

**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 C. MICHAEL SMITH
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Hearing Committee

Ronald Sorokin – Chair
Ryan Anderson, KC – Bencher
Mary Ellen Neilson – Lay Bencher

Appearances

Shanna Hunka – Counsel for the Law Society of Alberta (LSA)
C. Michael Smith – Self-represented

Hearing Dates

September 26-28, 2023

Hearing Location

Virtual Hearing

HEARING COMMITTEE REPORT

Overview

1. Mr. Smith is a lawyer who has been practicing since 1977. He practices in civil and criminal litigation.
2. Mr. Smith acted for his daughter and her common-law partner (tenants) in a dispute with their landlords regarding the house and property that the tenants were renting (property).
3. The landlords and owners of the property were the complainant, WS, his wife and daughter (collectively, the landlords).
4. The landlords notified the tenants that they intended to list the property for sale and requested access to the property. Mr. Smith and the tenants disputed the landlords' right to access.

5. There were initial confrontations at the property between WS, the landlords' realtor and Mr. Smith. Following these initial confrontations, the landlords retained CS as counsel to represent them on the property dispute and litigation ensued.
6. The litigation was ultimately resolved between the landlords and tenants. However, circumstances that arose during the initial confrontations between WS and Mr. Smith at the property and disputes between Mr. Smith and CS led to WS's complaint (Complaint) and the issuance of citations.
7. The following citations were directed to hearing by the Conduct Committee Panel on September 13, 2022:
 - 1) It is alleged that C. M. Smith engaged in conduct that brings the legal profession into disrepute by removing and damaging a realtor's lawn sign and that such conduct is deserving of sanction.
 - 2) It is alleged that C. M. Smith failed to act with courtesy and civility and that such conduct is deserving of sanction.
 - 3) It is alleged that C. M. Smith failed to respond fully and substantively to inquiries from the Law Society and that such conduct is deserving of sanction.
8. From September 26 to 28, 2023, the Hearing Committee (Committee) convened a hearing (Hearing) into the conduct of Mr. Smith, based on the three citations. None of the citations were amended during the Hearing.
9. After reviewing all of the evidence and exhibits and hearing the testimony and arguments of the LSA and Mr. Smith for the reasons set out below, the Committee finds Mr. Smith guilty of conduct deserving sanction on citations 2 and 3, and not guilty on citation 1, pursuant to section 71 of the *Legal Profession Act (Act)*.
10. The appropriate sanction for this conduct, as well as any order for costs and any other matters, will be determined at the sanction phase of the Hearing.

Preliminary Matters

11. 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 Mr. Smith's conduct proceeded.
12. At the outset of the Hearing, Mr. Smith brought the following two preliminary applications.

Application to vary the mode of hearing

13. Mr. Smith brought an application to vary the mode of hearing from the default virtual hearing to proceed in-person.
14. Mr. Smith submitted that he could not conduct effective and competent cross-examination of witnesses during a virtual hearing, as it would impede his ability to challenge the witnesses' credibility.
15. LSA counsel, Ms. Hunka, opposed the application to vary the hearing mode from a virtual hearing to an in-person hearing on the grounds that:
 - a) In June, 2022, the Benchers had imposed a Rule that the default mode of hearing would be virtual.
 - b) Mr. Smith was first advised in June 2022 and then during five subsequent pre-hearing conferences and again in the June 28, 2023 Notice to Attend that the hearing would be virtual. He could have applied but did not apply prior to the Hearing to vary the mode of hearing.
 - c) There was not sufficient reason to require in-person testimony. Ms. Hunka intended to call the following four witnesses, all of whom, she submitted could provide virtual testimony and/or would not be available during the Hearing to provide in-person testimony:
 - The Complainant would be in British Columbia on the date he is scheduled to testify at the Hearing so he would not be available to provide in-person testimony on his scheduled Hearing date;
 - The LSA investigator, SF is immunocompromised so for health reasons, he could not attend in person;
 - The witness who will testify on the sign removal and damage, SB;
 - Counsel for the Complainant, CS
 - d) Corroboratory video evidence and email evidence would be adduced during the virtual Hearing.
16. The Committee considered the application to vary the hearing mode from a virtual hearing to an in-person hearing based on the following rules:
 - Rule 2.5(1) which prescribes that "An oral hearing under the Act and these Rules shall proceed as a virtual hearing".
 - Rule 2.5(2)(d) which prescribes that "Notwithstanding subrule (1), a hearing shall proceed by means other than a virtual hearing when:

(d) a pre-hearing conference chair in accordance with Rule 90.2, or a panel or Hearing Committee, grants an application to allow part or all of a hearing to proceed by means other than a virtual hearing.”

17. The Virtual Hearing Guideline (Guideline) provides the following guidance:

- “If parties agree to another mode of hearing, they should provide notice to the Tribunal Office as soon as practicable” (paragraph 19).
- “Where a party objects to holding all or part of a hearing as a virtual hearing, an application may be made to the pre-hearing conference chair to vary the mode of hearing in accordance with Rule 2.5(2)(d)” (paragraph 20).
- The section Factors for Consideration to Vary Hearing Mode states:

“It is in the public interest to avoid unnecessary delay. Likewise, the principles of procedural fairness provide for the right to a hearing without unreasonable delay. Other principles of procedural fairness include adequate notice of a hearing, the entitlement to disclosure, the right to counsel, the opportunity to present one’s case and be heard by an unbiased decision maker, and the right to cross-examine witnesses. Courts and tribunals have held that the requirements of procedural fairness are satisfied by virtual hearings” (paragraph 27).
- “In considering an application to vary the mode of hearing, the following factors should be considered:
 - a. past and future delay, as well as any waivers of delay;
 - b. the health and safety of all parties and the panel;
 - c. personal circumstances of any participants;
 - d. the cost of holding an in-person hearing;
 - e. the nature of the evidence before the panel;
 - f. whether a party will be prejudiced by the mode of hearing; and
 - g. any other factors that the pre-hearing conference chair considering relevant in the circumstances” (paragraph 29).

