



The Law Society of Saskatchewan

DARYL SHIRKEY

HEARING DATE: June 11, 2014

DECISION DATE: July 28, 2014

Law Society of Saskatchewan v. Shirkey, 2014 SKLSS 9

**IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF **DARYL SHIRKEY,**
A LAWYER OF DAVIDSON, SASKATCHEWAN**

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

1. The Hearing Committee of the Law Society of Saskatchewan (the "Hearing Committee"), comprised of Brenda Hildebrandt, Q.C. as Chair, Greg Stevens, Ph. D., and David Rusnak, convened on Wednesday, June 11, 2014 to hear this matter. Counsel for the Conduct Investigation Committee was Timothy F. Huber. Michael Tochor, Q.C. represented the member. All parties participated by conference call.
2. At the hearing, Daryl Shirkey (the "Member") pled guilty to the allegations of conduct unbecoming a lawyer, as outlined in the Formal Complaint dated October 16, 2013, which were that he:
 - i. did fail to perform legal services undertaken on behalf of his clients G.S. and B.S., namely the preparation of a Separation Agreement and Interspousal Contract, to the standard of a competent lawyer; and
 - ii. did continue to act for one party to a joint retainer where there was or was likely to be a conflicting interest, without the consent of the other party.
3. An Agreed Statement of Facts was filed in relation to this matter, a copy of which is appended to this Decision.
4. After receiving the Agreed Statement of Facts and hearing the submissions of Mr. Huber and Mr. Tochor, Q.C., the Hearing Committee accepted the Member's guilty plea and heard the representations by the parties regarding penalty.

BACKGROUND

5. The Law Society began an investigation into the Member after receipt, on May 29, 2012, of a complaint raising concerns about the Member's preparation of a Separation Agreement and Interspousal Contract in 2010, particularly in relation to the absence of independent legal advice for either party. The Member's later conduct in 2012, in providing a legal consultation to one party to a joint retainer without the consent of the other, also came to light as the parties pursued divorce proceedings.

6. Although the facts are outlined in the attached Statement of Facts, several matters are noteworthy in the context of the decision of the Hearing Committee, so are briefly summarized in the following.

7. The Member's clients, a husband and wife, who were described to the Hearing Committee as relatively sophisticated in legal matters, had tentatively agreed on terms of their separation and wished to have the Member formalize the agreement. The preference was expressed, however, to not have another lawyer involved. Although aware of the requirement of independent legal advice as set out in section 38 of *The Family Property Act*, the Member acquiesced, indicating that he could provide such independent legal advice to both the husband and wife. He amended his standard form of agreement, noting that the parties ". . . wish to dispense with the need to see separate lawyers."

8. In proceeding as he did, the Member failed to provide his clients with a valid agreement which satisfied the applicable legislation, thus leaving each party exposed to future claims by the other. Indeed, in the subsequent divorce action, the wife did seek to re-open several aspects of the agreement. Ultimately these were resolved by incorporation of the substantive terms from the original Separation Agreement and Interspousal Contract in the resolution of the divorce. However, additional legal fees were incurred in finalizing matters.

9. Regarding the second element of the Formal Complaint, when the husband commenced divorce proceedings in 2012, his counsel in Alberta had the Member serve documents on the wife. In doing so, the Member met with the wife and her perception was that he was providing legal advice to her alone. The Member subsequently wrote to the husband's counsel, raising concerns about financial support for the wife. Accounts were rendered to the husband, both in relation to service of documents and in relation to the legal advice provided to the wife. The husband, however, had not consented to the Member providing advice to the wife.

10. The Member has no prior discipline history and cooperated with the Law Society investigation.

SUBMISSIONS ON PENALTY

11. Upon acceptance by the Hearing Committee of the Member's guilty plea, counsel for the Conduct Investigation Committee and counsel for the Member made a joint submission on penalty. This was that the Member should receive a global reprimand, and be required to pay a fine of \$1,000.00 in relation to the first finding of conduct unbecoming a lawyer, a fine of \$500.00 regarding the second finding, and costs in the amount of \$750.00.

