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)

Darcia Schirr, Q.C.

Judy McCuskee

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 an Amended Formal Complaint dated October 14, 2016 alleging that the Member:

    1. **did fail to be frank and candid with S.H. in relation to the anticipated costs of S.H.'s legal matter;**
    2. **did fail to serve his client, S.H., in a conscientious, diligent and efficient manner as follows:**

   a. **he spent time unnecessarily in connection with issues S.H. had instructed him to abandon; and**
   b. **he required S.H. to make unnecessary and excessive personal attendances at his office;**

3. **did charge a fee to S.H. that was not fully disclosed, fair and reasonable.**

2. The evidentiary hearing on the merits of the Complaint was held in person in Regina, Saskatchewan on December 12, 2017. There were no objections to the constitution of the Hearing Committee.

3. Preliminary matters raised before the commencement of the hearing proper included:

   a) An application by the Conduct Investigation Committee (hereinafter sometimes referred to as CIC) to exclude the public from the hearing on the grounds that the possible disclosure of intimate personal matters would outweigh the desirability of allowing the public to be present during the hearing pursuant to section 49(6)(b) of *The Legal Profession Act, 1990.* That application was granted by the Hearing Committee.
   b) An Agreed Statement of Facts and Admissions was filed and in the course of the proceedings marked as Exhibit P-3.
   c) A timeline was established for the exchange and filing of written submissions.

d) A discussion was held clarifying and limiting the "issues" referred to in Allegation 2(a) of the Amended Formal Complaint to be medical issues only.

e) Counsel for the Member raised the issue that in the Member's evidence, they intended to present hearsay evidence which she argued the Hearing Committee could consider pursuant to s. 48(10) of *The Legal Profession Act, 1990*. CIC Counsel advised he would be objecting to the admission of that evidence at such time as it would be proffered during the course of the hearing.

f) A brief discussion was held concerning the timing of the calling of witnesses during the hearing.

DECISION

4. For the reasons set out below, the Hearing Committee finds the Amended Formal Complaint to be well founded in relation to Allegations 1 and 3 and to not be well founded with respect to Allegations 2(a) and (b).

THE AGREED STATEMENT OF FACTS

5. A summary of the facts is as follows:

a) The complainant in these matters is The Law Society of Saskatchewan and the genesis of the complaint is outlined at paragraph 2 of The Agreed Statement of Facts. The allegations forming the basis of the Amended Formal Complaint came to the attention of the Law Society as a result of a decision of the Provincial Court of Saskatchewan under *The Small Claims Act.* This was a decision as a result of a claim made by the Member against S.H. for payment of legal fees in relation to S.H.'s family law matters.

b) In February 2008 S.H. was referred to the Member by her father, who was a longstanding client of the Member, in relation to S.H.'s matrimonial problems. The Member continued to represent S.H. in this matter until November 16, 2009 when the Member received a letter and Notice of Change of Solicitor from S.H.'s new counsel. S.H.'s father passed away on March 21, 2009. At the initial meeting between the Member, S.H. and her father, the Member was advised by S.H. of the details of her matrimonial difficulties. A petition was prepared by the Member which was issued the following day for the purpose of crystalizing S.H.'s claims with respect to division of matrimonial property, child support, and spousal support. The Member also prepared a letter to S.H.'s estranged husband outlining their initial position and a new will was prepared by the Member for S.H. As noted in paragraph 7 of the Agreed Statement of Facts, at the initial meeting S.H.'s father advised the Member in the presence of S.H. that he would assist with the expenses. S.H.'s father was aware of the Member's hourly rate of $350.00 from past experience with the Member.

c) S.H. was struggling with depression at the outset of her family matter and letters were requested and obtained by the Member from various physicians upon whom S.H. attended throughout the conduct of the file beginning on May 22, 2008 and continuing until August, 2009.As indicated in paragraph 36 of the Agreed Statement of Facts, S.H. indicated to the Member on January 19, 2009 that she no longer believed her medical condition was worth pursuing as an aspect of her claim for spousal support. However, some months later in the summer of 2009 S.H. continued to attend medical appointments some distance from home at the request of the Member and continued to contact the Member concerning her medical issues.

d) S.H. did not reside in Regina and had to travel to attend at the Member's office when requested. As noted in paragraph 63 of the Agreed Statement of Facts, S.H. had other reasons for attendances and appointments in Regina which coincided with appointments at the Member's office on the dates as specified in the Agreed Statement of Facts.

