LAW SOCIETY OF ALBERTA

IN THE MATTER OF THE *LEGAL PROFESSION ACT;*

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF DAWN WILSON, A MEMBER OF THE LAW SOCIETY OF ALBERTA

Hearing Committee:
W. E. Brett Code, Q.C., Chair (Bencher)
Nancy Dilts, Q.C., Committee Member (Bencher)
Glen Buick, Committee Member (Lay Bencher)

Appearances:
Counsel for the Law Society – Nancy Bains
Counsel for Dawn Wilson – Jim Rooney, Q.C.

Hearing Dates:
April 11, 12, 13, 2016

Hearing Location:
Law Society of Alberta at 500, 919 – 11th Avenue S.W., Calgary, Alberta

HEARING COMMITTEE REPORT

Summary Conclusion

1. A hearing was conducted into whether the Member, Ms. Dawn Wilson, acted in a conflict of interest and whether she acted in a manner that might weaken public respect for the law or justice system or in a manner that brings discredit to the profession. We have found that she did so act and that she is guilty of conduct deserving of sanction.

2. The matter will now proceed to the sanction phase.

Tragic Background to a Disputed Estate Matter

3. On May [●], 2012, the bodies of three people were found on the side of a road in Saskatchewan. More was learned later, but at the time that the matters

pertaining to the conduct of Ms. Wilson commence, it was known that [DW] had shot his wife, [HW], his two-year old son, [CW], and himself. All three of them died. The gun used by [DW] had been taken from the secure gun storage case at his parents' house. The gun belonged to his father, Mr. [GW].

4. Pertinent to later issues regarding the estates of [HW], [DW], and [CW], the order of their death was not known. While all three died on the same day, it was not known who had died first, and which of the three had been the last to die. Such matters became important when the estates were contested. The manner of death also affected the potential validity of extant insurance policies and later became issues for the estates of the deceased. Those were estate issues that existed from the time of the deaths, that created complications, and that created potential disputes.

5. Soon after they learned the news of the murder-suicide, members of the families of the deceased gathered and met at the home of the deceased. All were in shock and all were experiencing a full range of intense emotions, from sorrow to anger, from kinship to mistrust, from love to hatred, and from respect to resentment. While they conducted the obligations that arise after such a tragic event, cleaning up, sorting, moving, and planning what to do with the home and possessions, they, quite naturally, were sorting through what had happened and, perhaps equally naturally, trying to figure out who among the living might be to blame. In addition to the loss of his son, daughter-in-law and grandson, GW was feeling the guilt of one who owned guns, one of which had been taken and used as a murder weapon. Mrs. [SW] [DW's mother] was feeling the trauma of a mother and grandmother and wondering whether there were things she could have or should have done differently to ensure that such an event not happen. [LW and MW] [HW's parents] were equally traumatized as parents and grandparents and were searching for reasons to explain how they could have lost their daughter and grandchild in the flash of a moment.

6. [HW] and [CW] were buried on June 2. [DW] was buried on June 5.

7. Along with [LW] and MW], [GW and SW], [DW]'s brother, [OW], was at that family home. As his parents and his brother's parents-in-law tried to understand and cope with the loss and the guilt, it was apparent to [OW] that tensions were very high. It fell to him in that situation to try to take the lead in finding out what needed to be done to attend to the estates. He gathered and collected various papers, and agreed to go see a lawyer on behalf of the families, to learn what needed to be done to process their estates.

8. In due course, but quite soon thereafter, [OW] spoke to and then met Ms. Wilson, along with his parents. [OW] testified that they believed that they had retained her as counsel. He also testified that he was therefore very surprised, sometime later, when Ms. Wilson told him that she could not act for him or his parents, as she had been retained to act on behalf of [LW and MW].

9. OW eventually told Ms. Wilson that she could not act for [LW and MW], complained about her conduct to the Law Society of Alberta ("LSA"), and had his new counsel apply, on October 12, 2012, to have her removed from the file as counsel to [LW and MW].

10. Ms. Wilson refused and resisted. She testified that that she had not been retained by [GW, SW or OW], that she had been properly retained by [LW and MW], and that she owed it to them to represent their interests and not to step aside.

11. Eventually, by a decision delivered orally on July 9, 2013, Ms. Wilson was removed as counsel by the Honourable Madam Justice Nation.

12. The issues left to us to resolve relate to whether the conduct of Ms. Wilson in relation to this matter and these parties amounts to conduct deserving of sanction pursuant to s. 49 of the *Legal Profession Act*, RSA 2000, c. L- 8 (hereinafter referred to as the "LPA").

Citations

13. In the "Twice Amended Notice to Solicitor", dated January 27, 2016, the Conduct Committee of the LSA directed that a Hearing Committee conduct a hearing into various allegations as set out in four citations, in which it was alleged:

    a. That Ms. Wilson acted or continued to act for a client where there was a conflict of interest;

    b. That Ms. Wilson acted in a manner that might weaken public respect for the law or justice system or in a manner that brings discredit to the profession;

    c. That Ms. Wilson failed to meet her duty of competence with respect to ethical principles;

    d. That Ms. Wilson failed to be forthright with the Law Society of Alberta;

    and further that each of those allegations of misconduct by Mr. Wilson constituted conduct deserving of sanction in accordance with s. 49 of the LPA.

14. During her opening statement, counsel to the LSA advised that the LSA would not be calling any evidence on the third and fourth citations. The LSA asked us to dismiss those citations, and we did.

15. The hearing proceeded with regard only to the first and second citations listed above.

Evidence and Findings of Fact

16. A binder of Exhibits was entered. Several witnesses spoke to various parts of those Exhibits and provided oral evidence under oath. We heard testimony from Mr. [OW], Ms. Wilson, and Mr. [LW].

17. As is often the case, the most difficult part of the evidence is that for which there is no independent documentary corroboration. Key to determining whether Ms. Wilson is guilty of conduct deserving of sanction are a series of telephone calls, which were not recorded, and a first meeting of which there is also no recording. We heard the conflicting testimony of the above-mentioned witnesses and were required to determine what happened during those communications and whether what flowed from them amounts to conduct deserving of sanction. What follows is our summation of the evidence necessary to make the latter determination. Many parts of the chronology were either undisputed or unchallenged. On certain matters we were required to choose as among the various witnesses. Where we have done so, we have attempted to explain why.

18. From the time of the deaths until the funerals, the families were working to clean up the house, looking for information, and deciding how to deal with the various matters that arise upon death.

19. Both [families] thought at that time that they needed a lawyer. It appears that, at the beginning, both families thought it best to try to retain one lawyer for both families. [LW] testified that he thought so primarily because he did not think there would be much money in the estate. [OW] testified that he thought one lawyer would suit, for he believed there to be only one estate. For him, that there was one house meant one estate, he said.

