



The Law Society of Saskatchewan

MONTE JAMES SHEPPARD

February 24, 2014

Law Society of Saskatchewan v. Sheppard, 2014 SKLSS 5

**IN THE MATTER OF THE LEGAL PROFESSION ACT, 1990
AND IN THE MATTER OF MONTE JAMES SHEPPARD,
A LAWYER OF KINDERSLEY, SASKATCHEWAN**

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

INTRODUCTION

1. The hearing took place on November 4, 2013. The hearing proceeded by telephone conference call with consent of Mr. Monte James Sheppard (the *Member*), counsel for the Investigation Committee of the Law Society of Saskatchewan, and of the Hearing Committee.
2. The Amended Formal Complaint against the Member, contains two allegations of professional misconduct:

THAT MONTE JAMES SHEPPARD, of the Town of Kindersley, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

- 1. did act against the interests of his former family law client, Ms. E. by representing her former spouse in a related domestic violence matter; and**
- 2. did place himself in a position where he was tempted, or might have appeared to have been tempted, to breach the duty of confidentiality he owed to Ms. E.**

THE EVIDENCE AND THE FACTS

3. The Member signed a Statement of Admissions which was entered in evidence at the hearing as Exhibit P2. At the hearing, the Member offered some additional facts as contextual background to his admissions. Counsel for the Law Society did not object to the additional facts being before the Hearing Committee.

4. The following are the relevant facts:
- a. during a two-year period, the Member represented Ms. E in her family property and child custody action against her former common-law spouse, Mr. E;
 - b. Ms. E disclosed to the Member several instances of physical abuse she had suffered at the hands of her former spouse;
 - c. Mr. E's assaults were a key element of Ms. E's evidence in the child custody action and the Member included details of the assaults in affidavits he prepared for her;
 - d. in 2006, Ms. E moved away from Kindersley and reported the assaults to the R.C.M.P.;
 - e. as a result, the police filed criminal charges against Mr. E including assault with a weapon, pointing a firearm, carrying a weapon for a purpose dangerous to the public, threatening, and common assault;
 - f. the criminal charges were based on the same facts as Ms. E's evidence in her child custody action;
 - g. Mr. E worked out a plea bargain with the Crown prosecutor's office in which he agreed to plead guilty and hired the Member to represent him at his sentencing; and
 - h. Ms. E did not learn that the Member had represented her former spouse at his sentencing until she read about it in a newspaper.

5. At the hearing, the Member stated that by the time Ms. E's former common-law spouse came to see him it was almost three years after his solicitor-client relationship with Ms. E had ended. As Mr. E had worked out a plea bargain with the Crown prosecutor's office, the Member understood that he would be speaking in favour of a joint submission on sentence as opposed to advocating for a lesser sentence than what was being sought by the Crown.

6. The Member understood that, aside from her complaint to the R.C.M.P., Ms. E would not be involved in the sentencing as she had not prepared a Victim Impact Statement and to his knowledge, would not be present in the court.

7. In light of these factors, the Member did not regard representing Ms. E's former common-law spouse as taking an adversarial position against her or even truly advocating on Mr. E's behalf.

8. In response to a question from the Hearing Committee, the Member conceded that he would not have agreed to help Mr. E if the foregoing factors had not been present. For example, he stated that he would have withdrawn as counsel for her former spouse if Ms. E had prepared a

Victim Impact Statement as he would have considered himself to be in an adversarial position against her.

9. In response to questions from counsel for the Investigation Committee and from the Hearing Committee, the Member admitted that his submission to the sentencing judge included Mr. E's version of events which minimized the severity of Mr. E's conduct, and as such, substantially differed from Ms. E's evidence in the child custody action.

10. After hearing the submissions of counsel for the Investigation Committee, the Member admitted that in representing Mr. E at his sentencing it would have appeared that he might have been tempted to breach the duty of confidentiality he owed his former client, Ms. E. We agree and find that the second count of the Amended Formal Complaint is well-founded.

11. This leaves the first count to be decided.

ARGUMENT

12. As the foundation for the first count, counsel for the Investigation Committee referred us to the definition of "conduct unbecoming" in the *Legal Profession Act, 1990*, and to Chapter V of the pre-2012 version of the Code of Professional Conduct and selected commentaries in that chapter:

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;

Code of Professional Conduct, Chapter V

The lawyer shall not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

Commentary

1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client.
2. The reason for the rule is self-evident. The client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from compromising influences.
3. Conflicting interests include, but are not limited to the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.

