

**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 DANA CARLSON
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Hearing Committee

Sanjiv Parmar – Chair and Bencher
Jodi Edmunds – Adjudicator
Corinne Petersen, KC – Adjudicator

Appearances

Christine Blair – Counsel for the Law Society of Alberta (LSA)

Non-Appearances

Dana Carlson

Hearing Dates

November 15, 2022

Hearing Location

Virtual Hearing

HEARING COMMITTEE REPORT

Overview

1. The following citations were directed to hearing by the Conduct Committee Panel on March 15, 2022:
 - 1) It is alleged Dana I. Carlson failed to serve his client, RS, in a timely, conscientious, and diligent manner and that such conduct is deserving of sanction; and
 - 2) It is alleged Dana I. Carlson failed to reply to communications from the Law Society of Alberta and that such conduct is deserving of sanction.

2. Dana Carlson was admitted as a member of the LSA on August 14, 1995. Mr. Carlson's status at the commencement of this hearing was "Administratively Suspended" for non-payment of fees, as of January 1, 2021. Prior to his suspension, Mr. Carlson was a sole practitioner, owning a general practice in Red Deer, operating as Dana I. Carlson.
3. The allegations stem from a matrimonial matter in which Mr. Carlson represented RS. Broadly speaking the allegations cover: failing to respond to RS, failing to act for RS, failing to attend court, failing to keep RS informed, failing to file documents, failing to file a notice of withdrawal, failing to respond to opposing counsel, failing to respond to RS's new counsel, failing to provide RS's counsel RS's client's file in a timely manner, and failing to respond to the LSA.
4. On November 15, 2022, the Hearing Committee (Committee) convened a hearing into the conduct of Mr. Carlson based on the two citations.
5. Mr. Carlson neither attended the hearing, nor made any communication with the LSA or Tribunal Counsel. The LSA made a pre-hearing application to the Committee for direction prior to the hearing, which will be addressed in this decision.
6. After reviewing all the evidence and exhibits, and hearing the testimony and arguments of the LSA, for the reasons set out below, the Committee finds Mr. Carlson guilty of conduct deserving sanction on both citations 1 and 2 pursuant to section 71 of the *Legal Profession Act (Act)*, RSA 2000, c. L-8.
7. LSA counsel provided submissions for an appropriate sanction to be a suspension between 4 to 6 months. The Committee asked LSA counsel to provide further submissions with respect to the proposed sanction, notably with respect to the step-up principle and governability. LSA counsel provided those submissions with cases, on November 28, 2022.
8. The Committee also finds that based on the facts of this case the appropriate sanction is suspension. In accordance with section 72 of the *Act*, the Committee orders that Mr. Carlson be suspended for 6 months.
9. In addition, the Committee orders costs in the amount of \$3,906.00. Costs are payable prior to reinstatement for Mr. Carlson.

Preliminary Application

10. On October 3, 2022, LSA counsel Ms. Blair made a pre-hearing application asking the Committee for advance ruling on a Notice to Admit Facts and Exhibits (Notice to Admit). The Notice to Admit was served upon Mr. Carlson on August 31, 2022, via email, regular post, and registered mail, to which there was no response by him. The Notice to Admit included the applicable provisions from the LSA Pre-Hearing and Hearing Guideline

(Guideline) which required Mr. Carlson to reply in writing within 21 days of service and either admit or deny each fact or the authenticity of each document for which admission was requested. The Committee convened on October 13, 2022, to render a decision on the Notice to Admit.