20. [OW]'s parents delegated decision-making to him, as he lived in Calgary and was therefore near to the Airdrie home of the deceased.

21. [LW] testified that he believed that [OW] was getting a lawyer for both families.

22. Following the funerals for each of the deceased, [OW] returned to Calgary on June 8 or 9. He did some online research, saw the *Wills and Estates Act*, saw that there exist Surrogate Rules and forms, and that these forms were what were

used to apply for what he learned was a Grant of Administration. His parents and he agreed that he was best suited and best located to be the person who applied to be the Administrator of the estate of [DW]. He prepared himself for that, using online materials. He told us that he hoped that if he completed the forms himself and then sought legal advice that he could reduce the cost of that legal advice.

23. On June 12, [OW] contacted the LSA and was given the names of five lawyers who practice wills and estates law. He contacted each of them and decided that Ms. Wilson was most suitable for his purposes. Also, she agreed to meet with him in person for no charge. He said that he called her again briefly on June 14 to arrange for a meeting to occur on June 16 with him and his parents.

24. Ms. Wilson testified that she thought the purpose of his call on June 12 was to get advice and direction as to whether he could act on behalf of his brother's estate, and not whether she could represent him in that role. She testified that, when he mentioned his parents, she told him that they would have the first right to make an application for his brother's estate, but that, if they were willing, they could renounce and nominate him in their stead. We accept her evidence.

25. Also on June 12, [OW] contacted [LW] by email, sent him the forms for a Grant of Administration and a Grant of Probate, and told him that two lawyers stood out for him, Ms. Wilson and Mr. [DF], the lawyer who ultimately ended up acting for [OW] in his capacity as Administrator for the Estate of [DW]. [OW] did not tell [LW] that Ms. Wilson had agreed to meet with him and his parents.

26. A few days later, [LW] replied, expressing his understanding of matters. At that time, he told [OW] that any lawyer [OW] decided on would be fine. He expressed reliance on [OW], based on his understanding that there would be one estate, that of [DW], that the lawyer would act for the estate and that there would be co-administration of it. He was awaiting further word from [OW] and thanked him for his work to date. The email was cooperative and amicable.

27. [OW] testified that he wanted to retain Ms. Wilson for himself to assist him in administering the estate of [DW] on behalf of the beneficiaries, whom he thought of as his parents.

28. Ms. Wilson's testimony regarding the call on June 14 from [OW] further confirmed for her that his plan was to represent himself. She swore that he informed her that he was bringing his parents to Calgary because he was bringing the application and that he was representing his brother's estate. He told her that his parents were coming to town and wondered whether she would give them the same advice that she had given him already concerning their

ability to renounce in his favour. She said that she told him that it was "in order" for them to do this and for him to represent the estate of his brother. Her understanding, she said, was that [OW] wanted to meet with her, so that she could tell his parents that personally. She then agreed to his proposal to meet with her at her home on the coming Saturday. We accept her evidence.

29. [GW] and [SW] drove the seven hours from their home in Saskatchewan, and, along with [OW], met with Ms. Wilson at her home office on June 16. [OW] testified that, before the meeting, they had created a list of specific questions they wanted answered, and they asked Ms. Wilson those questions. Among other things they asked her who the beneficiaries of [DW]'s estate were, and they asked her to opine on "the value of" a holograph will that they had found in the home of [DW] and [HW] and whether it was valid. They asked her what is part of the estate, and what is not, and they asked whether, if the estate is in debt, they would have to pay its debts if they were administrators. They asked how the wedding and engagement affected the estate and the impact of a student loan. They also asked how they list for sale the home of the deceased.

30. Ms. Wilson's testimony was that those types of questions led to a proper characterization of the meeting. In her view, [DW's family] were not seeking to retain her but were seeking legal advice free of charge that would supplement their own online research. The specific questions were gaps in their knowledge and they sought no more than to fill those gaps. There is no dispute regarding whether the questions were asked but only as to the characterization to be placed on the questions and the inference to be drawn from them.

31. Her evidence was unequivocal that [OW] never asked her to represent them. To the contrary, she testified, unequivocally, that they made it clear that they were self-representing – that he was representing his parents, and that they were representing themselves. [OW] did not testify to the contrary. We accept her evidence.

32. Ms. Wilson testified that [OW] told her that he had obtained Surrogate Court forms from the Queen's Printer and that he either had completed them or intended to do so. [OW] did not show her the forms. Ms. Wilson testified that those statements strengthened her conviction that they were seeking free advice and not seeking to retain her as their lawyer. She was surprised that they had those forms, which [OW] confirmed under cross-examination.

33. [OW] had written Ms. Wilson's name on the forms, representing that Ms. Wilson was counsel to the Estate of [DW]. When told by the Court Clerk at the time he went to file the documents on June 18 that all communication would then go to

Ms. Wilson, [OW] crossed out her name and initialled the change. He had never asked Ms. Wilson if he could put her name on the forms.

34. Ms. Wilson said that [OW] did not mention the idea of a joint retainer with the [LW and MW], nor did he mention that he had been tasked to find a lawyer on behalf of [LW] and himself. [OW] confirmed those facts on cross-examination. [OW] had received the email from [LW], amicably expressing his thanks and his reliance, the day before the meeting with Ms. Wilson. He did ask whether there could be a joint representation of the estate and got a negative answer to that from Ms. Wilson, but [OW] did not tell Ms. Wilson that [LW] was at home in Saskatchewan waiting to hear from him regarding the lawyer that he had retained, or had been planning to retain, for both of them. Ms. Wilson said that he did not mention retaining a lawyer at all, let alone for two different families.

35. It turned out that, due to the growing tension between the families, [OW] was reluctant to tell [LW] that he wanted to retain a lawyer only for his own family and [DW]'s estate. He was hoping that Ms. Wilson would tell that to [LW], he said on cross-examination, but he did not tell her about [LW] nor did he ask her to call him. He did not give her [LW]'s phone number.

36. In chief, in response to a question as to how he felt when he left Ms. Wilson's office, he said that he felt that he had someone who was going to represent his parents and him. That is how he felt. He did not say it to Ms. Wilson. Nor did he say it to [LW] when he reported to the latter on the meeting a few days later.

37. [DW's family] did not talk to Ms. Wilson about paying her for legal advice, and they did not ask how much it would cost or how she would be paid if she was retained. As to legal costs specifically, the evidence of [OW] was that, at the end of the meeting at Ms. Wilson's house, they reconfirmed that there was no cost for that meeting, even though the meeting had gone well over the half-hour that they heard was normally free. They did not offer to pay her for her time that day. He testified that he told her that they would take care of the Surrogate Court forms and, once that was done, she would "become more involved".

