

**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 JAMES D. MURPHY
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Hearing Committee

Robert Philp, QC – Chair
Sony Ahluwalia – Bencher
Linda Maj – Adjudicator

Appearances

Karl Seidenz – Counsel for the Law Society of Alberta (LSA)
Ed Halt, QC – Counsel for James D. Murphy

Hearing Date

September 8, 2021

Hearing Location

Virtual Hearing

HEARING COMMITTEE REPORT

Overview

1. Certain individuals and James D. Murphy were involved in business dealings. Legal proceedings were commenced in relation to those business dealings, but ultimately settled. On November 15, 2018, the LSA opened a complaint file regarding Mr. Murphy concerning an issue that arose during the settlement of legal proceedings.
2. On September 15, 2020, the Conduct Committee directed that the complaint related to Mr. Murphy proceed to hearing in relation to a single citation, which, as amended, reads:

It is alleged that James D. Murphy advised a client to enter into an agreement that involved valuable consideration being exchanged in return for influencing the Law Society not to proceed with a complaint, without the consent of the Law Society, and that such conduct is deserving of sanction.

3. On September 8, 2021, this Hearing Committee (“Committee”) convened a hearing into Mr. Murphy’s conduct based on the citation.
4. The LSA and Mr. Murphy jointly submitted a Statement of Admitted Facts, Exhibits, and Admission of Guilt (Statement) and made a joint submission on sanction.
5. The Committee found the Statement to be in the appropriate form and accepted it pursuant to section 60 of the *Legal Profession Act*, RSA 2000, c.L-8 (“Act”).
6. The Committee also found that it was in the public interest to accept the joint submission on sanction and did so. The LSA and Mr. Murphy also made a joint submission on costs to be payable by Mr. Murphy and the time within which to pay the costs, and the Committee found this joint submission on costs acceptable.
7. The Committee determined that, based on the facts of this case, the appropriate sanction was, as jointly recommended by the parties, a reprimand in accordance with section 72 of the *Act*.
8. In addition, pursuant to section 72(2) of the *Act*, the Committee ordered Mr. Murphy to pay costs in the amount of \$3000.00, with Mr. Murphy having until November 30, 2021, to pay the costs.
9. This report provides the Committee’s reasons for its findings on guilt, sanction and costs.

Preliminary Matters

10. There was no objection to the composition of the Committee or its jurisdiction. The Committee determined jurisdiction had been established.
11. A private hearing was not requested. Accordingly, a public hearing into Mr. Murphy’s conduct was held.

Background

12. The Statement sets out the facts agreed to by the LSA and Mr. Murphy. For ease of reference, we set out below some of the salient facts.
13. On June 8, 2004, Mr. Murphy was admitted as a member of the LSA. Since then, he has practiced at a large firm in Calgary as a commercial litigator. At all material times, Mr. Murphy’s status was “active/practicing”.

Initial Complaints

14. On November 11, 2017, the LSA received a complaint from EB about a Client of Mr. Murphy's (the Client). EB was a former business partner of the Client in a company known as PFI, among others.
15. On November 14, 2017, the LSA received a complaint from BC and TB about the Client. CB and TB were the parents of EB and also former business partners of the Client.
16. The conduct complained of was also the subject matter of legal proceedings in Saskatchewan between the Complainants and the Client, in which Mr. Murphy acted as counsel for the Client. The Complainants were represented by counsel in the legal proceedings.
17. On March 9, 2018, the LSA received responses to both complaints from Mr. Murphy on behalf of the Client. On April 9, 2018, the LSA received an additional response from Mr. Murphy on behalf of the Client.

Settlement Negotiations

18. On March 15, 2018, a decision was issued by the Court of Queen's Bench, which prompted the parties to enter into settlement discussions. On March 24, 2018, the Complainants and the Client met at Mr. Murphy's office in Calgary without either counsel being present.
19. On March 7, 2018, Mr. Murphy left the following voice message with LSA counsel:

Hi [EP], it's James Murphy calling. I'm, counsel for [the Client], with respect to the two complaints made by the [Complainants] against him. I am calling because in the related action it looks like we're pretty close to a settlement and as part of the settlement, the [Complainants] have offered to write letters to the Law Society saying or requesting that their complaints be revoked or that no investigation be done. We're just wondering if that can happen, what those letters would need to say and if the Law Society would not look further into the complaints if the [Complainants] were to say that they are now satisfied that there is no issue. Can you please give me a call [EP] at [...] and just let me know? Thank you very much. Bye.