11. Counsel for the LSA sought to admit facts and exhibits in the above manner. In sum, the Notice to Admit contains specific allegations related to the above noted citations and evidence related to the complaints.
12. From about March 2021 to October 3, 2022, the LSA received no reply from Mr. Carlson. The Notice to Admit application was delivered to him on August 31, 2022.
13. LSA counsel provided the authorities to support their submission.
14. In *Law Society of Alberta v. Peterson*, 2021 ABLS 14 at paragraph 7 and 8, the Notice to Admit was granted for a member who failed to participate in the hearing process and failed to communicate with the LSA.
15. In the case of *Law Society of Alberta v. Wu*, 2020 ABLS 29 paragraphs 6-17 are relevant, particularly paragraphs 16 and 17 where it is stated:
 - 16) The LSA cannot be hobbled when a member simply abdicates responsibility in the regulatory process with a hearing, without answer from the member, if necessary. As such, the application for the LSA were granted...
 - 17) For the purpose for this hearing Schedule "A" Facts and Exhibits was accepted by the Committee.
16. In consideration of this and in consideration of the authority set out for the Notice to Admit application in paragraphs 35 to 45 of the Guideline, and under section 68 of the *Act*, Rule 90.4(8) of the Rules of the LSA (Rules), and Rule 6.37 of the Alberta Rules of Court Alta Reg 124/2010, the Committee is given jurisdiction to admit evidence in any matter it considers proper.
17. Mr. Carlson is a member of the LSA and is required to respond promptly to the LSA. Since January 29, 2021, despite repeated attempts which will be discussed later, Mr. Carlson has missed this matter's pre-hearing conferences, has failed to reply to the LSA and failed to remain in contact with the LSA pursuant to Rule 42 of the Rules.
18. For the reasons noted, the pre-hearing application to admit the Notice to Admit was granted.
19. On October 3, 2022, Tribunal Counsel sent correspondence to Mr. Carlson and LSA Counsel via email, and the following week via registered mail to Mr. Carlson, on behalf

of the Committee, advising that the request to admit certain evidence pursuant to the Notice to Admit were admitted. The correspondence outlined that Mr. Carlson is deemed to have admitted the truth of the facts or authenticity of the documents set out in the Notice to Admit. The correspondence further stated that the decision of the Committee was based on being satisfied with the contents of the Notice to Admit, that Mr. Carlson was given proper notice and that he had as to date failed to respond. Furthermore, the correspondence iterated that should Mr. Carlson appear at this matter's hearing, which the Committee encourages he attends to advocate his position, the admissions accepted by for the Notice to Admit would stand; however, he would have the opportunity to bring an application set aside the decision.

Preliminary Matters

20. There were no objections to the constitution of the Committee or its jurisdiction, and a private hearing was not requested.

Background

21. As noted, the Notice to Admit was granted and the facts of this matter are summarized in the following paragraphs.
22. Mr. Carlson was admitted as a member of the LSA on August 14, 1995, and was administratively suspended on January 1, 2021, for non-payment of fees. Prior to his suspension, Mr. Carlson, was a sole practitioner, owning his own general practice in Red Deer. On February 26, 2021, Mr. Carlson signed a consent custodianship order that granted the LSA custodianship of his practice, as he was unable to manage his files.

Previous Discipline History

23. Mr. Carlson has previous discipline history with the LSA, including the following:
 - 1) February 8, 2012, Mr. Carlson was found guilty of conduct deserving of sanction on five of seven citations, including improperly accepting compensation other than appropriate legal fees from a party seeking to achieve an improper purpose, representing clients in business transactions which he knew or ought to have known were in breach of securities law, and failure to be candid with the Law Society. There was an agreed statement of facts, and Mr. Carlson's joint submission on sanction was accepted, and he was suspended for three-months and ordered to pay \$6,100.25 in costs.
 - 2) March 23, 2019, Mr. Carlson was found guilty on conduct deserving of sanction on five citations, including failure to sign a court order, failure to respond to

communication from opposing counsel and failure to finalize and file an order on behalf of his client. There was an agreed statement of facts and Mr. Carlson's joint submission was accepted, he was suspended for one-month and ordered to pay \$8,800.00 in costs.