38. [OW] said that he was not then experienced in legal matters, and credits inexperience as the explanation for not formalizing the relationship that he felt had been created. He testified that he did not know the word "retainer" and that he did not know exactly what was involved. We accept that. What he did know was that legal advice is not free, that he was worried that the estate would not be able to cover legal costs, and that this lawyer had not offered to act for the estate, for him, or for his parents for free. To ensure he had a retainer that he

could afford, we believe that he would have asked about that. That he did not is inconsistent with what he testified were his purposes.

39. Ms. Wilson testified that she took and looked at their identification, so that she could assure herself that they were who they were saying they were, but she did not take copies of the identification, as she would have if she was opening a new file for new clients.

40. The only documents that she saw from [OW]'s briefcase were a holograph will and a handwritten direction regarding guardianship. She remembered seeing the two pages. She remembered that the holograph will had been created in 2011, and that, in it, [DW] left his possessions to [HW]. Ms. Wilson testified that [DW's family] asked her if it was a valid will. She said that she remembers thinking that it was valid, but she did not provide that opinion. She told them that it was something they should attach to their application so that the Court could determine the issues arising from it, as she could not really tell them whether it was valid.

41. She also remembered being shown a second document, which was an expression of intention written by [HW] regarding guardianship for [CW], saying that her parents should be guardians in the event of the demise of [CW]'s parents.

42. Ms. Wilson did not take copies of the documents. She testified that she told [DW's family] that they were important and that they should both be shown to the Court.

43. They had further conversation of a more confidential, personal, and emotional nature, discussed in more detail below, but she did not take any notes. The reason she gave is the one outlined above: they had told her that they were going to make the application themselves, and they were doing no more than asking her to go through the Act and Rules with them. We accept that that is the reason she did not take notes, but we also accept her evidence that they discussed matters of a confidential, personal, and emotional nature.

44. Ms. Wilson testified that she did not open a file, and that [DW's family] never mentioned that they were thinking of hiring her. To the contrary, they said they were self-representing. They did not ask her to do anything on their behalf. Her practice is not to let clients file their own documents, and she did not consent to them using her name on their application. She did not know about that until the Court Clerk told her about it, and she did not see the document in which her name is stroked out and initialled by [OW] until the hearing. We accept her evidence.

45. On June 18, [OW] met his parents at the Courthouse, and filed his application.

46. On June 19, [OW] received a text message from [LW] who was inquiring about their contact with the lawyer. [OW] then prepared a summary of Dawn Wilson's recommendations. He also prepared a document that he called a "principles" document, and sent that to [LW].

47. On June 19, at 9:13 p.m., [OW] sent a page-and-a-half long email to [LW], entitled "Information from lawyer on estate administration". [OW] did not mention that Ms. Wilson was retained or hired. There is no indication in this document that she was his lawyer, his family's lawyer, or anyone's lawyer. The language and tone used about her fits very well with the characterization given by Ms. Wilson, that she was a resource and that she answered their specific questions.

48. In that document, [OW] told [LW] that Ms. Wilson had told him that there would be two estates. She later called him to tell him that that was incorrect. Three people had died; there were three estates. We do not think it likely or even possible that Ms. Wilson told [OW] that there were two estates.

49. In the next section of his email, he listed the reasons why [OW] should be the sole administrator of [DW]'s estate, while [LW] would be the sole administrator of [HW]'s estate.

50. In the third section, he stated that Ms. Wilson had said that neither of the wills they had found were "valid wills, per se." He said that they were only statements of guardianship, that [DW]'s had expired, and that "the Surrogate Court would place no value on them." We do not believe that Ms. Wilson would have provided such incorrect advice. The only correct course was to provide those documents to the Court and to have them evaluated in the broader context of all the evidence, and we believe that that is what Ms. Wilson advised [DW's family] to do.

51. Later on June 19, at 10:18 p.m., [OW] sent another email to [LW]. In the prior email he had referenced the document he was creating as something that would support his strong recommendation that they immediately enter "a formal memorandum of understanding" on how both estates were going to be managed. In the 10:18 email, he called his attachment a set of principles to be used to establish the groundwork for "how we intend to administer the estates of [HW] and [DW]". There is again no reference to Ms. Wilson having been retained or to having her advice and assistance in administering the estates. He was not imposing these principles, but expressed complete openness to negotiation.

52. In neither of those documents, written by [OW] to solidify the manner by which his family and [LW and MW] would deal with these estate matters, do we find anything that supports the idea that Ms. Wilson had been retained by [DW's] family, that they were relying on her future support, guidance or advice, or that he was expecting to pay her for legal advice. We note in that regard that in his principles, the priority of payment is mentioned as is the payment of various costs and expenses: legal costs are not mentioned.

53. The next day, Ms. Wilson demonstrated her belief that she was not acting for [DW's] family and that she believed that she was free to act for [LW and MW] against [DW's family].

54. On June 20, [LW] telephoned Ms. Wilson. After they spoke, Ms. Wilson called [OW]. After that call, [OW] wrote to [LW] by email at once, apologizing for providing him incorrect information, advising him that there were three estates, and asking him both how he wanted to deal with them and what he thought was fair.

55. [LW] responded by email, referencing that Ms. Wilson would be acting in "the estates best interests" and saying that the proper steps would be taken upon her recommendation.

56. On June 20, Ms. Wilson had a conversation with [LW and MW]. The conversation lasted over two hours, and she took six pages of detailed notes. After hearing a very detailed account of facts and opinions regarding various issues related primarily to [DW], [HW] and [CW] – all of which Ms. Wilson took us through - these words appear: "ACT – Retained". Those words meant, she told us, that she was going to act and that she was retained by [LW and MW]. Asked by her counsel whether she had any qualms about agreeing to the retainer, Ms. Wilson said: "None".

57. Her counsel placed the question in the context of the proceedings, reminding her that she had spoken to [DW's] family and that now she had heard many details, and he asked her whether she was at all concerned. She said:

> A. No, because what we were - - I believed is that [OW] had referred me. He had been given these names, and I'd gotten, subsequently, this copy of this email that - - from [LW] saying "Dawn Wilson," and there was some other lawyers there, [DF] were these lawyers, and he was suggesting Dawn Wilson. And [LW] said, we are going by your recommendations as to the lawyer.

> But it was my understanding that was the purpose of why they had come to me, not just - - I guess there would have been a twofold purpose: to get some help interpreting the Wills and Succession Act, regulations and Surrogate Rules; but, also to - - to - - I guess what I'm trying to say is, pass the name on. Because I'd learned from [LW] that [OW] was looking for a lawyer for them. That was my understanding. And it seemed to make sense, because they were doing their own Application.

58. We have trouble with this evidence. It does not fit. It is evident that, since she knew she was not retained by [DW's family], she believed she was free to be retained by someone else. But, for us, this notion of a referral does not ring true. We have no doubt, no doubt at all, that Ms. Wilson was truthful in her testimony before us, and we do not think that this evidence was false or that she was not telling the truth as she remembered it before us. We do not, however, believe that this is what actually happened.

