The Law Society of Saskatchewan

MERVIN CLAYTON PHILLIPS
HEARING DATE: December 2, 2014
DECISION DATE: March 20, 2015
PENALTY HEARING: September 22, 2015
DECISION DATE: November 27
***Law Society of Saskatchewan v. Phillips*, 2015 SKLSS 2**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF MERVIN CLAYTON PHILLIPS,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Members of the Hearing Committee: Robert Heinrichs, Q.C. (Chair)
Lorne Mysko
Darcia Schirr, Q.C.

Counsel: Timothy Huber for the Conduct Investigation Committee
Merrilee Rasmussen, Q.C. for the Member

INTRODUCTION

1. Mervin Clayton Phillips (the Member) is the subject of a Formal Complaint dated July 5, 2012 alleging that the Member:

> 1. did after receiving notice of termination of his retainer from his clients, the Executors of the Estate of B.A., attempt to impose inappropriate conditions upon the release of his client's files

A second count contained in the Formal Complaint was withdrawn at the hearing by Counsel for the Conduct Investigation Committee.

2. The evidential hearing on the merits of the Complaint was initially convened by conference call on December 2, 2014. There were no objections to the constitution of the Hearing Committee nor were there any other preliminary motions or objections made to the Hearing Committee.

3. An Agreed Statement of Facts and Admissions was filed in relation to this matter, a copy of which less its attached tabs is appendixed to this decision. A timeline was established for the exchange and filing of written submissions and the hearing was adjourned to be re-convened on February 3, 2015 for oral summation.

BACKGROUND

4. A brief summary of the facts which are appendixed to this decision is as follows:

a) The Member represented the administrators and beneficiaries of the Estate of B.A. The estate administrators were siblings and, along with one other sibling, comprised the four beneficiaries of the estate. Legal services provided by the Member during the course of acting as the estate solicitor included, among other things, obtaining Letters of Administration and selling the deceased's residence.

b) On December 15, 2009 one of the estate administrators (whose subsequent complaint is the genesis of this hearing) contacted the Member's office and, among other things, left instructions to distribute the estate assets other than in the manner required by *The Intestate Succession Act, 1996*. Confirmation of those instructions from the other administrators/beneficiaries was not received by the Member. The day following that contact, the Member replied that he had been in court and would probably not be able to respond until early the following week.

c) In the late afternoon of December 24, 2009, after the office had been closed for holidays, the Member's office received a fax signed by the aforesaid administrator only, purporting to terminate the Member's services. On his return to the office following holidays, the Member advised the administrators and beneficiaries that instructions to terminate his retainer must come from all four of them. The Member's office received the same notice of termination but which contained all four signatures on January 7, 2010.

d) On January 25, 2010 two of the four administrators (one of which was the complainant) called and spoke with the Member about the file.

e) The Member began drafting a letter to the four beneficiaries on January 25, 2010 which letter was revised on January 26, 2010 and ultimately sent to the clients on January 31, 2010. In that letter the Member outlined the conditions which he required to be satisfied in order to facilitate his release of the file to the clients. The conditions included, among other things, a form of Release to be executed and returned to the Member's office. The wording of the Release as initially prepared by the Member is set out below (with the exception that initials have been substituted for names and address information has been deleted):

THE SURROGATE COURT FOR SASKATCHEWAN
JUDICIAL CENTRE OF REGINA
IN THE ESTATE OF B.A., LATE OF THE CITY OF REGINA, IN THE PROVINCE OF SASKATCHEWAN, DECEASED

RELEASE TO PHILLIPS & CO.
WHEREAS B.A., late of the City of Regina, in the Province of Saskatchewan, deceased, died on or about the 5th day of May, 2009, intestate, and at the time of his death had a fixed abode at the City of Regina, in the Province of Saskatchewan;
AND WHEREAS I, L.W., currently of _____, of the ____ of _____, in the Province of Saskatchewan, _____, am one of the beneficiaries and administrators hereby consent & authorize the law firm of PHILLIPS & CO. to release my late father's estate file to all the beneficiaries, namely L.W., A.W., H.B. and K. W.
AND WHEREAS I, L.W., hereby consent to Phillips & Co. to proceeding as outlined in their correspondence dated January 25th,2010, and as per their trust statement attached thereto, thereby releasing their office from the conclusion of their administration of my late father's estate.
NOW THEREFORE I, L.W., do by these presents remise, release, quit claim and forever discharge the said law firm, PHILLIPS & CO., as aforesaid, their heirs, executors and administrators of and from any claim for same.
IN WITNESS WHEREOF I have hereunto set my hand and seal this ____ day of January, A.D. 2010.
SIGNED IN THE PRESENCE OF:

