

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 MARK HUYSER-WIERENGA, a Member of
The Law Society of Alberta

INTRODUCTION

1. On January 11, 2006 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society office in Edmonton to inquire into the conduct of Mark Huyser-Wierenga. The Committee was comprised of Rodney Jerke, Q.C., Chair, Charles Gardner, Q.C. and Yvonne Stanford. The LSA was represented by James Conley and the Member was represented by Alexander Pringle, Q.C. The Member was present for the Hearing.

JURISDICTION AND PRELIMINARY MATTERS

2. Exhibits 1 through 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend, and the Certificate of Status of the Member, established jurisdiction of the Committee.
3. There was no objection by the Member's Counsel or Counsel for the LSA regarding the constitution of the Committee.
4. The Certificate of Exercise of Discretion, Affidavit of Service of a letter and Private Hearing Application Notice on the Complainant and the Affidavit of Service of a letter dated January 3, 2005 and a Notice to Attend on Steven J. Fix, a Member and former Counsel for the Complainant, were entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing and neither Counsel for the LSA nor Counsel for the Member requested a private hearing, therefore the hearing was held in public.

CITATIONS

5. The Member faced the following citations:

Citation 1: IT IS ALLEGED that you lied to or misled the complainant in the anteroom meeting on January 19, 2004, contrary to Chapter 4, Rule 1 of the *Code of Professional Conduct*, and that such conduct is

conduct deserving of sanction.

Citation 2: IT IS ALLEGED that you misled the Court, contrary to Chapter 10, Rule 14 of the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

6. At the Hearing, LSA Counsel sought to amend Citation 1 to read:

IT IS ALLEGED that you lied to or misled Steven J. Fix in the anteroom meeting on January 19, 2004, contrary to Chapter 4, Rule 1 of the *Code of Professional Conduct* and that such conduct is conduct deserving of sanction.

Counsel for the Member consented to the amendment and the Citation was amended accordingly.

SUMMARY OF RESULT

7. In the result, on the basis of the evidence entered at the Hearing, and for the reasons set out below, the Hearing Committee dismissed both Citations.

EVIDENCE

8. A Binder with Agreed Exhibits 1 - 20 was entered by consent of the parties.
9. Exhibits 21 and 22 were entered by Counsel for the Member.
10. The Hearing Committee heard evidence from Steven J. Fix and the Member.

FINDINGS OF FACT

11. The Member is a Crown Prosecutor and has been since completing his articles with Alberta Justice in 1989. He occupies a senior position as Unit Leader of the Child Protection Unit for the Department. The Member was the Prosecutor in respect of sexual assault charges against the Complainant (CLSA). CLSA was represented by Steven J. Fix, a Member of the LSA who had been practising as a criminal defence lawyer since 1991. The matter of CLSA's criminal charges was set for a Jury Trial. The Jury was selected on Thursday, January 15, 2004, and the Trial opened on Monday, January 19, 2004.
12. The Crown obtained a statement from a witness, (VK), (a relative) of the Complainant in the criminal proceedings (CCP). This statement was provided to Mr. Fix before the preliminary inquiry. Although VK did not testify at the preliminary

inquiry, CCP did and Mr. Fix cross examined her about some possible observations made by an infant (N). CCP testified that VK told her that N had related to VK certain observations. The Member spoke to VK immediately after the preliminary inquiry and asked for her memory of the incident. VK told the Member that she would have to think about it and, at that time, really didn't have an answer or an immediate recollection.

13. CLSA was at least aware of the allegation and the possibility of observation by N, well in advance of the Trial.
14. Naturally in the course of preparation for Trial, the Member was in contact with witnesses, including VK. Sometime, probably in early January, 2004, in the course of another conversation, VK told the Member that she did recall an incident where N "came running up from the basement of J's house and told her that L and CCP were having sex". A few other details of her recollection were provided by VK to the Member.
15. On Sunday, January 18, 2004, in the course of a briefing session, VK reaffirmed these circumstances to the Member. On January 19, 2004, after the Trial had opened and argument made on preliminary matters, but before the Jury began to hear evidence, VK gave the Member additional information. The Member then provided all of this new disclosure information to Mr. Fix and an issue arose concerning Crown Disclosure. After argument, the Trial was adjourned until the following morning and in the meantime, the Member obtained a statement from VK and it was provided to Mr. Fix the following morning before Court opened. The statement gives all of VK's "new information" and the timing on when that information was provided to the Member.
16. The matter was again discussed in detail on January 20, 2004 before the Trial Judge, including the specifics of the timing of the disclosure, and the Trial Judge ruled that there would be no remedy arising from the circumstances of the disclosure.
17. The Trial proceeded and the accused (CLSA) was ultimately acquitted.

DECISION AS TO CITATIONS

CITATION 1

18. This Citation arises as a result of the provision of the new disclosure information to Mr. Fix on January 19, 2004, and the circumstances under which the Member provided that information.

