The Law Society of Saskatchewan

HENRY SIWAK
HEARING DATE: May 18, 2017
DECISION DATE: June 13, 2017
***Law Society of Saskatchewan v. Siwak*, 2017 SKLSS 6**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF HENRY SIWAK,
OF PRINCE ALBERT, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Members of the Hearing Committee: Craig Zawada, Q.C., Chair
David Brundige, Q.C.
Nikki Rudachyk

Counsel: Marcel Simonot, Q.C.,
on behalf of the Member, Henry Siwak
Timothy F. Huber,
on behalf of the Conduct Investigation Committee

INTRODUCTION

1. The Hearing Committee of the Law Society of Saskatchewan (the "Hearing Committee"), comprised of Craig Zawada, Q.C., as Chair, David Brundige, Q.C, and Nikki Rudachyk, convened on Thursday, May 18, 2017 to hear this matter. Counsel for the Conduct Investigation Committee was Timothy F. Huber, and Marcel Simonot, Q.C. represented Henry Siwak (the "Member"). All parties participated by conference call.

2. Neither Mr. Huber nor Mr. Simonot had any objections to the constitution of the Hearing Committee, the conference call format for the Hearing, or any other matter relating to the proceedings giving rise to the hearing.

3. At the Hearing, the Member pled guilty to the allegations of conduct unbecoming a lawyer, as outlined in the Formal Complaint dated August 9, 2016, which were that he:

i. did, without the approval of the Court, enter into a contingent fee agreement for legal services related to a matrimonial property matter.

4. An Agreed Statement of Facts was filed in relation to this matter. A copy of these Facts, which were marked as Exhibit P-2 at the Hearing, is appended to this Decision.

5. After receiving the Agreed Statement of Facts and hearing the submissions of Mr. Huber and Mr. Simonot, the Hearing Committee accepted the Member's guilty plea, made a finding of conduct unbecoming a lawyer in relation to the allegation, and heard the representations by the parties regarding penalty.

BACKGROUND

6. The Law Society began an investigation after receipt of a complaint dated February 11, 2016 from K.G., a former client of the Member.

7. As detailed in the Agreed Statement of Facts, there was a dispute between the Member and K.G. over fees in a matrimonial property matter. The Member ultimately charged K.G. fees based on a percentage of the property settlement amount.

8. On March 10, 2016, the Member advised the Law Society he had overlooked Rule 1502(b) which prohibits the charging of a contingency fee on a matrimonial property matter.

SUBMISSIONS ON PENALTY

9. Upon acceptance by the Hearing Committee of the Member's guilty plea, counsel for the Conduct Investigation Committee and counsel for the Member, during the conference call of May 18, 2017, made a joint submission on penalty. They submitted the Member should receive a reprimand, pay a fine in the amount of $2,000.00, and be required to pay costs in the amount of $1,250.00.

10. While there are no cases directly on the point of Rule 1502(b) and matrimonial contingent fee agreements, counsel did provide the Hearing Committee with decisions where there was a failure to comply with contingent fee retainer rules.

11. In *Law Society of Alberta v. Collins*, [2004] L.S.D.D. No 19, a Member faced three citations, and was found guilty of one, for using a contingency agreement which was contrary to the Rules of Court at the time regarding taxable costs. The agreement in question had been used for four clients, and the Member had not taken any corrective action to provide restitution to the clients. These, together with the Member’s previous disciplinary record, were cited as aggravating factors in seeking a suspension from practice. The panel declined to impose a suspension, instead administering a reprimand, a fine of $4,000.00, and one half of actual costs of the hearing.

12. The Member in *Law Society of British Columbia v. Chiasson* [2014] L.S.S.D. No. 178 had utilized a contingent fee agreement which was contrary to B.C.’s *Legal Profession Act*. He was also accused of and found guilty of professional misconduct for failing to take steps and communication in a timely manner with respect to the same client. After also being found guilty

for the contingent fee agreement charge, he was fined $4,500.00 and assessed costs of $1,000.00 The panel noted he had no relevant disciplinary history, he had cooperated during the investigation and admitted professional misconduct at an early stage.

