

The Law Society of Alberta Hearing Committee Report

In the matter of the *Legal Profession Act*, and in the matter of a hearing regarding the conduct of Mary Jo Rothecker, a member of the Law Society of Alberta

Jurisdiction and Preliminary Matters

1. On December 7th, 2006, a Hearing Committee of the Law Society of Alberta (LSA) convened at the offices of the LSA in Calgary to inquire into the conduct of Mary Jo Rothecker (the "Member"). The Committee was comprised of 3 Benchers of the LSA, being Hugh D. Sommerville, Q.C., chair, Julia Turnbull, Q.C. and Norma Sieppert, Lay Bencher.
2. The Member was represented at the hearing by Hersh Wolch, Q.C. and the LSA was represented by Lindsay MacDonald, Q.C.
3. The Jurisdiction of the Committee was established by the entry, by agreement, of an Exhibit Book containing 33 exhibits, including:
 - a) Exhibit 1 – Letter of Appointment
 - b) Exhibit 2 – Notice to Solicitor
 - c) Exhibit 3 – Notice to Attend
 - d) Exhibit 4 – Certificate of Standing of Member
 - e) Exhibit 5 – Certificate of Exercise of Discretion
4. The Committee asked whether the Member's counsel had any objection to the membership of the Committee based on bias, and no objection was made.
5. The chair invited applications to have all or part of the hearing held in private. No such applications were made, so it was ordered that the hearing be open to the public.

Citations

6. As per the Notice to Solicitor, the Committee was inquiring into the conduct of the Member on the following Citations:
 1. IT IS ALLEGED that you failed to give opposing counsel proper notice prior to contacting Madam Justice Phillips on January 23, 2004, and that such conduct is conduct deserving of sanction.
 2. IT IS ALLEGED that you failed to give opposing counsel proper notice prior to contacting Madam Justice Phillips on March 5, 2004, and that such conduct is conduct deserving of sanction.
 3. IT IS ALLEGED that you failed to give opposing counsel proper notice prior to contacting Mr. Justice Sullivan on March 4, 2004, and that such conduct is conduct deserving of sanction.

4. IT IS ALLEGED that you threatened Mr. "K.P.", the opposing party, when you indicated to opposing counsel on February 13, 2004, that you would have him charged with theft if he did not return the original Consent Order, and that such conduct is conduct deserving of sanction.
5. IT IS ALLEGED that you failed to treat Ms. "E.N.", your client, with courtesy in your telephone calls on February 13, 2004, and that such conduct is deserving of sanction.
6. IT IS ALLEGED that you failed to serve Ms. "E.N.", your client, in failing to attend or in failing to adjourn the application scheduled for February 26, 2004, and that such conduct is conduct deserving of sanction.

Facts – Evidence and Submissions

Evidence of the Law Society

7. The evidence on behalf of the Law Society commenced with the entry, by admission, of an Exhibit Book containing Exhibits 1 through 33. These documentary exhibits outlined the background of the case, as well as a number of details. The matters in question arose out of a domestic dispute between former common law partners Ms. E.N., represented by the Member, and Mr. K.P., represented by Ms. Alexandra Harris. It would seem to be common ground that the issues came to a head at a Chambers application before Madam Justice Phillips on December 19th, 2003, where Ms. Harris appeared for Mr. K.P., and the Member's associate, Ms. Terra Yates, appeared for Ms. E.N., as the Member was on vacation.
8. Counsel for the Law Society called Ms. E.N. as their first witness. Ms. E.N. had been represented by the Member in 2003 and previous, but her testimony was regarding an incident on February 13 of 2004. Ms. E.N. testified that on that date she attended the Member's office to pick up a consent order that the Member was drafting. Mr. K.P. remained outside, but he was to look at the order prior to signing it.
9. Ms. E.N. said that she spoke with the Member and with her secretary, "L". Ms. E.N. was then given the order, but there were a few things in it that the parties did not want. Prior to signing the order Mr. K.P. took it to his home to fax to his lawyer. Some changes were made then to the order by the Member's office, and the secretary came out with more papers. Ms. E.N. told "L" that the order would be taken to Mr. K.P. at his house, and that the documents would be returned to the Member's office along with Ms. E.N.'s cheque for fees owed.
10. Ms. E.N. went to Mr. K.P.'s residence, but the faxing of the documents was not complete. Ms. E.N. phoned "L" at the Member's office to let her know that she was running late, and would not be in right away. Ms. E.N. then drove to Calgary to work, and was 15 minutes late.
11. Once at her work in Calgary Ms. E.N. received a phone call from the Member's office. The witness testified that Ms. Rothecker was upset, and, in her mind "screaming". The Member's concern was "where's my money".

