

**IN THE MATTER OF PART 3 OF THE
LEGAL PROFESSION ACT, RSA 2000, c. L-8**

AND

**IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF JOANNE HEMING
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Hearing Committee

Kenneth Warren, QC – Chair and Bencher
Corinne Petersen, QC – Bencher
Michael Mannas – Adjudicator

Appearances

Karl Seidenz – Counsel for the Law Society of Alberta (LSA)
Elena Semenova – Counsel for Joanne Heming

Hearing Dates

December 11 and 12, 2019

Hearing Location

LSA office, at 701, 333 - 11 Avenue SW, Calgary, Alberta

HEARING COMMITTEE REPORT

Overview

1. Joanne Heming was retained by PS in April 2010 with respect to problems he was having with his farm neighbours. Ms. Heming was a relatively young lawyer running a practice in [S], Alberta. She initiated proceedings on behalf of PS and his wife HS that in hindsight were ill-advised and eventually resulted in significant costs awards and enforcement proceedings against PS and HS and without them gaining the remedy PS had sought. The facts for the most part are not contentious. Ms. Heming and PS provided limited oral evidence to supplement the Statement of Agreed Facts, and a former staff member of Ms. Heming's firm provided very brief testimony by phone. The LSA and Ms. Heming however disagree as to whether the facts, including a number of admitted mistakes by Ms. Heming, amount to unprofessional conduct and whether that conduct is deserving of sanction.
2. On December 11, 2019, the Hearing Committee (Committee) convened a hearing into the conduct of Ms. Heming based on four citations, as set out below with the particulars provided. References are to the Code of Professional Conduct and to the Code of Conduct (collectively, the "Code") in effect at the relevant times:

Citation 1

It is alleged Joanne E. Heming failed to obtain consent and instructions from HS to represent her in legal matters and that such conduct is deserving of sanction, particulars of which are:

- a. Heming failed to confirm with HS personally that she consented to being named as a co-applicant in the Originating Application filed on September 15, 2011, contrary to Rules 5, 9, and 14 of Chapter 9 of the Code; and
- b. Heming failed to confirm with HS personally that she consented to being named as a co-Plaintiff in the Statement of Claim filed on September 13, 2013, contrary to Rules 2.01(1), (3) and (5) of the Code.

Citation 2

It is alleged Joanne E. Heming failed to provide competent, conscientious, and knowledgeable service to her clients, HS and PS, and that such conduct is deserving of sanction, particulars of which are:

- a. Heming advised PS that the easement could be removed from his lands and filed an Originating Application to that effect on September 15, 2011, which was incorrect legal advice and an incorrect procedure, contrary to Rule 1 of Chapter 2 of the Code;
- b. Regarding incidents described by PS in his letters to Heming dated June 2, 2010, and June 4, 2010,
 - (i) Heming failed to file a Statement of Claim seeking damages for the 2009 incidents of trespass and damage to property before the expiration of the limitation period of June 27, 2011, contrary to Rule 1 of Chapter 2 of the Code;
 - (ii) Heming failed to file a Statement of Claim seeking damages for the 2010 incident of civil assault before the expiration of the limitation period on May 21, 2012, contrary to Rule 2.01(2) and Rule 2.02(1) of the Code;
- c. In January 2012, upon receiving instructions from PS to abandon the Originating Application proceedings, Heming failed to inform him about the costs consequences of doing so without obtaining consent from the opposing party, contrary to Rule 2.01(1) of the Code;
- d. On August 15, 2012, having received a Non-Waiver Agreement from ALIA, Heming failed to sign and return it until January 3, 2013, resulting in ALIA taking no steps to appoint repair counsel to prosecute the Appeal of the Order of Master [H] (the "**Appeal**"), which Heming had filed on behalf of PS and HS, contrary to Rule 2.02(1) of the Code; [abandoned at the start of the Hearing]
- e. On September 17, 2012, upon receipt of a letter from opposing counsel making it clear that ALIA had not yet appointed a lawyer for PS and HS, Heming failed to take any steps to follow up with ALIA to ensure that PS and HS were represented

during the Appeal, despite being their solicitor of record, contrary to Rule 2.02(1) of the Code; [abandoned at the start of the Hearing]

- f. On September 27, 2012, Heming failed to appear in Court for the hearing of the Appeal despite being the solicitor of record for PS and HS, contrary to Rule 2.02(1) of the Code;
- g. On April 2013, Heming acted in a conflict of interest by accepting a follow up retainer to deal with the enforcement proceedings against PS and HS, which had been incurred primarily because of her original mistake in filing the Originating Application, without obtaining a waiver from her clients beforehand, contrary to Rule 2.04(1) and (10) of the Code; and
- h. On September 13, 2013, Heming failed to advise PS about the risks associated with filing a Statement of Claim that included claims which she knew to be statute-barred at the time of filing, contrary to Rule 2.02(1) of the Code;

Citation 3

It is alleged that in relation to her errors on the matter for which she acted for HS and PS, namely, providing incorrect legal advice and choosing an incorrect legal procedure when she filed the Originating Application on September 15, 2011, Joanne E. Heming failed to comply with the provisions of Rule 6.07 of the Code, including:

- a. Failing to inform her clients of her errors or omissions until August 2002 [corrected by agreement of the parties to 2012], nine months after she admitted liability for costs on November 25, 2011;
- b. Failing to recommend that the clients obtain independent legal advice concerning the matter, including any rights of action the clients may have had against her arising from the errors or omissions; and
- c. Failing to advise her clients of the possibility that, in the circumstances, she may no longer be able to act for them, and that such conduct is deserving of sanction.

Citation 4

It is alleged Joanne E. Heming failed to promptly notify ALIA of her errors in handling her clients' litigation matter as required by the Commentary for Rule 6.07 of the Code, particulars of which are:

- a. Failing to report her mistake in providing incorrect legal advice and choosing the incorrect legal procedure in filing the Originating Application on September 15, 2011;
 - b. Prejudicing the insurance coverage by admitting liability in her letter of November 25, 2011, to opposing counsel.
3. After reviewing all of the evidence and exhibits, and hearing the testimony and arguments of the LSA and Ms. Heming, for the reasons set out below, the Committee

finds Ms. Heming guilty of conduct deserving sanction on the first three citations, pursuant to section 71 of the *Legal Profession Act* (the *Act*).

4. The Committee will convene a hearing to hear submissions on and determine the appropriate sanction.
5. Any determination of costs will be made as part of the sanction hearing.

Preliminary Matters

6. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing was not requested, so a public hearing into Ms. Heming's conduct proceeded.

Agreed Statement of Facts/Background

7. The parties submitted a Statement of Agreed Facts and Exhibits dated September 23, 2019. A copy of the Statement of Agreed Facts, without exhibits, is attached as Appendix A.

Submissions of the LSA

8. On cross-examination, Ms. Heming agreed that the following particulars were factually correct, without admitting that the conduct was contrary to the provisions of the Code or amounted to conduct deserving of sanction: 1(a), 1(b), 2(a), 2(b) to the extent that a statement of claim seeking damages with the 2009 incidents of trespass and damage to property was not filed before the expiration of the limitation period, 2(f), 2(g) and 4(b) to the extent that she did admit liability to opposing counsel in her letter of November 25, 2011.
9. Counsel for the LSA argued that the evidence showed a pattern of professional misconduct by Ms. Heming for a period of five years, resulting in harm to HS and PS. The LSA submitted that pursuant to Section 49(1) of the *Act*, conduct deserving sanction is conduct of the member 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.

Conduct that is deserving of sanction must amount to a marked departure from the conduct expected of lawyers. The conduct need not be disgraceful, dishonourable or reprehensible. The LSA conceded that conduct may be negligent but not breach the rules of professional conduct and that breaching the rules of professional conduct may not necessarily amount to negligence. However, while a single mistake, that may or may not amount to negligence, will generally not result in discipline proceedings, a habitual pattern of mistakes may provide a basis for discipline.