59. More consistent with the main thrust of her evidence, which was that [DW's family] were not seeking to, and did not, retain her, is the idea that she was not retained by the one party, so she believed she was free to be retained by the other party. Her focus was on the retainer, the contract. In that regard and, as a result of her focus on the fact of being retained or not, she misunderstood the circumstances, misunderstood the gravity of her situation from the point of view of confidentiality, and was mistaken in her belief that she was free to be retained by [LW and MW]. It is that misunderstanding, easily avoided by her, that is the source of our finding of guilt. We speak of that further below.

60. Later that day, on June 20, Ms. Wilson called [OW] to talk about his June 19 email to [LW] which set out what he said that he thought she had told him and the advice she had given. She told him that, since he was self-representing, she had been retained by, and would be acting for, [LW and MW]. Her evidence was that, during the phone call, [OW] accepted that.

61. She then went on, she said, in her new role as advocate for [LW and MW], to correct [OW] on a number of matters and in particular on the number of estates, which she said was three, and on the holograph will, of which she sought a copy and said that it should be shown to the Court. They discussed various matters, including that she would be filing an Application for [LW] to be Administrator of the estates of [HW] and [CW]. Ms. Wilson recommended that he get his own legal counsel and that he retain [DF].

62. Ms. Wilson did not tell [LW] that she could not act for him and his wife until she cleared it with [DW's family]. Nor did she seek or obtain the consent of [DW's family] to act against them even though she had had a confidential two-hour meeting with them. She did not believe that she needed to, because, as she said, they were self-representing and she had somehow persuaded herself that [OW] had referred her to [LW].

63. Ms. Wilson was taken through [OW]'s June 19 email to [LW]. She identified the various things that were incorrect with a particular focus on things that she did not say to [DW's family] on June 16, and things that she would never say, since they were factually or legally incorrect. What stands out for us is that, while she was going through the corrections, her testimony was that [OW] did not argue with her, did not say things like, "but that is exactly what you told us" or "that was your advice to us". We accept her evidence.

64. The next day, on June 21, [OW] wrote a letter to the Court requesting that his Application be returned to him.

65. [OW] retained [DF] in July of 2012.

66. Having heard and read all the evidence, having considered the various issues arising from that evidence, and having considered the reasonable inferences that are available to us as a result, we have concluded that Ms. Wilson was not retained by [DW's parents] or by [OW].

67. As alluded to above, the matter does not end there, that is, the scope of our analysis is not complete by a finding that the [DW's family] did not retain Ms. Wilson. The real question raised by Citation 1, and in part by Citation 2, is whether Ms. Wilson was precluded from acting for [LW and MW] as a result of her relationship and communications with [DW's] family. We have concluded that she was so precluded and that in failing to recognize that she was not free to act for the [LW and MW] and therefore against [DW's family], and in failing to cease to so act in the face of the reasonable request that she recuse herself, that she is guilty of conduct deserving of sanction on both citations.

The Decision of Madam Justice Nation to Remove Ms. Wilson as Counsel

68. On June 9, 2013, the Honourable Madam Justice Nation, in the Matter of the Estate of [DW] over which she was presiding as case management judge, ruled on an application made by [OW] to have Ms. Wilson removed as counsel to [LW and MW]. She ordered that Ms. Wilson be removed. Her decision does not bind us in these proceedings; the question faced by her was different than the questions we are asked to resolve. In addition, she did not have the benefit of

the evidence of Ms. Wilson, as we do. While her decision is not binding, it is instructive, particularly as she made various statements upon which we can rely.

69. Almost immediately after Ms. Wilson was retained by [LW and MW], the administration of the estate became complicated and, in the words of Justice Nation, "very contentious". In the ordinary course, estate litigation is not overly contentious until it comes time to pay out the proceeds, when various people make potentially contradicting claims on the assets in an estate. In this matter, Justice Nation said the following:

> The case management in this matter was directed by the court due to what was becoming very contentious litigation over the estate of [DW], the estate of [HW], and the estate of the child, [CW]. The issues include the meaning and validity of a holograph will written by [DW], the effect of the intestacy of [HW] and [CW], and especially the right of [DW's] family to claim any benefits due to the alleged murder by [DW].
>
> These matters have become very contentious. [LW and MW] opposed [OW] being appointed as a representative of the estate of [DW]. They wanted to be appointed to that position, and court orders were necessary to arrange for the sale of the matrimonial home, some of the mechanics of which could not be agreed between the parties. These are all preliminary matters and do not even start to deal with entitlement to any money in the estates or any of the life insurance proceeds which exist.

70. In cross-examination, Ms. Wilson downplayed the extent of the conflict or contention in the estate dispute. She did not think that [DW's family] and [LW and MW] were truly in conflict. Yet she was acting for [LW and MW] on all of the above-described matters, including even the question of whether [OW] could be appointed as representative of [DW]'s estate. If there is anything that she agreed she gave advice to [OW] on, it was that it was "in order" for him to self-represent as the administrator of his brother's estate, so long as his parents consented to renounce. Thus, she led the charge for her clients to oppose the very advice she gave on that issue.

71. Conflict in estate matters is common. Conflict in litigation is common. Lawyers are only rarely responsible for the conflict and contention, which are generally caused or fomented by the parties themselves, by those who are personally involved and those who have personal stakes in the result. We do not for a moment say that Ms. Wilson was responsible for the conflict on this estate litigation matter. If conflict is inevitable on any matter, it seems that this one likely epitomized a matter on which conflict would arise. Based on the foregoing

description by Justice Nation, we find it easy to conclude that the matter was contentious, that [DW's family] and [LW and MW] were opposed to one another, and that Ms. Wilson, who had been consulted by both of them on the facts and matters at issue and who had advised them on various aspects of those issues and matters, had an obligation to determine whether she could continue to act as counsel to either of them.

72. In her examination-in-chief, Ms. Wilson highlighted the various matters that were discussed by [LW and MW] in their two-hour conversation on June 20. Filled as that discussion was with animosity, anger, distrust, and blame toward [DW's family], she should have known to step back and consider whether she could get into that fray as counsel for [LW and MW], having had a long discussion of many of the matters in contention with [DW's family]. We also think that there was only one correct answer: no.

73. [DF] was retained by [OW] on July 6. On August 17, [DF] raised the issue of the appropriateness of Ms. Wilson's having decided to act for [LW and MW] and against [DW's] family and of the inappropriateness of her continuing to act. Soon thereafter, Ms. Wilson responded in a way and in terms that she has used consistently since then. Indeed, her correspondence with [DF] and with the LSA is generally very consistent with her testimony before us. She has been consistent in her view, and she continues to hold it, that she had not been retained, that she was therefore not acting in a conflict, and that she could therefore continue to act for the [LW and MW]. She frequently expressed that she felt she had an obligation to continue to act for them, particularly since, as we heard from both her and [LW], her client wanted her to continue.