12. Ms. E.N. testified that to the best of her recollection there were 4 phone calls from Ms. Rothecker that day, with one from "L". The witness describes the Member as being quite upset and quite rude. The witness stated that "in my mind she was totally out of control".
13. Ms. E.N. then had a conversation with Mr. K.P., where she learned that the Member was charging him with theft.
14. Ms. E.N.'s next area of testimony related to the scheduled Court Appearance of February 26, 2004. As Ms. E.N. and Mr. K.P. had an agreement, Ms. E.N. asked Ms. Rothecker to stop acting. The witness was advised that "you can't just stop", and there was some explanation that the Member had to do certain things.
15. Ms. E.N. assumed the Member would have to cancel the February 26th Court date, but later learned that the matter had proceeded with no-one appearing on her behalf.
16. On cross-examination Ms. E.N. was clear that she did not understand that the outstanding fees had to be paid prior to her getting the consent order. In her mind Mr. K.P. would not sign the order if he did not agree to it, and payment was not a pre-condition to receiving it. She had told the Member that she would pay her "that day".
17. On further questioning Ms. E.N. testified that there had been no problems relating to the payment of fees, and the cheque that was left with Mr. K.P. was post-dated to the following Monday because she couldn't get back that day, though she was expecting to get paid.
18. Ms. E.N. did clarify on questioning that the Member expressed her unhappiness in the telephone conversations, but she did not swear.
19. Regarding the February 26th Special Application, Ms. E.N. testified that she believed it had been cancelled, so she did not attend. There had been no communication from the Member between February 13 and 26, and the next she heard about the application was in a call from Mr. K.P. where she was told "I guess I win".
20. The Second witness called on behalf of the Law Society was Mr. K.P.. He testified that he had been asked to go to the Member's office on February 13th to sign some papers. Ms. E.N. brought the papers out to Mr. K.P.'s vehicle for him to sign, but the document was not what they had agreed on. Mr. K.P. therefore wanted to fax the documents to his lawyer, Ms. Harris.
21. Ms. E.N. went back to the Member's office, and eventually returned to Mr. K.P. with another agreement. He then faxed these documents to his lawyer. When he next spoke with his lawyer he learned he was being charged with theft.
22. Mr. K.P. testified that Ms. E.N. had left a cheque with him at his house, and asked him if he would drop it off at Ms. Rothecker's office. Later that day he handed the cheque to the Member, indicating that "this cheque is for " E.N. The Member then followed him to his vehicle, concerned that the cheque was post-dated for Monday.

23. Mr. K.P. said that no other documents came with the consent orders, and that he had simply been told by E.N. to come and sign the orders. He testified that the documents were given to him, and he had not stolen them.
24. On cross-examination Mr. K.P. testified that the parties had originally not wanted Ms. Rothecker to draft the consent order, but it seems that the Member and Ms. Harris had something of an argument. In the end, Mr. K.P. didn't seem to know how the task of drafting the order had been left to Ms. Rothecker, but he had wanted his lawyer to do it. The parties did not go to Ms. Rothecker because they believed she would not charge and Ms. Harris would.
25. Regarding the cheque for Ms. Rothecker, Mr. K.P. testified that he was simply asked to take it over to her, and he did not look at the cheque. He did not discuss with Ms. E.N. how much money she had in the bank.
26. Mr. K.P. testified that he faxed the documents to his lawyer rather than sign them because they didn't make sense. He did not know what arrangement there was between Ms. E.N. and Ms. Rothecker, or if there were any conditions for the order leaving the office. He learned of the theft allegation both from his own lawyer, who told him he was being charged, and from the Member directly on the phone when she said "you are going to be charged with theft".
27. The third, and final, witness called on behalf of the Law Society was a Member, Ms. Alexandra Harris. She represented Mr. K.P. in responding to an application brought on behalf of Ms. E.N. in Court of Queen's Bench Chambers on December 19th of 2003. Ms. E.N. was represented at the application by Ms. Yates of Ms. Rothecker's office. The application was dismissed by Madame Justice C.S. Phillips, and the Order appeared as Exhibit 6 – Tab 2.
28. Ms. Harris subsequently received a fax copy of a letter addressed to Madame Justice C.S. Phillips, dated January 23, 2004. This letter was at Exhibit 23 – Tab 21 of the Exhibit book. Ms. Harris had no prior knowledge that this letter was being sent to the Court, and she was concerned that it accused her of misstating the facts to the Court on December 19th, 2003.
29. Ms. Harris Madame Justice Phillips' assistant, and was advised to respond. She therefore faxed a response to the Court on January 23, 2004, and this appears at Exhibit 18 – Tab 21.
30. On January 26, 2004, Madame Justice Phillips replied to both letters by fax. This appears at Exhibit 18 – Tab 24. She declined to consider the arguments contained in Ms. Rothecker's letter, and specifically expressed her displeasure at the Member corresponding with her directly. She did "not fault Ms. Harris in responding to Ms. Rothecker's letter of January 23, 2004".
31. On March 5, 2004, Ms. Harris was surprised to receive another fax copy of a letter directed to Madame Justice Phillips. In this letter, at Exhibit 23 – Tab 29, the Member apologises for "the delay in responding to your letter of January 26, 2004. The letter tries to explain