_____ _____
Witness L.W.

f) Upon receipt of the Member's letter, the complainant contacted the Law Society of Saskatchewan and objected to the Member's conditions and the terms of the Release.

g) Subsequently, correspondence occurred between the Law Society and the Member in which the Law Society advised the Member which of his conditions it considered were acceptable and which were not. The Law Society's objections included a concern with the last paragraph of the form of Release which it advised was unacceptable because "Asking the client to remise, release, quit claim and forever discharge your firm from any future claim should not be a precondition for release of the client's file."

h) Further correspondence between the Law Society and the Member ultimately resulted in the Member amending the release as requested by the Law Society and transferring the file to the clients.

SUBMISSIONS REGARDING CONDUCT UNBECOMING

5. Written and oral arguments were exchanged and submitted on a number of different issues including recitation of the facts; strict liability and charge wording; delay in turning over the file; the Code of Professional Conduct; bargaining away complaints; breach of fiduciary

duty; and nature of the release. The position of both counsel with respect to each of these issues is set out briefly below.

Recitation of Facts

6. Despite the existence of an Agreed Statement of Facts and Admissions, some argument arose as to the facts of the case. The Member, in written argument, stated that the complainant accused the Member of misappropriating trust funds. The Conduct Investigation Committee Counsel disagreed stating there is no evidence to support that assertion and that it should be disregarded.

Strict Liability and Charge Wording

7. Both counsel agreed that in general, disciplinary proceedings involve strict liability offences. Counsel for the Member, however, argued that the use of the word "attempt" in the Formal Complaint imports an element of intention on the Member's part. On the contrary, counsel for the Conduct Investigation Committee argued that inclusion of the word "attempt" had no such effect and was simply the only appropriate way of characterizing the facts as they occurred in this case.

Delay/Code of Professional Conduct

8. Delay was raised as an issue in the context of the common law and the Code of Professional Conduct in paragraphs 13 and 14 of the Conduct Investigation Committee brief dated December 9, 2014. Counsel for the Member noted that the formal complaint does not contain any allegation about delay.

Solicitor-client Fiduciary Relationship

9. Counsel for the Conduct Investigation Committee characterized the Member's conduct in the present case as conduct unbecoming and deserving of sanction because it breached the solicitor-client/fiduciary relationship. A lawyer should not receive a benefit at the expense of the client and the Member should not have sought to obtain a blanket release of liability as a condition to transferring the file and its attendant trust monies to the clients. The Member's counsel faults the Conduct Investigation Committee assertion arguing that it is based on the assumption that the Release in question was a blanket release, when in fact it was not. This argument is necessarily related to the argument raised under "Nature of the Release".

Bargaining Away

10. Counsel for the Conduct Investigation Committee also characterized the Member's conduct in the present case as conduct unbecoming because it was akin to those cases where lawyers have attempted to "bargain away" the client's right to complain or sue the lawyer. Counsel for the Member did not dispute that a complaint cannot be "bargained away". However, the Member's counsel referred again to the wording of the Release, arguing that it did not refer in any context to the release of any complaint or of the ability to sue the Member for any steps he had previously taken with respect to the client. Again, there is overlap between this issue and the "Nature of the Release" issue.

Nature of Release

11. Finally we come to the "Nature of the Release" issue. Counsel for the Member argued that one cannot interpret the fourth paragraph of the Release as originally drafted in isolation from the other provisions of the Release. The document must be read in its entirety in order to understand the final paragraph and in doing so, counsel argued, it is not possible to characterize the release as a blanket release of liability. Counsel for the Member focused on the last part of the final paragraph of the release which released the Member "…from any claim for same". She argued that the words "for same" refer back to what was previously set out in the release – claims relating to the Member's release of the file and claims relating to the Member's release from concluding the administration of the estate. Conduct Investigation Committee counsel also referred to the wording of the Release as a whole, but argued that the more reasonable interpretation of the quoted phrase above is to interpret it as meaning the estate file generally and the administration of the deceased's estate generally as opposed to referring back only to what had been previously set out in the Release.

DECISION

12. Some of the issues raised in argument can be easily dealt with. This includes the issue regarding delay. Counsel for the Member is correct in stating that the formal complaint does not contain any allegation regarding delay. Counsel for the Conduct Investigation Committee advised in oral summation that those portions of his written argument were included to provide the Hearing Committee with some background and context within which to place the Agreed Statement of Facts. Accordingly, the Hearing Committee has not in any way considered delay as part of the complaint against Mr. Phillips or the evidence filed at the hearing. Similarly the Committee has disregarded any argument concerning violations of the Code. Those portions of the Conduct Investigation Committee argument regarding the Code of Professional Conduct were primarily focused on delay which, as set out above, is not part of the formal complaint in this case.