20. Later that day, Mr. Murphy and LSA counsel discussed the matter over the telephone, a summary of which was set out in a note to file by LSA counsel:

Telephone call with L's lawyer, James Murphy. Murphy advised that the Court has made a decision on about 50% of the claim. In Murphy's opinion the decision and the Justice's statements vindicate L's actions. Murphy will send me the

decision. The decision has prompted settlement discussions. C's have said they will withdraw their complaint as part of the settlement. I explained that a withdrawal does not change the Law Society's ability to pursue L if we decide there is conduct deserving of sanction. At the same time, I advised Murphy that if there is no conduct in our opinion and the parties settle, then I am able to close my file as "resolved". I told Murphy that our process should not form part of their settlement as we are not bound by their agreement. In Murphy's opinion that may be a problem as he says the C's used our process to influence the Court proceedings and force a settlement and now L has less reason to settle if our process will continue regardless. I reminded Murphy that our process is confidential and cannot be used for a collateral purpose.

Murphy suggested that they may have to wait to settle until we are done our process and requested a timeline. I advised that I could not provide a timeline and that I had expected the Court decision to be helpful in my review given the allegations of missing money, invalid agreements, etc. Murphy said he would let L know that our process will continue regardless of the settlement, and they will keep me posted on the Court decisions.

21. On March 29, 2018, LSA counsel emailed Mr. Murphy as follows:

As a follow up to our telephone conversation earlier this week, the section of the Code of Conduct that I was referring to is 3.2-12 Inducement for Withdrawal of Criminal or Regulatory Proceedings.

22. Shortly thereafter, an associate of Mr. Murphy emailed the wording of Rule 3.2-12 to the Client with the following note:

Just a quick note. In your discussions with the [Complainants], please ensure you are cognizant of the following Law Society of Alberta Code of Conduct provision which is relevant to the interplay between settling the dispute as well as the Law Society of Alberta complaint.

23. Earlier that day, CB and TB had emailed counsel for the LSA as follows:

We are in the midst of settlement with [the Client] on the affairs and future of [PFI], as it is now a completely insolvent company. One of the terms of settlement proposed by [the Client] is that we are required to withdraw our complaint to the Law Society.

24. On April 2, 2018, CB and TB followed up again:

We have been trying to contact either yourself or [EP] since Thursday and are hoping to speak to someone directly.

We have been discussing a settlement with [the Client] however, one of his settlement demands is that we drop the complaint filed with the Law Society. We would really appreciate some advise or direction as this has the potential to stall our settlement with [the Client].

25. On April 3, 2018, counsel for the LSA responded as follows:

I apologize for my delay in responding. I am not available for a confidential telephone call as any information you provide to me must be provided to [the Client] for his response. Further, the Law Society cannot provide you with legal advice. I recommend you seek legal advice about any potential settlement. I can advise that if the Law Society determines there is conduct deserving of sanction, a complaint will continue despite a withdrawal by the complainants. However, in the event the Law Society determines there is no conduct, then a resolution between the parties could result in a file being closed as "resolved".

26. On April 5, 2018, the Client emailed an outline of the terms of settlement to Mr. Murphy.
27. On April 6, 2018, CB provided a draft Settlement Agreement to the Client, who forwarded it to Mr. Murphy. The proposed terms of settlement had been drafted by counsel for the Complainants and included as Schedule "M" a Full and Final Mutual Release and as Schedule "N" an Indemnification Agreement.
28. On April 12, 2018, an associate of Mr. Murphy emailed a copy of a modified draft of the Settlement Agreement to counsel for the Complainants.
29. On April 13, 2018, the parties exchanged two drafts of the Settlement Agreement. Later that day, the final version of the Settlement Agreement was signed and exchanged. Article 4 of the Settlement Agreement concerned the indemnification of the Client:

Article 4 - Indemnification of [the Client]

4.01 Indemnification

[PFI and Complainants] (the "Indemnitors") hereby agree to indemnify [the Client] and GAE for legal costs, damages, penalties, or other losses that he may sustain or be required to pay as a result of any actions, claims, suits that are in any way related to his position as a Director of [PFI], or any business that he conducted for, or in any way related to, [PFI]. specifically including but not limited to, the Law Society of Alberta Complaints #[...] and #[...] This indemnification shall be of no force and effect in regard to any Law Society of Alberta disciplinary action that may arise as a consequence of the provisions of para 4.04 hereof.

In addition, this indemnification shall, in regard to the Law Society of Alberta Complaints #CO[...] and #CO[...], be limited to payment of the actual costs, charges, legal fees, expenses and penalties of any kind up to a maximum of \$50,000.00. Should the costs, charges, legal fees, expenses, and penalties of any kind exceed the sum of \$50,000.00, [the Client] and the Indemnitors agree to share equally said costs on an equal, 50/50, basis. Should [the Client] also be suspended by the Law Society of Alberta, the Indemnitors shall pay \$25,000.00 per month provided on a weekly basis for every month of suspension.