e) S.H. first requested an account from the Member's law office on August 8, 2008. An interim account totalling $4,118.92 (comprising $3,000.00 in fees plus taxes and disbursements) and a summary of services totalling 49.80 hours both dated October 31, 2008 was provided by the Member to S.H. by letter of November 6, 2008. The interim account had only one entry under the "DESCRIPTION" column which said:

> TO OUR PROFESSIONAL SERVICES RENDERED on your behalf; to all personal & telephone attendances; to all correspondences; to attendances for Mediation, to court attendances; etc., to all matters not included above; TO OUR INTERIM ACCOUNT HEREIN;

A cheque dated October 24, 2008 from S.H.'s father to the Member's law firm was receipted by the Member's law firm on October 27, 2008. A further "Sample Account" was e-mailed by the Member to S.H. following a request from her on October 28, 2009. The "Sample Account" was comprised of 10 pages and indicated time recorded and disbursement charges but not the dollar amount and shortly thereafter S.H. asked the Member about his hourly rate. (See the Agreed Statement of Facts at paragraphs 55 and 56).

f) Following receipt in November, 2009 of the Notice of Change of Solicitor, the Member rendered a final account dated December 1, 2009 totalling $24,349.04 (comprising $21,500.00 in fees plus taxes and disbursements). The final account referred to billing all time on file and included an adjustment for $3,000.00 paid as part of the interim account. Further, the final account enumerated all time expended by the Member from the commencement of the file on February 21, 2008 to November 5, 2009.

g) Ultimately, S.H.'s family matter was resolved while she was represented by her new solicitor just prior to a scheduled pre-trial conference some eighteen months later.

THE HEARING

6. An interim application was made by way of Notice of Motion dated May 30, 2016 in which the Member sought an order that the decision of the Provincial Court of Saskatchewan not be admissible into evidence. Following argument in that matter and upon an analysis of relevant cases and authorities, the Hearing Committee decided that the Provincial Court of Saskatchewan Small Claims Court decision could be introduced into evidence by the Conduct Investigation Committee as *prima facie* proof of the allegations set out in the Amended Formal Complaint but that the Member would be entitled to lead evidence to "displace" the findings of fact made by the Provincial Court judge. Accordingly at the hearing of this matter the Small Claims Court decision was entered into evidence as Exhibit P-2. In that decision, the presiding judge found that the Member acted in his firm's monetary self-interest by:

    a. not expressly advising S.H. on February 21, 2008 or within a reasonable time thereafter of the Member's hourly fee, his billing procedure and some range of what his total bill might be;

    b. rounding up the time spent on telephone and other attendances; and,

    c. engaging in unnecessary work on S.H.'s family law file and requiring S.H. to attend at the Member's Regina law office on numerous occasions.

7. CIC Counsel called S.H. as its only witness. She testified that she first met the Member on February 21, 2008 on her father's recommendation as he had been a client of the Member's and S.H. did not know any other lawyers. At that time S.H. was in a poor emotional state – feeling depressed and stressed as a result of her marital breakdown, her husband's extramarital affair, the fact that her mother had passed away and her ongoing medical problems [redacted]. Prior to their marriage, S.H. [redacted]

8. She testified that her father attended only the initial meeting which she had with the Member. At that meeting, S.H. recalled her father stating he would help with payment of her legal fees. She was adamant that she was the client – not her father. She was not aware if her father had ever provided any instructions to the Member or received any progress reports or correspondence from the Member in regards to her file. She also testified that upon hearing of the [redacted], the Member advised S.H. that was an issue they should be pursuing as it would be debilitating to her [redacted] as a result of this complicating health issue. It was the main reason for her to claim financial support in her petition. Following that initial meeting S.H. stated that she was willing to pursue her estranged husband as

suggested by the Member. She continued to trust the Member's advice as time progressed because in her mind her parents were very close to the member and he treated her very kindly and she saw no reason to question his advice at the time.

9. S.H. had not had much contact with lawyers prior to this involvement aside from minimal involvement with her parents' estate planning. She said there was no mention at the first meeting of the Member's hourly rate or fees. She did not sign any retainer contract. Her father had not told her what the Member's hourly rate was. She candidly admitted that she did not know why she did not ask those questions at that first meeting. .