Citation 1

24. RS retained Mr. Carlson at the end of March 2020 for a matrimonial matter. In RS's complaint to the LSA, filed on December 17, 2020, RS alleged that Mr. Carlson failed to respond to RS's communication (blocked RS's phone number), failed to respond to opposing counsel, and failed to notify RS of a court date. RS said that as a result of Mr. Carlson's poor handling of RS's matter, RS was noted in default and RS's bank accounts were frozen. RS was also seeking RS's client file as RS had retained new counsel and had a court hearing on March 16, 2021.
25. An LSA investigator was able to speak to Mr. Carlson on January 29 and February 1 of 2021. Mr. Carlson said that he would call RS and send her the file in a few days. The investigator followed up with Mr. Carlson on numerous occasions. Eventually RS's new counsel received the file on February 18, 2021.
26. In a March 21, 2021 interview with a LSA investigator, Mr. Carlson confirmed he reviewed RS's complaint and acknowledged that he did not give the file the attention it was required. He said he advised RS that he no longer wished to communicate via text message. He admitted that he did not respond to RS's email for the recent months. He stopped working on RS's file in November 2020 and should have filed a Notice of Ceasing to Act but did not do so. He admitted he lapsed in providing competent and conscientious legal services to his client. Mr. Carlson admitted to not properly diarizing this matter during the COVID-19 pandemic and a default judgment was granted against RS, which he learned of in June 2020. He did contact opposing counsel to ask to set the default judgment aside but opposing counsel had refused. He was aware of the March 2021 hearing. He said the concise letters for the March 2021 hearing were to be filed in February 2021, but he was suspended by the LSA and did not file anything.
27. Mr. Carlson consented to a custodianship order on February 21, 2021, and a copy of the client file was subsequently obtained from the custodian. The materials confirmed that Mr. Carlson received a filed statement of claim, applications and supporting documents on April 1, 2020, confirming receipt with opposing counsel. Mr. Carlson had asked opposing counsel that no further steps be taken until he could respond. On May 5, 2020, opposing counsel emailed Mr. Carlson advising that if he received no response in two weeks to a requested statement of defence he would pursue a noting in default. On June 2, 2020, RS was noted in default for failing to provide a filed Statement of Defence. The opposing party obtained an order for their exclusive possession of the family home and to be allowed to list the home for sale and accept any offer without consent from RS. The pleadings were sent to Mr. Carlson on June 15, 2020. On June 17, 2020, the

opposing party obtained an ex-parte emergency order freezing RS's bank accounts, control over RS's property, and was awarded \$500 in costs against RS.

28. Mr. Carlson attempted to address the orders that prejudiced his client. A consent order was granted on August 4, 2020, that set an application to set aside the June 17, 2020, order to August 14, 2020. The application to set aside the noting in default was to be heard in a half-day special hearing. On August 27, 2020, an order was granted that all matters be adjourned to a special hearing.
29. The documents show no further communication from Mr. Carlson to RS following their email communications in October 2020 discussing the special hearing.

Citation 2

30. The Complaint related to Citation 2 was opened on December 17, 2020. Correspondence requesting Mr. Carlson's response was sent on December 22, 2020, via email to his law office. Proof of delivery was received and no response from Mr. Carlson. An LSA investigator contacted Mr. Carlson commencing on January 26, 2021. On January 29, 2021, Mr. Carlson contacted the investigator. The investigator and the LSA contacted Mr. Carlson subsequently with no response.
31. Since that time the LSA investigator had no response from Mr. Carlson, despite the following noted attempts.
32. On June 4, 2021, the LSA investigator attended Mr. Carlson's residence and learned that Mr. Carlson moved. No new address was provided to the LSA.
33. A final review letter was sent to Mr. Carlson on July 8, 2021 at his email address registered with the LSA. This letter was resent via a different email address on August 5, 2021, after it was learned that Mr. Carlson had recently started communicating with the Custodianship Department from this email address. No responses were received from Mr. Carlson on various subsequent correspondences sent to him at both email addresses.
34. On March 24, 2022, the Tribunal Office emailed Mr. Carlson the Hearing documents. These documents were also sent to Mr. Carlson via registered mail to his above-noted registered mailing address with the LSA. On March 24, 2022, a friend of Mr. Carlson telephoned the LSA investigator in response to the registered letter. She stated that she was assisting Mr. Carlson who had no telephone or computer, and that she could be contacted on his behalf, providing her phone number. She also advised that Mr. Carlson wished to obtain permission to use his office email. She was advised by the LSA investigator to tell Mr. Carlson to review his correspondence, that he could use his office email, and to contact the LSA investigator. On March 30, 2022, the LSA investigator contacted Mr. Carlson's friend, who said that Mr. Carlson moved, and that she neither