10. With respect to Citation 1, the LSA noted that the facts of the particulars were admitted. Ms. Heming never met with HS and never received instructions from her to name her as a co-applicant or co-plaintiff in either of the proceedings commenced by Ms. Heming.
11. With respect to Citation 2, the factual content of four of the particulars was admitted. Ms. Heming admitted that she provided incorrect legal advice and utilized an incorrect legal procedure with respect to the originating application filed by her in September 2011. Ms. Heming did not conduct any legal research and could not recall whether she had consulted with a more senior counsel about her strategy. She had about a sixteen-month period within which she could have done so. Ms. Heming failed to file a Statement of Claim seeking damages for the 2009 incidents of trespass and damage to property before the expiration of the limitation period. Ms. Heming could not recall whether she discussed the limitation period with PS. Ms. Heming's reason for not pursuing the damages claim when she first learned of the facts was not supported by any legal research by her. With respect to particular 2(b)(ii), the LSA submitted that Ms. Heming was aware of the potential claim well before the limitation period expired and did not act on it. There was no explanation provided for that omission. The Committee notes that the recollections of PS and Ms. Heming were impaired by the passage of time and could not be refreshed from Ms. Heming's file materials. The file did not contain notes of meetings or telephone discussions, legal research, reporting letters or opinions as might have been reasonably expected having regard to PS's legal issues and the issues that arose between him and Ms. Heming as a result of her initial mistakes.
12. Paragraph 30 of the Statement of Agreed Facts states that Ms. Heming received instructions from PS to abandon the claim and Ms. Heming did so by letter dated January 5, 2012. With respect to Citation 2(c), Ms. Heming's evidence was that she did not recall whether she gave advice to PS regarding the costs consequences of abandoning the claim. PS's evidence was that he did not receive any advice to that effect. The LSA submits that PS could not give informed instructions on whether to abandon the claim without understanding the costs consequences of doing so. When the costs hearing occurred on July [...], 2012, in the absence of Ms. Heming notwithstanding the Master's phone call to her, HS and PS were subjected to a significant costs liability.
13. With respect to Citation 2(f), Ms. Heming admitted her failure to appear in court on September [...], 2012 for the hearing of the appeal despite being the lawyer of record. On September 17, 2012, Ms. Heming received a letter from opposing counsel making substantive inquiries about the hearing and seeking an adjournment. Ms. Heming's response was to file a Notice of Withdrawal, but she did not respond to the opposing solicitor. The appeal proceeded in her absence and was dismissed. She took no steps to ensure that ALIA would handle the appeal or that PS's interests were adequately represented. HS and PS incurred a further costs liability as a result of the dismissal of the appeal.

14. With respect to Citation 2(g), Ms. Heming admitted her conduct. She knew that the costs ordered to be paid by PS and HS arose from her mistake and that ALIA had denied a claim, but she did not consider paying the costs herself and did not recognize her conflict in accepting the retainer with respect to the enforcement proceedings.
15. With respect to Citation 2(h), Ms. Heming did not recall if she explained the risks of filing a statute barred claim and PS was positive that Ms. Heming never discussed with him the costs consequences that may flow from filing a claim that may be out of time. The "pattern of conduct" theory advanced by Ms. Heming was a novel one that had a low chance of success. It was formulated without legal research. Again, in the absence of thorough advice from Ms. Heming, PS was unable to provide informed instructions on the initiation of the claim.
16. With respect to Citation 3, Rule 6.07 of the Code requires a lawyer to promptly inform the client of a material error or omission in connection with a matter for which the lawyer is responsible. Ms. Heming referred PS to a senior lawyer she knew ("JT") for what appeared to be a second opinion. It is clear that no later than November 25, 2011, Ms. Heming was aware of her material error in invoking the wrong procedure. There is no evidence that she informed PS of that error around that time. PS's evidence was that he learned of the error from JT. While Ms. Heming referred PS to JT, there is no evidence that she recommended to PS that he obtain independent legal advice concerning Ms. Heming's error and including any rights PS may have against her arising from her error. Ms. Heming did not recognize the conflict that arose due to her error and failed to advise PS of the possibility that in the circumstances (those arising from her error) she may no longer be able to act for PS.
17. The LSA characterized PS as an intelligent man, but not a lawyer. PS was 78 years old at the time of the hearing. He has a basic grade school education and was a farmer for most of his life. The LSA submitted that the obligation of Ms. Heming was to explain her error and to fulfil her obligations under Rule 6.07 of the Code in a manner that would be clearly understood by her client, and that she failed to do so.
18. With respect to Citation 4, the LSA relied upon a lawyer's obligation to notify ALIA as set out in the commentary to Rule 6.07 of the Code. The LSA submitted that Ms. Heming should have informed ALIA around the time that her error was realized, either in October or November of 2011. The LSA's counsel, in response to a question from the Committee, submitted that the commentary to a Rule in the Code is of equal importance to the Rule itself. Ms. Heming did not report her error to ALIA until July 31, 2012, long after admitting her error to the opposing counsel in November, 2011.
19. In response to arguments from Ms. Heming's counsel regarding the application of the commentary to Rule 6.07, the LSA's counsel advised the Committee following the hearing that Rule 152 of the Rules of the Law Society of Alberta("Rules") sets out a mandatory reporting obligation to ALIA, as follows:

152 (1) A member shall:

(a) as soon as is practicable after learning of a claim involving services performed by the member, or a circumstance which may give rise to such a claim, notify ALIA of the claim or circumstance;...

While the Citation referred to an obligation raised by the commentary to Rule 6.07 of the Code, the obligation was concurrently raised by Rule 152. Ms. Heming's counsel's response to that late submission was that no Citation had been issued respecting Rule 152.

20. The LSA submitted that there were five patterns of conduct that together constituted conduct deserving of sanction: 1) assumptions by Ms. Heming that she knew best for her clients and that she did not need to fully explain risks in order to be properly instructed; 2) failure to conduct legal research before providing advice to clients; 3) a lack of understanding of conflicts and her obligations to her clients when conflicts arose; 4) failure to provide information to her clients that would permit them to provide informed instructions; and 5) failing to be in court when required to represent her client's interests.

Submissions of Ms. Heming

21. Counsel for Ms. Heming agreed that conduct deserving of sanction required a marked departure from the conduct that the LSA expected of its members. The evidence required to establish guilt must be clear, convincing and cogent. The essence of Ms. Heming's defence was that she was at the time a young and inexperienced lawyer. She admittedly made a number of mistakes (several were expressly admitted by her counsel in argument) and some of those mistakes may have amounted to negligence, but her conduct did not amount to a marked departure from the standard expected. Her mistakes ought to have been for her insurance to handle. The irony is that the insurer denied the claim.
22. With respect to Citation 1, the facts were admitted by Ms. Heming. Her counsel referred to statements given by other counsel who dealt with PS regarding the matters in question at times Ms. Heming was not acting. The thrust of the statements, which were not under oath and were not subject to cross-examination as the witnesses were not called, was that other lawyers did not take steps to confirm instructions with HS or to confirm that PS had authority to provide instructions on behalf of HS. The argument advanced was that Ms. Heming's conduct with respect to HS was not a marked departure from the standard expected by the LSA of its members because three or four other lawyers dealt with HS in a similar fashion to that of Ms. Heming, following her pattern of conduct.