4.02 Letters to Law Society of Alberta

[Complainants] agree to write letters to the Law Society of Alberta advising that they have settled the Action and are satisfied that their Law Society of Alberta Complaints #CO[...] and #CO[...] were without merit and that they do not wish to see them proceed with them.

LSA Follow-Up

30. On July 19, 2018, LSA counsel emailed CB and TB as follows:

Further to your March 29, 2018, email and my April 3, 2018, response (below), please confirm whether you wish to withdraw your complaint. If you no longer wish to pursue your complaint, we can cease involving you in the file. In the event my review indicates no inappropriate conduct by [the Client], then we would close the file as "resolved". However, if my review indicates conduct on the part of [the Client] that breaches our Code of Conduct, then the Law Society will proceed with conduct proceedings.

31. On July 20, 2018, CB and TB provided a letter to LSA counsel, as follows:

As you are aware, on October 23rd, 2017, we entered into lengthy and complicated litigation with [the Client] regarding a partnership company and leased lands. Certain actions taken by [the Client] and events leading up to start of litigation, led us to file the complaints described above as CO[...] and CO[...].

On April 13th, 2018 a Settlement Agreement was entered into with (the Client) regarding ongoing litigation involving, inter alia, the Leased Lands and the Feedlot Business, denoted as ...

Amongst the terms of the Settlement Agreement, all parties have been mutually released from existing and future litigation related to that partnership. We feel that further investigation or findings by the Law Society related to these complaints would be extraneous, therefore, no longer warranted and we wish to withdraw the claim.

However, since the conditions of Articles 4.01 and 4.04 of the Settlement Agreement would impact us in a significant financial manner, we would therefore request notification of the decision brought forth by the Law Society.

32. On July 30, 2018, LSA counsel requested additional clarification:

Can you please clarify what you mean by the conditions in the Settlement Agreement impacting you in a significant financial manner? And how that relates to the complaint with the Law Society? This reference seems to conflict with your statement that you have entered into a mutual release from all existing and future litigation.

With regard to notifying you of the result, our process does not really allow us to do so if you withdraw your complaint. In the event the file results in citations being issued, those citations are public, and you would have access to the information. You would also likely be called as witnesses at the hearing. In the event I determine that citations are not appropriate, and you withdraw your complaint, then we would not notify you of the result.

Please confirm how you wish to proceed given the above.

33. On September 24, 2018, LSA counsel wrote to EB as follows:

Further to my letter of March 20, 2018, it is my understanding that you now wish to withdraw your complaint against [the Client].

If it is your intention to withdraw this complaint, I would request that you kindly confirm same, in writing, to my attention at your earliest convenience.

34. On September 27, 2018, EB wrote back as follows:

Based on the settlement [...] and its conditions between [the Client], myself and the rest of the parties on April 13th, 2018, I no longer wish to pursue a complaint with the law society against [the Client]. Further investigation into my legal relationship with [the Client] would be extraneous and unnecessary.

I wish to move on with my life and put this entire personal, business, and legal connection far behind me.

35. On October 3, 2018, the LSA elected not to pursue the complaints and closed both complaint files.

LSA Complaint

36. On November 15, 2018, the LSA opened a new complaint file.
37. On December 11, 2018, the LSA received a response from the Client to the LSA's allegations.
38. On January 3, 2019, the Client emailed LSA counsel with additional information.

Admission

39. Rule 3.2-12 of the *Code of Conduct* (the "*Code*") provides as follows:

Inducement for Withdrawal of Criminal or Regulatory Proceedings

3.2-12 A lawyer must not:

- (a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;
 - (b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter such discussions; or
 - (c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.
40. Mr. Murphy agreed that he failed to comply with Rules 3.2-12 of the *Code* by failing to obtain the consent of the LSA before advising his Client regarding terms of the Settlement Agreement, the effect of which was to potentially expose the Complainants to financial consequences in the event that the LSA elected to continue to pursue the Complaints against the Client and the Client was found guilty by a hearing committee of conduct deserving of sanction, none of which occurred.

41. Mr. Murphy admitted the statements contained in the Statement and acknowledged and agreed that the Statement be used during the hearing of these proceedings.
42. Mr. Murphy made specific admissions to certain conduct:
 - a. He admitted that the described conduct is “conduct deserving of sanction” as defined in section 49 of the *Act*;
 - b. He understood the nature and consequences of the admissions; and
 - c. He made the admissions freely and voluntarily, without any compulsion or duress.
43. Mr. Murphy further acknowledged that he had the opportunity to obtain independent legal advice.

