

*Case Name:*  
**LAW SOCIETY OF ALBERTA v. TRALENBERG**

**IN THE MATTER OF the Legal Profession Act  
AND IN THE MATTER OF a Hearing regarding the conduct of  
Arthur Tralenberg, a Member of The Law Society of Alberta  
Law Society Hearing file: HE20090030**

**Law Society of Alberta**

**Hearing Committee  
Panel: J. Royal Nickerson, Q.C., Harry Van Harten  
And Miriam Carey, Ph. D.**

Heard: Edmonton, Alberta, June 29 and 30, 2010  
Decision: June 30, 2010  
Sanction: June 30, 2010

**Appearances:**

Lois MacLean, for the Law Society.  
Peter Royal, Q.C., for the member.

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**DECISION**

**INTRODUCTION**

**1** On June 29 and 30, 2010, a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Edmonton to inquire into the conduct of the Member, Arthur Tralenberg. The Member was present throughout the hearing.

**JURISDICTION AND PRELIMINARY MATTERS**

**2** Exhibits 1 – 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor with acknowledgement of service, the Notice to Attend with acknowledgement of service and the Certificate of Status of the Member, established the jurisdiction of the Hearing Committee. The Letter of Exercise of Discretion re: Private Hearing Application Notices was entered as Exhibit 5. These exhibits were entered into evidence by consent.

**3** There was no objection by the Member's counsel or counsel for the LSA regarding the constitution of the Hearing Committee.

**4** The entire Hearing was conducted in public. The Hearing Committee made an order excluding witnesses.

## **BACKGROUND**

**5** This matter arises from the Member's actions between January 2008 and March 2009 which resulted in complaints from two Judges of the Provincial Court of Alberta and an Alberta Justice Prosecutor. A summary of these complaints are set out below.

### **THE COMPLAINT OF THE HONOURABLE JUDGE A. H. LEFEVER**

**6** This complaint arises out of the Member's representation of S, a resident of Hobbema, who was charged on or about the 9<sup>th</sup> of January, 2008 with several offences arising out of her allegedly discharging a firearm at a motor vehicle in Hobbema, allegedly in retaliation for the discharge of a firearm at her home approximately 24 hours earlier.

**7** The Member confirms that he received a telephone call from S at about 5:00 p.m. in the afternoon on January 9, 2008 as a Duty Counsel. and/or someone S. apparently obtained the Member's name from the Legal Aid list at the Hobbema R.C.M.P. detachment and was looking for a lawyer who could speak to an application for judicial interim release.

**8** The Member attended by telephone to the application for judicial interim release in the early morning hours of January 10, 2008. A transcript of the hearing was placed in evidence before the Hearing Committee. During the hearing the name of P, a young person and long time client of the Member's, came up as being a possible *provocateur* in the incident with which S was charged.

**9** The Member indicated that when he later received initial Crown disclosure confirming P's involvement, he attempted to extricate himself from S's matter, as P was well known to him and he correctly anticipated that P might eventually be a material witness in the case against S.

**10** P was eventually charged with offences in relation to the incident for which S had allegedly retaliated. P was detained and by and large remained in custody until his charges were eventually dealt with on November 19, 2008.

**11** The Member remained as counsel for P until he was ordered off the case on the May 28, 2008 trial date, by the presiding Provincial Court Judge.

**12** The Member was obliged to respond to the Judge Lefever complaint by August 28, 2008 and did not ask for an extension until October 10, 2008. He then provided a reply dated October 24, 2008.

## THE DAVID BEATON COMPLAINT

**13** This complaint arises out of two acrimonious exchanges between the Member and the complainant, a Crown Prosecutor, at the court house in Wetaskiwin on the 28<sup>th</sup> of February, 2008.

## THE COMPLAINT OF THE HONOURABLE JUDGE B. ROSBOROUGH

**14** This complaint arises out of three incidents. In December 2008 and March 2009, the Member failed to appear for his client in court in Wetaskiwin, when the client's case was set for trial. The Member further failed to attend before Judge Rosborough, when summoned to do so, to explain his previous absences.