23. With respect to Citation 2, Ms. Heming's counsel admitted that Ms. Heming chose the wrong conduct and the wrong procedure, but submitted that amounted to an error and omission and not conduct deserving of sanction. The error ought to have been handled through the insurance process rather than through the discipline process.
24. With respect to Citation 2(a), the conduct was admitted and the submission was that if that amounted to a failure to provide competent, conscientious and knowledgeable service, it did not amount to conduct deserving of sanction.
25. With respect to Citation 2(b), Ms. Heming submitted that the onus was on the LSA to prove that PS wanted those claims filed at an earlier time. There was no evidence to that effect. The missing of the limitation period is an error made by many lawyers and is a frequent basis for a negligence claim, but missing a limitation does not amount to marked departure from the conduct expected of members.
26. With respect to Citation 2(c), Ms. Heming submitted that the evidence did not establish whether she did or did not inform PS of the cost consequences of abandoning the action. As a result, the LSA failed to meet its burden of proof that she did not provide that advice.
27. With respect to Citation 2(f), Ms. Heming felt she could not appear at the appeal hearing because she was in conflict. Ms. Heming's counsel addressed Ms. Heming's response to the September 17, 2012 letter from opposing counsel about the upcoming appeal hearing. She stated that Ms. Heming should have done more to follow up and it was a mistake for her not to have done so. Ms. Heming had told ALIA in August about the date for the appeal and failed to realize that she had not returned to ALIA the non-waiver it required before taking any steps. Ms. Heming's counsel conceded that was another mistake by Ms. Heming. When Ms. Heming filed the Notice of Withdrawal shortly before the appeal hearing, she failed to file the requisite affidavit of service. Ms. Heming's counsel conceded that was also a mistake. All of Ms. Heming's mistakes with respect to the events leading to the dismissal of the appeal were characterized as mistakes not amounting to conduct deserving of sanction.
28. With respect to Citation 2(g), Ms. Heming was of the understanding that the conflict had been resolved by ALIA's denial of the claim pursuant to its January 10, 2013 letter to PS, a copy which was sent to Ms. Heming.
29. With respect to Citation 2(h), PS testified that there was no discussion with him about potential cost consequences. Ms. Heming's counsel submitted that if the Committee found that the Citation had been proven on a balance of probabilities, then this was simply another mistake that did not amount to a marked departure from the expected standard.
30. With respect to Citation 3(a), Ms. Heming submitted that the evidence did not establish that she failed to inform PS of her error until August 2012. Ms. Heming spoke to PS

when the opposing counsel raised her incorrect procedure in October 2011. Ms. Heming referred PS to JT and a few months later PS instructed her to abandon the claim. Ms. Heming submitted that there was not clear, convincing and cogent evidence that PS was not told of her error until August 2012.

31. With respect to Citation 3(b), Ms. Heming's counsel admitted that Ms. Heming did not send PS to JT for independent legal advice with respect to her error, but JT did provide some independent legal representation to PS. Ms. Heming's counsel admitted that Ms. Heming did not make a recommendation to PS to see JT in respect of her mistake but made a recommendation for PS to see JT to take over the matter.
32. With respect to Citation 3(c), Ms. Heming did in fact cease to act for PS in February of 2012 and Rule 6.07(c) does not expressly state when the lawyer must provide the requisite advice about the lawyer's ability to continue to act. Ms. Heming did not provide the advice "right away" but she did cease to act eventually and so a breach of Rule 607(c) is not made out.
33. With respect to Citation 4, the commentary to Rule 6.07 requires the claim or potential claim to be reported to ALIA but it does not establish a timeline. As a result, Ms. Heming's report to ALIA in August 2012 satisfied her obligation. Ms. Heming further submitted that because the reporting obligation to ALIA was raised in the commentary and not in the Rule itself, it had no application. Ms. Heming conceded that she admitted liability to opposing counsel in her letter of November 25, 2011. However, there was no evidence that the insurance coverage was prejudiced as no coverage was provided. Admitting liability in a matter where there is no prejudice to ALIA cannot be conduct deserving of sanction. Ms. Heming's counsel distinguished *LUK v. Law Society of Manitoba*, 2011 MBCA 78 (CanLII) on the basis that the Rules of the Law Society of Manitoba required a member to notify the law society of a potential professional liability claim as soon as practicable after becoming aware of the relevant acts or omission. The member was charged with breaching that requirement. That requirement in the Manitoba Rules was to be distinguished with the statement in the commentary to Rule 6.07 of the Alberta Code.

Analysis and Decision

34. The Committee finds that the first three Citations have been proven on a balance of probabilities on evidence that is clear, convincing and cogent and that Ms. Heming's conduct is deserving of sanction.
35. Before it reviews each of the Citations, the Committee notes that Ms. Heming's counsel pursued a very technical approach to the particulars. In the Committee's view, the Citations and particulars provided were sufficient to provide Ms. Heming with reasonable notice of the allegations against her and satisfied the LSA's requirement to provide

procedural fairness. In *Hesje v. Law Society of Saskatchewan*, 2015 SKCA 2 (CanLII) the court succinctly summarized the law on this issue as follows:

[50] Focusing on whether the member charged is aware of the case he has to meet - rather than exclusively focusing on the charge itself - is consistent with how courts approach charges laid by an administrative body...

[51] In short, procedural fairness will only be violated by inadequate particulars if the member is deprived of knowledge of the facts alleged to constitute misconduct, and is therefore deprived of knowledge of his case to meet....

36. Similarly, in *Law Society of Upper Canada v. Roy Francis Dmello*, 2013 ONLSAP 5 (CanLII), the appeal panel stated:

[108] First, it is well-established that particulars are not to be treated as if they are counts in a criminal indictment. This means, amongst other things that:

(a) A notice of application should not be critiqued in an overly technical manner. [citing authority]

(b) The doctrines of *res judicata* or issue estoppel do not preclude findings of misconduct on overlapping particulars. [citing authority]

(c) The failure to plead the most applicable rule will not preclude a finding of professional misconduct, **as long as the licensee has had a fair opportunity to respond to the substance of the allegations being made.** [citing authority]

(d) Similarly, deviations between the facts alleged in the notice of application and though it was ultimately proven by the Society will not preclude a finding of professional misconduct, **unless the licensee has been prejudiced in his/her ability to respond to the allegations.** [citing authority]...

[109] This principle recognizes the overriding public interest in ensuring that alleged professional misconduct or conduct unbecoming is evaluated, to the fullest extent possible, on the merits, while ensuring fairness to the licensee. The importance of fairness to the affected lawyer is captured in the highlighted passages contained in subparagraphs 108(c) and (d) above.

37. A regulatory body need not prove all the particulars alleged respecting a citation if the proved particulars demonstrate unprofessional conduct with respect to the citation. In *Regular v. Law Society of Newfoundland and Labrador*, 2005 NLCA 71, the discipline committee found the member had failed to act with integrity, failed to avoid questionable

conduct and failed to fulfill his duties to a fellow lawyer. The member appealed first to the Benchers and then to the Court of Appeal. A ground of appeal was that one of the six particulars alleged had not been proven and therefore the finding of unprofessional conduct could not stand. The Court of Appeal held at paragraphs 24-25 that considering the evidence as a whole, the citation was made out. It was not critical to deciding the complaint to establish that the sixth particular had been proven. The citation was clearly established on the evidence as a whole.

