. Berger which dealt with a number of issues, and which asked for a copy of the filed Order. (*Exhibit 21, Tab 9*)
36. On May 3rd Mr. MacDonald faxed a letter to Ms. Berger asking for reply to the letter of April 15th. (*Exhibit 21, Tab 10*)
37. On May 30th Mr. MacDonald faxed a letter to Ms. Berger indicating he had not heard from her since April 19th, and asking for a reply. (*Exhibit 21, Tab 11*)
38. On June 15th Mr. MacDonald faxed a letter to Ms. Berger asking for a reply by June 24th. (*Exhibit 21, Tab 12*)
39. On June 28th Mr. MacDonald faxed a letter to Ms. Berger enquiring as to whether he had to have to contact the Law Society in order to get a response. (*Exhibit 21, Tab 13*)
40. On July 13th Mr. MacDonald faxed a letter to Ms. Berger demanding a response by month end, failing which he would report the matter to the Law Society. (*Exhibit 21, Tab 14*)
41. On Aug. 2nd Ms. Berger sent a fax to Mr. MacDonald which dealt with access, but which did not refer at all to the filing of the Order. (*Exhibit 21, Tab 15*)
42. On Aug. 9th Mr. MacDonald responded, and asked for a filed copy of the Order. He noted that it had been 16 months since the Chambers application, and that his client required a copy of the filed Interim Order for income tax purposes. (*Exhibit 21, Tab 16*)
43. On Aug. 17th Mr. MacDonald faxed a letter to Ms. Berger advising her that he was arranging to have the minutes of the April 28, 2004 Order settled, and that he would be asking for costs of that application of \$300 against Ms. Berger. (*Exhibit 21, Tab 17*)
44. On the same date, Ms. Berger faxed a letter to Mr. MacDonald advising that the Order had been sent in for filing on Aug. 11th, and that she would provide a copy of the filed Order upon receipt. (*Exhibit 21, Tab 18*)
45. On Sept. 9th, Ms. Berger faxed a letter to Mr. MacDonald advising that the form of Order had been rejected as Ms. Berger had not filed the child support information sheets. (*Exhibit 21, Tab 19*)
46. On Sept. 22nd Ms. Berger faxed a letter to Mr. MacDonald advising that the form of Order had been rejected a second time due to an error on the part of the Clerk’s office. (*Exhibit 21, Tab 20*)

47. On Oct. 17th Ms. Berger faxed a letter to Mr. MacDonald proposing a settlement of the divorce. The fax was silent as to the filing of the Interim Order. (*Exhibit 21, Tab 21*)
48. On Oct. 25th Mr. MacDonald sent a letter of complaint to the Law Society with all of the above letters attached. (*Exhibit 21*)
49. On Oct. 28th the Law Society wrote to Mr. MacDonald acknowledging his letter of complaint. (*Exhibit 22*)
50. On Oct. 31st, Ms. Berger forwarded to Mr. MacDonald a copy of the Interim Order which had been filed on Oct. 28th. (*Exhibit 26, Tab 5*)
51. On Dec. 7th the Law Society advised Mr. MacDonald that the complaint would be dealt with as a formal complaint. (*Exhibit 23*)
52. On Dec. 9th, the Law Society wrote to Ms. Berger asking for her written response to the complaint pursuant to section 53 of the *Legal Profession Act*. (*Exhibit 24*)
53. On Jan. 12th Ms. Berger provided her formal response. (*Exhibit 26*) She set out a chronology of the steps taken. The opening paragraph of her letter prior to the chronology stated:

I clearly procrastinated on this matter. My lack of a working relationship with counsel did not help, however I take full responsibility for not providing a timely response.

ALL OF THESE FACTS ARE ADMITTED THIS 28th DAY OF AUGUST, 2007.

"original signed"

Carol L. Berger

D. Decision as to Citations

9. The Hearing Committee granted the application to consolidate the citations and proceeded on the basis that the only citation before it was the single citation set out in paragraph 7 above.
10. The Member, through counsel, admitted guilt to the single consolidated citation based on the facts stated in the Agreed Statement of Facts and Admission of Guilt (Exhibit 28). The Hearing Committee determined that the contents of Exhibit 28 were in an acceptable form, and consequently, is deemed for all purposes to be a finding of the Hearing Committee that the conduct of the Member, as stated in the single consolidated citation, is conduct deserving of sanction.

E. Decision Regarding Sanction

11. The Member responded under oath to questions posed by counsel and by the Committee members. The Hearing Committee also heard submissions regarding sanction from both counsel.