13. With respect to the issue of strict liability and charge wording, the Committee does not accept the Member's contention that the wording of the Formal Complaint imports some element of intention on the Member's part. The impugned conduct cannot be characterized otherwise than as "an attempt" as the intended signatories of the Release did not sign the document as originally drafted. The use of the word "attempt" does not import some element of intention any more than would the use of the word "did" had the intended signatories signed the Release. As noted by the Saskatchewan Court of Appeal in *Merchant v. Law Society of Saskatchewan* (2014 SKCA 56) at paragraph 69:

> In this case, the Law Society did not insert any words that would indicate the conduct unbecoming charge hinged on a finding of intention. Examples of such words are "intentionally" or "knowingly". The charges in this case merely say "did" (breach) and "did" (counsel and/or assist). "Did" merely refers to the action of doing something and does not, in itself, impart any type of mental element. One of the definitions that the Oxford English Dictionary provides for the word is "perform, effect, engage in." The word "did" alone does not impart any *mens rea* into the charge.

14. The above reasoning applies regardless of whether the actor was successful in completing the action or not.

15. The Member further argued that even if one accepts that the current case is a strict liability offence, the charge must still fail as a fault element amounting to at least negligence must be alleged in the Formal Complaint. Member's counsel relied on the Saskatchewan Court of Appeal decisions in both the 2009 and 2014 Merchant v. Law Society of Saskatchewan decisions (*Merchant v. Law Society of Saskatchewan 2009 SKCA 33* and *Merchant v. Law Society of Saskatchewan* 2014 SKCA 56). While these cases do stand for the proposition that when dealing with strict liability offences, fault may result from conduct arising from acts involving intentional behavior, wilful blindness, recklessness or even negligence, they do not stand for the proposition that the level of fault must be alleged in the charge wording. As pointed out by counsel for the Conduct Investigation Committee, the 2014 Merchant case did not involve reference to level of fault nor did the charge wording in the more recent case of *Hesje v. Law Society of Saskatchewan* (2015 SKCA 2) and yet both resulted in findings of conduct unbecoming being upheld.

16. That leaves the issues of "bargaining away", "fiduciary duty" and "nature of the release" outstanding and which do, as indicated above, have some degree of overlap among them. For the purposes of our decision, an analysis within the context of the nature of the release issue is the most germane. The cases provided by counsel for the Conduct Investigation Committee with respect to the bargaining away argument or the breach of solicitor-client/fiduciary duty are not similar in fact to the present case and not particularly helpful.

17. The Release as originally drafted and set out earlier in this decision contains four main paragraphs. The first paragraph simply identifies the Estate file to which the Release applies. The second paragraph names the person who is to sign the Release, identifies them as one of the beneficiaries and/or administrators of the estate and instructs the Member's firm to release the estate file to the estate beneficiaries named therein. The third paragraph is the signatories consent to the Member's firm to proceed as outlined in the correspondence to which the Release was attached and in accordance with the trust statement that was also attached and in so doing acknowledges that the Member's firm is released from concluding the administration of the identified estate. The fourth and final substantive paragraph is the impugned condition and states that the Member's firm is released from "…any claim for same."

18. In order to understand the third paragraph of the Release, the body of the January 25, 2010 letter which accompanied the Release is reproduced below in its entirety. (Again with the exception that initials have been substituted for names and address information has been deleted):

> Further to our letter of January 4th, 2010, we enclose our account for your attention, along with our trust statement, which is self-explanatory.
> We are now in a position to release our file to you, including the original Grant of Letters of Administration, the original Infant Certificate, all correspondences, etc., upon confirmation by each of the beneficiaries acknowledging the following conditions:

> 1. That the enclosed Releases be executed & returned to our office, duly executed;
> 2. That you will arrange to prepare and file the 2009 T'1 & T'3 tax return for the estate and thereafter request Clearance Certificate from CRA;
> 3. That you will file with the Regina Court House an Affidavit Verifying Accounts in the estate of your late father, B.A.; and
> 4. That our account will be paid in full, i.e., via your authorization to pay same from monies held in trust.
>
> We will progress the final report to MCAP by this weekend and it will be concluded the same time the estate is concluded.
> We also enclose reporting documentation respecting the sale of the estate property at _____, _____, which is self-explanatory.
> We confirm we have paid the Ministry of Social Services the sum of $2,549.90 per their correspondence of January 26th, 2010, a copy of which is attached hereto for your reference, being the balance of the funeral account outstanding.
> We will be providing a cheque for the balance of monies held in trust in the amount of $113,296.14 in accordance with the attached trust statement, payable to all the beneficiaries, i.e., A.W., L.W., H.B. and K.W.