38. Ms. Heming admitted the conduct set out in the two particulars to Citation 1. The Committee finds that the conduct breached the provisions of the Code set out in the particulars and that the conduct is worthy of sanction. Ms. Heming commenced three proceedings in which HS was a named party without ever speaking with her about the matters, entering into a retainer agreement with her or taking any reasonable steps to ascertain whether PS had authority to act on her behalf. Ms. Heming never received instructions from HS and there is no indication that Ms. Heming ever reported to HS with respect to the status of matters, including the significant costs awards made against HS. Ms. Heming did not have express or implied authority from HS to do anything and Ms. Heming appeared to be oblivious to the fact that she required instructions in order to act. It was not reasonable for Ms. Heming to assume that PS had the authority to provide instructions on behalf of himself and HS merely because they were a married couple. The conduct of other lawyers who acted for PS does not assist Ms. Heming. They did not give evidence and were not cross-examined. The limited information from them in the investigation report does not in the Committee's view establish a standard.
39. With respect to Citation 2, Ms. Heming admitted her conduct as set out in particulars (a), (b) to the extent that a Statement of Claim seeking damages with respect to the 2009 incidents of trespass and damage to property was not filed before the expiration of the limitation period, (f) and (g). The Committee finds that the conduct alleged in particular (h) has been established on the evidence. The Committee accepts the evidence of PS that Ms. Heming did not discuss with him the potential consequences of pursuing her novel claim. The evidence is less clear with respect to particular (c). Ms. Heming could not recall whether she advised PS of the consequences of discontinuing the proceeding. PS in his evidence in chief denied having any discussions with Ms. Heming about "the consequences of simply walking away from a claim". On cross-examination, PS stated that he could not recall for sure whether he had discussions about abandonment of the claim with Ms. Heming. Neither counsel referred to the "costs consequences". The Committee finds that the conduct set out in particular (c) has not been established on the evidence.
40. Based on the authority cited above, the Committee finds that the failure to prove the conduct set out in particular (c) does not prevent the Committee from concluding that Citation 2 has been established based on a consideration of the evidence as a whole.

41. Citation 2 is that Ms. Heming failed to provide competent, conscientious and knowledgeable service to HS and PS. On the facts admitted or found by the Committee with respect to this citation based on a consideration of the evidence as a whole, the Committee is satisfied that the conduct breached the referenced sections of the Code and that it is deserving of sanction. Rule 2.02(1) provides in its commentary examples of expected Standards of Practice that include:
- (e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
 - (f) answering, within a reasonable time, any communication that requires a reply;
 - (k) providing the client with complete and accurate relevant information about a matter; and
 - (l) making a prompt and complete report when the work is finished or, if the final report cannot be made, providing an interim report when one might reasonably be expected.
42. The Committee finds that Ms. Heming's conduct fell well short of that expected of a competent lawyer:
- a. she filed proceedings without proper instructions and simply assumed that PS was instructing on behalf of HS;
 - b. she filed proceedings using an incorrect procedure;
 - c. she failed to conduct the necessary legal research with respect to steps taken by her;
 - d. she failed to properly advise her unsophisticated client PS in a manner that would allow him to provide informed instructions with a full understanding of the risks of his instructions. PS testified that he essentially signed whatever Ms. Heming put in front of him and "just did what she wanted me to do, you know";
 - e. Ms. Heming failed to document her advice or instructions;
 - f. she filed a Statement of Claim seeking damages after the expiry of the limitation period;
 - g. she appeared to be oblivious to her obligations to her client upon discovering a mistake in her representation; and

- h. she mishandled the obvious conflict between her and her clients.
43. Ms. Heming's argument would have the Committee look at each of these acts in isolation. The Committee rejects that submission and agrees with the LSA's submission that the evidence shows a pattern of misconduct, through incompetence, in Ms. Heming's representation of PS and HS. In making that finding, the Committee has considered that Ms. Heming was a relatively junior lawyer at the time. Her inexperience does not relieve her of her obligation to provide competent services and to not undertake a matter that she cannot competently handle.
44. It is also no answer to say that the clients' remedy with respect to any mistakes by Ms. Heming is to seek recourse from ALIA. Whether or not there has been a negligent act, and whether or not insurance coverage is provided respecting that act, is not relevant to the issues before the Committee respecting whether Ms. Heming's conduct is contrary to the Code and deserving of sanction. Ms. Heming eventually reported her errors to ALIA on July 31, 2012 and by letter dated January 10, 2013 ALIA wrote to PS denying the claim. That denial is inexplicable to the Committee in the circumstances but is not a matter that requires consideration by it.
45. On April 5, 2013, Ms. Heming accepted a retainer to deal with enforcement proceedings against PS and HS. The costs liability that led to those enforcement proceedings began with Ms. Heming's mistakes in commencing her original proceeding, which cascaded into a dismissal of the action and dismissal of the appeal filed by Ms. Heming.
46. Ms. Heming admitted during testimony or in the Statement of Agreed Facts and Exhibits that:
- a. she received an October 25, 2011 letter from opposing counsel that maintained she had invoked the incorrect procedure with respect to the action she commenced for HS and PS on September 15, 2011;
 - b. she recognized on October 27, 2011 that she appeared to have made a mistake and referred PS to more senior counsel, JT, to take over the matter. PS met JT but continued to be represented by Ms. Heming;
 - c. Ms. Heming continued to act for PS and HS and she sent a letter dated November 25, 2011 to opposing counsel admitting her mistake and offering to pay some court costs;
 - d. on January 31, 2012, Ms. Heming received a letter from opposing counsel with an application by their client seeking full indemnity solicitor/client costs. Ms. Heming felt that put her "in a conflict with PS because I had made an error". She did not consider herself to have any conflict before then;

- e. on February 6, 2012 Ms. Heming withdrew from the record and PS moved his representation to JT's office;
- f. on or about April 12, 2012, JT's office withdrew from the record. The last settlement offer required payment of \$1,000.00 in costs and a mutual restraining order. Ms. Heming was prepared to pay only \$500,00 and PS would not consent to the restraining order. As the indemnity costs hearing was approaching, PS approached Ms. Heming and sought her representation. PS testified that Ms. Heming wanted more money and he did not have any funds so she was not retained. Ms. Heming denied asking for a further retainer and testified that she did not want to be retained at the time and did not feel that PS should be retaining her at that time. Ms. Heming realized she had a conflict. She told PS to appear on his own;
- g. the costs application proceeded on July [...], 2012 and PS was self-represented. The Master called Ms. Heming and asked her whether she was going to attend. Ms. Heming told her she was not attending. The Court granted an order for solicitor/client costs against PS and HS, which were to be assessed by a reviewing officer on notice to PS, HS and Ms. Heming. The Committee is satisfied that the Master made that direction because she concluded that Ms. Heming was responsible for the initiation of the incorrect procedure that led to the costs application;
- h. Ms. Heming received advice on July 27, 2012 from an LSA practice advisor to notify ALIA. Ms. Heming wrote to opposing counsel and stated "I am advised that I now stand in a conflict of interest position with my former client."
- i. Ms. Heming filed a Notice of Appeal from the Costs Order on July 27, 2012 but was uncertain whether she had instructions from PS to do so. The appeal was scheduled for September [...], 2012. PS testified that he did not give Ms. Heming instructions to file the document but she told him that she had taken that step to protect him and he had no objections to that. The Committee finds that Ms. Heming filed the appeal without instructions from her clients. Ms. Heming testified that she did not think at the time as to whether she required her clients' instructions to file a Notice of Appeal.
- j. On July 31, 2012, Ms. Heming submitted a claim report to ALIA;
- k. On August 2, 2012, Ms. Heming wrote to PS and advised him that she had made "a claim on your behalf" and filed a Notice of Appeal. The letter does not state that she did so on instructions. On August 15, 2012, Ms. Heming received a letter from ALIA that identified the potential for prejudice from her late reporting and notes that her admission of liability may jeopardize her coverage. ALIA sought

her return of a non-waiver agreement "before we can take any further steps". She did not return the signed non-waiver agreement until January 3, 2013;