12. In determining sanction, the Hearing Committee had regard to this information disclosed in the evidence and the submissions:
 - At all relevant times, the Member was engaged as a sole practitioner in an exclusively matrimonial practice providing services in high conflict cases. These cases often involved acting for the wife in spousal abuse situations in which the litigants were new immigrants to Canada. Sometimes the cases involved persons labouring under mental illness or illiteracy. It is fair to say that the Member's clientele were of the high needs and high maintenance variety.
 - The Member found this practice extremely stressful. The Member indicated that at the time of the conduct complained of, the "toll was building".
 - The Member suffers medically from severe migraine headaches, approximately one day per month, rendering her incapable of functioning on that day.
 - At the time of the conduct complained of, the Member lacked support systems to assist her in dealing with her practice and her medical issues.
 - The Member noted that she had an acrimonious relationship with the complainant lawyer, who was representing the husband in the case, but that there was activity on the file during the period in question, such as the negotiation of Christmas access.
 - The Member noted experiencing frustration with the complainant Legal Aid Society of Alberta in that it required the Member to undertake additional unpaid work in order to conform with its billing requirements, even though the accounts had already been taxed by the taxing officer.
 - At the date of hearing, the Member was 44 years of age, married to a biologist, and was the mother of a six year old child. She is under administrative suspension from practice for non-payment of fees. It is not her current intention to return to practice, but she has no objections to the conditions proposed in Exhibit 31 in the event that she does decide to return to legal practice. The Member offered to enter into a written undertaking in that regard.
13. LSA counsel pointed out that the Member is entering a guilty plea, took responsibility for her conduct from the outset and has no disciplinary record.
14. As aggravating factors, LSA counsel pointed out that the Member's inaction was not without consequences. First, there was financial loss caused to the Legal Aid Society of Alberta. Second, the opposing lawyer's client was prejudiced by an inability to claim an income tax deduction. LSA counsel also suggested that the length of the delay on the Member's part was inordinate.
15. LSA counsel sought a reprimand and full costs of the hearing as sanction.
16. The Member's counsel referred to the Member's lack of record. He submitted that the public was already protected because the Member had in effect gone into a self-imposed suspension from practice. He agreed with the reprimand, but thought the costs should be $\frac{1}{4}$ to $\frac{1}{2}$ of the actual costs, if any.

17. The Member's counsel suggested that had the Member remained in practice, rather than voluntarily transfer to the inactive list, the complaints giving rise to the citation would have been dealt with by the LSA Conduct Committee by way of a mandatory referral to Practice Review. By going inactive, rather than remaining in practice, the Member has subjected herself to greater jeopardy. The Member's counsel argued that these circumstances warrant a more lenient sanction. Indeed, the Member's counsel suggested that he came very close to succeeding in a dismissal application on April 27, 2007.
18. The Hearing Committee decided to sanction the Member for this conduct by issuing a reprimand and levying the full costs of the hearing.
19. The Hearing Committee also accepted the Member's offer to provide an undertaking to comply with the proposed conditions indicated in Exhibit 31. In doing so, it is the Hearing Committee's expectation that the Member will execute a document agreed to between counsel that will embody those conditions.

F. The Reprimand

20. The Hearing Committee is not prepared to speculate about what would have happened had the Member remained in practice, nor what occurred during the dismissal application on April 27, 2007. The Hearing Committee can only deal with the matter that is before it today.
21. The Hearing Committee heard that the Member was undergoing a great deal of stress due to the nature of her practice at the time of the conduct complained of. This may well be an explanation for the conduct, but it is not an excuse for breaching the Code of Conduct and the common rules of civility.
22. The profession can only effectively serve its clients, the public, by treating one another in a professional manner and with respect. Failing to respond to another practitioner is a failure to serve the public. The individuals who make up the public depend on efficacious communication between counsel in order that they can order their affairs, whether they be personal or societal. The other lawyer's client had difficulty proving entitlements that he may have been able to claim with the Canada Revenue Agency and the Legal Aid Society of Alberta had difficulty dealing with some of its clients because of the Member's failure to respond.
23. This is not a matter of a momentary lapse of judgment or a fleeting transgression. These are events that occurred over a protracted period of time, and although the Hearing Committee is not prepared to say that they were deliberate, certainly they involved inordinate procrastination, and as indicated, this procrastination was not without consequences.

24. Both the Legal Aid Society of Alberta and the other lawyer were left in the position of having to explain to their respective clients some rather incomprehensible conduct on the part of the Member.
25. In order for the Law Society of Alberta to express its denunciation of this type of conduct, the Hearing Committee decided to levy the full costs.
26. To the Member's credit, she has no discipline record whatsoever. She took responsibility for her actions, or lack of action, at a very early juncture and came to the hearing to enter a guilty plea.
27. The Hearing Committee expresses regret over the circumstances that transpired in this case. It is obvious that the Member chose to involve herself in a very difficult area of the law, and that is to her credit. The profession and society need competent and dedicated practitioners to devote themselves to that area of the law and it is not this Hearing Committee's intention to deter any people entering the profession or any young lawyers from undertaking that very difficult and challenging type of practice.

G. Concluding Matters

28. There will be no referral to the Attorney General.
29. There will be no notice to the profession.
30. With regard to time to pay, the costs payable are the actual costs of the hearing when determined and they shall be paid on or before September 5, 2008.
31. The exhibits and proceedings will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that the identities and other identifying information about clients will be redacted from those exhibits.
32. It was pointed out during the hearing that some of the exhibits in the exhibit books distributed to the Hearing Committee members may have been misnumbered. The Hearing Committee requests that LSA counsel ensure that the exhibits in the official binder of exhibits are correctly numbered so as to coincide with the Agreed Statement of Facts.

Dated this _____ day of _____, 2007.

Douglas R. Mah, QC – Chair and Bencher

Hugh Sommerville, QC – Bencher

Rodney Jerke, QC – Bencher