19. The Member candidly admitted that although the information that he was given by VK in early January, 2004 was in his opinion marginally relevant, it did need to be passed on to Mr. Fix, and that the Member did not pass that information on to Mr. Fix until January 19, 2004. His explanation for not doing so, namely that while he intended to do so, it slipped his mind because of the relatively innocuous nature of the information provided and the Member's other activities, including conduct of a one week Trial the week immediately before the Jury Trial in question, is understandable.
20. The Member states that it was his intention to disclose the additional information to Mr. Fix prior to the opening of the Trial on January 19, 2004, but he was distracted from doing so by Mr. Fix's application at the very opening of the trial for exclusion of certain evidence. Undoubtedly this became a matter of some contention as it occupied the entirety of the morning's proceedings and delayed the commencement of hearing of evidence by the Jury. The Member says that as a result of the morning's proceedings, he made a choice to change the order of his witnesses and call VK as his first witness rather than CCP. When he spoke to VK to advise her of this change she advised the Member of another memory relevant to the proceedings. What happened next in the Anteroom became the subject matter of this Citation.
21. The Member and Mr. Fix met in the Anteroom and the Member told Mr. Fix he would be calling VK as his first witness. The Member says that he advised Mr. Fix that he had additional information for disclosure, namely he had one piece of information that had recently been provided to him, and it was spoken of again the previous evening in a meeting with VK. He stated he also had some additional information that had just been provided a few minutes before by VK. A heated exchange occurred, perhaps before the Member made these statements, perhaps immediately after, but certainly in close proximity. Mr. Fix appeared to the Member to be critical of the Member having spoken with VK the night before. The Member interpreted Mr. Fix's comments as being critical of him in meeting with the witness the night before the opening of a Trial.
22. Mr. Fix candidly agreed that the meeting in the Anteroom did become heated, but he recalls being told by the Member that the Member got the information concerning the incident about N the night before and the other information was provided a few moments before the conversation in the Anteroom. Mr. Fix stated that he was relatively confident of his recollection but readily agreed that people can have misunderstandings and can make mistakes. Mr. Fix related two incidents where he had been clearly mistaken during the course of proceedings in Court, one during conduct of cross examination of CCP during the Trial in question where he misstated evidence CCP had previously given in a videotaped statement.
23. Having carefully reviewed all of the evidence, the Hearing Committee found that the

Member did not lie to or mislead Mr. Fix in the Anteroom meeting on January 19, 2004. While Mr. Fix was adamant in his recollection concerning the events, his explanation to the Trial Judge on January 20, 2004, is most consistent with the facts, namely "I also was not aware and maybe I misheard my friend yesterday. I was under the understanding that he got this information yesterday."

24. Accordingly, the Hearing Committee found that the evidence showed that there was a misunderstanding by Mr. Fix and not a lie or misrepresentation by the Member. Accordingly, this Citation was dismissed.

CITATION 2

25. This Citation arises as a result of the proceedings before the Trial Judge the afternoon of January 19, 2004. The transcript of the proceedings was provided as an Exhibit.
26. The question for the Citation centres on what the Member told the Court about when he had first received the new information from VK concerning the incident about N. The Member testified that because he did not know the date in January 2004 when the new information was first given to him by VK, and in light of the fact that VK reaffirmed that information to him the evening of January 18, and because of the atmosphere which had developed between the Member and Mr. Fix, and until he could check his diary for exact times, he was trying to be imprecise in telling the Trial Judge that he had received that information recently. The matter was complicated due to the fact that VK had undoubtedly provided some fresh information to the Member just a few moments before the matter was argued before the Trial Judge, and because it was also connected with an objection to the Member calling another witness based again on late disclosure by the Crown. The Member testified that he was trying to be imprecise and that it was not his intention to tell the Trial Judge that he only received the new information about the incident involving N the night before and that he had no intention to mislead the Court.
27. At the close of the proceedings on January 19, 2004, the Trial Judge set the matter over to the following morning. The Member then requested VK to provide a statement outlining the information that VK had and specifically requested VK to confirm when that information had been provided to the Member.
28. Undoubtedly, the Trial Judge formed the conclusion on January 29, 2004 that the Member had only been told about VK's new recollection concerning the incident about N on the night of January 18, 2004. A decision on the Citation, however, depends upon making a determination of whether the Trial Judge's misunderstanding resulted from the Member's conduct in misleading the Court.

29. A review of the transcript of the proceedings on January 19, 2004, shows that it is reasonable to interpret that the Member had first been informed of the incident involving N on the evening of January 18, 2004. The Member agreed that upon his own review of the transcript, that interpretation was certainly possible. When the information provided by the Member is considered in light of the information provided by Mr. Fix in the same transcript, there is little wonder why the Trial Judge formed the conclusion that she did.
30. The Member's explanation was that given the acrimonious nature of the discussion with Mr. Fix in the Anteroom, the Member's concern that Mr. Fix was criticising him for speaking to VK the night before the Trial opened and the need to think very quickly, he failed to listen closely to what Mr. Fix told the Trial Judge and failed to be careful in his choice of words, thus giving rise to a misinterpretation.
31. Certainly, in later portions of the transcript, the Member's words are more consistent with the way VK actually provided the information to the Member than in earlier portions of the transcript.
32. The commentary to Rule 14 states as follows:

"It is an obvious contravention of Rule Number 14 for an Advocate to lie to the Court. The Rule applies as well however to an indirect misrepresentation. For example, a lawyer may not respond to a question from the Court in a technically correct manner that creates a deliberately misleading impression."

Counsel for the LSA pointed out that the burden of proof in cases such as this is higher than the balance of probabilities.
33. Having carefully considered all of the evidence, the Hearing Committee found that the evidence fell short of establishing on any standard that the Member misled the Court. It was particularly relevant that the Member on his own initiative, asked VK to provide the chronology of the fresh disclosure she had made to him and provided that statement to Mr. Fix and the details of it the next day to the Court prior to a final ruling on the matter.
34. Accordingly, the Hearing Committee found that although the Court was under a misapprehension, this did not arise because the Member misled the Court. Accordingly, this Citation was dismissed.

CONCLUDING MATTERS

35. With respect to Exhibits and these proceedings, they will be accessible to, and may be copied by the public except that initials will be substituted for the names of anyone other than the Member, Mr. Fix and words referencing relationships between such persons will be removed.

Dated this 14 day of February, 2006

Rodney A. Jerke, Q.C., Bencher
Chair

Charles Gardner, Q.C. Bencher

Yvonne Stanford , Bencher