



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 DIANN P. CASTLE,
a member of the Law Society of Alberta.**

Introduction

1. The Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of Diann P. Castle on October 4, October 5, October 23 and October 30, 2006. The Committee was comprised of Shirley Jackson, Q.C., chair, Vivian Stevenson, Q.C. and Morris Taylor. The LSA was represented by Garner Groome. The Member was represented by Grant Stapon.

Jurisdiction and Preliminary Matters

2. Exhibits 1 through 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, established 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. Counsel for the LSA advised that the LSA did not receive a request for a private hearing and the member's counsel confirmed no such request was being made. Therefore the hearing was held in public. An application was made and granted to exclude the following exhibits from public viewing because of solicitor-client privilege: Exhibits 7, 8, 10, 12, 16, 17, 18, 20, 21, 27, 28, 31, 32, and 34.
5. At the hearing a binder of Exhibits 1 to 22 was admitted by consent. During the hearing the following additional Exhibits were admitted:

Exhibit 23 CD of court proceedings dated May 19, 2004
Exhibit 24 Notice of Appeal of the W. matter
Exhibit 25 Appeals to the Court of Appeal Rules 501-505
Exhibit 26 Transcription of Voice Mail April 15, 2004
Exhibit 27 Letter dated April 11, 2004
Exhibit 28 Facsimile dated March 29, 2004
Exhibit 29 Memo of April 14, 2004 incident
Exhibit 30 Memo of January 6, 2004 incident
Exhibit 31 Time docket for the file
Exhibit 32 Letter dated April 17, 2004
Exhibit 33 Letter dated April 14, 2004

Exhibit 34 Letter dated May 4, 2004 (responding to Ex 16)
Exhibit 35 Statement of Claim
Exhibit 36 Estimated Statement of Costs
Exhibit 37 Discipline Record

Citations

There were initially two citations. At the outset of the hearing, counsel for the LSA advised that first citation would not be pursued.

The remaining Citation is:

Citation 2: It is alleged that you misled or attempted to mislead the Court in relation to your preparation or knowledge of the content of a Notice of Appeal, and that such conduct is conduct deserving of sanction.

Background and Basic Chronology of Events

6. The complainant, J.H., and the Member worked together in the same law firm starting in 1998. J.H. and the Member would often work on the same files. Generally, J.H. would do the solicitor work and the Member was trial counsel. In addition, when the Member went on holidays she often relied on J.H. to carry forward on a file in her absence.
7. The file which gave rise to the citation was a divorce file involving N.P. N.P.'s husband was represented by R.F.N.
8. Both custody and property issues were in dispute in the divorce. From early on, J.H. worked on the custody matters. As the trial approached, J.H. was involved in the preparation work. The Member was to be trial counsel.
9. The divorce trial commenced in the Court of Queens' Bench on March 15th, 2004. The Member, her student-at-law and J.H. were in attendance on behalf of N.P. J.H. attended to assist on the custody matter on the first day only.
10. On March 16th, 2004 a settlement was negotiated between the parties. J.H. was not present and did not participate in the settlement. The Trial Judge granted judgment in accordance with the settlement agreement.
11. On March 16th, 2004 R.F.N. forwarded a draft Judgment Roll intended to reflect the negotiated settlement (Exhibit 6). The Judgment Roll dealt with both custody issues and property issues.
12. Shortly after the Judgment Roll was filed, N.P. and her sister began raising concerns about the Judgment both in telephone calls and correspondence to the

13. The Member wrote N.P. April 1, 2004 (Exhibit 8) indicating the Judgment was binding, but that the Member was attempting to have the matter brought back in front of the Trial Judge to deal with an issue that had arisen regarding the value of a truck that was included in the settlement.
14. There was conflicting testimony about what discussion occurred on April 1st 2004 between J.H. and the Member regarding the filing of a Notice of Appeal in the divorce action.
15. The Member left on vacation on April 1st, 2004, and was scheduled to return to the office on April 20, 2004.
16. J.H. prepared and filed a Notice of Appeal.
17. On May 19, 2004 the Member and R.F.N. appeared before the Queen's Bench Justice who had granted the Judgment Roll and certain representations were made to the Court regarding the circumstances surrounding the Notice of Appeal.
18. The issue in this hearing is whether the Member deliberately misled or attempted to mislead the Court at the May 19, 2004 court appearance.