10. In October of 2008 her personal life had improved. Her estranged husband had been paying his share of mortgage and car payments although he had paid no spousal or child support. Although she was not certain when she started asking about the legal costs, she did ask the Member on three different occasions about costs. On each occasion, the Member responded that she should not worry about it. To her recollection, the August 8, 2008 request for some idea of what her account would be, may or may not have been the first time that she asked but she believed she asked the Member a second time in a face to face meeting in his office. When she received the October 31, 2008 interim account which showed $3,000.00 fees owing plus GST, PST and disbursements for a total of $4,118.92, she thought she was paid up-to-date from the $5,000.00 payment made by her father at that time. She concluded this because the interim account showed a

"NIL" balance due. Further the October 31, 2008 summary of services, detailed 49.80 hours expended by the Member, but provided no indication of fees. S.H. simply thought everything was paid up.

11. She estimated 75-80 % of face to face time with the Member was spent discussing [redacted] medical issues. She attended on various physicians, including a British Columbia psychiatrist, at the instruction of the Member. She did not receive another bill from the Member until after she had dismissed him as her lawyer and in that December, 2009 final billing it noted a balance due of $24,349.04 (after a courtesy discount of $25,095.00) and 141.7 hours spent. At that time she did the math and calculated that his hourly fee was $350.00. She described progress made on the file between October 31, 2008 and December 1, 2009 as "Nothing".

12. As the medical reports continued to come in with questionable relevance to the spousal support issue, S.H. began to question the reason for pursuing them. In the beginning of 2009 she stated that she told the Member to leave the health problems alone and get on with the matter, but the Member reacted resistantly stating that the medical reports were not good enough and that due diligence had to be completed.

13. S.H. also confirmed that at the Small Claims trial, she testified that she had made 31 in-person visits to the Member's office. These meetings were, for the most

part, instigated by the Member. Some of the meetings lasted 5 to 10 minutes but required multiple hours of driving to and from her residence. She was not certain she voiced any concerns to the Member regarding the amount of travel and number of in-office visits she had to make because she trusted his advice and assumed that was what had to be done. In cross-examination S.H. stated it was her decision to obtain legal representation outside of her home community. She also stated that she had been attending upon physicians for some period of time prior to retaining the Member as a result of experiencing severe headaches and later depression. She noted that her emotional state prior to and during the time the Member represented her was "kind of a roller coaster; being okay, and then not okay, and okay and not being okay." and she would have sought some medical attention irrespective of any divorce or legal proceedings. Finally, she also noted that there were some times when her face to face appointments with the Member would have overlapped with occasions when she was already in Regina for other unrelated reasons.

14. In a brief re-examination, S.H. confirmed the Member never volunteered information directly to her about his hourly rate, the estimated expense or about his billing arrangement nor did he reply to any of her enquiries regarding his hourly rate.

15. The Member then testified confirming that he had conducted many files on behalf of S.H.'s parents and particularly her father which were all on an hourly billing

basis. Although his practice was to normally enter into written retainer contracts with clients, he did not follow that practice with long term clients like S.H.'s father as "it would be considered an insult". He confirmed that S.H.'s father initially called him on February 20, 2008 to arrange an appointment with S.H. and that S.H. and her father both attended that initial February 21s, 2008 meeting. He confirmed what work was completed at that meeting including reviewing the information and discerning what needed to be done, preparation of the petition, discussing what would happen next, and the preparation of a new will, Power of Attorney and Health Care Directive for S.H. He testified that S.H. and her father were going to be providing him with instructions and that " they", meaning the father and the Member, would do everything they could to protect S.H., especially in relation to the fact that she had a serious depression which was the biggest issue. It was clear to the Member that S.H.'s father was helping because of her circumstances and her distressed emotional state. The Member testified that it was important for him during that meeting to clarify "... that we had dealt with her family for a significant period of time, but it was her case."

16. It should be noted that the hearsay evidence proffered during the Member's testimony about discussions with S.H.'s father carries no probative value to this Committee and has not been considered in reaching its conclusion. While section 48(10), of *The Legal Profession Act, 1990* empowers the Hearing Committee to consider any evidence that it considers appropriate and does not bind the Committee to the evidentiary rules of law, this Committee does not consider the

proffered hearsay evidence as appropriate. There is no way of corroborating statements in a situation such as this where the speaker has passed away, leaving the impugned evidence so prone to being self-serving that it carries no weight.