8. ***A lawyer who has acted for a client in a matter should not thereafter act against him ... in the same or any related matter***, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person.
[emphasis added]

13. The Investigation Committee's counsel submitted that a lawyer must act, at all times, both during and after the solicitor-client relationship, for the sole benefit and in the best interest of their client. This duty of loyalty is paramount to the solicitor-client relationship and to the public's confidence in the integrity of the solicitor-client relationship.

14. In support of his argument, counsel referred us to a few key cases. The first is *Law Society of Upper Canada v. John Leigh Daboll*, 2006 ONLSHP 79. In *Daboll*, a lawyer represented a client in a matrimonial dispute while at the same time carrying on a personal relationship with, and giving legal advice to, his client's unrepresented estranged wife. The hearing panel made the following comments about the law as it pertains to a lawyer's duty of loyalty to their client:

11 At no time was it alleged that the member had used confidential information to the benefit or detriment of either his client or his client's estranged spouse. Conflict of interest, however, goes beyond mere disclosure of confidential information. As Mr. Justice Binnie of the Supreme Court of Canada said in *R. v. Neil*, [2002] 3 S.C.R. 631, at p. 644, "the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role."

15 The duty of loyalty is one of the highest duties a lawyer owes to his client. Quoting again from *R. v. Neil*, the duty of loyalty "endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained...The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation".

15. In *R. v. Speid* (1983) 43 O.R. (2d) 596 (C.A.), a law firm represented Ms. Nugent in a criminal matter for a short period. Mr. Speid was a co-accused. Ultimately, another law firm resolved Ms. Nugent's charges. In the meantime, her former law firm took on Mr. Speid's defence. He and Ms. Nugent had conflicting interests and versions of events as to their respective involvements in the alleged crime. On the eve of Mr. Speid's trial, the trial judge disqualified Ms. Nugent's former law firm from representing him. The Ontario Court of Appeal upheld the trial court's decision and had the following to say about the lawyer's duty of loyalty to a former client:

15 A client has a right to professional services. Miss Nugent had that right as well as Mr. Speid. It was fundamental to her rights that her solicitor respect her confidences and that he exhibit loyalty to her. ***A client has every right to be***

confident that the solicitor retained will not subsequently take an adversarial position against the client with respect to the same subject-matter that he was retained on. That fiduciary duty, as I have noted, is not terminated when the services rendered have been completed. [per Dubin, J.A.; emphasis added]

16. The Investigation Committee's counsel also referred us to the following useful summary of a lawyer's ongoing fiduciary duty to a former client found in *Stewart v. Canadian Broadcasting Corp.*, [1997] O.J. No. 2271 (ONT.C.J.):

302 ... That fiduciary relationship survives the termination of the lawyer and client relationship and the end of the duties which are solely part of it. Paraphrasing Gale, J., in a fiduciary relationship, the agent (read lawyer) is:

- obliged to obey instructions.
- obliged to act solely for the benefit of the principal (read client or former client) in all matters connected with the agency (read subject matter of the retainer).
- prohibited from competing with his principal (read client or former client).
- prohibited from taking unfair advantage of his position either:
 - in the use of the things acquired by him because of the agency (read retainer) or
 - in the use of the opportunities which his position affords.
- prohibited from acting disloyally in matters which are related to the agency (read subject matter of the retainer).

Macdonald J. went on to say:

303 In my opinion, this authoritative and helpful listing of duties was not intended to be all inclusive, and the separate headings were not intended to be regarded as mutually exclusive. If regarded as all-inclusive, this list would close the categories of fiduciary obligations and stifle the ability of the fiduciary remedy to meet new fact situations. ...Gale, J.'s prohibition against disloyalty is frequently expressed as a positive obligation of loyalty. A positive obligation of loyalty is more consistent with the positive obligation to act solely for the benefit of the principal. Consequently, in my view, these categories are best regarded as authoritative examples of underlying principles.

17. Counsel for the Conduct Investigation Committee invited us to give an expansive interpretation to Chapter V of the *Code of Professional Conduct* and the relevant commentaries, in keeping with the expansive definition of "conduct unbecoming" as described in the recent Law Society of Saskatchewan's *Report of the Hearing Committee in the Matters of Joel Arvid Hesje, Q.C. and Timothy Wayne Froese*:

54. Similar to other legislation governing professions, what acts or conduct constitutes “conduct unbecoming” is not specified. These “acts or conduct” are determined on a case-by-case basis and evolve with the standards of practice and ethics. As we observed in our ruling on the Demand for Particulars, the obligations of a lawyer are not reducible to a list of “dos” and “don’ts,” and these obligations required of lawyers a constant and complex process of making choices.