## CITATIONS

**15** As a result of the above matters, the Member faced the following citations:

### Judge Lefever Complaint Citations

***Citation 1: IT IS ALLEGED that you acted for a client while in a conflict of interest, and that such conduct is conduct deserving of sanction.***

***Citation 2: IT IS ALLEGED that you misled or sought to mislead the Court in relation to the issue of whether you were acting in a conflict of interest, and that such conduct is conduct deserving of sanction.***

***Citation 3: IT IS ALLEGED that you failed to serve your client in a diligent, efficient and conscientious manner by continuing to act while in a conflict of interest, and that such conduct is conduct deserving of sanction.***

***Citation 4: IT IS ALLEGED that you failed to respond to the Law Society of Alberta with respect to the following particulars and that such conduct is conduct deserving of sanction:***

- (a) By failing to respond to a Section 53 demand to respond to the complaint of Judge Lefever on a timely basis, and***
- (b) By failing to respond to correspondence on the Beaton complaint in a timely manner.***

## David Beaton Complaint Citations

***Citation 5: IT IS ALLEGED that on February 11, 2008 you made a statement concerning the complainant before the Hon. Judge Mitchell and the remainder of the Court, which was discourteous, and that such conduct is conduct deserving of sanction.***

***Citation 6: IT IS ALLEGED that on February 28, 2008 on the Wetaskiwin court house steps you made statements concerning the complainant and/or the Hon. Judge Gaede which were discourteous and which were made in a manner that brought discredit to the profession, and that such conduct is conduct deserving of sanction.***

***Citation 7: IT IS ALLEGED that on February 28, 2008 in court in Wetaskiwin you made statements to the complainant which were discourteous, and which were made in a manner that brought discredit to the profession, and that such conduct is conduct deserving of sanction.***

***Citation 8: IT IS ALLEGED that you failed to respond to communications from the Law Society that contemplated a reply, and that such conduct is conduct deserving of sanction.***

## Judge Rosborough Complaint Citations

***Citation 9: IT IS ALLEGED that you failed to be courteous to Crown Counsel, and that such conduct is conduct deserving of sanction.***

***Citation 10: IT IS ALLGED that you failed to serve your client in a conscientious, diligent and efficient manner, and that such conduct is conduct deserving of sanction.***

***Citation 11: IT IS ALLEGED that you brought the profession into disrepute by failing to appear in court even after being directed by the Court to appear, and that such conduct is conduct deserving of sanction.***

***Citation 12: IT IS ALLEGED that you failed to make reasonable efforts to expedite the litigation process, and that such conduct is conduct deserving of sanction.***

***Citation 13: IT IS ALLEGED that you failed to be courteous and respectful to the Court, and that such conduct is conduct deserving of sanction.***

**16** Citations 1, 2 and 3 were contested by the Member.

17 Citations 4, 6, 7, 10 and 11 were not contested by the Member.

18 Citations 5, 8, 9, 12 and 13 were not pursued by the LSA.

## **SUMMARY OF RESULT**

19 On the basis of evidence received at the hearing and for reasons outlined below, the Hearing Committee finds that citations 1, 3, 4, 6, 7, 10 and 11 are proven and the Member is guilty of conduct deserving of sanction with regard to those citations.

20 On citations 2, 5, 8, 9, 12 and 13 the Hearing Committee finds that the Member is not guilty of conduct deserving of sanction as the result of Citation 8 being incorporated into Citation 4 and the invitation of counsel for the LSA to make that finding on the balance of the citations.

21 The finding of guilt on citations 1 and 3 resulted from a consideration on the evidence tendered at the hearing and the finding of guilt on citations 4, 6, 7, 10 and 11 resulted from the Member's admission of facts set out in the AGREED STATEMENT OF FACTS And ADMISSION OF CONDUCT DESERVING OF SANCTION ON SPECIFIED CITATIONS (Exhibit 43).

## **SUMMARY OF EVIDENCE AND FINDINGS OF FACT**

22 Exhibits 6 – 49 were entered into evidence by consent or through witnesses during the course of the proceedings.

23 The Hearing Committee heard *viva voce* evidence from Kenneth R. Sockett, Q.C., and Ewan Gilmore, Esq. for the Law Society. The Member testified on his own behalf.

24 At the conclusion of the testimony, the Hearing Committee heard argument as to whether the conduct of the Member with regard to citations 1, 2 and 3 was conduct deserving of sanction.

## **CITATION 1**

25 The evidence with regard to the first three citations was as follows:

- (a) The Member received a telephone call from S on the afternoon of the 9<sup>th</sup> of January, 2008. S was in custody as a result of her arrest on several charges involving the discharge of a firearm in the Village of Hobbema on or about the 7<sup>th</sup> of January, 2008. The Member was asked to speak to bail before a Justice of the Peace later on that day or the early hours of the next day. The Member attended by telephone and made submissions on behalf of S. She was ordered detained by the justice.