knows where he is nor has she spoke to him since contacting the LSA on March 24, 2022.

35. The LSA and LSA investigator subsequently attempted to contact Mr. Carlson via email, and at a residence that his custodian had previously obtained client files from. This includes multiple attempts of service via process server. On August 8, 2022, the pre-hearing conference chair granted a service order deeming the citations and LSA Tribunal hearing documents left at the residence that the custodian provided to be good and sufficient. Further correspondences from the LSA were sent to Mr. Carlson with no response.
36. There were three pre-hearing conferences in this matter, on May 17, 2022, June 23, 2022, and July 21, 2022. Mr. Carlson did not attend any of the conferences.

Analysis and Decision on Merits

Standard of Proof

37. As with all administrative hearings, unless otherwise specified by a statute, the standard of proof is on the balance of probabilities as set out in *F.H v McDougall*, 2008 SCC 53. The standard of proof on the balance of probabilities was recently confirmed by the Alberta Court of Appeal in *Moll v College of Alberta of Psychologists*, 2011 ABCA 110. The Court noted the law is now clear there is one civil standard of proof in common law, that is the proof on a balance of probabilities.
38. Mr. Carlson did not attend the Hearing.
39. Mr. Carlson failed to serve RS in a timely, conscientious, and diligent manner. He failed to respond to RS, opposing counsel, and RS's new counsel in a timely and contentious manner. He failed to diarize his file, respond to pleadings, file documents, and attend court appearances. This all led to several prejudicial orders against RS, including losing RS's home, and RS's finances being frozen. Mr. Carlson failed to respond to RS or opposing counsel since October 2020 and did not remove himself from the record when he acknowledged he stopped working on the file. He never communicated this to RS. Mr. Carlson exacerbated the situation by then failing to provide his client file to RS's new counsel in a timely manner, and only did so with the intervention of the LSA, a short time before RS was to have a special hearing.
40. Mr. Carlson did take some accountability in the short discussions he did have with the LSA, and admitted he lapsed in providing competent services.
41. Mr. Carlson failed to respond to the LSA. He had no contact with the LSA in over a year, which appears to be since March 2021, despite the numerous attempts by the LSA.

42. The Committee finds that Mr. Carlson is guilty on citations 1 and 2.
43. The Committee finds that the citations have been proven on a balance of probabilities and Mr. Carlson's conduct is deserving of sanction.

Analysis and Decision on Sanction

Mandate of the LSA

44. Section 49(1) of the *Act* states that:

For the purpose of this Act, any conduct of the member... that:

- a) is incompatible with the best interests of the public or the member of society,
or
- b) tends to harm the standing of the legal profession generally

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

45. This statutory provision is followed in the Guideline which states at paragraph 102 that:

The purpose of disciplining lawyers is to protect the public interest and maintain confidence in the legal profession. By enforcing ethical and professional standards, the Law Society is fulfilling its regulatory mandate and supporting the rule of law, the proper administration of justice and the independence of the legal profession.

46. Based on the *Act* and the Guideline, it is clear that the mandate of the LSA to ensure a high degree of confidence in the legal profession and protection of the public from misconduct by the profession is essential to the viability of the profession. Accordingly, cooperation with the LSA and participation in the disciplinary process by a member is critical. If a member can simply ignore the disciplinary process with impunity, the LSA will have abdicated its authority and ceased to have any ongoing legitimacy.