13. The final case cited by counsel was *Law Society of Upper Canada v. Jesudasan*, [2016] L.S.D.D. No. 256. The lawyer was found guilty of professional misconduct by failing to obtain the required judicial approval regarding two contingency fee retainer agreements and by failing to deposit retainer funds received from a client into a trust account. Based on a joint submission, the lawyer was suspended for one month, ordered to repay his client $5,750.00 and to pay costs of $3,500.00. While there were few aggravating factors, and no disciplinary history, it was noted at para. 32:

> "In the present case, as the Law Society indicated, a reprimand might have been considered for either one of the particulars. With the two matters combined a more serious penalty is reasonable."

14. While the three cases cited by counsel and noted above resulted in penalties greater than that jointly submitted here, they each involve some element of aggravation or additional wrongdoing beyond that exhibited in the current circumstances. In *Collins* there were multiple clients involved, the lawyer had a prior disciplinary record, and he had not taken any corrective actions. *Chiasson* involved not just a breach of the rules for contingent fee agreements but also a further charge of professional misconduct regarding acceptable levels of service. And in *Jesudasan* there were also two charges, including the contingent fee agreement breach. The other charge related to trust account issues, which is often held to a higher standard of care.

15. The Member in the current case apparently overlooked Rule 1502(b), and there is no evidence this was through other than inadvertence. It is the only charge in these proceedings, and he has no prior disciplinary history. He did refund a portion of the fees billed and collected to the complainant. He has been cooperative throughout and did acknowledge quickly he had transgressed the Rule.

16. There was mention at the hearing of the purpose of Rule 1502(b) and whether its goals had been violated in the specific circumstances of this case. Some arguments have been made that the purpose of such a rule is to reduce the temptation by lawyers to get in the way of settlements or reconciliations in matrimonial matters where a percentage is ultimately charged as fees. Whether this rationale is correct is an interesting issue but did not factor into the Hearing Committee's decision. The plain fact is Rule 1502(b) exists in Saskatchewan and the Member frankly admitted he had overlooked it.

CONSIDERATION OF JOINT SUBMISSION

17. In asking the Hearing Committee to consider the joint submission, counsel for the Conduct Investigation Committee provided a summary of the law of Joint Submissions, both in the Court context and the Regulatory (Discipline) context. This summary was helpful to the Hearing Committee as it referenced a number of cases outlining the factors relevant to how a panel should approach a joint recommendation on penalty.

18. In considering this matter, the Hearing Committee is mindful of the obligation of the Law Society to protect the public interest. Sections 3.1 and 3.2 of *The Legal Profession Act,* S.S. 1990-91, c. L-10.1 mandate this:

> 3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:
>
> (a) to act in the public interest;
> (b) to regulate the profession and to govern the members in accordance with this Act and the rules; and
> (c) to protect the public by assuring the integrity, knowledge, skill, proficiency and competence of members.
>
> 3.2 In any exercise of the society's powers or discharge of its responsibilities or in any proceeding pursuant to this Act, the protection of the public and ethical and competent practice take priority over the interests of the member.

19. It is well established that joint submissions concerning penalty should not be disregarded by hearing committees of the Law Society if the proposed penalty is within the range of outcomes in similar cases and is responsive both to the type of conduct established and the particular circumstances of the member. [See *Rault* v *Law Society of Saskatchewan,* 2009 SKCA 81; as cited and followed in *Law Society of Saskatchewan v Wilson,* 2011 SKLSS 8.]

20. In *Law Society of Upper Canada v. Orzech*, [1996] L.S.D.D. No. 56, it was stated at page 6:

> "Joint submissions concerning penalty should not lightly be disregarded by the Committee, particularly when they are the outcome of an extended period of discussions and negotiations through the pre-hearing conference process. Where joint submissions concerning penalty are wholly inappropriate having regard to the nature of the conduct involved then such joint submissions can and should be disregarded; however, when the joint submissions are not inappropriate and they are responsive to both the type of conduct established an the particular circumstances of the Solicitor, it is the Committee's view that only in rare circumstances and considerable caution should the Committee disregard such joint submissions concerning penalty."