18. After considering the submissions and factors noted above, the Committee dismissed Mr. Smith’s application to vary the hearing mode from a virtual hearing to an in-person hearing, and issued the following decision:

It is mandated in the Rules and the Virtual Hearing Guideline that all oral law society hearings proceed as virtual hearings. However, the Rules and Virtual Hearing Guideline stipulate that where a party objects to holding all or part of a hearing as a virtual hearing, an application may be made to the pre-hearing

conference chair or to the Hearing Committee to vary the mode of hearing in accordance with Rule 2.5(2)(d). The Virtual Hearing Guideline note that Courts and tribunals have held that the requirements of procedural fairness are satisfied by virtual hearings. The Hearing Committee has carefully considered Mr. Smith's application to vary the mode of hearing to an in-person hearing and Ms. Hunka's response, on behalf of the Law Society. Mr. Smith's main reason for objecting to a virtual hearing is that he will not be able to properly cross-examine witnesses. The Hearing Committee is not convinced, by reviewing and applying each of the factors in the Virtual Hearing Guideline, that the Hearing should be held in-person. Therefore, the Hearing Committee directs that the hearing will proceed virtually.

Application that Citations are not adequately particularized

19. In Mr. Smith's second application, he asserted that the citations were inadequately particularized by the LSA and therefore he was not afforded a reasonable opportunity to prepare his defence.
20. Mr. Smith submitted that:
 - a) Prior to the Hearing he did not receive adequate particulars;
 - b) He did not receive notice of witnesses that the LSA intended to call at the Hearing until two weeks before the Hearing; and
 - c) He was not consulted about a proposed Exhibit book;
21. LSA counsel opposed this application. Ms. Hunka acknowledged that prior to the Hearing, Mr. Smith and the LSA were unable to agree on particulars, exhibits and facts. However, she submitted that Mr. Smith knows the case that he will need to defend and meet at the Hearing. She noted that well in advance of the Hearing:
 - a) Disclosure was provided to Mr. Smith and he acknowledged receipt of disclosure;
 - b) Proposed particulars were provided to Mr. Smith as early as December, 2022; and
 - c) A proposed exhibit book was provided to Mr. Smith previously, but he never responded to her with his position on its contents.
22. After considering the submissions and factors noted above, the Committee dismissed Mr. Smith's application regarding particulars and issued the following decision, orally:

Mr. Smith's second application is that the citations have not been adequately particularized to afford him a reasonable opportunity to meet his defense. We do note that this is a professional regulatory proceeding with different standards than a criminal proceeding. Although no exhibits or statements of facts were agreed upon between the Law Society and Mr. Smith, Ms. Hunka advises that disclosure was provided several months ago, and Mr. Smith confirms receipt of disclosure. Ms. Hunka submits that the materials provided to Mr. Smith during the pre-hearing stage should be sufficient for Mr. Smith to know that case that he will need to meet and defend at this hearing. The Law Society pre-hearing process is robust. There were five pre-hearing conferences. Mr. Smith had opportunity during those pre-hearing conferences to raise issues/concerns about particulars. If the citations are not sufficient for the Law Society to prove its case, that will be determined during this Hearing.

The Hearing Committee dismisses Mr. Smith's application that the citations are not adequately particularized to affirm him a reasonable opportunity to prepare his defence.

Jurisdictional Documents / Exhibits / Exclusion of Witnesses

23. There was no agreement prior to the Hearing regarding statements of facts or evidentiary exhibits.
24. At the outset of the Hearing and by consent, four jurisdictional documents and exhibits were entered into the record. 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 Mr. Smith's conduct proceeded.
25. Over the course of the Hearing, 18 exhibits were entered.
26. All witnesses, other than Mr. Smith, were excluded from the Hearing room before those witnesses' testimony.

Standard of Proof

27. As set out in the Guideline at paragraph 104, generally, LSA counsel has the burden to prove citations on a balance of probabilities. The Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53 confirmed that civil standard of proof being on a balance of probabilities and the Alberta Court of Appeal in *Moll v. College of Alberta of Psychologists*, 2011 ABCA 110 endorsed this principle in the context of regulatory proceedings.

Citation 1

Particulars: Citation 1

28. The following is a summary of the particulars alleged in support of citation 1:
- a) Mr. Smith removed a realtor's sign from the front lawn of the property and tossed it on the boulevard between the sidewalk and the street;
 - b) Mr. Smith damaged the realtor's sign while removing it by breaking the bottom of the sign's post and losing the sign peg; and
 - c) Mr. Smith's actions in removing and damaging the realtor's law sign brought the legal profession into disrepute, contrary to section 2.1-1 of the LSA Code of Conduct (Code).

Evidence: Citation 1

29. On August 21, 2020, the landlords notified the tenants that they would be listing the property for sale.
30. On October 5, 2020, the landlords notified the tenants that their realtor would be contacting them to schedule a time to enter the house on the property to prepare the realtor. On October 6, 2020, the landlords notified the tenants that they intended to enter the property and take photos and measurements.
31. On October 7, 2020, Mr. Smith's daughter, who was one of the tenants, replied to the landlords that they had no rights to enter the property and that they had retained a lawyer, her father, Mr. Smith.
32. On October 7, 2020, WS and the landlords' realtor attended at the property. Mr. Smith confronted WS and the realtor on the lawn of the property. Mr. Smith denied them access to the property. Mr. Smith told them "I have been practicing 40 years ... the landlord doesn't have the right to access. ... You can't come in. ..."
33. On the morning of October 9, 2020, a "For Sale" sign was placed on the front lawn of the property at the request of the landlords' realtor. On the afternoon of October 10, 2020, WS discovered that the sign had been removed and broken.
34. Video evidence from the property house doorbell alarm camera and screen shots of the video were adduced as Exhibits 7 and 9. Those video and screen shot exhibits show Mr. Smith removing the sign and show that the sign had been damaged as debris from the sign was on the ground.