- l. on September 17, 2012, Ms. Heming received a letter from opposing counsel asking what was happening with respect to the appeal and whether it could be adjourned. Ms. Heming did not reply, did not contact ALIA to find out whether it was responding to the appeal and did not alert PS. She proceeded to file a Notice of Withdrawal but remained the lawyer of record because she did not comply with Rule 2.29(1);
 - m. neither Ms. Heming, PS nor anyone from ALIA appeared at the appeal hearing on September [...], 2012 and it was dismissed, resulting in another costs award against PS and HS;
 - n. on January 3, 2013, Ms. Heming sent to ALIA the non-waiver agreement that had been requested by it in August; and
 - o. by letter dated January 10, 2013, ALIA advised PS that it was dismissing the claim. Ms. Heming testified that she felt that ALIA's letter dismissing the claim put an end to her conflict of interest. She testified that it did not cross her mind that PS could still have a claim against her. He still had his problem and she could proceed to fix it.
47. Ms. Heming's conduct from the time in late 2011 when she realized she had made a mistake through to her acceptance of a new retainer from PS in the spring of 2013 demonstrates a complete lack of understanding of the obligations of a lawyer who finds themselves in a conflict of interest with a client due to a mistake by that lawyer. She failed to recognize her conflict in a timely manner and she breached Rule 2.04(1) of the Code in acting or continuing to act while in a conflict of interest.
48. Citation 3 deals with Ms. Heming's failure to comply with Rule 6.07 of the Code. Rule 6.07 requires, when a lawyer discovers a material error or omission that is or may be damaging to the client, the lawyer to do three things:
- a. promptly inform the client of the error or omission;
 - b. recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and
 - c. advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.
49. With respect to Rule 6.07(a), Ms. Heming was aware of her procedural error on her own evidence no later than October 27, 2011 when she referred PS to JT. PS testified that JT

told PS that the opposing counsel was right in that the easement could not be removed. Ms. Heming testified that she could not recall whether she had any conversation with PS around this time at which she advised him she had made a mistake. The Committee finds that the first time Ms. Heming advised PS of her error was in August 2012, after the costs award had been made against PS and HS and that did not satisfy her obligation to provide that advice "promptly".

50. With respect to Rule 6.07(b), Ms. Heming referred PS to JT on two occasions but there is no evidence that she recommended to PS that he obtain advice concerning any rights he may have against Ms. Heming arising from her error or omission. PS testified that Ms. Heming never told him that he might have to sue her for damages for her mistake. Referring a client to another lawyer for a second opinion or to take over the matter does not satisfy the obligation set out in Rule 6.07(b). Ms. Heming admitted that she did not think that she had ever advised PS that as a result of her error, he may have a claim against her and that he should seek independent legal advice respecting a claim against her.
51. With respect to Rule 6.07(c), there is again no evidence that Ms. Heming provided this mandatory advice. She filed a withdrawal from the record in the original proceeding in February of 2012 and she filed another withdrawal shortly before the appeal in September of 2012 but she did not provide the advice prescribed by Rule 6.07(c).
52. Ms. Heming's counsel argued that the adverb "promptly" in Rule 6.07(a) modified only that clause and that Rule 6.07 did not prescribe any timing element with respect to clauses (b) and (c). This submission was that the advice required by those clauses did not have to be given promptly and that Ms. Heming had satisfied the requirement in (c) by withdrawing from the record when she did so. The Committee rejects that submission. While the drafting might be more clear if the word "promptly" appeared in the proceeding sentence of Rule 6.07, as "... the lawyer must promptly:", there exists a timeliness element to all three clauses. The opening words of Rule 6.07 requires the lawyer to do the three things "when" the lawyer discovers the requisite material error or omission. "When" may depending on the circumstances be a matter of a days or perhaps a matter of weeks but it is certainly not a matter of months. That would defeat the obvious intention of the Rule which is to ensure that the client is informed of the error or omission and provided with the requisite advice in a timely way.
53. With respect to Citation 4, the requirement to report a potential claim or liability to ALIA is set out in the commentary to Rule 6.07. The commentary expressly notes that the duty to report a potential claim to ALIA is a contractual one while the duty to disclose an error to the client is "an ethical or fiduciary one". The Committee is of the view that a failure to report a potential claim to ALIA in a timely way may be a contractual breach, but it is not an ethical breach of Rule 6.07. The commentary wording in Rule 6.07 is a reminder to a member of his or her contractual duties pursuant to the ALIA policy.

54. Ms. Heming knew she had made a mistake by October 27, 2011 and failed to report the potential claim. Her jeopardy worsened in January 2012 when she received the application seeking indemnity costs from her clients. She again failed to report the claim to ALIA. She submitted a notice of the claim to ALIA finally on July 31, 2012, four days after being told by a Practice Advisor that she needed to do so. ALIA's response on August 15, 2012 commented on "the potential for prejudice due to late reporting". No prejudice in fact accrued because ALIA several months later dismissed the claim notwithstanding the late reporting.
55. The LSA's counsel shortly following the hearing directed the Committee's attention to Rule 152 of the Rules which does impose a mandatory reporting obligation to ALIA, as set out above at paragraph 18. Failing to follow the Rules may be unprofessional conduct but as Ms. Heming's counsel points out, no citation was issued with respect to any breach of Rule 152 of the Rules. Rule 152(1)(a) requires notification to ALIA "as soon as practicable after learning of a claim". Ms. Heming did not have an opportunity to address that timing requirement and it would be unfair to her to consider a possible breach of Rule 152(1)(a) in the circumstances. The Committee finds that Citation 4 has not been established.

Analysis and Decision on Sanction

56. As indicated above, the Committee will convene a hearing to consider sanction.

Concluding Matters

57. The exhibits, other hearing materials, and this report will be available for public inspection, including providing copies of exhibits for a reasonable copy fee, although redactions will be made to preserve personal information, client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated at Calgary, Alberta, June 15, 2020.

Kenneth Warren, QC - Chair

Corinne Petersen, QC

Michael Mannas

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

- AND -

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF

JOANNE E. HEMING

A MEMBER OF THE LAW SOCIETY OF ALBERTA

HEARING FILE HE20180228

STATEMENT OF AGREED FACTS AND EXHIBITS

INTRODUCTION

1. I was admitted as a member of the Law Society of Alberta (the “**LSA**”) on August 20, 2007. My current status is “Active/Practising”.
2. From August 20, 2007 to December 1, 2009, I worked at [H] LLP. Since then, I have operated my own firm, Heming & Associates, in [S].
3. My practice consists primarily of family law, civil litigation, criminal law, and real estate law.

FACTS AND ADMISSIONS

4. I admit as facts the statements contained in this Statement of Admitted Facts.

NO DURESS AND INDEPENDENT LEGAL ADVICE

5. I have had the opportunity to consult with legal counsel and confirm that I have signed this statement voluntarily and without any compulsion or duress.

COMPLAINT

6. On May 12, 2017, the LSA received a complaint from HS alleging that she had never retained me in litigation in which her spouse, PS, had retained me.

Tab 1 - Information Concerning a Lawyer Form (May 12, 2017)

7. The LSA investigated the allegations, which resulted in an Investigation Report dated May 30, 2018, and a referral to the Conduct Committee.

Tab 2 – Investigation Report

(Digital Copy Includes Attachments; Paper copy does not)

8. On October 16, 2018, the Conduct Committee directed that the following citations be dealt with by a Hearing Committee:
 1. It is alleged Joanne E. Heming failed to obtain consent and instructions from H.S. to represent her in legal matters and that such conduct is deserving of sanction;
 2. It is alleged Joanne E. Heming failed to provide competent, conscientious, and knowledgeable service to her clients, H.S. and P.S., and that such conduct is deserving of sanction;
 3. It is alleged that in relation to her errors on the matter for which she acted for H.S. and P.S., Joanne E. Heming failed to:
 - a. promptly inform the clients of the errors or omissions;
 - b. recommend that the clients obtain independent legal advice concerning the matter, including any rights the clients may have had arising from the errors or omissions; and
 - c. advise the clients of the possibility that, in the circumstances, she may no longer be able to act for them as required by Rule 7.7-1 of the Code of Conduct and that such conduct is deserving of sanction; and
 4. It is alleged Joanne E. Heming failed to promptly notify ALIA of her errors in handling her clients' litigation matter as required by Rule 7.7-2 of the Code of Conduct and that such conduct is deserving of sanction.