74. Justice Nation analyzed the issue from the point of view of the law as laid out by the Supreme Court of Canada in *MacDonald Estate v. Martin* which, she said correctly (at page 4 line 23 to Page 5, line 4):

> … set out the process to go through when a judge has to decide whether a disqualifying conflict of interest exists, the court has to look at the competing values of the concerns to maintain the high standards of the legal profession and integrity of our system of justice against the countervailing balance that a litigant should not be deprived of his or her choice of counsel without good cause. …
>
> The Supreme Court of Canada indicated that two questions have to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

> In answering the first question, once it is shown by a client that there existed a relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. The degree of satisfaction must withstand the scrutiny of the reasonably informed member of the public, and the court noted this would be a difficult burden to discharge.
>
> In answering the second question, whether the confidential information will be misused, a lawyer who has received confidential information is automatically disqualified from acting against a client or former client.

75. Justice Nation discussed at some length the evidentiary problems she faced, from having no evidence directly from the "solicitor", Ms. Wilson, who argued the case as counsel while relying on the hearsay evidence of her clients. Additionally, Ms. Wilson raised an issue of [OW]'s credibility on the evidence before Justice Nation. However, Justice Nation found that the evidence of [OW] and [LW] was essentially the same, once the hearsay concerning the role of Ms. Wilson was removed. She could therefore decide the issue before her.

76. Her first finding was that the [DW]'s family had seen Ms. Wilson in her capacity as a lawyer to get legal advice. She found, "[f]rom the evidence, [that] [OW] and his parents understood there was a solicitor/client relationship and there was no evidence to suggest that Ms. Wilson was not seeing them in her capacity as a lawyer to give legal advice" [Page 7, lines 16-18].

77. From that finding, her decision followed the Supreme Court of Canada's analytical framework easily. Having found that there existed a solicitor/client relationship, there is, as stated above, a presumption that confidential information was imparted unless the solicitor demonstrates the opposite. Justice Nation went on to say that the solicitor's burden in that regard is a difficult one to discharge. In the case before Justice Nation, Ms. Wilson provided no personal evidence, since she was acting in the role of counsel and would have been disqualified, so Ms. Wilson could not succeed in overcoming the presumption that confidential information had been imparted.

78. Justice Nation did not stop there, for she also analyzed the evidence provided by [OW] as applicant. She said:

> Here, there was discussion of the evidence of the murder/suicide, much of which was public in the press. However, [OW's] evidence is that he discussed his family's fears and wishes and it cannot be said that

> confidential information about their thoughts, emotions, and positions was not discussed. The emails written by [OW] after the meeting attached to the affidavit of [LW and MW] gives some appreciation of the breadth of the meeting. And from it, one would infer, for instance, that the potential holograph will was discussed. And that is one of the contentious matters before the court, which has been litigated. The interesting issue here is that confidential information is just that, meant to be confidential. So one cannot ask the applicant to spell out the information in detail, as its confidentiality would then be lost.

79. Having found that a solicitor/client relationship existed, and having found that confidential information was imparted to Ms. Wilson by [DW's] family, Justice Nation stated that a lawyer who has received confidential information is automatically disqualified from acting against a client or former client. Again, she did not rely on the presumption, but looked to the evidence before her, and concluded (at page 8, line 35 to page 9, line 6):

> In this situation, Ms. Wilson met with [DW's family], heard their story, and gave them some advice, took copies of their identification, and left them with the impression that they had retained her to assist with at least [DW's] estate and possible advice on working collaboratively on all three estates.
>
> As a result of a document they generated, Ms. Wilson was contacted by [LW and MW], had a long conversation with them, and left [LW and MW] with the impression they had retained her. Ms. Wilson then contacted [OW] and told him she was acting for [LW and MW], but one hour later contacted him to say she could act for all estates. Having talked to both parties, giving them advice, and left them both with the impression they had retained her, Ms. Wilson cannot continue to act for either when the estates become so highly contentious and the parties are litigating aspects of the estate as they are now.

80. Ms. Wilson was removed as counsel to [LW and MW].

81. At this hearing, we had vastly more evidence before us than did Justice Nation, both documentary and testamentary. Further, we had the direct oral testimony of Ms. Wilson herself, subject to cross-examination. We therefore had a huge advantage over Justice Nation and we were able to do more than rely on presumptions but were able to make findings and draw inferences as well as to make findings of credibility, as described above. Her decision therefore, while important, does not govern the outcome here.

Applicable Versions of the Code of Conduct

82. The Code of Conduct was adopted by the LSA on November 1, 2011. That first version of that Code applied until December 1, 2012, meaning that it applied to the conduct of Ms. Wilson at the time that she met with [DW's family] and decided to accept the retainer from [LW and MW]. The version of the Code of Conduct as amended on December 1, 2012, applied through most of the time that Ms. Wilson was refusing to remove herself as counsel for [LW and MW]. That version was again amended in February of 2013, and that 2013 version governed her conduct through the period up to the decision of Justice Nation to remove her.

83. The conflict of interest provisions in the November 2011 version were the same provisions as had existed in the *Code of Professional Conduct*. They had been renumbered to accord with the numbering system being used in the Federation of Law Societies' Model Code, but the substance of the conflict of interest provisions was essentially identical to what had existed since 1995 in the *Code of Professional Conduct*.

84. The provisions related to conflicts of interest were completely re-written in the December 2012 version. The essence of those amendments remained the same through the November 2013 version of the Code of Conduct, although that version added a provision related to "concurrent clients" in the conflicts of interest section of the Code of Conduct.

Applicable Rules of the Code of Conduct

85. Since 1995, the Preface to both the Code of Professional Conduct and the Code of Conduct has acted as a key interpretive aid, assisting users of those documents in applying their judgment to the circumstances faced by them. In those documents, the Preface provides a purpose statement and constitutes the lens through which all lawyers must look to understand their obligations and to judge themselves in the day-to-day of acting ethically and professionally. The key statements that describe that purpose statement are the following:

> Lawyers have traditionally played a vital role in the protection and advancement of individual rights and liberties in a democratic society. Fulfillment of this role requires an understanding and appreciation by lawyers of their relationship to society and the legal system. By defining and clarifying expectations and standards of behaviour that will be applied to lawyers, the Code of Conduct is intended to serve a practical as well as a motivational function.

Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach. While the Law Society is empowered by statute to declare any conduct deserving of sanction, whether or not it is related to a lawyer's practice, personal behaviour is unlikely to be disciplined unless it is dishonourable or otherwise indicates an unsuitability to practise law. **However, regardless of the possibility of formal sanction, a lawyer should observe the highest standards of conduct on both a personal and professional level so as to retain the trust, respect and confidence of colleagues and members of the public. [emphasis added]**

The legal profession is largely self-governing and is therefore impressed with special responsibilities. For example, its rules and regulations must be cast in the public interest, and its members have an obligation to seek observance of those rules on an individual and collective basis. **However, the rules and regulations of the Law Society cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider legislation relating to lawyers, other legislation, or general moral principles in determining an appropriate course of action. [emphasis added]**

Disciplinary assessment of a lawyer's conduct will be based on all facts and circumstances as they existed at the time of the conduct, including the willfulness and seriousness of the conduct, the existence of previous violations and any mitigating factors.

The willingness and determination of the profession to achieve widespread compliance with this Code is a more powerful and fundamental enforcement mechanism than the imposition of sanctions by the Law Society. A lawyer must therefore be vigilant with respect to the lawyer's own behaviour as well as that of colleagues. However, it is inconsistent with the spirit of this Code to use any of its provisions as an instrument of harassment or as a procedural weapon in the absence of a genuine concern respecting the interests of a client, the profession or the public.

86. Rule 2.04 in the November 2011 Code of Conduct, read in the context of the language of the Preface, governed the conduct of Ms. Wilson at the time she met [DW's family] and agreed to the retainer by [LW and MW]. It said:

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not represent opposing parties to a dispute.

Commentary

The existence of an actual dispute precludes multiple representation, not only because it is impossible to properly advocate more than one side of a matter, but because the administration of justice would be brought into disrepute. However, it is sometimes difficult to determine whether a dispute exists. [emphasis added]

While a litigation matter clearly qualifies as a dispute from the outset, parties who appear to have differing interests or who even disagree are not necessarily engaged in a dispute. The parties may wish to resolve the disagreement by consent, in which case a lawyer may be requested to act as a facilitator in providing information for their consideration. At a certain point however, a conflict or potential conflict may develop into a dispute, in which event the lawyer would be compelled by Rule 2.04(1) to cease acting for more than one party and perhaps to withdraw altogether.

In considering whether a dispute exists, a lawyer should have regard for the following factors:

(a) degree of hostility, aggression and "posturing";

(b) importance of the matters not yet resolved;

(c) intransigence of one or more of the parties; and

(d) whether one or more of the parties wishes the lawyer to assume the role of advocate with respect to that party's position.

When in doubt, a lawyer should cease acting.

. . . .

87. The portion of the Code of Conduct on Joint Retainers contains an important commentary on "conflict" and "potential conflict" that we think applies here, so we also include that section, as follows:

> Joint Retainers
>
> 2.04 (2) A lawyer must not act for more than one party in a conflict or potential conflict situation unless all such parties consent and it is in the best interests of the parties that the lawyer so act.
>
> **Commentary**
>
> "Conflict" means the situation existing when the parties in question are prima facie differing in interest but there is no dispute among the parties in fact. Examples include vendor and purchaser, mortgagor and mortgagee, insured and insurer, estranged spouses, and lessor and lessee. **"Potential conflict" means the situation existing when the parties in question are prima facie aligned in interest and there is no dispute among the parties in fact, but the relationship or circumstances are such that there is a possibility of differences developing. Examples are** co-plaintiffs; co-defendants; co insured; shareholders entering into a unanimous shareholder agreement; spouses granting a mortgage to secure a loan; common guarantors; **beneficiaries under a will**; and a trustee in bankruptcy or court appointed receiver/manager and the secured creditor who had the trustee or receiver/manager appointed. [(emphasis added]

Application of the Code of Conduct to the Conduct of Ms. Wilson

88. We have no doubt that Ms. Wilson accepted her retainer with [LW and MW] in circumstances where she ought to have known that she could not act competently as a barrister and solicitor for her client, [LW and MW] and the estates of [HW] and [CW], and where she ought to have known that she could not act at all against her former "client", [DW's family], in these estate matters.

89. Had she read the above-quoted section of the Code, in light of the definition of "client" (discussed below) and in light of the confidential information that had been discussed with [DW's family] (also discussed below), she could not but

have come to the same conclusion as we have: that she was precluded from acting for [LW and MW] against the [DW's family].

90. The hearing before us had two matters as its prime focus from the point of view of the parties and their counsel:

    a. Was Ms. Wilson retained by [DW's family]? and

    b. Did she obtain confidential information that precluded her from acting against the [DW's family]?

    That approach is too narrow as should be clearly understood in reading the conflict provisions of the Code of Conduct in light of the purpose statement in the Preface, the language of which is reflected clearly in the commentary for each of the above-quoted sections of the Code of Conduct.

91. Utmost integrity, conduct above reproach and the highest standards of conduct so as to maintain respect and trust are not accomplished by a close and careful parsing of whether there was, in fact, a contract of legal retainer, or whether, in fact, each and every bit of information discussed and exchanged would, in and of itself, be defined as confidential. The public interest is not served by such an approach, but harmed; the standing of the profession is not advanced by such legalistic arguments, but harmed.

92. On the facts as they faced Ms. Wilson, from June 20, 2012, until she was removed by Justice Nation, the question that Ms. Wilson was required to answer was whether she was precluded from acting for [LW and MW] as a result of her relationship and communications with [DW's] family as understood from the point of view of Rule 2.04 of the Code of Conduct. The answer was yes. She never understood that, and still does not understand it.

93. Without being able to be certain, we think that the narrow focus of the hearing may have arisen from Ms. Wilson not having considered the definition of "client" in the Code of Conduct as it existed in 2012. Her focus was on two related things that drove her thinking and her conduct: she believed that [DW's family] were self-representing; and she believed that she had not been retained by them. In her mind, and in the minds of the senior counsel that she consulted to get advice on the matter (neither of whom was her counsel at the hearing), [DW's family] were not her clients if there was no retainer, and she was free to act for other persons interested in the dispute and to make them her clients, particularly if the one had "referred" the other. There is a possible sense here that Ms. Wilson thought of the referral as a form of consent. That was not her evidence

and the question was not probed at the hearing. To the extent that that might have been her thinking, it was incorrect: a referral is not consent, fully informed.

94. The Definitions section of the November 2011 Code of Conduct precluded that line of thinking. It defined “client” as follows:

> In this Code, unless the context indicates otherwise, …
> “client” includes a client of a lawyer’s firm, whether or not the lawyer handles the client’s work, **and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law**; [emphasis added]

95. The Commentary on that definition is fully explanatory of the potentially broad reach of the definition of “client”. At the time that Ms. Wilson was accepting her retainer by [LW and MW] in June of 2012, the extant Code of Conduct commented as follows:

> A lawyer-client relationship is often established without formality. For example, an express retainer or remuneration is not required for a lawyer-client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer’s own interest to carefully manage the establishment of a lawyer-client relationship.