Evidence

19. Counsel for the LSA called J.H., R.F.N., and the Member's student-at-law as witnesses.
20. Counsel for the Member called the Member.
21. On April 1st, 2004 the Member sent a letter to N.P. (Exhibit 8) indicating that the settlement agreement was not a deal that could be called off, but a Court Judgment that was final and binding. The Member indicated that she was attempting to contact the Trial Judge to set up a Hearing with respect to the value of the truck as represented to them.
22. The Member testified that the same day she wrote a memorandum to her student-at-law requesting that she prepare a Notice of Appeal. The memo is Exhibit 9 and reads as follows:

Please prepare Notice of Appeal and Docketing Statement on "P" for file for my review. Get "J.W." precedent.
Require client's instructions + need consent from opposing counsel re: filing of Appeal – consent judgment.
Grounds should be (1) Appellant relied on erroneous information provided by the Defendants the value of the vehicle in the sum of 15,000 (2) Justice

erred in law by facilitating negotiation off the record during trial process.
Be careful with wording will need to review!!

23. The Member's student-at-law did not recall ever seeing this memo. J.H. testified that she did not see the memo either.
24. The Member testified that she left the memorandum for her student-at-law and was leaving the office on vacation when she stopped by J.H.'s office and indicated to J.H. that she was having her student prepare a Notice of Appeal on the N.P. matter. She said that J.H. offered to supervise the student, and that she was fairly ambivalent on the subject. She testified that their discussion lasted only a minute or two, and that she then proceeded out of the office.
25. J.H. testified that the Member came into her office and said she needed to speak to J.H. so J.H. walked into the Member's office. She says the Member told her that they needed to file a Notice of Appeal on the N.P. file and that she had given instructions to her student about it. J.H. said she was surprised by this because this did not make sense to her given the fact the Judgment had been entered by consent. J.H. also said that the Member told her the appeal had to be filed because she would be gone when the appeal period expired.
26. J.H. testified that a discussion ensued about the grounds for the appeal and that she felt it necessary to get a pad of paper and pen in order to take notes. She said that they discussed three specific grounds and that the Member told her to get the "W" precedent to work from. J.H. also said that at this point it was clear to her that the Member was concerned about being sued and that she wanted the Notice of Appeal to be filed while she was away.
27. J.H. testified that she kept her notes and believes that they were on the file when she left the firm. No notes have been located in the file materials.
28. The Member categorically denied that any sort of detailed discussion occurred, that she dictated specific grounds to J.H., or that she had any concern about being sued or getting the Notice of Appeal filed within the appeal period.
29. It should be noted that there was evidence that the relationship between the Member and J.H. had been deteriorating prior to and during this period of time and that the Member said that by the time she left for vacation, she couldn't even look at J.H.
30. On April 11, 2004 NP sent a letter (Exhibit 27) addressed to the Member and/or J.H. indicating that she had concerns that they had entered into a settlement agreement without her instructions. N.P. requested certain information and indicated that failure to respond would leave her with no other choice than to involve the Law Society.