35. SB testified on behalf of the sign company that installed the sign. Her evidence was that her company installed the sign on the morning of October 9, 2020 and was requested to repair the sign on the afternoon of October 9, 2020. She testified that the sign was missing a sign peg and there was a broken peg. The sign was repaired, and the realtor was invoiced for \$60.00 to repair the sign. SB's email to the LSA investigator, a photo of the sign which showed the damage to the bottom of the sign and the \$60.00 repair invoice were tendered as Exhibit 14.
36. Mr. Smith admitted that he removed the first sign. He said that he left the sign in plain sight, on the boulevard in front of the property.
37. Mr. Smith testified that he did not remove the sign peg and that he does not know who removed the sign peg.
38. Mr. Smith did not admit to damaging the first sign.
39. A second sign was installed and then removed on October 10, 2020.
40. Mr. Smith testified that he did not know who removed the second sign and no evidence (video or oral) was adduced to show who removed the second sign.

Arguments and Submissions: Citation 1

41. Mr. Smith objected to the doorbell videos being entered as exhibits on the grounds that there was no way to determine who took the videos and, furthermore, such videos were taken without the tenants' consent and breached the landlords' covenant to provide the tenants with quiet enjoyment under their lease.
42. LSA counsel said that the doorbell videos are of the front lawn as opposed to the inside of the house. Further, and, in any event, LSA counsel referred to section 68(1) of the *Act* which stipulates as follows:
 - 68(1) In proceedings under this Division, a Hearing Committee, the Practice Review Committee or the Appeal Committee
 - (a) may hear, receive and examine evidence in any manner it considers proper, and
 - (b) is not bound by any rules of law concerning evidence in judicial proceedings.
43. The Committee admitted the doorbell video evidence and said that the weight of that evidence would be considered following the Hearing.
44. LSA counsel submitted that Mr. Smith's conduct is subject to Code section 2.1-1 re Integrity and its Commentary which read:

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

...

[3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

45. Mr. Smith submitted that he was entitled to remove the first sign as the landlords had no legal right to access the property.
46. Mr. Smith submitted that he legally removed the sign and that he used ordinary and reasonable care. While he did not admit to damaging the sign, he submits that if the sign was damaged, he did not intend to damage the sign.
47. Mr. Smith submitted that removal of the sign was conduct outside of his professional practice.

Analysis and Decision Regarding Citation 1

48. The Committee finds that there is no need to debate or consider the weight of the doorbell video as Mr. Smith admits that he removed the first sign.
49. Mr. Smith does not admit to damaging the sign and, in any event, the damage to the sign was minimal as the repair cost was only \$60.00.
50. Mr. Smith's conduct is governed by Code section 2.1-1.
51. The Committee also refers to Code section 2.1-1 Commentary [4] which reads:

Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

52. The Committee rejects Mr. Smith's assertion that his conduct in removing the sign was in his private life and outside of his professional practice. From the moment Mr. Smith first confronted WS on the property lawn on October 7, 2020, the Committee finds that Mr. Smith was acting as the tenants' lawyer, and he continued to act as the tenants' lawyer when he removed the sign on October 9, 2020.

53. The Committee accepts Mr. Smith's evidence and submission that, he believed he had a legal right to remove the sign, that he used reasonable efforts to minimize damage and that he did not intend to damage the sign.
54. The Committee finds that Mr. Smith's conduct in removing and damaging the sign, while somewhat questionable, was not found to be dishonourable and does not rise to the level of being of conduct deserving of sanction or conduct that would bring into question Mr. Smith's professional integrity.
55. The Committee therefore finds Mr. Smith not guilty of conduct deserving of sanction on citation 1.

Citation 2

Particulars: Citation 2

56. The following is a summary of the particulars alleged by the LSA in support of citation 2:
 - a) Mr. Smith's communications with WS, the Complainant on October 7, 2020 were uncivil and discourteous;
 - b) After the landlords' counsel, CS, was retained to represent the landlords on the property dispute, Mr. Smith's communications with CS were uncivil and discourteous.

Evidence: Citation 2

Communications between WS and Mr. Smith:

57. WS testified that on October 7, 2020:
 - a) WS and the landlords' realtor attended at the property to perform an inspection at the property;
 - b) Mr. Smith confronted them on the front lawn and told them they would not be permitted to access the property.
 - c) Mr. Smith told them "Don't preach to me sir. I've been practicing 40 years at the and I know the law, and you guys are out of luck, so get lost." [Exhibit 6]; and
 - d) When WS and the realtor were leaving the property, Mr. Smith said words to the effect "I hope you have deep pockets".

58. Mr. Smith testified to the events on October 7, 2020 that:
- a) When WS and the realtor arrived at the property seeking access to the property, the realtor did not identify himself;
 - b) He told WS that the landlords had no legal right to access the property;
 - c) After Mr. Smith had told WS that they would be denied access to the property, the realtor said to him “these tenants won’t last long.” Mr. Smith replied something to the effect “sounds like a threat”; and
 - d) He could not recall specifically if he made the “deep pockets” comment but if he did make that comment, it followed the earlier exchange quoted above between him and the realtor.