17. The Member stated that between the time of issuance of the petition in February, 2008 and service of the petition in June, 2008, there remained hope for reconciliation and that was the goal. However, with instruction received from S.H. to issue the petition at the end of June, the nature of the file changed. S.H.'s depression, in his opinion, had worsened at that time to the point where he prepared a letter signed by S.H. authorizing him and his law firm to seek assistance on her behalf in the event of suicidal thoughts or actions.

18. The Member testified that when he met with S.H. on October 24, 2008 and she raised the issue of the account, he indicated she should speak with her father. He testified that there was never any indication that it was going to be a large bill or a massive bill. He prepared the interim account to show no balance outstanding in an effort to not distress S.H., but attached the summary of services to show what work had been done. He also testified that in June of 2009, while he did not recall a specific enquiry from S.H. regarding his hourly rate, he did recall her asking about the cost connected with going to a pre-trial conference. He stated that prior to her father's death there were discussions in anticipation of his death that the Member would not render an account until the matter was settled or litigated. He further testified that in September of 2009 while at a meeting partly to discuss S.H.'s father's estate there was a discussion about the concern for S.H. in terms of

what the costs were going to be and there was discussion about her father's estate and about helping her out in regard to costs. There were no specific discussions about an hourly rate. The Member stated that by the end of October, 2009 when S.H. requested an account and asked about the hourly rate, he queried why she was asking about that given all of the earlier discussions and steps that had been taken. He felt they were not communicating. In his opinion she knew his hourly rate was $350.00 because he always charged her father $350.00 per hour. In regards to the significant discount included in the final account, the Member explained that he had told S.H.'s father he would not bill the file until it was over and as he had always provided discounts to the family in the past, he wanted to continue to honour that tradition. His practice was also to provide "discounts" to account for errors in billing times as the billing system they used involved approximations.

19. Regarding the medical issues, the Member estimated time spent on them to be 25-30% of total time expended. This included time spent on the issue of her depression. He did admit that S.H. had on some occasions stated that she doubted whether spousal maintenance should be claimed particularly in January, 2009 when a discussion was happening and some medical reports were received that caused her to feel more optimistic about her matters. But when other problems occurred, for example parenting problems with one of her children, he testified that S.H. would again assert that she wanted her estranged husband to pay spousal support. On the issue of requiring S.H. to attend numerous appointments at his

office, the Member testified that they tried to schedule her appointments while she was already in Regina.

20. Under cross-examination, the Member characterized both S.H. and her father as clients akin to a joint retainer. He did concede, however, that payment of an account on behalf of a client does not elevate the payor to the status of a client.

21. The Member intended to call an expert witness to give evidence on the factors to be taken into account in making a claim for spousal support, the process of four-way meetings, mediation in family law practice, to comment specifically on the number of meetings/attendances and the circumstance of having the parent pay for the child's divorce. The Committee declined to hear the expert evidence citing rules 432(9) & (10) of *The Law Society of Saskatchewan Law Society Rules* which state that:

(9) **The Hearing Committee shall not permit a witness to testify unless the name of that witness, a summary of that witness' evidence, and, if the witness is called to give expert evidence, a summary of that witness' qualifications has been disclosed in accordance with subrule (2) or (8) of this Rule. The Hearing Committee shall not permit a document to be entered into evidence unless the information respecting that document has been disclosed in accordance with subrule (1) or (8).**

(10) **Notwithstanding subrules (1) and (2), if the Hearing Committee is satisfied that the failure to disclose the required information arose through inadvertence, or that the information was not in the possession of the party at the time that disclosure was required, or that for any other compelling reason it would be manifestly unfair to exclude evidence or documents not disclosed as required, or if the opposing party consents, the Hearing Committee may permit such evidence to be**

given, or such documents to be introduced into evidence. This may be done on such terms or conditions as the Hearing Committee may determine, including the following:

(a) the Committee may adjourn the hearing for such time as the Committee considers reasonable to permit the other party the opportunity to respond to such evidence;

(b) the Committee may require the party who requests the introduction of such evidence to agree to pay an amount of costs, as estimated by the Committee , which may be incurred by the member or the Society as a result of the failure to disclose such evidence in accordance with subrule (1) or (2) or (8).

22. The rule is mandatory dictating that the Hearing Committee shall not permit a witness to testify unless proper disclosure has been made. The three saving provisions in Rule 432(10) – that the failure to disclose arose through inadvertence; or that the information was not in the possession of the party at the time that disclosure was required; or that for any other compelling reason it would be manifestly unfair to exclude the evidence – do not apply in this case. CIC Counsel did not consent and the Hearing Committee had no choice but to disallow the proposed expert testimony.