Purpose of Sanction

47. The Guideline states the purpose of sanction as follows:

185. The fundamental purposes of sanctioning are to ensure that 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.

186. Other purposes of sanction include:

- a) specific deterrence of the lawyer;
- b) where appropriate to protect the public, preventing the lawyer from practicing through disbarment or suspension;
- c) general deterrence of other lawyers;
- d) ensuring the Law Society can effectively govern its members; and
- e) denunciation of the misconduct

187. Sanctioning must be purposeful, the factors that relate most closely to the fundamental purposes outlined carry more weight than others.

48. This overriding obligation to protect the public and foster the confidence in the profession was affirmed by the Court of Appeal in the decision of *Adams v. Law Society of Alberta*, 2000 ABCA 240 (“*Adams*”) at paragraph 6 wherein the Court stated:

A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual’s misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies [emphasis added].

Factors in Determining Appropriate Sanction

49. There are a number of factors which must be considered in determining the appropriate sanction including the seriousness of the misconduct. The Committee is mindful, however, of the comments of the Alberta Court of Appeal in the *Adams* decision at paragraph 27 wherein the Court observed:

Further, and in any event, because the relevant facts vary greatly from case to case, care must be taken to consider each complaint in the context of its particular circumstances.

50. The ability of the LSA to govern the profession is essential to self-governance. Serious misconduct which undermines the LSA’s regulatory function must be dealt with appropriately, including, where necessary, limiting the ability of the member to continue to deliver legal services.

51. A non-exhaustive list of factors to be considered in determining the appropriate sanction are contained in paragraphs 198 – 206 of the Guideline. These factors include, but are not limited to:

- the degree to which the misconduct constitutes a risk to the public;
- the degree to which the misconduct constitutes a risk to the reputation of the legal profession;
- the degree to which the misconduct impacts the ability of the legal system to function properly;
- the potential impact on the LSA's ability to legally govern its members;
- the potential harm to a client, the public, the profession or the administration of justice;
- the disciplinary history of the Member involved
- whether the Member acted intentionally, knowingly, recklessly, or negligently;
- whether the Member failed to respond to the communications from the LSA;
- whether the Member cooperated with the LSA;
- whether the Member was candid with the LSA;
- whether the Member refused to participate in conduct proceedings;
- whether and to what extent there was a breach of trust involved in the misconduct;
- the potential impact on the LSA's ability to effectively govern its members by such misconduct;
- the harm caused by the misconduct;
- the potential harm cause by a client, the public, the profession or the administration of justice that is reasonably foreseeable at the time of lawyer's misconduct, and which, but for some intervening factor or event, would likely have resulted from the lawyer's misconduct
- the number of incidents involved;
- the length of time involved
- whether the conduct brought the administration of justice into disrepute;
- in impact of previous sanctions on the member; and
- whether the member has demonstrated a desire to remain a member of the LSA

53. Taking the above factors into account, the Committee notes that the relationship between the LSA and its members is an important factor to take into consideration when determining the appropriate sentence. If the LSA cannot regulate its members, it can neither protect the public nor instill confidence in the profession.