19. In addition to the Release, the other conditions related to finalizing tax matters with respect to the estate; filing the Affidavit Verifying Accounts in court with respect to the estate; and, paying the Member's invoice from trust monies. The letter goes on, among other things, to advise the clients that the Member would be forwarding trust monies in a specific amount to them as calculated in an attached Trust Statement.

20. Conduct Investigation Committee counsel characterizes the final condition as a blanket release of liability arguing it is reasonable to do so because there is otherwise no need for the Member to have added the fourth paragraph to the Release. Paragraph two contains the instructions to transfer the file which had already been contained in the termination notice signed by all of the beneficiaries on January 7, 2010. Paragraph three contains the client's consent to the Member proceeding as outlined in his letter as set out above and thereby releasing him from any further legal duties with respect to the estate. The beneficiaries could not later sue the Member for failing to conclude the estate when they already released him from that duty both in the termination notice and by agreeing in paragraph three to have the Member proceed as outlined therein.

21. The Member contends that the fourth paragraph merely refers back to what has been previously set out in the Release. In other words the Member included the final paragraph to simply confirm that the clients were releasing the Member from any claims arising from his transfer of the file to them and that they were releasing the Member from having to conclude the administration of the estate.

22. It is this Committee's job to interpret the Release based on the evidence before it. The Release was prepared "…in the context of communication and correspondence with the client to date." (paragraph twelve of the Agreed Statement of Facts). The Member stated in his February 8, 2010 letter to the Law Society attached to the agreed statement of facts as tab 12 that he took care in drafting the releases because it involved trust funds. More specifically, and in paragraph eight of the Member's written submission dated December 19, 2014, the Member contends that at some point after January 7, 2010, the complainant accused the Member of misappropriating trust funds.

23. The evidence filed indicates that any written mention of the trust account monies did not occur until the clients' letter to the Member dated January 25, 2010 as well the complainant's e-mail to the Law Society dated February 1, 2010. In both instances, the concerns about money fall short of alleging that the Member misappropriated trust money. Furthermore, the Member states in his correspondence to the Law Society dated February 8, 2010 (tab 12) that the complainant's letter of January 25, 2010 was not received by him until February 2, 2010 and it was received by the Member with the fax from the Law Society containing the complaint. The Release was prepared before that date, sometime between January 25, 2010 and January 31, 2010.

24. The evidence also indicates that two of the administrators/beneficiaries called and spoke to the Member on January 25, 2010. There was no evidence submitted as to the content of those conversations (other than a brief mention at the conclusion of the Member's letter to the Law Society referred to in paragraph eighteen of the agreed statement of facts and admissions) but it is reasonable to conclude having regard to the surrounding circumstances of the relationship between the Member and the clients, that the clients were not happy with the Member. He would have been aware that he was in jeopardy with them. After all, the clients had already provided the fully signed termination notice on January 7, 2010. The Release was initially prepared, therefore, within the context of a solicitor and client relationship that had gone sour.

25. Given the above, it is reasonable to conclude that the fourth condition of the Release was drafted to protect the Member from such jeopardy. The Member's explanation that he was preparing the release in relation to the release of trust money and not as a release of liability generally, is not reasonable.

26. In conclusion, we find that the Member's conduct in this case is inimical to the best interests of the public. The allegation is well founded.

27. The complaint in this matter was made on January 26, 2010 and accordingly predates amendments made to The Legal Profession Act, 1996 effective July 1, 2010. Therefore, this hearing proceeded pursuant to the Act as it existed before the amendments. Section 53(3) of the pre-amended Act empowered the Hearing Committee to assess any penalty specified in sub clauses 55(2)(a)(iii) to (vi) or clause 55(2)(b), if the Member so requested and counsel for the

Conduct Investigation Committee approved. Counsel are invited to advise whether they wish this Committee to assess penalty or have the matter referred to the Chair of Discipline for the imposition of penalty.