Communications between CS and Mr. Smith:

59. CS testified about his communications with Mr. Smith.
60. CS is a lawyer who has been practicing since 1999. His practice concentrates on civil litigation, and he said that he has extensive experience in residential tenancy matters.
61. CS was retained by the landlords in October, 2020. The landlords told him they were looking to sell their house and required access to the property so they could view the property and then list the property for sale. They said they were having difficulty obtaining access to the property. They told CS that the father of one of the tenants, Mr. Smith, was a lawyer and representing the tenants.
62. CS testified that it became a “real struggle” at the early stage of the matter in dealing with Mr. Smith. He said that he had one initial telephone call with Mr. Smith and then all further communication with Mr. Smith was in writing.
63. CS testified that at the initial discussions, it was apparent that he and Mr. Smith disagreed on the law surrounding whether or not the landlords had a lawful right to access the property and take steps to show the property for sale.
64. CS was referred during his testimony to the following communications from Mr. Smith to him to support the LSA’s allegations of uncivility and discourtesy:
- a) November 24, 2020 email exchange [Exhibit 10] which included the following statements from Mr. Smith to him:

... I also draw your attention to your obligations under the Code of Professional Conduct Rule 5.1-2 (d), (g), (i) and (j) in case you have either forgotten them or perhaps never knew about them.

[WS] knowingly gave false evidence in his Affidavit of October 16, 2020, which I remind you was commissioned by you.

...

How he could have done this after receiving competent legal advice is an interesting question of and in itself...

- b) December 1, 2020 email exchange with the subject line of “Your misrepresentations to the Court this morning” which included the following statements from Mr. Smith to him:

... It seems [the Complainant] is not the only person involved in this case who has a cavalier attitude to the truth.

...

As of right now in my opinion you have knowingly or been wilfully blind (which frankly seems unlikely) made a factual misrepresentation to the Court.

- c) December 2, 2020 email exchange with the same subject line of “Your misrepresentations to the Court this morning” which included the following statements from Mr. Smith to him:

So you admit to carelessly misrepresenting the facts to the Court. You purported to read to the Court from the [tenant’s] affidavit that you also claimed had no attached exhibits. You made no effort to ensure that your information was correct before you did so, contradicting me in open Court in the process.

...

Now you compound that scurrilous act by implying some sort of wrongdoing on my part. Your resemblance to the lame duck POTUS continues to impress me...

...

In the meantime I ask you to carefully consider your ethical obligations when putting perjury before the Court...

- d) December 3, 2020 email exchange [Exhibit 13] with the same subject line of “Your misrepresentations to the Court this morning” which included the following statements from Mr. Smith to him:

You don’t get off that easily. You represented to the Court that you were aware of authority specific to the Residential Tenancies Act. You now admit this was not true. You say now that you rely upon “the entire body of ‘implied’

contract law” and compound this by suggesting that common sense is a legal principle applying to contracts. It is not.

...

I had previously seen a tv actor in a law drama [perhaps it was really a comedy] try this routine. It is unethical to suggest you know of specifically applicable precedent when you know there is no such thing...

...

You cannot ignore the perjury. If you present perjured testimony to the Court asserting that it is reliable there will be consequences....

65. CS testified that he interpreted Mr. Smith’s November 24, 2020 communications and references to the Code provisions as Mr. Smith intimidating him with threats that if CS proceeded with the lawsuit on behalf of the landlords that CS may be subject to regulatory or even criminal sanction (for perjury).
66. CS acknowledged he had made an error in his representations to the Court on December 1, 2020 and explained as follows.
- a) When he and Mr. Smith attended in Court on December 1, 2020, Mr. Smith had tendered an Affidavit with exhibits from Mr. Smith’s client. CS had told the Court that he had not previously received the exhibits attached to Mr. Smith’s client’s Affidavit.
 - b) When CS got back to his office, he checked his email and realized that he made an error as the exhibits had, in fact, been sent by Mr. Smith prior to the December 1, 2020 Court application; and
 - c) CS wrote to Mr. Smith on December 2, 2020 to explain his error as follows:

As a result of your most recent email, I have again viewed all the emails received from your email address at that of your office. You are correct, your office’s email sent on Friday afternoon at 3:23 p.m. has 2 exhibits attached to the end of the sworn but unfiled affidavit. By way of explanation for my comments in court, I was unable to connect to my email/outlook on Friday and access was not restored until the end of the day ... The emails were delivered to my remote server but I could not access them. As I did not retrieve your email until November 30th, and as I had already completed my preparation for the application on Friday, I did not scroll down to the end of the attachment to your email to discover the exhibits prior to the court application. I believed your attachment was the same as the print-out I had in hand. As a result of that oversight, I will correct the record on December 18th.

67. CS explained Mr. Smith's December 3, 2020 comment that CS had misrepresented to the Court that he had authority to support his position. He wrote to Mr. Smith on December 3, 2020:

The case law I am relying upon is the entire body of "implied" contract plus a little common sense. ...