Tab 3 – CCP Minutes

STATEMENT OF FACTS

1. Retainer

9. In April 2010, I was retained by PS to start proceedings against his neighbours for the improper exercise of an easement, which he alleged had caused damages to his fence and allowed water to escape onto his property.

Tab 4 – Letter (Apr 26, 2010)
10. I had previously acted for PS and HS in 2007 and 2008. They had both been named as defendants in an action filed by different neighbours who claimed that a fence owned by them was encroaching on the neighbours' lands.
11. During the course of my first retainer in 2007-2008,
 - a. Because they did not have access to email, I usually communicated by letter addressed to both of them at their postal box address;

- b. I sent statements of account addressed to both of them at their postal box address;
 - c. I received instructions from PS by return letter, telephone, and in person. I assumed that the instructions from PS were being provided on behalf of himself and HS; and
 - d. I never met with HS to confirm my retainer.
12. Little changed during the course of my second retainer in 2010:
- a. I communicated with PS by letter addressed to him at their postal box address;
 - b. I sent statements of account addressed to PS to their postal box address;
 - c. I received instructions from PS by return letter, telephone, and in person. I assumed that the instructions from PS were being provided on behalf of himself and HS; and
 - d. I never met with HS to confirm my retainer.

Tab 5 – Statements of Account (2011-2017)

2. Initial Proceedings (Originating Application)

13. On June 2, 2010, PS wrote me a letter in which he discussed the history of the fence dispute with his neighbours. He also mentioned the following potentially actionable incidents:
- a. Two incidents of trespass to land and property damage on June 27, 2009; and
 - b. An incident of civil assault on May 21, 2010.

Tab 6 – Note (Jun 2, 2010)

14. Two days later, PS wrote me a letter in which he provided additional information about the incidents on June 27, 2009

Tab 7 – Note (Jun 4, 2010)

15. Although I was familiar with the provisions of the *Limitations Act*, which mandated the filing of most types of claims within two years, I did not discuss limitation periods with PS.

16. Between June 2010 and April 2011, I wrote five letters to opposing counsel about the fence and the other incidents, without a response. I eventually received a response to the effect that opposing counsel no longer represented the neighbours and that I should contact them directly.

17. On April 19, 2011, I wrote to PS for instructions, which I received by phone on April 26, 2011.

Tab 8 – Letter (Apr 19, 2011)

Tab 5 – Account for Services (Apr 26, 2011)

18. On April 26, 2011, I wrote to the neighbours, enclosing a discharge of easement. I also advised them that I had instructions to start proceedings for damages for the prior access to the easement.

Tab 9 – Letter (Apr 26, 2011)

19. On June 29, 2011, the limitation period expired for the 2009 incidents of trespass to land and damage to property.
20. On September 15, 2011, I filed an Originating Application on behalf of PS and HS seeking to have the easement discharged. The Application was supported by the affidavit PS in which PS claims unspecified damages for trespass to land, property damage, and civil assault.

Tab 10 – Originating Notice with Affidavit (Sep 15 and 16, 2011)

Tab 11 – Procedure Card (Action 1101-12759)

21. On October 25, 2011, I received a letter from the law firm that had been retained by the neighbours. Opposing counsel stated the following in his letter:

We note for the record that it would appear the relief you seek in your application is not appropriate to the allegations set forth in the supporting Affidavit of [PS]. To the extent there is any validity to any of the statements set forth in your client's Affidavit (which is wholly lacking in any particularity whatsoever), it would seem that you client's remedy is an *in personam* remedy of damages, not an *in rem* remedy affecting the rights attaching to the respective lands owned by the parties.

Tab 12 – Letter (Oct 25, 2011)

22. On October 27, 2011, I wrote to PS and advised him that he should retain a JT, a senior lawyer with whom I had completed my articles, given his experience in this area of law.

Tab 13 – Letter (Oct 27, 2011)

23. On November 1, 2011, I provided the file materials to JT.

Tab 14 – Letter (Nov 1, 2011)

24. On November 10, 2011, JT wrote to opposing counsel, stating the following in part:

We have received a copy of Ms. Heming's file and your correspondence of October 25 and we can advise that we do not disagree with the position set out in your correspondence. We expect to obtain instructions to file a Statement of Claim for damages as a result of damage caused to the [S]'s property by your client. ...

Tab 15 – Letter (Nov 10, 2011)

25. Although JT had indicated that his firm was taking over conduct of the file, the file materials were soon returned to me and I carried on with conduct of the matter until February 2012.
26. On November 16, 2011, the defendant filed a responding affidavit.
27. On November 22, 2011, I wrote to opposing counsel seeking his consent to discontinue the proceedings on a without costs basis.

Tab 16 – Letter (Nov 22, 2011)

28. On November 24, 2011, opposing counsel advised me that he had received instructions to seek costs of \$1,000.00, plus disbursements, for the discontinuance. He also suggested the possibility of entering into a mutual restraining order.

Tab 17 – Letter (Nov 24, 2011)

29. On November 25, 2011, I responded as follows in part:

Thank you for yours of November 24, 2011. I believe costs payable in this matter is determined under column 1, item 7(3) such that we are abandoning our chambers application. His would allow for \$250.00 costs plus your reasonable disbursements. I do not believe, however that you would have any qualified disbursements, but do invite you to provide same to me. **Given that it was my error in taking the incorrect action, which I now realize should have been for an injunction and damages for trespass, now supported by your client's affidavit contained in your aforementioned correspondence, I will be paying the costs personally.** I believe this offer is more than fair to your client.
[Emphasis added]

Tab 18 – Letter (Nov 25, 2011)

30. I did not send a copy of this letter to PS, nor did I advise him that I had made a mistake in my legal advice and choice of procedure.
31. On November 29, 2011, I exchanged a series of letters with opposing counsel about the quantum of costs and the wording of a mutual restraining order. We eventually agreed that I would pay \$500.00 in costs personally and we would adjourn the application to give us time to negotiate the terms of the order.

Tab 19 – Letter (Nov 29, 2011)

32. Between November 29, 2011 and January 5, 2012, opposing counsel and I exchanged a series of draft orders. However, we could not agree on the terms of the order and I received instructions from PS to abandon the claim. I did not explain to PS the costs implications of doing so.

33. On January 5, 2012, I wrote the following letter to opposing counsel, in part:

... Therefore it appears we will not be able to resolve this matter, and my client is abandoning his claim.

Tab 20 – Letter (Jan 5, 2012)

34. On January 31, 2012, I was served with an application by the Defendant for her full indemnity solicitor-client costs and a restraining order.

Tab 21 – Letter (Jan 31) with Application and Affidavit (Jan 30, 2012)

35. On February 1, 2012, I sent the application materials to PS and asked him for instructions about how he wanted to proceed.

Tab 22 – Letter (Feb 1, 2012)

36. On February 6, 2012, I filed a Notice of Withdrawal of Lawyer of Record and returned the file materials to PS. The Affidavit of Service was filed on February 10, 2012, and, ten days later, I ceased to be the lawyer of record.

Tab 23 – Notice (Feb 6, 2012)

37. On February 7, 2012, PS retained JT, who wrote to opposing counsel as follows, in part:

Upon a review of the file, it appears that the issue of costs has been settled with Ms. Heming offering to personally pay \$500 towards your client's legal fees. ...