Findings on Guilt

44. For an admission of guilt to be acceptable, the admission must have the following elements:
 - a. the admission must be made freely and voluntarily;
 - b. the lawyer must unequivocally admit guilt to the essential elements of the citations;
 - c. the lawyer must understand the nature and consequences of the admission; and
 - d. the lawyer must understand that the Committee is not bound by any submission advanced jointly by the lawyer and the LSA (paragraph 47, *LSA Pre-Hearing and Hearing Guideline* (April 15, 2021) ("Guideline")).
45. The Committee accepted the Statement as being in the appropriate form pursuant to section 60 of the *Act*, having satisfied itself that the elements listed in paragraph 41 herein were established. As a result of the Committee's acceptance of the Statement, each admission in the Statement was deemed to be a finding of this Committee that Mr. Murphy's conduct was deserving of sanction.

Sanction

46. The LSA and Mr. Murphy jointly submitted that the appropriate sanction was a reprimand. In addition, they agreed and jointly submitted that Mr. Murphy should be ordered to pay \$3000.00 in costs.
47. While hearing committees are not bound to accept a joint submission on sanction, such a submission carries significant weight and is entitled to deference. In other words, a joint submission is to be accepted unless it is demonstrably unfit and contrary to the public interest. In *Law Society of Alberta v. Llewellyn*, 2018 ABLS 11, the hearing committee there put it this way at paragraph 10:

The Committee is not bound by joint submissions on sanctions. However, the Committee is required to give serious consideration to jointly tendered submissions, and accept, unless they are found to be unfit, unreasonable, contrary to the public interest, or there are good and cogent reasons for rejecting.

48. Further, as outlined at paragraph 187 of the Guideline:

The fundamental purposes of sanctioning are to ensure the public is protected from acts of professional misconduct and to protect the public's confidence in the integrity of the profession. These fundamental purposes are critical to the independence of the profession and the proper functioning of the administration of justice.

49. The Committee is also mindful of the factors for consideration in determining an appropriate sanction, as set out in the Guideline starting at paragraph 200.

50. Here, the Committee found the following factors to be particularly relevant to the inquiry into the appropriate sanction regarding Mr. Murphy's conduct:

- a. the potential impact on the LSA's ability to effectively govern its members by such misconduct;
- b. the need for deterrence;
- c. the risk to the public;
- d. the harm or lack thereof caused by the misconduct;
- e. the lack of any prior discipline record on the part of the member;
- f. an acknowledgment of wrongdoing and admission of guilt;
- g. an expression of remorse;
- h. cooperation during the conduct proceedings resulting in avoiding costs and inconvenience; and
- i. lack of intent on the part of the member to disregard their obligations as a lawyer.

51. In consideration of the relevant factors and in light of all the circumstances of the case, the Committee concluded that it was in the public interest to accept the joint submission on sanction and the Committee did so. A reprimand was issued to Mr. Murphy during the course of the hearing as follows:

Mr. Murphy, as a self-regulated profession, the Law Society has two principal duties by which it must be guided. Firstly, the need to protect the interest of public; and secondly, the need to protect and maintain the reputation of the profession. Your conduct in this matter before us engages both of those considerations.

The expectation of a lawyer is that you will be guided and adhere to the Code of Conduct. Here, your role in attempting to bargain away complaints to the Law Society without engaging the consent of the Law Society was totally inappropriate. It was an attempt to usurp the jurisdiction of the Law Society of Alberta. This conduct was contrary to the Code and reflects poorly on you.

However, you have taken full responsibility for your conduct, and we are satisfied that you understand the reasons why your conduct was unacceptable. We also accept that you had no intent to disregard your obligations as a lawyer entering into the negotiations which form part of the settlement of a contentious litigation. And we note from the material presented to us, that you have no prior disciplinary record.

Concluding Matters

52. In addition to the reprimand referenced in paragraph 51 herein, pursuant to section 72(2) of the *Act*, the Committee ordered Mr. Murphy to pay costs in the amount of \$3000.00. Mr. Murphy shall have until November 30, 2021, to pay the costs.
53. A Notice to the Profession is not required and will not be issued, nor is a reference to the Attorney General required and will not be made.
54. The exhibits, other hearing materials, and this report will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that identifying information in relation to persons other than Mr. Murphy will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege.

Dated October 6, 2021.

Robert Philp, QC

Sony Ahluwalia

Linda Maj