Dated this 20th day of March, 2015. ___ Robert R. Heinrichs, Q.C. Chair

___ Lorne Mysko _____

___ Darcia Schirr, Q.C. _____

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated July 5, 2012 alleging that he:

1. **did after receiving notice of termination of his retainer from his clients, the executors of the Estate of B.A., attempt to impose inappropriate conditions upon the release of his client's files.**

JURISDICTION

28. Mervin Clayton Phillips (hereinafter "the Member") is, and was at all times material to this proceeding, a practicing member of the Law Society of Saskatchewan (hereinafter the "Law Society"), and accordingly is subject to the provisions of *The Legal Profession Act, 1990* (hereinafter the "Act") as well as the Rules of the Law Society of Saskatchewan (the "Rules"). Attached at Tab 1 is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to section 83 of the Act confirming the Member's practicing status.

29. The Member is currently the subject of a Formal Complaint dated July 5, 2012 and consisting of the allegation above, as well as a second allegation that has since been withdrawn. The original Formal Complaint was served upon the Member on July 5, 2012. Attached at Tab 2 is a copy of the original Formal Complaint along with proof of service in the form of an Acknowledgement of Service.

BACKGROUND OF COMPLAINT

30. This matter came to the attention of the Law Society as a result of complaints from a member of the public (L.W).

PARTICULARS OF THE CONDUCT

31. The Member was the lawyer acting on behalf of the administrators of the Estate of B.A. The complainant, L.W., was one of the administrators. The administrators were siblings and the deceased was their father. The three administrators and one other sibling were the beneficiaries of the estate.

32. The Estate sold the home of the deceased to one of the beneficiaries/administrators, K.W., and the beneficiaries' mother (ex-wife of the deceased, divorced prior to his death). The Member handled the real estate transaction for the vendors and the purchasers, as well as the

purchasers' mortgage required to finance the purchase.. The financing was contingent on K.W. receiving a specified share of the estate.

33. The instructions to the Member were in writing and signed by all administrators/beneficiaries [Tab 3].

34. By operation of law, B.A.'s children would share the estate per stirpes. On December 15, 2009, L.W. called the Member's office and spoke to the office manager, stating, among other things, that K.W. should receive a small share of the estate than the other beneficiaries. Later the same day, L.W. sent an email to the Member's office confirming the discussion between L.W. and the office manager and setting out revised values for the shares of the estate that L.W. stated each beneficiary was to receive [Tab 4]. The revised instructions came from L.W. only, and she cc'd A.W., H.B., and their mother F.W. on the email; K.W. was not cc'd. The Member did not receive confirmation of these instructions from the other administrators/beneficiaries.

35. In the afternoon of December 24, 2009, after the close of business for the holiday, the Member's office received by fax a notice of termination, which stated that the Member's services were no longer required in respect of the Estate [Tab 5]. The notice of termination was sent and signed by L.W. only. By letter dated January 4, 2010, the Member advised the four administrators/beneficiaries that if they intended to terminate his retainer regarding the estate, instruction must come from all of them. On January 7, 2010, L.W. faxed the notice of termination, which now bore the signatures of all the administrators/beneficiaries [Tab 6].

36. On January 14, 2010 the Member reported the conclusion of the real estate transaction to the Estate and to the purchasers in the usual way. In relation to the real estate transaction, the Member did not receive a notice of termination from the lender or from the purchasers, K.W. and F.W.

37. On January 25, 2010, L.W. called and spoke to the Member about the file. Later that day, A.W. called and spoke to the Member about the file.

38. On January 26, 2010, the Member paid the invoice from the Ministry of Social Services from the funds held in trust. Later that day, A.W. called and spoke with the Member about the invoice from the Ministry of Social Services and advised that the family would pay this bill. The Member advised that the cheque had already been sent out.

39. By letter dated January 25, finalized on January 26, and sent to the clients on January 31, 2010, the Member wrote to the administrators/beneficiaries regarding the release of the legal file and trust funds he held in relation to the notice of termination and rendered his account. The Member's letter is attached at [Tab 7]. The release mentioned in the Member's letter is attached at Tab 8. The release was prepared in the context of the communication and correspondence with the client to date.

40. The complainant's complaint to the Law Society dated January 26, 2010, along with a letter from the clients to the Member, dated January 26 and finalized on January 26, 2010 is attached at Tab 9.

41. On February 1, 2010, L.W. sent an email [Tab 10] to the Law Society in which she objected to the conditions set out in the Member's letter dated January 25, 2010 and the terms of the Release, both of which she attached to the email. L.W. stated that the Member's "conditions are making us very worried – we are starting to wonder where our father's money maybe [sic]?"

42. On the afternoon of February 2, 2010, the Member became aware of L.W.'s complaint when he received a fax from the Law Society and the attached complaint dated January 26, 2010.