Tab 24 – Letter (Feb 7, 2012)

38. Following my withdrawal, counsel continued to negotiate the terms of a mutual restraining order.

39. On March 19, 2012, KM, the lawyer with JT's office who took over conduct of the file, forwarded me a letter from opposing counsel and asked me if I would be willing to pay \$1,500.00 in costs. The letter from opposing counsel stated the following in part:

My client was initially prepared to agree to a significant reduction in her Schedule "C" costs entitlement on the basis that your client's previous lawyer was prepared to work towards a resolution of the overall dispute by a mutually agreeable restraining order and that counsel would be paying the reduced costs amount. Your client's previous lawyer engaged us in negotiations towards our effort to resolve the matter in essentially the same manner as set forth in your proposed form of Order and we agreed to an adjournment sine die to permit that effort to bear fruit. Once your client's application was adjourned sine die with my consent, your client's previous lawyer retreated from that effort and simply indicated that the matter was being dropped.

This approached [sic] by your client's previous lawyer appeared to me to be a tactic to avoid a court hearing in which your client's previous lawyer would be required to concede the application she initiated was ill conceived and left my client no alternative but to initiate a separate court application to seek a formal dismissal of the matter with a concomitant award of costs. ...

In my opinion, the conduct of your client's previous lawyer provided a reasonable opportunity to argue for full indemnity, solicitor-client costs to my client in this matter.

In an effort to resolve the matter, my client is prepared to agree to your proposed Consent Restraining Order provided that the amount of costs payable is set at \$1,500, which is substantially less than her actual legal costs incurred to deal with the matter. Sadly, if your client's previous lawyer had approached this matter as you now have, it would have been resolved without the need for us to have Initiated a separate application with the attendant increase in legal costs borne by my client.

Tab 25 – Letters (Mar 19, 2012)

40. On March 23, 2012, I responded to KM as follows:

I am currently seeking legal advice with regard to your correspondence and allegations being made against me by the other party. I certainly did offer to pay the \$500.00 provided we could negotiate a restraining order. The other party advised that the "Household Agreement" was able to be used to access the easement and there was no room for negotiation on that point. It was at that time, Mr. [S] instructed me to abandon the claim. I will pay the \$500.00 and suggest that Mr. [S] pay the balance as I have not required him to pay my legal fees since the file was returned from your office until I gave Mr. [S] the file to retain you in this matter. I don't know what correspondence [LH] is referring to that I did not provide to you as I gave the entire file to Mr. [S]. As well, I paid your first account from my own funds. Please advise if this is acceptable and I will forward the \$500.00.

Tab 26 – Email (Mar 23, 2012)

41. I did not seek legal advice, nor did I report the allegations to the Alberta Lawyers' Insurance Associate ("ALIA").

42. On March 23, 2012, KM wrote to opposing counsel as follows:

We have canvassed your proposal regarding costs with Ms. Heming and Mr. [S] and can advise that Ms. Heming is only willing to pay the \$500 originally agreed upon and Mr. [S] is not willing to pay the extra costs. Please advise how you wish to proceed. If it is your client's instructions to proceed with your application regarding costs, we would request that Ms. Heming be served with same.

Tab 27 – Letter (Mar 23, 2012)

43. Shortly thereafter, opposing counsel advised KM that his client would accept \$1,000.00 in costs.

Tab 28 – Letter (Incorrectly dated January 31, 2012)

44. On April 10, 2012, KM spoke with PS, who advised that he would not pay the additional \$500.00 in costs and would not consent to a mutual restraining order.

Tab 29 – Letter (Apr 10, 2012)

45. Consequently, on April 11, 2012, KM filed a Notice of Withdrawal of Lawyer of Record. The Affidavits of Service were filed shortly thereafter, and JT ceased to be the lawyer of record on May 3, 2012.

46. On May 3, 2012, I wrote to KM for an update, who responded that her office had ceased to act for PS. She also advised me that opposing counsel was going to set a date for the application for costs.

Tab 30 – Letter (May 3, 2012)

Tab 31 – Letter (May 3, 2012)

47. I did not take steps to follow up with opposing counsel.

48. Shortly thereafter, Mr. [S] contacted me about the upcoming costs hearing. Although he did not retain me, I advised him that he would have to attend on his own and that the Master would likely be helpful and sympathetic given that he was unrepresented.

Tab 72 – Response (Aug 30, 2018)

49. On May 21, 2012, the limitation period expired for the incident of civil assault.

50. On July [...], 2012, the cost application took place before Master [H]. PS appeared on his own behalf. Before the hearing of the application, Master [H] called me at my office to ask me if I was aware of the application that day to which I responded that I was but would not be in attendance. Ultimately, Master [H] ordered that the Originating Application was to be discontinued and awarded solicitor-client costs to the Defendant, to be assessed by a reviewing officer upon notice to me and to PS and HS.

Tab 32 – Transcript (Jul 17, 2012)

51. On July 19, 2012, I was served with a copy of the filed Order and an Appointment for Assessment of Solicitor-Client Costs, returnable on August 21, 2012.

Tab 33 – Letter (Jul 19, 2012)

52. On July 27, 2012,

a. I spoke with the Practice Advisor, who recommended filing an appeal, alerting ALIA, and noted that I was now in a conflict with PS and HS.

Tab 34 – Note to File (Jul 27, 2012)

b. I filed an appeal of the Order (the “**Appeal**”), returnable on September 27, 2012, despite not being the solicitor or record for PS and HS and not having instructions to do so;

Tab 35 – Notice of Appeal (Jul 27, 2012)

c. I wrote to opposing counsel, starting the following in part:

Please be advised I will be contacting ALIA on Tuesday, July 31, 2012, to make arrangements for their conduct of the appeal, as I am advised I now stand in a conflict of interest with my former client.

Tab 36 – Letter (Jul 27, 2012)

53. On July 31, 2012, I submitted a New Claim Report to ALIA.

Tab 37 – Letter with Claim Form (Jul 31, 2012)

54. On August 2, 2012, I wrote to PS and advised him as follows:

Please note we have made a claim on your behalf and filed the Notice of Appeal to preserve your rights. Please find enclosed a copy of our claim for your records.

I have requested that the Alberta Lawyers Insurance Association (ALIA) appoint a lawyer to deal with the taxation and appeal. It is hoped that ALIA will be in touch with you in the near future.

Tab 38 – Letter (Aug 2, 2012)

55. On August 13, 2012, I wrote to PS and stated the following:

Further to our telephone conversation of August 13, 2012, if you wish to make a claim for the above noted matter, you must contact [D] at Alberta Lawyers Insurance Association (ALIA) at 403-[...] .

Tab 39 – Letter (Aug 13, 2012)

56. On August 15, 2012, I received a letter from ALIA, which provided as follows in part:

The actions described in your claim report form give rise to issues with respect to coverage under the Lawyers Professional Liability Insurance Group Policy; specifically we have identified the potential for prejudice due to late reporting. In the event that ALIA's position has been prejudiced as result of your failure to give notice, ALIA may deny insurance coverage to you. In addition, your report indicates that you offered to pay the Schedule C costs in exchange for a discontinuance of the claim. This was done before the report to ALIA and essentially constitutes an admission of liability. Such a step may also jeopardize your coverage.

As a result, we will require you to sign the enclosed Non Waiver agreement before we can take any further steps.

If you have any questions about the Non-Waiver agreement, please don't hesitate to contact me directly. You may wish to obtain independent legal advice regarding the Non-Waiver agreement at your expense. [Emphasis in Original]

Tab 40 – Letter (Aug 10, 2012)

57. I returned the Non-Waiver Agreement on January 3, 2013, after a follow-up email was sent to me by ALIA on December 28, 2012. In the interim, ALIA did not appoint repair counsel to conduct the Appeal.