12. In support of the joint submission, counsel for the Conduct Investigation Committee first referred the Hearing Committee to the case of *Law Society of Saskatchewan v. Sheppard*, 2014 SKLSS 5, to illustrate a comparable penalty, particularly in relation to the second allegation outlined in the Formal Complaint. There a reprimand was imposed, and a fine of \$1,000.00 and costs of \$4,230.00 were ordered to be paid, in circumstances where the Mr. Sheppard was found to have acted against the interests of his former family law client by representing her former spouse in a related domestic violence matter.

13. Before this Hearing Committee, counsel for the Conduct Investigation Committee also raised the spectrum of conduct subject to discipline, and noted that the actions of the Member in the case at hand were more than negligent in that they exhibited a reckless, or even willful, disregard for the statutory requirements of *The Family Property Act*. To illustrate these concepts, counsel referred the Hearing Committee to the following cases: *Law Society of British Columbia v. Martin*, [2005] L.S.D.D. No. 118; *Law Society of British Columbia v. Bjorkman*, [1994] L.S.D.D. No. 121; *Law Society of British Columbia v. Bhatti*, [2000] L.S.D.D. No. 31; and *Nova Scotia Barristers' Society v. Richey*, [2002] L.S.D.D. No. 30.

14. In the first three of these cases, the concept of gross negligence is emphasized in the considerations of the respective hearing committees. In the latter, Richey, the headnote summarizes the findings of the hearing committee without reference to such a classification of behaviour:

"Lawyer 'A' was found guilty of professional incompetence and professional misconduct in that he failed in his duty to his clients to be competent to perform all legal services undertaken on their behalf, failed in his duty to serve his clients in a conscientious, diligent, efficient and civil manner so as to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation, and failed to advance his clients' cases and expedite litigation and/or settle matters in an expeditious manner for clients. His conduct demonstrated a pattern of neglect and unprofessional conduct that constituted a failure to comply with his duties."

15. While this Hearing Committee accepts that a discussion of the spectrum of behaviour is of general assistance, it is also of the view that a strict classification of conduct may not be necessary. The Richey decision demonstrates that the consideration must be whether the lawyer complied with his duties. The Sheppard decision reinforces that "conduct unbecoming" is an "expansive definition," consistent with other recent Saskatchewan decisions. In applying such an "expansive definition," the hearing committee in Sheppard stated, at paragraph 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.'"

16. In considering the conduct of Mr. Shirkey, and assessing the penalty, this Hearing Committee looks to the definition of "conduct unbecoming" outlined in section 2(1) (d) of *The Legal Profession Act, 1990*:

"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)."

17. Had the Member not been aware of the provisions of *The Family Property Act*, his failure to ensure that the parties each had independent legal advice could well be considered as a lack of competence and, therefore, conduct unbecoming under the definition contained in *The Legal Profession Act, 1990*. Similarly, his oversight in failing to respect the limits of a joint retainer, and providing advice to one client that conflicted with his duty to the other client, does not require an aspect of intent to constitute conduct unbecoming. In both instances, he failed in his duty to his clients. However, particularly in the context of the first allegation, Mr. Shirkey's actions were deliberate.

18. The Law Society of Saskatchewan Code of Professional Conduct, effective July 1, 2012, highlights several of the duties pertinent to this case. Excerpts from both the Code requirements and the applicable commentary regarding the duty of competence are as follows:

"2.01(2) A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

"Commentary

"As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

"Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises . . .

"The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect . . .

"This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action."

19. In failing to insist that his clients obtain independent legal advice, the Member bowed to their expressed desire to complete the agreement quickly and without the additional cost and inconvenience of attending upon separate lawyers. The Member acquiesced, knowing that the resulting agreement did not meet the requirements of *The Family Property Act*. He placed each of them at risk that the agreement could be reopened, and this risk ultimately materialized. In short, he failed to assert his role as their lawyer and provide the advice and direction for which he had been retained. The Hearing Committee notes that although it may sometimes be difficult to disagree with the strongly expressed wishes of a client, the role of a legal professional in providing sound guidance requires such vigor.

20. The Member's actions in relation to the Separation Agreement and Interspousal Contract were intentional. He amended his standard form of agreement to reflect that the strict requirements of the legislation were not being met. He further provided an assurance to the clients that he could provide both of them with independent legal advice and "that this was not unheard of in rural communities." When questioned by this Hearing Committee on what basis this assertion was made, the Member effectively acknowledged that this was an inaccurate statement. He noted that even in a small, rural community there are many family agreements prepared and clients are sent to other lawyers to obtain independent advice, although "there are not a lot of lawyers to choose from." He further indicated that he did not believe at the time, and does not believe now, that there is a "habit" of lawyers providing both parties to an agreement with "independent advice" as he did in this case. Thus, the Member's conduct not only placed his clients at risk, but his misrepresentation clearly undermined the standing of the legal

profession generally. Both of these aspects are of considerable concern to this Hearing Committee.