43. On the morning of February 3, 2010, John Allen, the Law Society auditor, attended at the Member's office without an appointment or any prior notice. Mr. Allen requested financial records relating only to this file, including a printout of the trust ledger. No one from the Law Society subsequently expressed any concerns about the financial records relating to this file.

44. By letter dated February 5, 2010 [Tab 11], the Law Society advised the Member that conditions #3 and #4 (incorrectly identified as conditions #2 and #3) contained in the Member's letter dated January 25, 2010 were not acceptable as conditions for release of the file, although it was recommended that the Member identify these points to the clients as items that remained unfinished. The Law Society further advised the Member that the last paragraph in the Release was not acceptable.

45. By letter dated February 8, 2010, the Member provided a detailed response the Law Society regarding its letter of February 2 and 5 and L.W.'s complaint [Tab 12]. In his letter, the Member referred to the care he took regarding the trust funds, the Release and the focus of the Release on the trust funds.

46. On February 18, 2010 [Tab 13] the Law Society wrote to the Member stating that his concern about the allegations regarding trust funds was addressed by other provisions in the Release and reiterated that the last paragraph of the Release should be removed. The Member amended the Release as requested on March 1, 2010. The amended Release was signed by all parties between March 2 and 4, 2010 [Tab 14].

47. On March 5, 2010, L.W. delivered the signed Releases to the Member's office. The Member's account was then paid from trust by a cheque drawn on March 2, 2010 and deposited to the Member's general account on March 5, 2010 [Tab 15].

PRIOR HISTORY

48. The Member has no prior findings of conduct unbecoming.

PENALTY DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

INTRODUCTION

49. A Hearing Committee composed of Robert Heinrichs, Q.C. (Chair), Lorne Mysko and Darcia Schirr, Q.C. rendered a decision dated March 20, 2015 in which the Committee

determined that an allegation of conduct unbecoming regarding the Member, Mervin Clayton Phillips, was well founded.

50. The allegation as contained in the Formal Complaint which gave rise to those proceedings alleged that the Member;

> 1. did after receiving notice of termination of his retainer from his clients, the Executors of the Estate of B.A., attempt to impose inappropriate conditions upon the release of his client's files.

As noted in that Hearing Committee decision, the Formal Complaint contained a second count which was withdrawn at that hearing by Counsel for the Conduct Investigation Committee.

51. The Committee, having determined that the above-noted allegation was well founded reconvened on September 22, 2015 by telephone conference call to hear representations from counsel as to the appropriate penalty to be imposed. Mr. Timothy Huber appeared for the Conduct Investigation Committee and Ms. Merrilee Rasmussen, Q.C. appeared for the Member.

52. The Notice of Penalty Hearing with Acknowledgement of Service; the Hearing Committee decision dated March 20, 2015 and the Conduct Investigation Committee's Statement of Costs were all filed at the reconvened Penalty Hearing as exhibits P-1, P-2 and P-3 respectively.

53. The jurisdiction of the Hearing Committee to impose a penalty in this case is found in Section 53(3) of The Legal Profession Act, 1990 (pre-2010 amendments) and is dependent on the consent of the parties. Where sentencing proceeds in this manner, the Hearing Committee is restricted to imposing any one or any combination of a fine, costs and a reprimand.

54. It should be noted that in the intervening time period between the Hearing Committee decision dated March 20, 2015 and the reconvened penalty portion of the Hearing on September 22, 2015, one of the original Committee Members, Lorne Mysko, passed away leaving the Hearing Committee to be comprised of the other two Members aforesaid. Neither Mr. Huber nor Ms. Rasmussen had any objection to the composition of the smaller Hearing Committee, or any other matter relating to the proceedings leading up to the reconvened Hearing.

SUBMISSIONS REGARDING PENALTY

55. Mr. Huber asked the Committee to impose a reprimand, a $500.00 fine and an award of costs in the amount of $6,880 as particularized in the Statement of Costs.

56. Ms. Rasmussen disagreed, arguing that in this particular case no specific penalty was required and, in any event, arguing that an order of costs against the Member would not be appropriate in the present case.

57. Counsel for the Investigation Committee noted that Mr. Phillips had been a member of the Law Society of Saskatchewan since 1981 with no prior disciplinary record. However, counsel based his position on penalty on the very nature of the unbecoming conduct itself. We refer to this Committee's decision dated March 20, 2015 for a detailed discussion of that conduct

but, suffice it to say the crux of the conduct was the attempt by the Member to extract from his clients a release of any future right to sue the Member with respect to work previously completed by the Member for the clients, in exchange for a transfer of the file to the clients.