31. J.H. responded to the April 11th letter on April 13th (Exhibit10) Among other things, she indicated to N.P. that if N.P. was suggesting that there was a settlement recommended to her, as opposed to a judgment being recorded, that the best option was to return to the Trial Judge who granted the judgment. She wrote that “ in the interim, in light of the content of your correspondence, I am going to draft and file a Notice of Appeal on your behalf, which is required in order to protect the Appeal date, however, I would strongly urge that you comply with the request of (the Trial Judge) as that is the appropriate manner of dealing with these matters. Alternatively, if you do not wish to accept my advice in this regard I suggest that you obtain independent legal counsel to provide you with a second opinion...”
32. In the same letter J.H. indicated that if N.P. and her sister L.P. wished to attend at the proposed meeting with the trial judge to address their concerns with the judgment, that this may be an option.
33. J.H. prepared and filed a Notice of Appeal on April 14th. She testified that she took grounds d & e from the “W” precedent (paragraphs h and i) and grounds a, b and c from the notes she had made of her discussion with the Member. The fees for filing the Notice of Appeal were taken from the firm’s general account, which was contrary to the usual practice of having these disbursements paid by the client.
34. On April 15th, R.F.N. called and left a voice mail message for J.H. expressing her views on the Notice of Appeal. That voice mail message was transcribed and is Exhibit 26. J.H. testified that she returned the call and left a message for R.F.N., but never spoke to her. R.F.N. says that she spoke to J.H. and that J.H. told her that N.P. had instructed J.H. to file the Notice of Appeal. The discrepancy in the evidence relates to whether or not J.H. filed the Notice of Appeal at the Member’s request or the clients, as well as to credibility of J.H. and R.F.N.
35. On April 19th, J.H. wrote to N.P.’s sister in response to an April 17th letter from her. J.H. indicated in that letter (Exhibit 12) that she had no option but to file the Notice of Appeal in light of the concerns and issues being raised. She also indicated in her letter that in the event the appeal proceeds, N.P. should obtain a second opinion from independent legal counsel as to the appeal as there will likely be a conflict with her office in the circumstances.
36. J.H. testified that she had grave misgivings about filing the Notice of Appeal, and that this issue along with other difficulties caused her to decide to leave the firm. She testified that when the Member returned to the office on April 20th, she advised the Member that she had filed the Notice of Appeal and that R.F.N. was not happy about it. She testified she told the Member of her decision to leave.
37. The Member did not dispute that she became aware that an appeal had been filed at some point prior to the May 19th appearance before the Trial Judge.

38. On April 29th, J.H. wrote a Memo to the Member and her assistant indicating that N.P. had called and would be at the office at 8:30 on May 19th for the 9:00 hearing. She wrote that she told N.P. that she would come over too as N.P. wanted her to address two custody matters. J.H. indicated that she has discoveries that day but would try to be there. The memo is Exhibit 15.
39. J.H. also emailed N.P.'s sister indicating that she planned to attend court on the 19th but due to discoveries would have to leave fairly soon. She also indicated that she was not the lawyer who would be making representations but would be there to assist if needed since she had knowledge specifically regarding parenting issues. The email is Exhibit 16.
40. A transcript of the court appearance in the Court of Queen's Bench on May 19, 2004 was marked as Exhibit 19 in this hearing and the recording of the court appearance was played at the hearing.
41. During the court appearance His Lordship became aware that a Notice of Appeal had been filed. His Lordship reviewed the NA and became concerned about the grounds of appeal. There are a number of comments made by the Member to the Trial Judge which are the subject of the citation in this matter.
42. The context for the Member's comments is demonstrated by the Trial Judge's remarks at pages 25 and 26 of the transcript. After raising concerns about the grounds of appeal and being told that the Notice of Appeal was filed by J.H. and being told by N.P. that it was her understanding that the Member filed the appeal, the Court stated:

Well (the Member) has just represented to the Court she did not, so either (the Member) is lying or somebody else did it and if it was (J.H.) who did it, then (J.H.) is going to have to come here and tell me that she has forwarded---if she has a concern about my conduct---and she may raise concerns about my conduct as much...as she wishes. I am not -- it is - - for (J.H.) to suggest that I have acted improperly is completely within her right to so allege, and I will not debate that issue about whether I acted improperly with her. She can raise that with the appropriate authorities and that is the National Judicial Council. There is a formal procedure to make complaints about the conduct of a judge. I will not be the first judge that counsel have alleged acted improperly. I suspect I will not be the last. I am quite prepared to deal with that complaint with the appropriate authorities. As I say, for what it is worth, I am totally satisfied that I have acted quite properly, but – I am not the person who determines that, nor is (J.H.), nor is the Court of Appeal.