68. CS said that Mr. Smith was "a bully". He believed that Mr. Smith "tried to intimidate" him. He viewed Mr. Smith's comments as a "personal attack" on him. He said Mr. Smith was "basically calling him a liar." CS found Mr. Smith's words and comparison to the "lame duck POTUS" as "extremely offensive."
69. Mr. Smith testified that his comments in his November 24, 2020 communications where he reminded CS of the provisions of section 5.1-2 of the Code that require a lawyer to act honestly and not to present or rely on false evidence were because Mr. Smith knew that contents of WS's Affidavit which alleged certain conditions and facts about the house, including that floors had been replaced, were false.
70. Mr. Smith said that CS tried to proceed with the initial Court application on December 1, 2020 in regular Chambers when CS knew that the Civil Practice Note prescribed that the matter should be scheduled for Special Chambers.
71. Mr. Smith said that CS misrepresented to the Court on December 1, 2020 that he had legal authority to support his position and then, subsequently, CS suggested that the legal authority was based on the law of "implied" contract so, in Mr. Smith's opinion, CS did not actually have legal authority.
72. Mr. Smith said that CS did not acknowledge to the Court at the December 18, 2020 Chambers application that CS had misrepresented to the Court on December 1, 2020 that he had no court authority to support his position and, further, that CS did not apologize for suggesting to the Court on December 1, 2020 that Mr. Smith had not provided the Affidavit with exhibits.
73. Mr. Smith explained the "lame duck POTUS" comment was communicated to CS because Mr. Trump has a cavalier attitude to the truth.

Arguments and Submissions Regarding Citation 2

74. LSA counsel submitted that Mr. Smith's conduct and comments to WS on October 7, 2020 were uncivil and discourteous.
75. LSA counsel submitted that Mr. Smith's comments and communications to CS were uncivil and discourteous.

76. LSA counsel noted that CS acknowledged the error he had made on December 1, 2020 for stating that he had not seen the exhibits attached to Mr. Smith's client's affidavit and that CS advised the Court of the error at the December 18, 2020 Chambers application.
77. LSA counsel submitted that Mr. Smith's comments were bullying, intimidating and threatening.
78. LSA counsel submitted that Mr. Smith's uncivil and discourteous conduct and communications were in breach of Code sections 7.2-1 and 7.2-6 which read as follows:

Courtesy and Good Faith

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

[1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

[2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

...

Communications

7.2-6 A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

79. LSA counsel's written submissions referred the Committee to authorities where hearing committees or courts have found a lawyer's conduct to be considered uncivil and worthy of sanction, including:

- a) Reference to “The Principles of Civility” by the Advocates Societyⁱ which LSA counsel writes in their submissions “recommends advocates should avoid sending intemperate correspondence, including emails and should avoid acrimony or disparaging personal remarks when interacting with opposing counsel. Further, advocates should not make ill-considered, gratuitous, derogatory, or uninformed comments about opposing counsel to others, including clients and the court. Intimidation or bullying is also considered uncivil and worthy of sanction.”
 - b) *Law Society of Alberta v. Forsyth-Nicholson*, 2013 ABLs 24. The Hearing Committee discussed “courtesy” and “civility” within the context of a lawyer’s professional obligations. This was a case where the member was found guilty of being discourteous.
80. Mr. Smith submitted that his actions and conduct with WS during the lawn confrontation on October 7, 2020 were justified as the landlords’ unlawful entry on the property amounted to trespass. Mr. Smith intimated that the conversation turned heated after initial provocative and threatening comments from the realtor.
81. Mr. Smith submitted that his communications with CS were justified.
82. Mr. Smith’s position was that it was incumbent upon CS to advance evidence in the litigation from WS’s daughter which would have refuted WS’s affidavit evidence about the condition of the house.
83. Mr. Smith said that CS acted unethically in open court by saying that Mr. Smith had not provided the full affidavit with exhibits.
84. In Mr. Smith’s written submissions, he submits:
- a) “The impugned alleged uncivil communication is set out only in an email or emails sent by the Member to [CS]. This was not a dealing with [CS] in any public sense. ...”
 - b) “There is also a difference between the requirement to be civil under Rule 7.2- [1] which refers to the lawyers “dealings” with “all persons” and the requirements of Rule 7.2-6 relating to “correspondence” or ways in which the lawyer may “communicate.” The clear inference from the omission of the word “civil” from the latter Rule is that there is no requirement of civility in connection with “communications” as opposed to “dealings” which occur in a public environment. The two different Rules apply to two different and separate sets of circumstances.”

- c) He suggests that some considerations from *Groia v. Law Society of Upper Canada*, 2018 SCC 27 do apply to his matter, such as “[t]he relevant consideration is the subjective state of knowledge of the Member, assessed by the standard of honest belief...” He does not think that an objective standard such as reasonableness of that honest belief factors in.
- d) His understanding of the facts was based in actual fact.
- e) He had an obligation to prevent the presentation of false evidence by opposing counsel, CS. He goes further to state that it was his “entitlement to warn [CS] in a sufficiently assertive manner” to ensure that CS did not ask Court to rely on false evidence. His primary obligation was to prevent presentation of false evidence to the trier of fact.
- f) The emails concerning misrepresentations “... should be viewed in that context, including [CS]’s apparent disregard for the importance of preventing perjured testimony from influencing the eventual trier of fact.”
- g) “None of the cases provided by LSA counsel, other than *Groia*, support the argument that the impugned words used by the Member can in any way be considered improper. None of those fact scenarios is at all similar to this case. The facts in *Groia* are also not comparable.”

Analysis and Decision Regarding Citation 2

Allegation of uncivil communications with WS

- 85. The Committee finds that while Mr. Smith’s communications with WS on October 7, 2020 were blunt and direct, they were not uncivil.
- 86. There was a legal dispute as to whether the landlords had the right to enter and access the property. That legal dispute was before the Court.
- 87. CS advanced his clients’ position and Mr. Smith advanced his clients’ position for the Court to determine. And, that dispute was ultimately resolved and determined by Consent Order.

Allegation of uncivil communications with CS

- 88. The Committee finds that Mr. Smith’s communications with CS were uncivil and discourteous and in breach of Code sections 7.2-1 and 7.2-6.
- 89. Mr. Smith attempted to litigate the matter outside of Court by insisting that CS accept his legal position.