SUBMISSIONS AND ANALYSIS

23. Counsel for the CIC submitted that the first and third allegations are founded on Chapter XI of the Code of Professional Conduct, the relevant portion of which read as follows from the Code that was applicable at the time:

The lawyer shall not:

(a) **Stipulate for, charge or accept any fee that is not fully disclosed, fair and reasonable;**

From the commentary complementary to that rule the following is listed:

Factors to be Considered

1. **A fair and reasonable fee will depend on and reflect such factors as:**

   (a) the time and effort required and spent;
   (b) the difficulty and importance of the matter;
   (c) whether special skill or service has been required and provided;
   (d) the customary charges of other lawyers of equal standing in like matters and circumstances;
   (e) in civil cases the amount involved, or the value of the subject matter;
   (f) in criminal cases the exposure and risk to the client;
   (g) the results obtained;
   (h) tariffs or scales authorized by local law;
   (i) such special circumstances as loss of other employment, urgency and uncertainty of reward;
   (j) any relevant agreement between the lawyer and the client.

A fee will not be fair and reasonable and may subject the lawyer to disciplinary proceedings if it is one that cannot be justified in the light of all pertinent circumstances, including the factors mentioned, or is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty, or undue profit.

The spirit of the rule and commentary as noted by the CIC requires fairness, candor and full disclosure surrounding the fee arrangement based on the fiduciary relationship that exists between lawyer and client.

Allegation #1

24. CIC submitted that with respect to Allegation 1, the Member is guilty of conduct unbecoming a lawyer in that he failed to disclose to the client his hourly rate, fee estimate for the matter or even a range of fees which the client could incur depending on whether the matter turned out to be more or less difficult to conduct and conclude. The Member's counsel argued that the wording of this allegation imported an element of intention and that no evidence existed to prove intentional misconduct on the part of the Member. She based her submission on dictionary definitions of the words "frank" and "candid" contained in the allegation, noting that the definitions required acts marked by sincere expression or suggesting sincere honesty and the absence of deception, free from bias, prejudice or malice. Allegation 1 therefore alleged that the Member was insincere, dishonest, deceptive and malicious, thereby importing a *mens rea* requirement into the allegation, which would require proof of intentional misconduct.

25. With respect, the Committee rejects the Member's argument. The Saskatchewan Court of Appeal in *Merchant v. Law Society of Saskatchewan (2014 SKCA 56)* stated 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.**

26. The words "conduct unbecoming" are defined in *The Legal Profession Act, 1990* as follows:

> **2(d) "conduct unbecoming" means any act or conduct, whether or not disgraceful or dishonourable, that:**
>
> **(i) is inimical to the best interests of the public or the members; or**
>
> **(ii) tends to harm the standing of the legal profession generally;**
>
> **and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii).**

27. What constitutes "conduct unbecoming" varies on the facts of the case and is usually considered, absent the wording noted earlier, a strict liability offence. This summary of conduct unbecoming taken from *The Law Society of Saskatchewan v. Hesje (2013 SKLSS 13)* was also followed in *The Law Society of Saskatchewan v. Phillips (2015 SKLSS 8)*. The Committee adopts that summary in the case at bar.

28. In this case while The Agreed Statement of Facts notes the client's father was aware of the Member's hourly rate, the *viva voce* testimony is clear that S.H. was not aware of the Member's hourly rate until she saw the December, 2009 final billing and did the math to calculate that hourly fee. By that time the existing relationship between the Member and S.H. was over.

29. The Member insisted in his testimony that he had a joint retainer with S.H. and her father and that, as far as he was aware, her father told S.H. the hourly rate. The Committee rejects that version of events. The concept of the joint retainer appears to have been a complete construct made up by the Member after the fact.

30. S.H. and her father only attended one meeting together with the Member which was the initial meeting which occurred because S.H.'s father referred her to his lawyer.

31. Not only was there no clear disclosure of the anticipated costs, but the information regarding costs was confusing. The October 31, 2008 interim account states a nil balance owing after application of the $5,000.00 payment made by S.H.'s father and yet the summary of services bearing the same date shows 49.8 hours expended. Dividing the October 31, 2008 fee total of $3,000.00 by that number of hours would lead to an hourly rate of just over $60.00. The October 28, 2009 "Sample Account" provided to S.H. by the Member in response to her request included hours, but with no corresponding monetary amounts and it was not until the December 1, 2009 final account was rendered, following termination of the solicitor-client relationship between S.H. and the Member, that the full story of the costs of the matter was revealed.