- (b) The Member takes the position that he was acting as Duty Counsel to assist S, but says that he was not retained as counsel. He testified that he did not receive any confidential information from S either during the afternoon telephone call or at the telephone bail hearing.
- (c) The matter was adjourned to January 15, 2008 for the first court appearance. By that appearance time, the Member had received initial Crown disclosure which alleged the involvement of P, a long standing client of the Member's. For that reason the Member declined to act for S other than to facilitate the appointment of a new counsel for S and to appear as agent for S's new counsel.
- (d) Mr. Ken Sockett, Q.C. eventually came to represent S and gave evidence at this hearing.
- (e) On or about January 13, 2008, P was charged with a series of offences relating to the incident to which S had allegedly retaliated and been charged with her offences.
- (f) P was a young person. Because of the seriousness of the charges he faced, his prior record, and his breaches of initial bail conditions, P was ordered detained in custody. As a result, P was in custody from January 13, 2008 until November 19, 2008.
- (g) The Member explained to P that because of his dealings with S at her bail hearing, he might be conflicted and P should consider obtaining other counsel. However, P and his mother persuaded the Member to continue his representation of P. P entered a not guilty plea and the case was set for trial on April 23, 2008.
- (h) On April 23, 2008, the Crown sought an adjournment of the trial. S was present, in custody, as a scheduled Crown witness. The Crown indicated that it wished to add X as a witness and, therefore sought the adjournment. X had been charged with related offences. He too had retained the Member and the charges against him had, with the Member's assistance, been withdrawn. The Crown's adjournment request was granted and the trial re-scheduled for May 28, 2008. At this point, the assigned Crown prosecutor was unaware that the Member had acted for X or had represented S at her bail hearing.
- (i) The May, 28, 2008 trial was to be heard by the Honourable Judge Kvill.
- (j) Judge Kvill heard from Mr. Sockett and the Crown prosecutor Ewan Gilmour, in the absence of the Member, who was late for court. The

Member was dealing with a matter in court in Breton and could not be in Wetaskiwin at the same time.

- (k) Mr. Sockett, now acting for S, had written a May 22, 2008 letter to the Crown prosecutor Mr. Gilmore, which stated that:

One might suggest that S and P are diametrically opposed in their positions. I understand that my client had been subpoenaed to give evidence against P. I wonder if you might let me know when the next court date is for P because I certainly will be there if I am available to take objection to Mr. Tralenberg cross-examining my client.

- (l) Mr. Gilmore gave evidence at the hearing. He added little to the evidence contained in the transcript of the proceedings before Judge Kvill on May 28, 2008, which was entered as an exhibit before the Hearing Committee.
- (m) At the hearing, Judge Kvill, Mr. Sockett and Mr. Gilmore on behalf of the Crown were understandably unsettled by the prospect of the Member cross-examining S (and, for that matter, X) in the circumstances. S. was present, in custody, but X was not.
- (n) The Member unsuccessfully resisted Messrs. Sockett's and Gilmore's efforts to terminate his acting for P.
- (o) In his resistance the Member indicated that he:

*simply acted as an agent*

and stated:

*When S called me and I did not know who the complainant- or who she – she – who she was complaining about. The minute I heard it was P I told her that I could not represent her and that for that reason I got another lawyer to represent her. So I never represented her other than initially when she was in custody. As soon as I found out what she was alleging I got off the record. Well, I didn't get off the record, I never was on the record, I simply spoke with her.*

- (p) P's May 28, 2008 trial was adjourned after Judge Kvill ordered the Member to cease acting. P remained in custody and the trial was rescheduled for November 19, 2008. At the trial, the Crown called no evidence and the charges against P were dismissed.

**Was the Member in a conflict of interest by continuing to act for P when he knew that S would be a witness for the Crown against P in subsequent proceedings?**

**26** The Member takes the position that nothing he heard from S was confidential in that she had had made a full confession to the police, a fact alleged during the bail hearing. Therefore, the Member says that whatever he had heard from S during his limited contact with her was not confidential.