43. The Member responded to these comments as follows:

My Lord, I just want to say that before I left on holidays, I indicated to (J.H.) that she better check with N.P. with respect to filing a notice of appeal on this matter

because she was dissatisfied, so that would be my extent in this. So I am not sure what transpired between (N.P.) or (L.P.) in my absence. I have had no conversations with either of the two of them, and I've done so for very good reason.

44. He asked the Member if she was still a partner of J.H. The Member responded "(J.H.) filed the notice of appeal when I was on vacation, My Lord. And (J.H.) has left the firm, but she did that to protect the right of appeal..."
45. LSA counsel also directed the panel to the Member's comment when the Trial Judge first expressed concern about the grounds of appeal: "My Lord, I haven't even seen that. Can I have a look at that, please?" (page 12 line 2) and her comment at page 15 line 12 that "I quite frankly, haven't even read the appeal, My Lord although the backer is on the back of it (sic)".
46. It was submitted by LSA counsel that the use of the word "even" by the Member on both occasions was a clear attempt to minimize her involvement with the Notice of Appeal to simply knowing that the appeal had been filed by J.H., and that this was not an accurate representation of events.
47. At the conclusion of the May 19th attendance, the Trial Judge made it clear that he expected an explanation from J.H. The Member suggested that a copy of the tape be ordered for J.H. so that she would be aware of what had transpired, and later also asked that the Trial Judge direct that a transcript be provided so that it could be made available.
48. After the May 19th hearing, J.H. filed an affidavit setting out her version of the events leading up to the filing of the Notice of Appeal. This affidavit was marked as Exhibit 22. It was submitted by counsel for the Member that this affidavit was misleading and did not provide full disclosure.
49. It is clear from the testimony at this hearing that there was considerable animosity between the Member and J.H. and between R.F.N. and J.H. both before and after the May 19th court appearance.

Decision

50. The burden of proof is set out in *Ringrose v. College of Physicians and Surgeons of Alberta*, [1978] 2 WWR 534 (ABCA) as stated by Clement, JA:

'The burden of proof ... is to establish the guilt charged against a practitioner by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon a balance of probabilities.'

'...The cogency of the evidence required to satisfy the burden of proof by a preponderance of probability may vary, however, according to the nature of the issue with respect to which that burden must be met.'

‘...The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established.’

51. In *Law Society of Alberta v. Estrin* (1992) 4 Alta LR(3d) 373 (ABCA), the Court said:

‘The evidence required by the Law Society to reach a conclusion of deceit is short of that in a criminal proceeding but must meet a higher standard than the balance of probabilities.’

52. Counsel for the LSA stated that the burden of proof in this hearing would require more than a balance of probabilities but less than beyond a reasonable doubt. Counsel for the Member agreed as does the Hearing Committee.

53. The credibility of the Member was in issue in this hearing. In assessing credibility, the panel was directed to the principles in *R.v. W(D)* (1991) 1 S.C.R. 742, and three basic principles to apply:

1. if the panel accepted the Member’s evidence (assuming that evidence to be exculpatory) the citation must be dismissed;
2. if the panel did not accept the Member’s evidence, but was left with the requisite level of doubt such that the balance of proof was not satisfied, the citation must be dismissed;
3. if the panel did not accept the Member’s evidence, the panel must still consider whether the facts to substantiate the citation had been made out, and if not, the citation must be dismissed,

54. In his submission to the panel, counsel for the Member suggested that the panel might have been prejudiced by the fact that citation 1 had been left in the materials before them, notwithstanding the fact it had been withdrawn. The panel has considered this submission and is satisfied that the inclusion of this citation in the materials did not influence its findings as to credibility and did not have any impact on the outcome of the hearing.

55. The panel is satisfied from listening to the tape of the May 19th court appearance and from reviewing the transcript that the Member intended to convey to the Trial Judge that she had no involvement in the decision to file the Notice of Appeal, and no involvement in, nor knowledge of the grounds set out in the Notice of Appeal. The panel is also satisfied that this was not an accurate representation of the Member’s level of involvement.