32. Once again Ms. Harris was directed to reply, and her letter to the Court is at Exhibit 18 – Tab 32. Once again Madame Justice C.S. Phillips sends a very displeased reply to Ms. Rothecker, seen at Exhibit 23 – Tab 30.
33. The next communication of concern took place after the Family Special Application scheduled for February 26, 2004. Ms. Harris appeared before Mr. Justice W.P. Sullivan on behalf of Mr. K.P., and no-one appeared on behalf of Ms. E.N.. On March 4, 2004, Ms. Rothecker faxed a letter directly to Mr. Justice Sullivan trying to explain her non-attendance. Not only did this letter go with no prior notice to opposing counsel, the Member claimed that "opposing counsel knew this matter had been settled between the parties". Ms. Harris testified that she knew that the matter had not been settled.
34. Ms. Harris' evidence went on to deal with matters relating to the Consent Order the Member prepared, and the threat relating to it. The actual threat was contained in a fax letter from the Member to Ms. Harris dated February 13, 2004, and this is at Exhibit 18 – Tab 27. The letter contains a line stating "the original Consent Order is in the possession of your client and must be returned to our office immediately or we will charge him with theft".
35. Ms. Harris testified that Mr. K.P. faxed her a copy of the Order which had a signature line for his name, but not for counsel. The copy of the Order received by Ms. Harris had not been signed by anybody.
36. Counsel for the Law Society then entered additional documentary Exhibits by consent. Exhibit 34 was the Notice of Motion for the Family Law Chambers application to be heard on February 26, 2004. An unfiled copy was faxed to Ms. Harris by the Member on January 30, 2004.
37. Exhibit 35 was the unsigned Consent Order that Mr. K.P. faxed to Ms. Harris. It has a line for consent to be endorsed by "K.P.", with no mention of counsel.
38. Exhibit 36 is a letter to Justice Chambers filed by Ms. Harris for the February 26th application. This was sent February 19, 2004, which was the final deadline to file their positions.
39. Exhibit 37 is a copy of a fax letter from Ms. Harris to Ms. Rothecker regarding filing deadlines for the February 26th application. The letter makes it clear that Ms. Harris would not agree to late filings.
40. Exhibit 38 is a faxed letter from the Member to Ms. Harris outlining the Member's understanding regarding the Consent Order.
41. Ms. Harris testified that around February 10th, 2004, she had had communication with the Member regarding the parties having reached an agreement, and wanting a Consent Order. Ms. Harris replied that, if there was an agreement, the Member should adjourn her

42. Ms. Harris was asked to give further detailed evidence about the application brought on December 19th, 2003, and dismissed by Madame Justice Phillips. The witness testified that the matter should not proceed at that time for a number of reasons, including the length of time required, and the fact that an existing Domestic application was scheduled. She testified that she properly advised the Court of her position, and this is borne out by the transcript, at Exhibit 9 – Tab 4.
43. As to the Consent Order and the February 26, 2004, application, Ms. Harris testified that the Member had indicated that she had instructions to proceed on February 26th if there was no Consent Order. There was no communication between the Witness and the Member except in writing, and the understanding of the Witness was that because there was no agreement they would be proceeding to Court.
44. Amidst continued friction between the parties and counsel, Ms. Harris did conclude a letter to Ms. Rothecker on February 12, 2004, by stating "we invite you to prepare a draft Order with regard to your client's proposed terms of settlement, which you may forward same to us on a **WITHOUT PREJUCE** basis". This letter appears at Exhibit 9 – Tab 7.
45. Ms. Harris testified that she did not approve that the draft Order should be provided directly to her client, and did not advise her client to sign it. She was concerned that the "consent" line was to be endorsed by the client, when her letter of February 12th had specifically requested that the Member forward a copy to her as counsel.
46. On cross-examination Ms. Harris admitted that she had not given Ms. Rothecker prior notice of her letters to Madame Justice Phillips, however she was only writing on the direction of Justice Phillips' assistant.
47. Ms. Harris testified that she did not reply to the letter addressed to Mr. Justice Sullivan as she was advised that there was no need to respond.
48. When questioned about the February 26, 2004, application Ms. Harris testified that she told the Court of the history of missed deadlines, and that "I don't know if Ms. E.N. will be there".
49. On re-direct it was clarified that the December 19, 2003, application had originally be scheduled for December 17, and the Notice of Motion was entered as Exhibit 39.