32. On the evidence contained both in the Agreed Statement of Facts and given at the hearing of the matter, this Committee concludes that the Member's conduct in

advising S.H. as to the anticipated costs of the legal matter fell short of the standard that would be expected and amounts to conduct unbecoming.

Allegation #3

33. The third allegation (while also dealing with fees and emanating from the alleged breach of the same Code of Professional Conduct rule as the first allegation), is focused on the actual fee charged rather than disclosure of the anticipated cost.

34. Similar arguments were made by the Member's counsel with respect to the wording of the allegation importing a *mens rea* element. The impugned word from this allegation is "fair" and in the dictionary definition provided by the Member's counsel, means "marked by impartiality and honesty ..." The Member argued that the allegation is therefore that the Member was dishonest and as there was no evidence of the intentional element of dishonesty on the Member's part, it must be dismissed. There is no need to reanalyze that argument, as the Committee rejects it based on the same reasons as provided earlier in this decision with respect to the first allegation. The third allegation takes its wording directly from the relevant Code of Professional Conduct provision and does not import an element of intent.

35. While the commentary to the Code of Conduct rule underpinning the first allegation anticipates fees so disproportionate to the services rendered as to introduce an element of fraud or dishonesty, that is not what is alleged in this

case. Rather, the wording in the Amended Formal Complaint before this Committee alleges conduct unbecoming because the Member did not fully disclose, to use the words of the underpinning rule, "a fee that was fair and reasonable."

36. CIC Counsel focused on the factors to be considered as listed in the commentary to the Code of Professional Conduct rule XI. CIC Counsel also relied on the finding of the Small Claims Court as *prima facie* proof that the Member's account was unreasonable.

37. The Member's counsel also focused on the commentary factors to be considered and argued that the evidence on the relevant factors displaced the findings of the Small Claims judge. To support that contention she noted that:

1. (a) time and effort required and spent – the Member spent numerous hours on S.H.'s family law file over the course of his representation which included efforts aimed at reconciliation as well as establishing a legal basis for spousal support;

   (b) difficulty and the importance of the matter – while some of the matters were quite straightforward such as accounting of the family property, others such as parenting issues were more complex;

(c) whether special skill or service has been required and provided –the immediate issuance of the petition thereby crystallizing S.H.'s claims with respect to the division of family property, child support and spousal support, required a special skill of an experienced family law practitioner;

(d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances – the Member noted that while the Provincial Court decision found a $350.00 hourly rate to be reasonable, the expert relied on by the opposing side in the Provincial Court decision did not have the benefit of reviewing the Member's file and would not have been aware of all of the services provided during his period of representation;

(e) in civil cases the amount involved, or the value of the subject matter –the value of the property was significant;

(f) in criminal cases the exposure and risk to the client – not relevant;

(g) the results obtained – the Member's efforts resulted in the protection of the client's property interests; ensured medical evidence was obtained to support a claim for spousal support if medical circumstances prevented her from returning to work; and put in place satisfactory interim financial arrangements;

(h) tariffs or skills authorized by the Law Society of Saskatchewan – not relevant;

(i) such circumstances as loss of other employment, urgency and uncertainty of reward – the Member's counsel argued special circumstances existed because S.H. was not initially working and had a reduced income on disability thereby elevating her need for interim support; there was an urgent need for medical attention relating to her depression and anxiety and there were parenting issues;

(j) any relevant agreement between the lawyer and the client – the Member's counsel noted that he testified he was jointly retained by S.H. and her father, with S.H. to provide instruction on the final direction and her father to be responsible for payment of accounts.

38. As noted earlier in this decision, this Committee rejects the notion that there was a joint retainer for the reasons already given.