58. The Investigation Committee referred to the case of the *Law Society of Saskatchewan v. Duncan-Bonneau* (2014 SKLSS 11). That case involved a situation where a lawyer acted as Executor and legal counsel for a particular estate. During the conduct of the file, the relationship between the lawyer and the estate beneficiaries deteriorated to the point where there was a dispute concerning the lawyer's fees as well as a complaint made by the estate beneficiaries to the Law Society concerning the lawyer's conduct. The lawyer was found by the Hearing Committee in that case to have abused her position by attempting to pressure the beneficiaries to abandon their right to taxation of her proposed accounts and to extract a release of liability from the beneficiaries in exchange for the release of file material which would lead to the conclusion of the estate. Mr. Huber noted the Duncan-Bonneau case proceeded on an Agreed Statement of Facts without a guilty plea which was the same as in the case at bar. Mr. Huber also noted the parallels between that conduct and the Member's conduct in the present case which also involved an attempt to impose inappropriate conditions on the release of the client's file and an attempt to obtain a blanket release of liability. The penalty imposed in the two counts contained in the Formal Complaint in the Duncan–Bonneau case included a fine in the amount of $5,000.00 in regards to one count, a reprimand in regards to the other and a global order of costs in the approximate amount of $12,600.00.

59. Ms. Rasmussen referred to the well-known decision in *Law Society (British Columbia) v. Ogilvie [1999]* L.S.D.D. No. 45(B.C.L.S.D.H. Pan.) with respect to the factors to be considered in imposing penalties in regulatory hearings. She noted, referring to those factors that in this case:

- The nature and gravity of the conduct was at the lower end of the spectrum and did not involve the bargaining away of a complaint or breach of fiduciary duty as was the situation in the Duncan-Bonneau case;
- Mr. Phillips is a senior member with 35 years experience and that, especially when combined with the absence of any prior disciplinary record, speaks to his good character.
- There was no impact on the victim in this case, the Member having rectified the situation by removing the impugned condition and releasing the file to the clients;
- There was no advantage gained by the Member as he did not obtain a blanket release of liability, having amended the draft as aforesaid;
- The conduct was isolated and not recurring;
- The Member acknowledged the misconduct and amended the release as indicated above in order to redress the wrong;
- Given the above, the issue of remediating or rehabilitating the Member was not applicable nor required;
- The effect on the Member of the Formal Complaint and ensuing hearing was significant given his previously unblemished career;

- Specific deterrence was not required given the Member's remediation of the situation as outlined above;
- General deterrence was achieved in this case through the publication of the facts leading to the decision of conduct unbecoming.

60. Ms. Rasmussen argued that no specific penalty needed to be imposed in this case as it would not make any sense to impose a penalty where the situation had been rectified and the Ogilvie factors were addressed as outlined above.

61. In the event the Committee decided to impose a reprimand and/or fine, Ms. Rasmussen objected to the costs claimed by the Investigation Committee arguing that the routine ordering of costs can in itself be inappropriate in cases where the costs are disproportionately high to the gravity of the offence. She noted that much of the solicitor-client costs claimed could be attributed to the development of the Agreed Statement of Facts upon which this matter proceeded along with general case management logistics including updating the complainant and also hearing preparation time by counsel for the Investigation Committee. As noted earlier, this matter proceeded on an Agreed Statement of Facts without a guilty plea and Ms. Rasmussen argued that the Member should not be penalized for defending against the complaint. She also noted that many of the arguments made by Counsel for the Conduct Investigation Committee during the hearing to determine whether the allegation of conduct unbecoming was well founded or not, were ultimately rejected by the Hearing Committee and she concluded the Member should not have to pay for any costs associated with the development and presentation of those rejected arguments. Her view, if there were costs to be awarded, was that they should be nominal only.

62. In response, Mr. Huber noted that while not many of the Ogilvie boxes had been checked, the fact was that there was a negative impact on the victim as the facts leading up to the impugned conduct caused the complainant much frustration and stress. In addition, Mr. Huber argued that the Member in this case did seek to gain an advantage over the complainant by attempting to obtain a blanket release of liability and attempting to insulate himself from any future complaint that may be made by unhappy clients. He also noted that in the circumstances there was a need for specific and general deterrence and that it must be made clear that the type of conduct as was exhibited by the Member in this case is not acceptable.