96. We refer also to a statement in the 2011 Code of Conduct, in Commentary to Rule 2.04(4) related to Acting against Former Clients, where it is said:

> A person who has consulted a lawyer in the lawyer's professional capacity **<u>may</u> be considered a former client for the purposes of this rule although the lawyer did not agree to represent that person or did not render an account to that person** (see also commentary following Rule 2.03(1) and the commentary following this rule, relating to prospective clients). [emphasis added]

97. The approach taken by Ms. Wilson was to defend her conduct on the basis that there was no retainer. If there was no retainer, there was no client. If there was no client, there was no conflict of interest in accordance with the literal reading of the Code of Conduct. That approach confuses the contractual and business nature of the solicitor-client relationship with the confidential and privileged nature of that same relationship. The latter is broader, and, as explained in the commentary to the definition, it applies to people who have confided in or provided confidential information to lawyers, even if they never go the next step and retain them.

98. The latter concept is correct, fair, and just, but it can obviously be taken too far. The mere fact that confidential information is provided to a lawyer would preclude lawyers from acting in situations where there is no risk of harm and where the provisions were not meant to apply. The factor that limits the scope of the definition of "client" is the phrase: "a person who reasonably believes that a lawyer-client relationship exists". The difficulty faced by a lawyer is being able to determine, at the time that confidential information is provided, whether the other person believes that a solicitor-client relationship has been created. That determination being *prima facie* subjective (even though the word "reasonably" implies an objective standard for ultimate determination), there is no way for the lawyer to know what the other person, the potential "client", believes.

99. No way, that is, other than by either asking or explaining. The Code of Conduct puts responsibility onto the lawyer for either determining what the other person believes or for limiting or controlling that belief. In any situation where a person is speaking to a lawyer and providing confidential information, the person with the ability to control the course of the conversation and its outcome, legal or otherwise, is the lawyer. The Code of Conduct, professionalism, and ethics require that the lawyer speak or act to ensure that he or she and the person communicating the confidential information know and understand the status of their relationship before the conversation ends.

100. In the context of known privilege, the responsibility of the lawyer is well known and undisputed: if someone begins speaking to a lawyer about something that the lawyer knows trenches on another retainer or on information already held by him or her as privileged, the obligation is immediate: interrupt; stop the conversation; clarify the reason; and move on to another subject, or cease speaking with the person. That is always the lawyer's obligation; not that of the speaker.

101. In the context of the formation of a solicitor-client relationship, the obligation for sorting out the relationship is also the lawyer's. When a non-lawyer is meeting with a lawyer, the non-lawyer generally brings to that meeting a non-lawyer's understanding of privilege, confidentiality, and retainers. The lawyer is expected to have knowledge of privilege, confidentiality, retainers, conflicts and ethical obligations existing under the Code of Conduct. The lawyer must be responsible for appreciating the significance of information he or she receives, which might be characterized as confidential or is related to a current or pending controversy or dispute. The lawyer, not the non-lawyer, has a positive obligation to clarify the scope of the relationship which is established with every person the lawyer meets.

102. Ms. Wilson's counsel conceded during his submissions that in the circumstances here prudence would have dictated that Ms. Wilson not take the retainer offered by [LW and MW]. He disagreed that there was any obligation on Ms. Wilson to decline the offer. He also conceded that most lawyers faced with the facts tendered before us would have refused to accept the retainer offered by [LW and MW]. He disagreed that Ms. Wilson had a duty to do so. We disagree on both accounts.

103. Like Justice Nation but having had the benefit of the oral testimony of Ms. Wilson herself, we find that Ms. Wilson had discussed confidential, highly personal information with [DW's family]. We also know that she learned from [LW] of highly-charged information that ought to have indicated to her, immediately, that if the parties were not already in conflict that they soon would be and that the possibility of potential conflict was extraordinarily high, if not simply inevitable.

104. LSA counsel fully and fairly summarized the evidence presented to us regarding the information exchanged and the communications had during the meeting between Ms. Wilson and [DW's family] on June 16. She first laid out the evidence that both [OW] and Ms. Wilson admitted was discussed:

    a. They talked about the murder-suicide; Ms. Wilson offered her sympathies.

    b. Ms. Wilson advised upon and answered their questions regarding the *Wills and Successions Act* and how it applied to their circumstances. She did not, we accept, provide legal opinions, but she provided what was repeatedly called "advice".

    c. They discussed the Surrogate Rules, the forms required to be completed for an application, and she knew that [OW] had them in his briefcase and was asking questions about them.

d. [DW's family] asked her how many estates there were. Ms. Wilson testified that that meant, for her, whether there could be a joint representation by [OW] and the parents of the estate of [DW]. It turns out that [OW] wanted to know whether, as among [DW], [HW] and [CW], there were one, two or three estates. His confusion on that issue, which survived the meeting, created subsequent problems.

e. They discussed the allocation of the assets of the deceased family as "estate assets".

f. They discussed who owned the family home and how that would affect estate assets.

g. There were questions and advice regarding mortgage insurance, other insurance policies, bank accounts, student loans, and other debts.

h. They discussed wedding rings and how to allocate those. Ms. Wilson advised that they were gifts and belonged to the recipient.

i. They showed her the holograph documents and sought advice. Advice was given, even though Ms. Wilson did not provide her opinion on the validity of the holograph will. Both recall discussing the expiry date on the holograph will.

j. [DW's family] also sought advice on how to proceed, which may have been only what Ms. Wilson describes as the fact that it was in order for them to file the application on their own, for the parents to renounce their interest and to nominate [OW] as the Administrator.

105. In our view, the provision of that advice and of the answers to those various questions is sufficient to have triggered Ms. Wilson's obligation to clarify the nature of her relationship with them. In the context of the murder-suicide, the discussion of those matters is confidential, in accordance with the definition in the November 2011 Code of Conduct.

106. Remembering that a client need not be one who has a formal retainer agreement, the language of Rule 2.04(4) of the November 2011 Code is important as it contains a definition of confidential information. The relevant parts of that section are as follows:

> Acting Against Former Clients
>
> 2.04(4)(a) Except with the consent of the client or approval of a court pursuant to (b), a lawyer must not act against a former client if the lawyer

has confidential information that could be used to the former client's disadvantage in the new representation.

(b) With the approval of a court, a lawyer may act personally against a former client where another lawyer in the firm has confidential information that could be used to the former client's disadvantage in the new representation.

Commentary

"Confidential information" means all information concerning a client's business, interests and affairs acquired in the course of the lawyer-client relationship (see Rule 2.03, Confidentiality). A lawyer's knowledge of personal characteristics or corporate policies that are notably unusual or unique to a client will bar an adverse representation if such knowledge could potentially be used to the client's disadvantage. An example is the knowledge that a client will not under any circumstances proceed to trial or appear as a witness. However, a lawyer's awareness that a client has a characteristic common to many people (such as a general aversion to testifying) or a fairly typical corporate policy (such as a propensity to settle rather than proceed to litigation) will not generally preclude the lawyer from acting against that client.