55. As stated by the Saskatchewan Court of Appeal in *Law Society of Saskatchewan v. Merchant*, (2009) SKCA 33, “conduct unbecoming” is the subject of an expansive definition and may be established through intention, conduct, negligent conduct or total insensitivity to the requirements of acceptable practice. Professional misconduct is considered a strict liability offence. ...

57. The *Code of Professional Conduct* sets out guidelines of conduct for lawyers. The Code outlines what kind of conduct [is] expected of lawyers in a range of situations, and this is of assistance in understanding what acts or omissions might constitute “conduct unbecoming.” [italicized word added]

18. Counsel then argued that although Ms. E’s child custody action and her former spouse’s sentencing were different matters, they were related matters because the subject-matter underlying both cases was the former spouse’s assaults on Ms. E. In addition, when the Member presented Mr. E’s version of events, he necessarily minimized what happened to Ms. E. In that sense the Member took an adversarial position against her. In his written brief, at paragraph 13, counsel for the Investigation Committee characterized the Member’s dilemma as follows:

“At best the Member appears inconsistent. At worst, the Member is at risk of making his former client appear to be a liar.”

19. The Member restricted his submission to arguing that the custody action on behalf of Ms. E and the criminal sentencing of her former spouse were completely different and unrelated matters, and as Ms. E was not directly involved in the sentencing process, the Member was not in an adversarial position to her.

CONCLUSION

20. Applying an expansive interpretation to the concept of two legal matters being related to each other, we find that Ms. E’s child custody application and her former spouse’s criminal charges were related matters. The central factual underpinnings, or subject matter, of both was her former spouse’s assaults on her.

21. It is clear that a lawyer’s duty of loyalty to their client does not end when the solicitor-client relationship ends. By representing Mr. E at his sentencing and presenting his version of events, which differed from Ms. E’s version, the Member took an adversarial position against his former client. The Member admitted as much by saying that he would not have agreed to represent Mr. E if his former client, Ms. E, had been involved in any way in the criminal sentencing process.

22. For these reasons, we find that the first count in the Amended Formal Complaint is well-founded.

Signed at Lloydminster, Alberta, on January 6, 2014.

"Miguel Martinez (Chair)"

Signed at Yorkton, Saskatchewan, on January 6, 2014.

"Thomas Campbell"

Signed at Melfort, Saskatchewan, on January 6, 2014.

"Thomas Healey"

PENALTY HEARING DECISION

23. By a written decision dated January 6, 2014, this Hearing Committee determined that Mr. Monte James Sheppard (the *Member*), was guilty of the following acts of professional misconduct described in the Amended Formal Complaint:

THAT MONTE JAMES SHEPPARD, of the Town of Kindersley, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:

- 1. did act against the interests of his former family law client, Ms. E. by representing her former spouse in a related domestic violence matter; and**
- 2. did place himself in a position where he was tempted, or might have appeared to have been tempted, to breach the duty of confidentiality he owed to Ms. E.**

24. On February 24, 2014, a penalty hearing was held by telephone conference call.

25. The Member and counsel for the Conduct Investigation Committee jointly proposed that the Hearing Committee impose the following penalty:

- a. that the Member be reprimanded, and
- b. that the Member pay a \$1,000.00 fine and agreed costs of \$4,230.00.

26. In support of the joint submission, counsel for the Conduct Investigation Committee referred us to two decisions by the Law Society of British Columbia and one from the Law Society of Alberta as he did not find any relevant decisions of the Law Society of Saskatchewan (*LSBC v. Culos*, 2013 LSBC 19; *LSBC v. Rutley*, 2013 LSBC 32; *LSA v. Bishop*, 2012 LSA No. HE20110067).

27. The penalty in each of the British Columbia decisions included a substantial fine and payment of costs. In those cases the breaches of the lawyer's duty of loyalty caused some harm to the legal interests of their former clients. In the Alberta decision the lawyer received only a

reprimand and was ordered to pay costs as he ultimately withdrew as counsel against his former client.

28. The Member has practiced law in Saskatchewan for almost 27 years and has no prior discipline history. He co-operated with the Law Society of Saskatchewan throughout the investigation of his conduct and the hearing proceeded on an Agreed Statement of Facts. The Member's ill-advised decision to represent his former client's ex-spouse at his sentencing on criminal charges stemming from their common-law relationship did not harm his former client's legal interests.

29. The Hearing Committee is not concerned about the Member's future conduct. In this case, the primary sentencing consideration is general deterrence, as the lawyer's duty of loyalty is central to maintaining the public's confidence in the legal profession.

30. For these reasons, the Hearing Committee finds that the joint submission on penalty is fit, reasonable, and not contrary to the public interest.