90. On December 2, 2020, CS explained and apologized to Mr. Smith for representing to the Court on December 1, 2020 that he had not received the exhibits. At the commencement of the December 18, 2020 Court application, CS notified the Court of that error. Mr. Smith would not accept CS's explanation.
91. In Mr. Smith's communications with CS, he called CS a liar and suggested he was incompetent and unethical.
92. Mr. Smith tried to intimidate and bully CS. His comments and communications were offensive.
93. The Committee rejects Mr. Smith's assertion and submission that there is a difference between the requirement to be civil under Rule 7.2- 1 which refers to the lawyers' "dealings" with "all persons" and the requirements of Rule 7.2-6 relating to "correspondence" or ways in which the lawyer may "communicate".
94. The Committee also addresses some of the nuanced points raised by Mr. Smith as follows:
 - a) The Committee disagrees with Mr. Smith's position that a lawyer's obligation of civility only extends to the public and not private communications. While Mr. Smith goes to great lengths in his argument to go to the etymology of the term "civil" and points out that the word "civil" is omitted from the Code provision 7.2-6, the Code provisions 7.2-1 and 7.2-6 do not in any way set out that the courteousness and civility (7.2-1) or that communications between lawyers (7.2-6) apply only to public communications. They are presumed to then apply to both public and private arenas.
 - b) Mr. Smith puts a lot of emphasis on argument that he was relying on facts in his communications to CS. The Committee does not find that it is necessary for it to assess whether Mr. Smith's position was legally sound or correct. The Committee is of the view the communication itself is what requires its attention.
 - c) The Committee does recognize a lawyer's responsibility to express themselves, however, the Code provisions (7.2-1 including commentary and 7.2-6) make clear that there is an expectation on lawyers that communication shall not be uncivil or abusive.
95. The Committee finds the Commentary under Rule 7.2-1 especially informative and relevant. The Commentary notes that it is in the public interest for matters to be "dealt with effectively and expeditiously" and that lawyers "fair and courteous" dealing with each other contributes to this end. Further, the Commentary notes that "personal remarks or personally abusive tactics interfere with the orderly administration of justice."

96. While Mr. Smith has pointed to his years of experience, his manner of dealing with CS, particularly in his communications, has the tone of incivility, discourteousness and frankly, appears to have engaged in belittling CS and intimidating tactics. The Committee fails to understand how, other than stalling, his tactics furthered the public interest and the administration of justice.

97. The Committee refers to the following excerpts from *Law Society of Alberta v. Forsyth-Nicholson* (at paragraphs 42-44 and 62):

While remaining a forceful advocate for her client, it serves no legal or practical purpose to “throw gasoline” on an already difficult file through intemperate comments to counsel or litigants.

...

... it is not always in the best interests of a case to forward such accusations, a more measured approach, or perhaps making the accusations subject of an affidavit which could be tested, which would be more appropriate.

The Hearing Committee consider that terms like, “courtesy” and “civility”, within the context of a lawyer’s professional obligations, reflects the lawyer’s important role in protecting and enhancing the administration of justice and goes beyond simply “good manners”. It is the lawyer’s professional obligation to recognize the distinction between being simply an advocate for the client’s cause and a professional obligation to remain technical and objective throughout.

...

Against that background, the members of this Hearing Committee are quite frankly appalled that you haven’t learned your duty of zealous advocacy of your client’s position does not necessarily obligate you to believe every fantastic story they tell you, make accusations based on those stories, or say hurtful and intemperate things to opposing parties even when potentially justified or legal or factual differences of opinion.

98. The Committee finds, on a balance of probabilities, that Mr. Smith’s communications with CS were uncivil and discourteous and in breach of Code sections 7.2-1 and 7.2-6. The Committee agrees with LSA counsel submissions that, “[a]s mentioned in the Code of Conduct, communicating in a manner that is abusive, offensive and inconsistent with a lawyer will typically be considered discourteous, uncivil, and worthy of sanction.”

99. The Committee therefore finds Mr. Smith guilty of conduct deserving of sanction on citation 2.

Citation 3

Particulars: Citation 3

100. The following is a summary of the particulars regarding citation 3:

- a) Mr. Smith was not responsive and cooperative with LSA conduct counsel; and
- b) Mr. Smith was not responsive and cooperative with the LSA investigator.

Evidence: Citation 3

Evidence of Mr. Smith regarding correspondence with LSA counsel:

101. LSA conduct counsel sent the Complaint to Mr. Smith on April 26, 2021. Mr. Smith replied on May 6, 2021 requesting an extension to reply to WS as the matter was still before the Courts. LSA conduct counsel granted an extension and requested Mr. Smith's reply by May 31, 2021.
102. Mr. Smith replied to WS on May 26, 2021.
103. Following Mr. Smith's May 26, 2021 reply, there was a series of correspondence between LSA conduct counsel and Mr. Smith including:
 - a) LSA June 3, 2021 reply to Mr. Smith requesting "... further response specifically addressing the allegation that you removed and/or damaged the realtor's "For Sale" sign that was placed on the property on two occasions. ...";
 - b) Mr. Smith's June 3, 2021 reply: "I am not able to answer that question.";
 - c) LSA's June 7, 2021 reply:

... Could you please advise why you are unable to address this allegation?