A person who has consulted a lawyer in the lawyer's professional capacity may be considered a former client for the purposes of this rule although the lawyer did not agree to represent that person or did not render an account to that person (see also commentary following Rule 2.03(1) and the commentary following this rule, relating to prospective clients). [emphasis added]

A lawyer's duty not to use confidential information to the disadvantage of a former client continues indefinitely. However, the passage of time may mitigate the effect of a lawyer's possession of particular confidential information, and may permit the lawyer to eventually act against a former client when the information becomes out-dated or irrelevant to the point that it no longer has the potential to prejudice the former client. [emphasis added]

A lawyer may be prevented by other rules of this Code from acting in circumstances in which the lawyer possesses confidential information (see, for example, Rule 2.03(2) and related commentary). However, as with the rule presently under discussion, consent of the

parties involved may permit a lawyer to act despite the lawyer's knowledge of confidential information. "Consent" comprises several elements, including full disclosure. See the definitions of "consent" and "disclosure" in “Definitions”. [emphasis added]

107. [OW] testified that much more confidential information was imparted during the almost two-hour-long meeting. He said that they discussed such things as:

a. the difficult experience with [LW and MW] at the home of the deceased, during which difficult emotions and tension were experienced. [LW] admitted to the same difficulty, having said that this was not an occasion for the hugs offered to them by [DW’s family] and that words were said; and voices, raised.

b. The difficult experience of [DW’s family] with [LW and MW] at the funerals of [HW] and [CW].

c. The animosity of the [LW and MW] (perhaps not unexpected in the context presented by [LW], that is, that their daughter and grandchild were murdered by their deceased son-in-law using the rifle from the storage locker of [GW].).

d. Potential liability for [OW] as Administrator for debts.

e. Whether [GW] could be charged criminally related to his ownership of the gun.

f. Knowledge by [LW and MW] that [DW’s family] knew that their son suffered from depression and had been suicidal previously.

g. Discussion of their fears.

108. Ms. Wilson testified that no confidential information was discussed. Question after question during cross-examination was met with a denial that confidential information was discussed. As we said above, we have no doubt of any kind that Ms. Wilson was truthful before us and that her testimony was given in accordance with her oath to tell the truth on that day in answer to each question asked. Her counsel carefully analyzed the nature of the information that may have been presented by [DW’s family] during their meeting on June 16, and characterized it in various ways that would make it possible to characterize the information as being, he thought, non-confidential, whether it was in the public domain, such as the murder-suicide that had been reported in the press, or whether it was the allocation of a long list of specific assets to one estate or another, all of which would eventually be published and filed in Court.

109. We prefer the evidence of [OW] on the issue of confidential information. While piece of evidence by piece of evidence, it might be explained why that evidence was not necessarily confidential, the overall two-hour meeting was not parsed in that manner. [DW's family], less than three weeks after the murder-suicide and less than two weeks after the funerals of the deceased family, appeared in Calgary to meet with a lawyer. We have found above that there was no retainer, but that finding does not take away from what had to be a very difficult, intense, emotional, and therefore confidential, meeting for [DW's family]. From the cold, contractual perspective of the concept of a formal retainer, it might be possible to understand that that meeting did not involve confidential information. From the unfathomable human perspective of the three members of [DW's family] in that meeting, it is, for us, almost impossible to imagine that they did not believe it to be wholly confidential. We find that they did hold that belief and that that belief was reasonably held. They were therefore "clients" as defined in the November 2011 version of The Code of Conduct.

110. Even though there was never a retainer, Ms. Wilson had a duty to protect that confidentiality and to ensure that there was no risk of that confidential information being used against [DW's family] or used in any manner whatsoever to prejudice them.

111. Our Code of Conduct has only one way of ensuring that those things happen, in the public interest and in the interest of the standing of the profession: it precludes representation by a lawyer in Ms. Wilson's circumstances of any party adverse in interest to the persons who provided the confidential information.

112. Further, even while the type of parsing done by Ms. Wilson's counsel may be correct factually in some way independent of the emotional context in which the meeting occurred, the time for parsing that information is not at the hearing. The time to sort out the legal consequences of the provision of information, and the scope or not of its confidentiality was, in this case, June 16, 2012, at the time that Ms. Wilson met with [DW's family]. Credit can be given to her explanations, to her understanding of the facts (that they were self-representing and that she was not retained, and everything that flows, logically, from those), and to her opinion several days later that she had absolutely no hesitation in accepting [LW and MW]'s retainer. Understood from her point of view, those matters are credible and possible.

113. But the determination of who is a client for the purposes of Rule 2.04 is determined from the point of view of the person providing the confidential information, the person who reasonably believes that a lawyer-client relationship exists. Ms. Wilson had an obligation on June 16 to determine whether [DW's family] believed that they were retaining her. She should have asked. She did not. The obligation on Ms. Wilson to act, to inquire, or to speak up arose again on June 20, both when she spoke to [LW] and learned of their mutual adversity, of their disputes or potential disputes, and when she spoke to [OW]. She was obliged, before she accepted the retainer, to clarify the belief of [DW's family] regarding the nature of their relationship. She was obliged, after she had accepted the retainer, not only to advise [OW] that she had accepted it, but to clarify with him that she had never had a solicitor-client relationship with [DW's family], to ask him whether he or his parents had believed that to be the case, and, if so, to seek his and their consent, after full disclosure and perhaps after independent legal advice, to act for the [LW and MW]. She misunderstood her obligations to both [DW's family] and [LW and MW], and she breached her obligations to all of them. That conduct is deserving of sanction.

114. Thereafter, despite the explanations she received from [DF], and his requests and demands on behalf of [OW] that she remove herself, she developed and stuck to her position, a position that she continues to believe to this day. We have no doubt that she did not realize that she was acting inappropriately and no doubt that she actually believed that she was doing the right thing in continuing to act against [DW's family], and even in representing [LW and MW], as counsel, in the application before Justice Nation to remove her as counsel. She was wrong.

115. Her obduracy negatively affects the public interest and negatively affects the reputation and standing of the legal profession.

116. We therefore find Ms. Wilson guilty of conduct deserving of sanction regarding both citations.

117. The matter will now move to the sanction phase, and we will hear submissions from counsel regarding the appropriate sanction to be applied in accordance with the LPA at an oral hearing to be scheduled by counsel with us, through the LSA's hearing coordinator.

Dated at the City of Calgary, in the Province of Alberta, this 14th day of February, 2017.

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W. E. Brett Code, Q.C.

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Nancy Dilts, Q.C.

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Glen Buick