39. Additionally, while it could be argued that the expert testimony accepted in the Small Claims decision was of less weight than it would have been had the expert had the benefit of reviewing the Member's file in full, this Committee is not satisfied that sufficient evidence was given in this hearing to displace the Small Claims Court on the issue of the reasonableness of the Member's fees. Much was made by the Member of the amount of work required to attend a series of four-way meetings between himself, his client and the opposing party and lawyer. However this factor was also considered by the Small Claims Court which still

found that little progress had been made on the file. The Committee notes that at paragraph 61 of that decision, the court states:

> **[61] I am satisfied that this file was more difficult than either Mr. Hunter or Mr. Rusnak believed it to be. The plaintiff did conduct negotiations with counsel for the defendant's husband and had to prepare for and attend a number of "four-way meetings" in an attempt to settle issues in dispute between the defendant and her husband. However, "the results obtained" were abysmal. The plaintiff had made little progress on the file.**

40. Additionally, it is clear from the Small Claims Court decision that the court heard similar evidence with respect to time spent by the Member on S.H.'s medical issues and evidence focusing on the factors of the difficulty and importance of the matter and the results obtained. This Committee can come to no different result as to the issue of the reasonableness of the fee charged. The Committee finds Allegation #3 to be well founded.

Allegation #2(a)(b)

41. The allegations contained in 2(a) and (b) differ from 1 and 3 in that they focus on time spent on the matter by the Member rather than on fees.

42. As noted earlier, allegation 2(a) was restricted to medical issues in a discussion which occurred during the preliminary portion of the hearing. Counsel for the CIC submitted that that time spent was excessive and fruitless, pointing out the various medical reports, none of which concluded that S.H.'s medical issues would be a debilitating matter going forward in her life.

43. On the issue of time spent unnecessarily on medical issues, the Member's counsel noted that a client's instructions to legal counsel in a family law matter typically evolve over the course of a file as circumstances and priorities change. When S.H. initially consulted the Member, she was on disability as a result of her medical issues and it appeared a claim for compensatory and non-compensatory spousal support was important. She noted that at no time did S.H. unequivocally instruct the Member to abandon her spousal support claim for any reason.

44. The Committee finds that this allegation is not made out. The evidence does not indicate that S.H. had clearly and unequivocally instructed the Member to abandon his pursuit of the spousal support claim based on medical issues. In fact, S.H. testified that her emotional state during the relevant times was like that of a roller coaster, vacillating from "okay to not okay" to use S.H.'s words. Indeed it appears that in the beginning of 2009, she instructed the Member to abandon her health problem claims and "get on" with the matter. However by that summer, the parenting issues and the possible recurrence of health issues resulted in a contrary approach by S.H. to the conduct of the file. Consequently, it is the opinion of this Committee that S.H. did not clearly or consistently instruct the Member to abandon the health issues and his efforts in that regard do not amount to conduct unbecoming.

45. With respect to allegation 2(b) that the Member required S.H. to make unnecessary and excessive personal attendances at his office, the Committee is again of the view that the Member's behaviour does not amount to conduct unbecoming. Paragraph 63 of the Agreed Statement of Facts states that S.H. kept the Member advised when she had to be in Regina for reasons unrelated to her legal case. Appointments were scheduled around those dates if possible. S.H. also testified that it was her decision to retain a lawyer outside of her home community. It was also clear from S.H.'s evidence that while she said the numerous office attendances were an inconvenience for her because she had to take time off work without pay, it is noted that in 2008 she was off work with a disability, In 2009 many of the attendances were scheduled for the summer months when she was not working. She also testified that she did not recall ever voicing any concern to the Member about the number of attendances at his office.

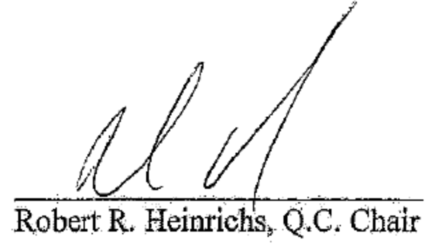
46. Additionally, the Small Claims Court, while commenting on the fact that the Member had an obligation to minimize S.H.'s round trips, also stated that a number of her attendances at the Member's office were occasioned by a legitimate need to meet with him and for the purposes of obtaining initial medical reports.

47. The Committee therefore finds that the Member is not guilty of conduct unbecoming in requiring S.H. to attend at his office unnecessary and excessively.

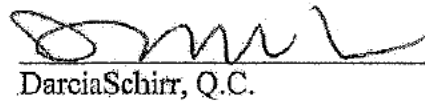
PENALTY HEARING

48. A Penalty Hearing with respect to allegations 1 and 3 will be scheduled in due course.

Dated this 17th day of April, 2018.



Robert R. Heinrichs, Q.C. Chair



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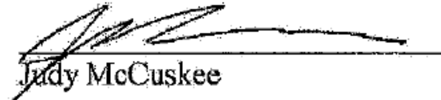

Judy McCuskee