Please note that you that you have an ethical obligation to cooperate with the Law Society and to respond completely to any inquiries. Specifically, sec. 7.1-1 of the Code of Conduct provides that a lawyer must reply promptly and completely to any communication from the Society. Further, Rule 85 of the Rules of the Law Society states:

*(7) A member who is the subject of a complaint shall
(a) cooperate fully with the Society in a review conducted under section 53 of the Act;*

(b) respond fully and substantively to any request to answer any inquiries or to furnish any records; and
(c) respond within any timeline or in accordance with any deadline established by the Society. ...

d) Mr. Smith's June 8, 2021 reply: "On what possible legal basis can the Law Society make that particular inquiry?"

e) LSA's June 8, 2021 reply:

... I have requested additional information from you so that I can complete my review of this complaint. The legal basis for this inquiry comes from s. 53 of the Legal Profession Act, which provides as follows:

- 1. Any conduct of a member that comes to the attention of the Society, whether by way of a complaint or otherwise shall first be reviewed by the Executive Director. ...*
- 2. The Executive Director, in the course of a review under subsection (1), may do either or both of the following:*
 - a. Require the complainant or the member concerned to answer any inquiries or to furnish any records that the Executive Director considers relevant for the purpose of the review;*

Further, as set out in my e-mail of yesterday, Rule 85 of the Rules of the Law Society states:

- (7) A member who is the subject of a complaint shall*
- (a) cooperate fully with the Society in a review conducted under section 53 of the Act;*
 - (b) respond fully and substantively to any request to answer any inquiries or to furnish any records; and*
 - (c) respond within any timeline or in accordance with any deadline established by the Society. ...*

f) Mr. Smith's June 9, 2021 reply:

I don't dispute my obligation to cooperate. I say that the inquiry you make is outside the bounds of any matter covered by the Law Society's jurisdiction.

Put another way, my private life is not a matter about which the Law Society can compel me to cooperate. Just because somebody complains about a lawyer does not automatically afford the Law Society the right to insist I respond to every question the Law Society may choose to put to me. The

Law Society is concerned with and only authorized to inquire about matters of professional practice.

Your question does not fall within that category and is therefore not a permitted question I have to respond to.

The question you ask has no bearing on any allegation about possible professional misconduct.

I have asked you to demonstrate the connection and you simply parrot back the legislation.

What connection can the Law Society possibly be making between the question asked and the Code of Professional Conduct?

g) LSA June 11, 2021 reply:

The Law Society is not limited to inquiring only about matters of professional practice. I note the broad definition of conduct deserving of sanction in the Legal Profession Act:

49(1) For the purposes of this Act, any conduct of a member, arising from incompetence or otherwise, 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, is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

I would also direct you to section 2.1 of the Code of Conduct regarding integrity. The Commentary under section 2.1-1 specifically states that dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession, and the Law Society may be justified in taking disciplinary action whether the conduct occurred within or outside the professional sphere.

In any event, I note this complaint arose out of your representation of clients in a landlord and tenant dispute, which is clearly within the professional sphere. The Complainants allege that on two occasions, you removed and/or damaged a realtor's sign that was placed on the lawn of the property they own, in which your clients were tenants. I have requested your response to this particular allegation as it is relevant to my review of the complaint. I have

provided you with the legislative authority for my inquiry. Please note that if you do not respond, I will still proceed with my review of the matter and the complaint may proceed to the Conduct Committee without the benefit of your response to this allegation. Further, the Conduct Committee could direct a citation in relation to your failure to respond completely to the Law Society.

I trust the above answers your questions.

h) Mr. Smith's June 15, 2021 reply:

I began acting on this file on October 20, 2020. I was not acting in a representative capacity as far as the [landlords] were concerned until that date.

I cannot accept that the video depicts even the broad definition of conduct you describe.

Is the Law Society seriously contending that the video you ask about is evidence of "dishonourable or questionable conduct" on the part of a lawyer? Those words must be read in the context of the commentary which is about "integrity" and "honesty". The video displays no aspect whatsoever about either of those concepts which have well defined meanings.

What is it about the video that could support an opinion that the displayed conduct evidences a lack of integrity or honesty?

I know of no such legal precedent.

Are you making that representation of law to me? That you are of that opinion?

If so I ask that you provide the legal basis for your opinion. I disagree. The conduct displayed in the video cannot be "dishonourable" nor "questionable". Neither the Act nor the Code supports requiring a lawyer to answer any question that springs to the mind of the Law Society staff.

I will respond if you can legally justify your demand, assuming this is now a demand rather than a request for information.

i) LSA June 18, 2021 reply:

To clarify, I have not formed any opinion or made any determination as to your alleged conduct in this matter. I am still in the process of collecting all relevant information in order to complete my review of the complaint, which is

why I have asked for your further response. I directed you to section 2.1 of the Code of Conduct in response to your assertion that the Law Society is limited to reviewing matters of professional practice, which is incorrect.

With respect to your comments that the alleged conduct does not constitute dishonourable or questionable conduct, I note you are at liberty to include those arguments in your further response.

Your response is your opportunity to provide a full answer and defence to the allegations made against you.

I note I have already provided you with the legal basis for my request. The Act and Rules are clear that the Executive Director may require a lawyer to answer any inquiries that the Executive Director considers relevant for the review, and that the lawyer who is subject to the complaint must respond fully and substantively to any such request. I further note that I have not asked you to answer “any question that springs to mind”. I have asked that you address a specific allegation that was made by the Complainant in his complaint against you, as your response to the complaint did not address this particular allegation.

I again reiterate my request that you respond to the Complainant’s allegation that you removed and/or damaged the realtor’s sign on two occasions within the next two weeks.

If you have any further questions or concerns regarding your obligation to respond to the Law Society, you may wish to consider contacting a Practice Advisor.

j) Mr. Smith’s June 18, 2021 reply: “I did not damage any realtor’s sign.”