56. At the hearing, the Member testified that on the second day of the trial the two counsel had been hauled into the Trial Judge's chambers and that it was made clear that the parties were to reach a settlement. The Member stated that after the matter was resolved that she returned to the office, and that at some point she would have discussed the matter with J.H. and told her that she had some concern about, and was uncomfortable with the closed-door meeting and the position taken by the Trial Judge, but that at the end of the day the client had achieved what she had wanted. The Member also testified that on April 1st she advised J.H. that she had put a memo in her student's office regarding the Notice of Appeal outlining what the Member thought the grounds of appeal should be. Finally, the Member said she reminded J.H. of their previous conversation after the trial and the two grounds they had discussed at that time, being the negotiations in the trial process with the Trial Judge and the value of the vehicle, and that she specifically referenced the "W" precedent.

57. Yet during the court appearance of May 19th, and as noted above, the Member's comments suggested that she had no involvement in nor understanding of the grounds in the Notice of Appeal. In addition, at page 17 of the transcript, the Trial Judge indicated his concern about the allegations by the parties that his conduct was improper, to which the Member says:

My Lord, I'm not sure that (J.H.) is - - the way this is worded, I agree with you wholeheartedly that it points the finger at you. It should have been stated that the party, the appellant, relied on the fact that the vehicle was worth \$15,000. That's -

And at page 18:

I can't answer why it's drafted this way, and unless (N.P.) can, you gave instructions for it to be filed. You had conversations with (J.H.). I have no - over the wording of the appeal.

58. In the panel's view, the Member was clearly trying to distance herself from the grounds of appeal and any suggestion that she might have thought the Trial Judge's conduct was improper, when it is clear that she was of the view that his conduct gave a legitimate ground of appeal, and that she envisioned that ground in the instructions she gave regarding the Notice of Appeal.

59. Counsel for the LSA also submitted that the Member's evidence that she had not looked at the Notice of Appeal before the May 19th hearing was not credible. The Member said that she did not do so because the purpose of the May 19th appearance had nothing to do with the appeal. However, during the course of the appearance, when asked where J.H. was, the Member advised the court "She (J.H.) did advise both N.P. and myself that she would be in attendance to speak

60. The Member also testified at the hearing that she did instruct J.H. to file the Notice of Appeal during her absence. She suggested that she was not concerned that the appeal period would expire because the court could grant an extension of time. However, the Member acknowledged that one of the factors that the court would consider would be the merits of the appeal, and that she considered the appeal to be without merit. The panel also found this evidence difficult to accept.
61. On the basis of the totality of the evidence given at the hearing, the panel did not accept the Member's evidence that she did not intend to mislead the Court as to the nature and extent of her involvement with the Notice of Appeal. The Hearing Committee also finds that based on all the evidence, on a standard of proof that is more than a balance of probabilities but less than beyond a reasonable doubt, that the Member did mislead the Court in relation to her preparation or knowledge of the content of a Notice of Appeal as set out in Citation 2 and that the Member made advertent misrepresentations to the Court in this regard.
62. As an officer of the Court the Member had a duty not to mislead the Court and a duty to correct any misapprehension of the Trial Judge. Code of Professional Conduct, c. 10, rules 14 and 15.
63. Section 49(1) of the Legal Profession Act states that:

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

 - (a) is incompatible with the best interest 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.
64. The panel is satisfied that the member's conduct is conduct deserving of sanction. To paraphrase the words of the Member herself, if a lawyer cannot be believed by the court, she might as well pack her bags and go home.
65. The Hearing Committee found that a reprimand, a fine of \$2500 and 75% of the costs of the Hearing was the appropriate order due to the nature of the advertent misrepresentations to the Court as set out in Citation 2 and a previous related sanction.

66. The costs of the Hearing were reduced by 25% as the matter proceeded over a number of days due to the unavailability of members of the Hearing Committee. Time to pay is 60 days from notification of the actual costs.

67. The chair delivered the reprimand.

Concluding Matters

68. No Notice to Profession was ordered and there was no order to give notice to the Attorney General.

69. There is no referral to Practice Review.

Dated this _____ day of April, 2007.

SHIRLEY JACKSON Q.C. – Chair

VIVIAN STEVENSON Q.C.– Bencher

MORRIS TAYLOR - Bencher