Evidence for the Member

50. No Evidence was called on behalf of the Member.

Submissions

51. Counsel for the Law Society argued that Ms. Harris' credibility had been attacked, but that she came out unscathed. They submitted that the evidence generally supported the charges.
52. Counsel for the Member argued that, while the Member had made some mistakes, the question was whether they were deserving of sanction. Counsel submitted that the Judge at the December 19th hearing had just wanted out of there, and that different Judges react different ways to being contacted by counsel.
53. It was further argued that the second letter to Justice Phillips was simply an explanation for the first letter. As well, the Member "had a legitimate complaint".
54. Member's Counsel submitted that the letter to Mr. Justice Sullivan was "just an apology".
55. Concerning Citations 4 and 5, Counsel argued that the other parties had been generally deceitful, and were "game playing" with the Member in relation to getting the Consent Order drafted without providing prior payment.

Decisions

Findings - Conduct Deserving of Sanction

Citation 1

56. The evidence shows that a contested application was brought on December 19, 2003, before Madam Justice Phillips. Ms. Rothecker's associate, Ms. Yates, appeared for the applicant on behalf of Ms. Rothecker's office, and Ms. Alexandra Harris appeared for the respondent. The application was quickly dismissed, apparently either due to the lack of a DRO (Dispute Resolution Officer) session, or because the issues were to be dealt with as part of an application already scheduled to proceed on February 26, 2004.
57. Ms. Rothecker was concerned with how the December 19th application had gone, and it is undisputed that on January 23, 2004, she wrote a 2 page letter to Madam Justice C.S. Phillips (Exhibit 23, Tab 21) without prior notice to Ms. Harris. This contravenes Chapter 10 Rule 7 of the Code of Professional Conduct, and the panel finds that it is conduct deserving of sanction.

Citation 2

58. On January 26, 2004, Madam Justice Phillips replied to Ms. Rothecker's, expressing her displeasure over the first letter. The evidence is clear, and the panel finds, that on March 4, 2004, Ms. Rothecker wrote a second letter to Madam Justice Phillips (Exhibit 23, Tab 29), trying to explain the first letter. She was also setting out her view that opposing counsel had prior knowledge of the first communication. This letter was sent without prior notice to Ms. Harris contrary to Chapter 10 Rule 7 of the Code of Professional Conduct and the panel finds that it is conduct deserving of sanction.

Citation 3

59. The evidence shows, and the panel finds, that on March 4, 2004, Ms. Rothecker sent a letter to Mr. Justice Sullivan (Exhibit 23, Tab 28) apologising for missing the Family Special application on February 26, 2004. This letter again refers to the knowledge and information of opposing counsel, but was sent without notice to that counsel. The

Citation 4

60. The panel finds that by way of facsimile sent to his counsel (Exhibit 18, Tab 27) the Member threatened to charge Mr. K.P., the respondent on these matters, with theft of an order that Ms. Rothecker's client had given him. The panel finds that this behaviour is conduct deserving of sanction.

Citation 5

61. The panel finds that on February 13, 2004, the Member treated her client with discourtesy by making repeated berating phone calls demanding money. Even though no swearing was involved, the panel finds that this abusive treatment of a client is conduct deserving of sanction.

Citation 6

62. The panel finds that on February 26, 2004, the Member failed to attend or adjourn a Family Special application even though she was counsel of record. It was her application and she had been reminded of it by opposing counsel, yet she did not attend or adjourn to the detriment of her client. The panel finds that this failure to serve her client is conduct deserving of sanction.
63. It should be noted that the Panel's decision on all Citations was unanimous.

Sanction and Orders

64. The Member's discipline record was entered as Exhibit 40. After some consideration, the Panel came to the unanimous decision that the appropriate sanction in this case was a reprimand together with fines.
65. The fines imposed were:
 - Citation 1 - \$500
 - Citation 2 - \$500
 - Citation 3 - \$500
 - Citation 4 - \$1000
 - Citation 5 - \$500
 - Citation 6 - \$1000
66. The Committee directs that the Member pay the full actual costs of the hearing. An Estimated Statement of Costs was entered as Exhibit 41.
67. The Member is given until November 30, 2007, to complete payment of the fines and costs.
68. The reprimand was immediately given to the Member by the chair.

Concluding Matters

69. The exhibits and proceedings shall be made available to the public. The names and addresses of all individuals, other than the members involved, will be deleted.
70. The Committee finds no need for a Notice to the Profession under Rule 107 in this case. There is also no need for a referral to the Attorney General pursuant to Section 78(5) of the Legal Profession Act.

DATED the 3rd of July, 2007.

HUGH D. SOMMERVILLE, Q.C. – Chair

JULIA TURNBULL, Q.C.

NORMA SIEPERT