21. The joint submission in relation to the first matter outlined in the Formal Complaint called for a fine of \$1,000.00. While, given the very deliberate nature of the conduct, this amount may perhaps be on the lower end, the Hearing Committee accepts that a fine in this amount, coupled with the reprimand, is within the acceptable range of penalty in the circumstances. Factors which mitigate against a higher amount were presented by both counsel and include: the Member has had a lengthy legal career without any prior disciplinary history; the Member neither sought nor gained any benefit from the conduct in question; the Member's purpose was not malicious but merely to make the process more convenient for his clients; the impact of the Member's conduct was, fortunately, limited; and the incident was an isolated one, which has resulted in considerable professional embarrassment for the Member, reducing the need for any further individual deterrence or rehabilitation measures.

22. Regarding the second allegation in the Formal Complaint, relating to the Member having provided a legal consultation with one party to a joint retainer in circumstances of a conflicting interest, without the consent of the other, the Code of Professional Conduct also provides guidance. Subsections 2.04(6) and (10) state:

"2.04(5) Before a lawyer acts in a matter of transaction for more than one client, the lawyer must advise each of the clients that:

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

"2.04 (10) Unless the former client consents, a lawyer must not act against a former client in:

- (a) the same matter,
- (b) any related matter; or
- (c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client."

The Commentary to subsection 2.04(10) provides that "This rule prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer."

23. Before this Hearing Committee, counsel for the Conduct Investigation Committee noted that, unlike the lawyer in the Sheppard case who continued with his representation in the conflict situation, the Member here did quite promptly cease providing advice to the wife. This fact, coupled with the mitigating factors noted above in relation to the first allegation, support a fine of less than that imposed in Sheppard. Accordingly, the Hearing Committee accepts that a fine

of \$500.00, along with the reprimand, in relation to the second finding of conduct unbecoming is appropriate in the circumstances.

DECISION

24. Having considered the submissions on penalty as outlined above, taking into account both the nature of the conduct and the mitigating factors, the Hearing Committee finds that the submission pertaining to penalty is reasonable and makes the order sought.

25. It is therefore ordered that the Member be subject to a formal reprimand, that he pay a fine in the amount of \$1,000.00 in relation to the first allegation in the Formal Complaint, and that he pay a fine of \$500.00 in relation to the second allegation. In addition, the Member shall pay the costs of this proceeding in the amount of \$750.00. The costs and fine shall be payable by September 30, 2014.

"Brenda Hildebrandt"
Brenda Hildebrandt, Q.C. (Chair)

"July 28, 2014"
Date

"Greg Stevens"
Greg Stevens, Ph.D.

"July 28, 2014"
Date

"David Rusnak"
David Rusnak

"July 28, 2014"
Date

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated October 16, 2013, alleging the following:

THAT DARYL SHIRKEY, of the Town of Davidson, in the Province of Saskatchewan:

- 1. did fail to perform legal services undertaken on behalf of his clients G.S. and B.S., namely the preparation of a Separation Agreement and Interspousal Contract, to the standard of a competent lawyer; and**
- 2. did continue to act for one party to a joint retainer where there was or was likely to be a conflicting interest, without the consent of the other party.**

JURISDICTION

26. Daryl Shirkey (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.

27. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated October 16, 2013. The Formal Complaint is comprised of the allegations noted above. The original Formal Complaint was served upon the Member on October 21, 2013. Attached at Tab 2 is a copy of the original Formal Complaint along with proof of service. The Member intends to plead guilty to the allegations set out in the Formal Complaint.

BACKGROUND OF COMPLAINT

28. The Law Society began an investigation into the Member after receipt of a complaint from B.S. on May 29, 2012. B.S. raised concerns about the Member’s preparation of a Separation Agreement and Interspousal Contract (the “Agreement”) between him and his spouse G.S. Two years after the Agreement was signed, B.S. had moved to Alberta and applied for a divorce. His then counsel identified problems with the manner in which the Member represented both B.S. and his then wife on the Agreement, specifically the implications of the Member’s failure to obtain independent legal advice for either party to the Agreement.