Tab 47 – Email (Dec 28, 2012)

Tab 49 – Non-Waiver Agreement (Jan 3, 2013)

58. On September 17, 2012, opposing counsel wrote to me to advise that he was not available to attend the Appeal on September [...], 2012. He also stated the following:

Also, I inquire whether you have ordered a copy of the transcript of the hearing before Master [H] as the Court normally expects that to be available at any appeal of the Master's Order.

Lastly, can you kindly confirm who will be representing [PS and HS] in the appeal as you had indicated in your fax correspondence dated July 27th that ALIA had been contacted and you were in a conflict of interest with your former clients.

Tab 41 – Letter (Sep 17, 2012)

59. Despite it appearing from his letter that ALIA had not yet appointed a lawyer to deal with the appeal, I did not follow up with ALIA, with PS, or with opposing counsel.

60. The next day, I filed a Notice of Withdrawal of Lawyer of Record, which I served on opposing counsel on September 19, 2012.

Tab 42 – Letter with Notice (Sep 19, 2012)

61. However, I did not comply with the provisions of Rule 2.29(1) and remained the lawyer of record for PS and HS.

62. On September [...], 2012, during morning Chambers, Justice [H] struck out the Appeal, with nobody appearing on behalf of PS and HS.

Tab 11 – Procedure Card (Sep 27, 2012)

63. On Oct 3, 2012, opposing counsel served PS and HS with the Appointment of Assessment of Costs, returnable on December 18, 2012.

Tab 43 – Letter (Oct 3, 2012)

64. On October 17, 2012, PS replied as follows:

Do not send any further letters to us. Direct all further correspondence to the Law Society of Alberta, Calgary office, which has now the file. J. Heming and you are being now investigated for badly handling this file!!

Tab 43 – Letter (Oct 3, 2012) with Response (Oct 17, 2012)

65. The Assessment of Costs proceeded on December 18, 2012 in the absence of PS and HS.

66. On December 20, 2012, opposing counsel filed a Bill of Costs for \$7,056.81 and obtained a Writ of Enforcement for that same amount, which was registered on title on January 3, 2013.

Tab 44 - Bill of Costs (Dec 20, 2012)

Tab 45 - Writ of Enforcement (Dec 20, 2012)

Tab 46 – Historical Land Title Certificate (Jan 3, 2013)

67. As noted, on December 28, 2012, I received an email from ALIA inquiring about the status of the matter and the Non-Waiver Agreement.
Tab 47 – Email (Dec 28, 2012)
68. On January 2, 2013, opposing counsel provided me with a filed copy of the Bill of Costs and explained that nobody had appeared during the assessment for PS or HS.
Tab 48 – Letter (Jan 2, 2013)
69. As noted, on January 3, 2013, I returned the executed Non-Waiver Agreement to ALIA.
Tab 49 – Letter (Jan 3, 2013)
70. On January 10, 2013, ALIA wrote to PS and HS and denied their claim. Six month later, the ALIA file was closed.
Tab 50 – Letter (Jan 10, 2013)
Tab 51 – Letter (Jul 18, 2013)

3. Follow up Retainer (Enforcement & Statement of Claim)

71. On March 13, 2013, opposing counsel wrote to PS and HS and demanded payment of the amount of the judgement. PS responded on April 2, 2013 that he was seeking legal counsel.
Tab 52 – Letter (Mar 13, 2013)
Tab 53 – Letter (Apr 2, 2013)
72. On April 5, 2013, I met with PS and he retained me to deal with the enforcement issue.
Tab 5 – Account for Services (Apr 5, 2013)
73. On April 18, 2013, I wrote to opposing counsel to explain that PS was unable to pay the judgment.
Tab 54 – Letter (Apr 18, 2013)
74. On September 13, 2013, I filed a Statement of Claim against the neighbours on behalf of PS and HS, the substance of which was similar to the Originating Notice that I had filed previously.
Tab 55 – Statement of Claim (Sep 16, 2013)
Tab 56 – Procedure Card (Action 1301-10859)
75. The Statement of Claim claimed damages for several incidents that I knew to be statute-barred, however, I intended to argue that these incidents constituted a continuing pattern of conduct. I did not advise PS about the risks associated filing pleadings for statute-barred claims.
76. On September 27, 2013, the Defendants filed a Statement of Defence, explicitly alleging that the claim was an abuse of process and seeking their solicitor-client costs. I did not

discuss with PS of the risks associated with proceeding with the litigation in the face of this defence.

Tab 57 – Statement of Defence (Sep 27, 2013)

77. Over the next two years, the litigation proceeded in the normal fashion, albeit with some delay because of the health of one of the Defendants.
78. On September 23, 2015, the Defendants filed a summary dismissal application on the ground that the allegations in the Statement of Claim were statute-barred. The Defendants also sought their costs on a solicitor-client basis.

Tab 58 – Application (Sep 23, 2015)

79. On September 29, 2015, I forwarded the application materials to PS.

Tab 59 – Letter (Sep 29, 2015)

80. On April [...], 2016, the Application for Summary Dismissal proceeded before Master [P], with some of the claim being dismissed as statute-barred. However, the action itself was stayed pending payment of the outstanding costs awarded in the previous proceedings. The deadline for paying those costs was November 1, 2016, failing which the entire action would be dismissed.

Tab 60 – Letter with Draft Order (Apr 13, 2016)

81. On April 20, 2016, I spoke with PS about the order that had been granted during the special application. However, I did not send him a copy of the Order itself.

Tab 61 – Note to File (Apr 20, 2016)

82. The outstanding costs were not paid by the deadline of November 1, 2016.
83. On November 2, 2016, the Defendants filed an application to strike the Statement of Claim and to have the Certificate of Lis Pendens removed, along with their solicitor-client costs.

Tab 62 – Letter with Application (Nov 2, 2016)

84. The application proceeded on December [...], 2016, at which time the Statement of Claim was dismissed and costs of \$10,000.00 were awarded against PS and HS.

Tab 63 – Letter with Draft Order (Dec 19, 2016)

85. A Writ of Enforcement was filed on December 23, 2016 and registered against title on January 19, 2017.

Tab 64 – Writ of Enforcement (Dec 23, 2016)

Tab 46 – Historical Land Title Certificate (Jan 19, 2017 entry)

86. On January 6, 2017, I wrote to PS and sent him a copy of the filed Order dismissing the action.

Tab 65 – Letter (Jan 6, 2017)

87. On March 10, 2017, opposing counsel wrote to me demanding payment of the total amount owing of \$18,217.49, failing which he would take steps to collect.

Tab 66 – Letter (Mar 10, 2017)

88. On March 13, 2017, I forwarded the correspondence from opposing counsel to PS.

Tab 67 – Letter (Mar 13, 2017)

89. On March 14, 2017, I filed a final Notice of Withdrawal of Lawyer of Record.

Tab 68 – Notice (Mar 14, 2017)

4. Complaint by HS

90. As noted, on May 12, 2017, HS submitted a complaint against me.

Tab 1 – Information Concerning a Lawyer Form (May 12, 2017)

91. On July 28, 2017, I provided my written response to the complaint.

Tab 69 – Letter (Jul 28, 2017)

92. On August 10, 2017, HS provided a reply to my response, as drafted by PS.

Tab 70 – Letter (Aug 10, 2017)

93. On November 29, 2017, the Senior Manager of Regulation directed a formal investigation into the complaint.

Tab 71 – Letter (Nov 28, 2017)

94. As noted, on May 30, 2018, the LSA completed the investigation into the complaint.

Tab 2 – Investigation Report (May 30, 2018)

95. On August 30, 2018, I provided my response to the Investigation Report.

Tab 72 – Letter (Aug 30, 2018)

THIS STATEMENT OF AGREED FACTS AND EXHIBITS IS MADE THIS 23 DAY OF September 2019.

**“Joanne Heming”
JOANNE E. HEMING**