**27** Part of the Member's response to the complaint of Judge Lefever is contained in his letter of the 24<sup>th</sup> of October, 2008 and is as follows:

*...I recognized that, at the very least, my involvement could raise the issue of a conflict of interest. For that reason, I spoke with P. I told him what had occurred with regard to S. I told him that I had divorced myself from S when it became apparent what she was alleging. I told him that he may want to hire someone else to represent him on this matter as some people may view my involvement as a conflict. I also spoke to his mother, telling her the same thing. Both of them were adamant that I remain as counsel. I did so, but in retrospect, I should not have.*

*...as I stated at the outset, I agree with his Honour Judge Lefever. Based on the facts as I knew them if I was not in a conflict situation, I certainly could be viewed as being so. I truly regret that I put myself in such a position, and, for so doing I apologize to P and his mother. I take this opportunity to again apologize to Judge Kvill.*

**28** The Member at the hearing somewhat backed away from these inculpatory utterances. Because they were made a few months after the incidents in question, they are probably more reliable than the Member's testimony over two years later and the Hearing Committee accepts them for what they are: admissions of conflict.

**29** **The Code of Professional Conduct** states at Chapter 6, Rule 3:

Except with the consent of the client or approval of a court...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.

The commentary in Chapter 6 further states:

A person who has consulted a lawyer in the lawyer's professional capacity may be considered a former client for the purposes of Rule #3 although the lawyer did not agree to represent that person or did not render an account to that person...

And the commentary at G.1 of Chapter 7 states:

...the obligation to treat information as confidential may arise although a

Lawyer/client relationship has not been established.

**30** The Hearing Committee does not accept the Member's evidence that he did not receive confidential information. His subsequent advice to S that he could not represent her and his similar advice to P that there might be a problem in representing him make it clear that the Member recognized that he had received information from S that was confidential or that S considered to be confidential.

**31** P and his mother were not in a position to determine whether the Member could continue to act for him. The Code's commentary under Chapter 6, Rule 2 (which addresses the issue of representing multiple parties) states:

Furthermore, the requirement that multiple representation be in the clients' best interests will not be fulfilled unless the lawyer has made an independent evaluation and has concluded that this is the case. It is insufficient to rely on the clients' assessment in this regard.

In other words, the Member was wrong in determining that P could decide whether the Member could continue to act for him.

**32** For the above reasons the panel finds the Member guilty of citation 1.

## **CITATION 2**

**33** Although the Member was wrong to think that the lack of a retainer by S would not put him in a conflict in continuing to act for P, the Hearing Committee is not satisfied that the Member is guilty of misleading the Court in these circumstances.

**34** Counsel provided the Committee with various authorities on conflict of interest, including **R. v. Werkman** [1997] 47 Alta. L.R., (3<sup>rd</sup>) 259 which somewhat reiterates the legal analysis of the Supreme Court of Canada in **MacDonald Estate v. Martin** [1990] 3 S.C.R. 1235 on conflict.

**35** The competing considerations in conflict situations are set out by Ritter, J in **Werkman**:

A court should be concerned with balancing three competing values: maintenance of high standards of the legal profession and the integrity of the judicial system; the rights of litigants not to be deprived of their counsel without good cause and a desirability of permitting reasonable mobility in the legal profession. (paragraph 9)

**36** Ritter, J. is paraphrasing from **MacDonald Estate** which discusses the first two competing values as follows:

There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore there is the **countervailing value** that a litigant should not be deprived of his or her choice of counsel without good cause (emphasis added) (Paragraph 13)

**37** The Committee is not satisfied that the Member was misleading Judge Kvill when he was defending the “countervailing value” that P was entitled to counsel of choice. Furthermore, the Member’s comments about his involvement with S were based upon a recollection of an event which had taken place some months earlier and under rather challenging circumstances.

**38** The Committee also considered that the objection raised before Judge Kvill did not arise at the first scheduled trial date. Because the Member was late for court, Judge Kvill had heard submissions about the issue of conflict from Messrs. Gilmore and Sockett prior to his arrival. The Member had not seen Mr. Sockett’s letter to Mr. Gilmour and was not given much opportunity to respond to the concerns it raised with the Court.

**39** For the above reasons, the Committee dismisses Citation 2.

### **CITATION 3**

**40** The Member’s conduct in the face of his conflict of interest no doubt contributed to his client languishing in custody longer than was necessary. Because of the Court’s ruling concerning the Member being in conflict, the trial had to be further adjourned.

**41** As noted above, the Member created this situation by allowing his client to talk him into continuing as counsel although, it must be noted, this occurred when the client was not in custody. Further, the Member could have sought the Crown prosecutor’s opinion about whether there would be a conflict if S were called a witness against P. If it was determined that there was conflict or the appearance of conflict, other counsel might have been retained for the purpose of cross-examining S on the scheduled trial date.