63. With respect to the issue of costs, Mr. Huber noted that the membership of a professional society should not have to bear the cost of disciplining its Members and that in this particular case the costs were not exorbitant. The logistics involved in case management are a necessary part of any such proceedings and even though it takes time to prepare an Agreed Statement of Facts, it is much less time than what would be required for a full viva voce evidentiary hearing. Finally, Mr. Huber noted that it does not make sense to parcel out arguments that are ultimately rejected by the Hearing Committee from those which are accepted.

ANALYSIS

64. With respect to the proposition by the Member's counsel that no specific penalty is required, the Hearing Committee in referring to the relevant legislation finds that imposing no penalty, which would be somewhat analogous to its criminal counterpart of an absolute

discharge, is not an option presented to the Committee. Section 53(3) of The Legal Profession Act, 1990 states that the Hearing Committee may assess any penalty or impose any requirement specified in section 55(2)(a)(iii) to (vi) or section 55(2)(b). Those sections in turn include authority for the Hearing Committee to impose penalties specifying certain practice conditions; imposition of fines; orders for costs; reprimanding the Member; and/or requiring the Member to transfer property or funds in an ascertainable amount to the rightful owner in situations where the complaint involves that factor. There is no discretion given to the Hearing Committee to not impose a penalty within the parameters of those legislative provisions.

65. Furthermore, even if the Committee was vested with such authority, it would not exercise it in this case. While the Ogilvie factors are certainly adopted and used in regulatory penalty assessment, depending on the circumstances some of the Ogilvie factors will be given more or less weight than others. In this case, at the very heart of the conduct upon which the complaint was determined to be well founded is the attempt by the Member to gain an advantage over the complainant and flowing from that conduct is the negative impact it did have upon the complainant. The self-serving motive behind the impugned conduct is an aggravating factor.

66. This said however, the Committee will not impose a fine as recommended by the Investigation Committee. The amount of the fine suggested is so nominal that it amounts to no fine at all. Given all of the circumstances in this case, a reprimand serves the principles of general and specific deterrence.

67. With respect to the issue of costs, the authorizing section of *The Legal Profession Act* (again, pre-2010 amendments), is as follows:

> s.55 (2)(a) (v) requiring the Member to pay:
> (A) the costs of the inquiry, including the costs of the investigation committee, hearing committee and discipline committee;
> (B) the costs of the society for counsel during the inquiry; and
> (C) all other costs related to the inquiry;

68. Clearly the enabling statutory provisions provide the Hearing Committee with a broad authority to require a Member to pay the full costs of the proceedings. The rationale for a costs order in discipline proceedings is outlined by the *Alberta Court of Queen's Bench in Hoff v. Pharmaceutical Assn (Albert)* (1994)18 Alta.L.R.(3d)387:

> As a member of the pharmacy profession the appellant enjoys many privileges. One of them is being part of a self-governing profession. Proceedings like this must be conducted by the respondent association as part of its public mandate to assure to the public competent and ethical pharmacists. Its costs in so doing may properly be borne by the member whose conduct is at issue and has been found wanting.

69. Bryan Salte, the author of The Law of Professional Regulation states at page 262:

> Law Society discipline decisions frequently refer to the expectation that the member who has been found to have engaged in professional misconduct should generally be expected to bear the costs of those proceedings, and not the membership as a whole.

70. Of course those costs must be reasonable within the context of the case in which they are ordered, failing which they are subject to assessment just as other solicitor and client bills are made subject. *(Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33(CanLII) at paragraph 102. See also *Peet v. Law Society of Saskatchewan*, 2014 SKCA 109 at paragraph 94).

71. The costs itemized in exhibit P-3 are 26.3 hours of Mr. Huber's time at an hourly rate of $200.00 per hour for a total of $5,260.00 In addition, court reporter costs in the amount of $945.00 and Hearing Committee Members honorariums in the amount of $675.00 are included for a grand total of $6,880.00.

72. In her submissions, Ms. Rasmussen objected to many of the entries for Mr. Huber's time such as:

> 8.1 hours – to develop the Agreed Statement of Facts
> 4.5 hours – logistics
> 4.6 hours – Hearing preparation
> .1 hour – withdrawal of other complaint

73. The Hearing Committee sees nothing exorbitant or unreasonable in the time breakdown provided in the Statement of Costs. Mr. Huber indicated in his submissions that the Statement did not include any time with respect to the Formal Complaint allegation which was withdrawn. It is the opinion of this Committee that the costs claimed are reasonable.

74. Accordingly, we impose a reprimand on the Member and order that the Member pay costs in the sum of $6,880.00. The Member is given until April 1, 2016 to pay the costs.

Dated this 27th day of November, 2015.

_"Robert Heinrichs, Q.C."_____
Chair

_"Darcia Schirr, Q.C."_____