PARTICULARS OF CONDUCT

Allegation #1 – Failure to Provide Competent Service

29. In May of 2010 B.S. attended at the office of the Member in Davidson. B.S. and his then wife G.S., residents of the nearby town of Craik, Saskatchewan, had decided to separate. B.S. and G.S. had previously used the Member for unrelated legal services in 2008.

30. When B.S. first attended with the Member he presented the Member with the terms of a tentative agreement between him and G.S. for a separation agreement that they wanted the Member to formalize in proper written form. The Member accepted this file and subsequently prepared a draft for B.S. to review.

31. After B.S. had reviewed the draft agreement, he attended with the Member to make necessary changes. During this meeting B.S. raised with the Member questions about the standard clause in the draft agreement that independent legal advice for one of the parties would be required. G.S. had indicated to B.S. that she did not want to get another lawyer involved. The Member’s response was to tell B.S. that he could provide “independent legal advice” to both of them and that this was not unheard of in rural communities.

32. The Member was, at the time, aware of the fact that the requirement of independent legal advice is mandatory according to section 38 of *The Family Property Act*.

33. The Member altered his standard form of agreement and added the following paragraph as clause 14(f):

“Notwithstanding of the need for separate lawyers, the parties agreed that each has received independent legal advice from their lawyer, Daryl Shirkey, and wish to dispense with the need to see separate lawyers”

34. The Member proceeded to meet with B.S. for the signing of the agreement and then subsequently with G.S. The Member signed as a witness to the signatures of B.S. and G.S. on both the Agreement and the Acknowledgement where both parties confirmed that they signed the Agreement voluntarily and that they were aware of the nature of the Agreement. The Member then completed the Certificate of Solicitor for both B.S. and G.S. and two Affidavits of Witness. The Agreement is attached at Tab 3. The Member billed B.S. \$1,400.00 in fees plus tax. The Member’s account is attached at Tab 4. Neither G.S. nor B.S. received proper independent legal advice.

35. The Member’s decision to proceed as he did, purporting to give “independent legal advice” to both parties to the Agreement, rendered the agreement void. The Member entirely defeated the purpose of B.S. and G.S. formalizing their informal separation arrangement. The Member’s decision left each party exposed to future claims by the other.

36. In 2012, B.S. applied for a divorce in Alberta. In the context of this process, G.S. sought to reopen the issue of spousal support and division of assets. Both of these issues had been settled in the Agreement prepared by the Member in 2010. However, the manner in which the Member purported to provide “independent legal advice” to both parties, placed B.S. in a very weak position vis-à-vis these claims. B.S. had none of the protection or finality he thought he had in relation to these issues due to the fact that the Agreement was void.

37. B.S. ultimately resolved his issues with G.S. and her attempt to reopen issues of spousal support and division of assets, and did not have to pay any additional amounts to G.S. B.S. did, however, incur additional and increased legal fees in finalizing his divorce as a result of the Member’s actions. The terms of the Agreement were eventually incorporated into the divorce process.

Allegation #2 – Conflict of Interest Between Clients

38. In 2012 when B.S. commenced divorce proceedings in Alberta he engaged the Member to serve documents on G.S. in Craik. When the Member served G.S., he met with her and discussed with her various issues surrounding her situation vis-à-vis B.S. G.S. perceived the Member as providing legal advice on the matter to her, and her alone. Ultimately, after the discussion with G.S., the Member prepared a follow-up letter to counsel for B.S. [Tab 5]. In the Member’s letter he raised a number of concerns to counsel for B.S. The letter highlighted the views of G.S. that B.S. should be providing financial support for her and that she was interested in an equalization of B.S.’s pension. Issues of life insurance and health benefits were also raised. The Member provided two legal accounts to counsel for B.S. to pay. One account was for the service of documents on G.S. The other account was in relation to the consultation the Member had provided to G.S. and the follow-up letter. The Member’s two accounts are attached at Tab 6.

39. The Member provided a legal consultation to G.S., one party to a joint retainer, when there was a conflicting interest with the other party, B.S. The Member did this without the consent of B.S.

PRIOR HISTORY

40 The Member has no prior discipline history.