**42** Further, the Member’s late arrival to the trial contributed to the Court’s rather prompt ruling and resulting adjournment

**43** For these reasons, the Hearing Committee finds the Member guilty of Citation 3.

### **FINDINGS WITH RESPECT TO THE CITATIONS TO WHICH THE MEMBER ADMITTED GUILT**

#### **CITATION 4**

- The LSA served the Member with an s. 53 demand on August 12, 2008. He was to respond within 14 days. He did not.
- On September 11, 2008, the LSA sent a follow up letter.
- On October 10, 2008 the Member contacted the LSA requesting an extension.
- The Member was given an extension until October 23, 2008.
- The Member's reply was dated October 24, 2008.

## **CITATION 6**

**44** This citation arises out of an exchange on the Wetaskiwin court house steps. The Member admits that he used "rude and unprofessional language about a prosecutor."

**45** An R.C.M.P. constable witnessed the exchange and his statement was admitted in evidence. It corroborates the rude and unprofessional language used by the Member and confirms that civilians in the vicinity may or may not have heard what the Member said.

## **CITATION 7**

**46** This citation arises out of another acrimonious exchange between the same parties and on the same date as the events in Citation 6. This also occurred in front of spectators in a courtroom during an adjournment.

## **CITATION 10**

**47** This citation arises out of the Member's failure to attend on behalf of his client, who had travelled from Lethbridge, Alberta to Wetaskiwin, Alberta on two separate occasions. On one of the occasions, a warrant was issued for the Member's client, which had to be vacated in a timely manner.

## **CITATION 11**

**48** This citation arises out of the Member's failure to appear as the result of a Trial Judge's order for the Member's personal appearance to explain his failure to appear in relation to the matter that is the subject of Citation 10. The Trial Judge's order was communicated to the Member. The Member arrived after court had been adjourned and the Judge had left the court house. The Member had made no effort to arrange an agent or an adjournment of a matter he had in another court so that he could comply with the order for personal appearance.

## **SANCTIONS**

**49** The Member is 61 years of age. He was a late arrival to the practice of law, having been called to the bar in 1996 after a career in the construction industry. 90% of the Member's practice is criminal defence.

**50** The Member has one previous entry on his discipline record for failing to follow the accounting rules of the LSA on several occasions. The Hearing Committee considers the record unrelated and of little weight in arriving at an appropriate sanction on these citations.

**51** Counsel for the Law Society submits that fines totaling \$8,000.00 to \$10,000.00 would be appropriate in view of the Member's admissions and cooperation regarding the evidence relating to the contested citations.

**52** In imposing sanctions, the Committee is mindful of the high standards imposed upon counsel in matters of client confidentiality, conduct within and without the court house and the importance of demonstrating respect for the Court and fellow counsel.

**53** The Committee finds that in his evidence, the Member exhibited genuine remorse for putting himself in the position in which he found himself as the result of continuing to act for P when his instincts told him there might be an ethical problem. He also clearly undertook to be more vigilant in matters of potential conflict and take appropriate steps which would avoid a disservice to clients in the future.

**54** Finally, the Member is one of small number of lawyers servicing a small market in which there is a great demand for criminal defence legal services. In this case, the facts involved retaliatory exchanges of gunfire between members of a tormented community.

**55** The sanctions will be a reprimand for all the citations on which there was a finding of guilt and the following fines:

Citation 4: \$1,500.00  
Citation 6: \$1,000.00  
Citation 7: \$1,500.00  
Citation 10: \$1,500.00  
Citation 11: \$2,000.00

The Member is given one year to pay the fines.

**56** In addition, the Member is directed to pay the full actual costs of the hearing, such costs to be paid within 6 months.

**57** The Chair issued the reprimand to the Member which included the following:

Your actions could very easily have led to a suspension of your privilege to practice law. Your actions may well have caused your client, whom you were obliged to help, spend unnecessary time remanded in custody. Your

discourteousness to your colleagues has labeled you a bully and buffoon and you should be ashamed of yourself.

## **CONCLUDING MATTERS**

**58** There will be no notice issued to the Attorney General, or to the profession.

**59** The exhibits in this matter will be available to the public, subject to redaction to protect solicitor and client privilege.

Dated this 3<sup>rd</sup> day of September, 2010:

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Royal P. Nickerson, Q.C., Bencher

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Miram Carey, Ph.D., Bencher

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Harry M. Van Harten, Bencher