Sanction Analysis

54. LSA counsel submitted that an appropriate sanction for Mr. Carlson's conduct would be in the 4 to 6 months range.

55. LSA counsel submitted that the step-up principle entails that prior sanctions and decisions are cumulative and will result in incremental increases in the level of sanctions imposed for additional findings of guilt for a member. LSA counsel's position is that the Committee may consider Mr. Carlson's prior discipline record and his lack of cooperation during the proceedings as aggravating factors. Furthermore, LSA counsel reiterated that this is Mr. Carlson's third discipline hearing, with him previously being ordered three-month and one-month suspensions as sanctions.
56. Along with the cases provided, LSA counsel noted that paragraph 204 and 205 of the Guideline stating that conduct deserving of sanction can be cumulative and prior misconduct will result in increasingly serious sanctions. As well, the Committee can consider the member's prior discipline record, acknowledgments of wrongdoings, including self-reporting and admission of guilt, level and expression of remorse, and restitution made.
57. LSA counsel submitted that the member's failure to participate in a hearing process is evidence of ungovernability and that could impact sanction. LSA counsel's position is that Alberta decisions demonstrate that a continued lack of response from members have been determined to be a ground of ungovernability and resulted in sanctions ranging from lengthy suspensions to disbarment.
58. LSA counsel also noted paragraphs 198 and 200 of the Guideline, which state that the Committee can consider relevant factors in determining the seriousness of the misconduct and the appropriate sanction. LSA counsel highlighted that paragraph 200 of the Guideline states that certain types of misconduct, such as failing to respond, cooperate with the LSA or participate in conduct proceedings, as being types of misconduct that must be seriously denounced.
59. The Committee reviewed the documents and submissions. Mr. Carlson's conduct caused serious harm to his client. Mr. Carlson's lack of cooperation with the LSA and failing to respond to the LSA is serious. The Committee notes his previous discipline record, this being his third discipline hearing, his conduct, and his lack of cooperation as all aggravating factors.
60. The Committee finds that Mr. Carlson seriously breached his professional obligations to both his client and the LSA. Such breaches undermine public confidence in the legal profession. These breaches are consistent with a pattern of conduct exhibited by him as evidenced by prior conduct found deserving of sanction. He has shown his unwillingness to comply with his professional obligations, as well as the specific directives imposed on him by the LSA.
61. The hearing committee in *Law Society of Alberta v. Zilinski*, 2017 ABLS 13 made the following remarks about an ungovernable member, at paragraphs 38 and 39:

The legal profession is self-governing and is therefore impressed with special responsibilities. The ability to govern the profession is essential. The finding that [Member] failed to be candid and cooperate with the LSA raises serious concerns about his ability to be governed by the LSA.

In order for the LSA to fulfill its mandate of respecting the public interest in the administration of justice, it is necessary for members of the Law Society to respond and to respect the authority of the Law Society as a regulating body. Without the ability the self-governing aspect of the profession is put at risk. The failure to respond and cooperate were deliberate and conscious choices of [Member].

62. This is similar to Mr. Carlson's case. His failure to respond and cooperate with the LSA and moreover, with his client were deliberate and conscious choices, and applies not only to his lack of governability but also his lack of service to his client.
63. Very recently, at the time of writing this decision, another LSA hearing committee issued a decision in *Law Society of Alberta v. Peterson*, 2022 ABLS 25, wherein the complete lack of cooperation of the member in that case, and a demonstration of ungovernability, resulted in the disbarment of the member. The Committee recognizes that no submissions were made on the applicability of this case to Mr. Carlson's circumstances, however the Committee notes that ungovernability is taken seriously and can lead to disbarment.
64. The Committee finds that the step-up principle is appropriate in this matter, and Mr. Carlson's ungovernability weighs into the sanction imposed.
65. The Committee finds that a suspension of 6 months is appropriate.

Concluding Matters

66. Mr. Carlson shall pay actual costs in the amount of \$3,906.00. Costs are payable prior to his reinstatement.
67. It is noted that Mr. Carlson is administratively suspended since January 1, 2021, for non-payment of fees. This disciplinary suspension will commence following the Committee's decision and run concurrently with the administrative suspension. Both suspensions will remain in effect until Mr. Carlson applies for reinstatement and such reinstatement is approved.
68. There shall be no referral to the Minister of Justice and Solicitor General under section 78(6) of the *Act*.

69. A Notice to the Profession shall be issued, as required by section 85 of the *Act* in the circumstances of a suspension.
70. 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. Carlson will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated January 31, 2023.

Sanjiv Parmar (Chair)

Jodi Edmunds

Corinne Petersen, KC