31. The Hearing Committee orders that the Member:

- a. be reprimanded,
- b. must pay a \$1,000.00 fine,
- c. must pay costs in the amount of \$4,230.00, and
- d. must pay the fine and costs on or before June 30, 2014, or such later date as the Chair of the Discipline Committee may allow.

Signed at Lloydminster, Alberta, on February 24, 2014.

"Miguel Martinez (Chair)"

Signed at Yorkton, Saskatchewan, on February 28, 2014.

"Thomas Campbell"

Signed at Melfort, Saskatchewan, on February 28, 2014.

"Thomas Healey"

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Amended Formal Complaint dated July 26, 2012 alleging that he:

- 1. did act against the interests of his former family law client, Ms. E. by representing her former spouse in a related domestic violence matter; and**
- 2. did place himself in a position where he was tempted, or might have appeared to have been tempted, to breach the duty of confidentiality he owed to Ms. E.**

JURISDICTION

32. Monte James Sheppard (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.

33. The Member is currently the subject of an Amended Formal Complaint dated July 26, 2012. The Amended Formal Complaint is comprised of the allegations noted above. The original Formal Complaint was served upon the Member on July 18, 2012. Attached at **Tab 2** is a copy of the original and Amended Formal Complaint along with proof of service in the form of an Acknowledgement of Service.

BACKGROUND OF COMPLAINT

34. This matter came to the attention of the Law Society of Saskatchewan when Ms. E filed a written complaint against the Member. Ms. E learned via the newspaper that the Member had represented her ex-spouse on charges of assault wherein she was the victim that had occurred during their common law relationship. The Member had represented Ms. E during the couple's separation proceedings where the details of the abuse were highly relevant.

PARTICULARS OF CONDUCT

35. In 2004, Ms. E was separating from her common law spouse and required a lawyer to handle the property settlement and child custody. As she was living in Kindersley at the time, she chose the Member to represent her.

36. Ms. E had been the victim of domestic violence during her common law relationship and detailed her abuse at the hands of her common law spouse to the Member. While the incidents were not reported to the RCMP at that time, the Member drew up affidavits regarding the incidents and collected witness statements.

37. In 2006, Ms. E moved from Kindersley. She reported the domestic abuse to the RCMP and assault charges were laid against her former common law spouse. Attached at **Tab 3** are two informations pertaining to Mr. E and his charges in connection with Ms. E, then known as Ms. P. The charges included, from 2002, assault with a weapon, pointing a firearm, carrying a weapon for a purpose dangerous to the public and threatening, as well as a common assault charge from 2005. The Member was aware of the substance of these charges while he represented Ms. E and prepared Affidavits detailing some of the events relevant to Mr. E's charges.

38. In 2009, Ms. E learned from the newspaper that her former spouse had pled guilty to assault and had been sentenced. She was shocked to discover that the Member had represented her ex-spouse on his charges given that they pertained to assaults against her. The Member had advised her in relation to these same occurrences matters to the extent that they impacted her family matters and spoke with her about reporting these matters to police.

39. The Member states that in March of 2009, Mr. E, the common-law spouse of Ms. E, came to his office. Mr. E had been representing himself on the assault charges but indicated that he was going to plead guilty and needed assistance with sentencing.

40. From the Member's notes dated, March 10, 2009, he indicates that the charges were assault and assault with a weapon. Details include, "She said fired 2 shots – in garage at her"

and “she says – grabbed throat – punching etc.” The date set for trial was April 28, 2009. A further note indicates, “if guilty to all cond’l Discharge + Firearm prohib 1 yr”. The Member would have already known the details of the assaults as he had taken affidavits and witness statements pertaining to the same incidents when he was representing Ms. E.

41. Ms. E did not provide a Victim Impact Statement in relation to the criminal matters. Ms. E. was not involved in any of the Court proceedings in relation to the criminal matters of Mr. E.

42. The Member, at the time he represented Mr. E, was in possession of information pertaining to the assaults upon Ms. E that he only obtained as a result of his solicitor-client relationship with her. He obtained this information in the preparation of Affidavits for use in the family law matter as well as meetings and other interactions with Ms. E. Information was provided to him by Ms. E. in confidence and within the context of the solicitor-client relationship.

43. The Member accepted Mr. E. as a client and represented him in a matter closely tied to the subject matter of his solicitor-client relationship with Ms. E.

44. While the Member represented the two clients in connection with the same events, the interests of each client differed greatly and the Member’s characterization of the events in question would have differed in the family matter from the sentencing matter.

PRIOR HISTORY

45. The Member has no other discipline history.