Evidence of SF and Mr. Smith re LSA interview:

104. The LSA called LSA investigator, SF as a witness.
105. SF interviewed Mr. Smith on August 11, 2021. SF’s testimony at the Hearing recalled and recounted the interview.
106. Mr. Smith confirmed that he had acted for the tenants for four or five years.
107. SF played the October 7, 2020 video for Mr. Smith which was the video of the confrontation on the front lawn of the property. Mr. Smith was asked several times to identify himself on the video and to confirm the accuracy of the video. Mr. Smith would not confirm or comment on the accuracy of the video.

108. SF asked a series of questions about the sign removal and damage allegations.
109. SF played the October 9, 2020 video for Mr. Smith which was the video from the doorbell camera showing the sign removal. Mr. Smith was asked several times to identify himself on the video and to confirm the accuracy of the video. Mr. Smith would not confirm or comment on the accuracy of the video.
110. Mr. Smith testified that he initially challenged the LSA's purported unlimited authority to request the information sought because he believed he had rights, as a private citizen, and that the LSA was overreaching. He did, ultimately, reply that he did not damage the sign. He also did not attempt to deny to the LSA that he removed the sign.
111. Mr. Smith said that he had no intention to mislead the LSA and gave fulsome answers to the LSA's questions.
112. Mr. Smith said he cooperated with and was candid with the LSA investigator.
113. Mr. Smith said that he could not answer the questions about the doorbell videos because Mr. Smith is of the opinion that a person cannot identify and recognize himself when viewing a video.

Arguments and Submissions Regarding Citation 3

114. LSA counsel noted that the LSA Conduct counsel had to ask and remind Mr. Smith at least four times of his obligations under the Code and the *Act* to provide information and that his actions, even if they purported to be as a private citizen, were subject to review.
115. Further, he was not cooperative and candid in the correspondence with LSA Conduct counsel. The back-and-forth correspondence exchanged between LSA counsel demonstrates that Mr. Smith never did acknowledge that he removed the sign. It was only in his last correspondence to LSA conduct counsel when he finally replied to the allegation that he damaged the sign when he wrote "I did not damage any realtor's sign."
116. LSA counsel submits that Mr. Smith was evasive with the LSA investigator as he refused to acknowledge that it was him on the videos. LSA counsel said Mr. Smith was playing "cat and mouse." Counsel cited the case of *Law Society of Ontario v. Diamond*, 2021 ONCA 255 which was a case where the member was required to provide information pursuant to Rule 7.1.1 of the Rules of Professional Conduct (Ontario Rules), effectively the same rule as Rule 85 in Alberta, which requires a member to reply promptly and completely to any communication from the Law Society. The following are excerpts from the *Diamond* decision (paragraphs 8, 42-44):

Rule 7.1-1 of the Law Society's Rules of Professional Conduct lies at the heart of this appeal. It requires the following:

A lawyer shall reply promptly and completely to any communication from the Law Society in which a response is requested. [Emphasis added.] [paragraph 8]

...

The Vice-Chair set out the following passage from para. 8 of Ghobrial, emphasizing the need to take all of the circumstances into account when determining good faith efforts:

The issue is whether the licensee received correspondence requesting a reply, and acted in good faith to provide a complete and prompt response. The question of whether the response was complete and prompt must be determined by the adjudicator based on all the circumstances, including how the requests were expressed and what was required in order to fulfil them. [Emphasis added]

...

The passage from Boissonneault, as cited by the Vice-Chair, makes clear that, whatever "nuances" might be involved in the term "cooperate", its meaning is "simple" in the context of a licensee's relationship with the Law Society, requiring that the licensee "shall be, in relation to the [Law] Society in its supervisory and investigatory functions, honest, open and helpful" (emphasis added).

117. LSA counsel submits that Mr. Smith was not honest, open, or helpful and he breached Rule 85(7).
118. Mr. Smith submits that he was cooperative. He submits that he did not answer the questions about the videos because a person cannot recognize themselves.
119. He submits that *Diamond* is distinguishable as *Diamond* was a case where the member was being asked to produce financial records.

Analysis and Decision Regarding Citation 3

120. The Committee agrees with LSA counsel that Mr. Smith was evasive and non-cooperative. The Committee also agrees with LSA counsel that Mr. Smith was not honest, open or helpful.
121. Mr. Smith went to great and unnecessary lengths during his interview with the LSA investigator and during the Hearing to explain the frailties of video evidence and not answer the questions asked. However, he admitted that he removed the sign which was the only germane issue.
122. The Committee finds that Mr. Smith failed to respond fully and substantively to inquiries from the LSA.

123. While Mr. Smith may think his evasiveness or non-cooperation as something trivial, these actions impact a professional regulatory body's ability to function. The LSA is a self-governing body. Its ability to regulate and govern lawyers in accordance with its statutory mandate is obstructed when lawyers are uncooperative and do not respond to inquiries. Furthermore, the LSA cannot protect the public, which is its ultimate mandate, in any meaningful way when it is not provided accurate, complete and candid information concerning its members.
124. For these reasons, the Committee finds, on a balance of probabilities, Mr. Smith guilty of conduct deserving of sanction on citation 3.

Concluding Matters

125. In conclusion, guilt on citations 2 and 3 are proven on a balance of probabilities and as such, the conduct is deserving of sanction.
126. Accordingly, a sanction hearing will be set to deal with remaining matters, including sanction, costs, notices, and any other outstanding issues.
127. 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. Smith will be redacted and further redactions will be made to preserve client confidentiality and solicitor-client privilege (Rule 98(3)).

Dated November 24, 2023.

Ronald Sorokin

Ryan Anderson, KC

Mary Ellen Neilson

https://www.advocates.ca/Upload/Files/PDF/Advocacy/InstituteForCivilityandProfessionalism/Principles_of_Civility_and_Professionalism_for_AdvocatesFeb28.pdf