21. This deference to a joint submission is noted in other cases, and there must be strong reasons to disregard one. This is not a blanket approval process or rubber stamp, however. The public interest and protection role of the Law Society was further outlined in *Law Society of Saskatchewan v. Martens*, 2016 SK LSS 12 at paras. 41-42:

> "Further, at paragraph 28 of the *Rault* [*Rault* v *Law Society of Saskatchewan,* 2009 SKCA 81] decision, in describing what reasons a Discipline Committee must provide for rejection of a joint submission on penalty, the Court of Appeal noted four considerations. These are whether the penalty proposed is:

i) inappropriate;
ii) not within the range of sentences;
iii) unfit or unreasonable; and/or
iv) contrary to the public interest.

In order to assess these four elements and how they address the particular circumstances of the Member, sufficient information must be provided to the Hearing Committee. While certainly there is respect for all counsel involved in the investigation and negotiation processes, and the confidential nature of such processes, it is the Law Society which is couched with the responsibility of acting in the public interest in the exercise of its powers and the discharge of its responsibilities. As such, a Hearing Committee cannot rely blindly upon the recommendations of counsel.

22. After hearing from counsel and considering the authorities, it is the Hearing Committee's view that the joint submission is within the range of sentences for similar cases, it is not unreasonable or inappropriate, and it is not contrary to the public interest.

DECISION

23. Having considered the submissions on penalty as outlined above, taking into account the nature of the conduct and the mitigating factors, and being satisfied that the joint submission is in the public interest, the Hearing Committee will accept the joint submission.

24. The Hearing Committee therefore orders that:

a. the Member shall receive a formal reprimand with respect to the finding of conduct unbecoming pursuant to the allegations outlined in the Formal Complaint dated August 9, 2016;

b. the Member shall pay to the Law Society of Saskatchewan a fine of $2,000.00 on or before August 1, 2017; and

c. the Member shall pay the costs of these proceedings to the Law Society of Saskatchewan in the amount of $1,250.00 by August 1, 2017.

"Craig Zawada, Q.C. (Chair)" June 13, 2017

"David Brundige, Q.C." June 12, 2017

"Nikki Rudachyk" June 13, 2017

AGREED STATEMENT OF FACTS AND ADMISSIONS
BETWEEN HENRY SIWAK AND
THE LAW SOCIETY OF SASKATCHEWAN

In relation to the Formal Complaint dated August 9, 2016, alleging the following:

> **THAT HENRY SIWAK, of the City of Prince Albert, in the Province of Saskatchewan is guilty of conduct unbecoming a lawyer in that he:**
>
> **1. did, without the approval of the Court, enter into a contingent fee agreement for legal services related to a matrimonial property matter.**

JURISDICTION

25. Henry Siwak (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").

26. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated August 9, 2016. The Member agrees to enter a guilty plea to the sole allegation set out in the Formal Complaint.

ORIGIN OF COMPLAINT

27. The Law Society began an investigation into the Member after receipt of a complaint dated February 11, 2016 from K.G. The complaint arose from the Member's involvement with K.G. in regard to preparation of a Separation Agreement and equal distribution of matrimonial property.

PARTICULARS

28. On July 20, 2015, K.G. attended at the Member's office to have a draft Separation Agreement reviewed to ensure an equal distribution of matrimonial property between herself and her husband, L.G. In her complaint, K.G. advised the Law Society that the Member indicated his fee would be $325.00/hour.

29. Over the next few months, once the financial disclosure was provided by L.G.'s solicitor, the Member and L.G.'s solicitor calculated a figure that would result in the equal distribution of the matrimonial assets.

30. On December 15, 2015, L.G.'s solicitor provided the final calculations and the final draft of the Separation Agreement for review by K.G.

31. On December 16, 2015, the Member attended at K.G.'s residence to review the draft Separation Agreement. The Member then advised L.G.'s solicitor that K.G. was satisfied with the draft Separation Agreement.

32. On December 23, 2015, L.G.'s solicitor sent the Member four copies of the Separation Agreement and the Transfer of Ownership for the 2010 Honda CR-V.

33. On January 7, 2016, the Member attended at K.G.'s residence and reviewed the Separation Agreement. K.G. signed the document with the Member in attendance. The Member then advised K.G. his fee would be 3.5% of the settlement amount. Nothing in relation to the 3.5% fee was reduced to writing.

34. On January 18, 2016, the Member sent his final report and Statement of Account in the amount of $15,566.38 to K.G. The Member's letter included the following in reference to his charging of a "commission" on a settlement in excess of $400,000.00:

> **The total settlement on your behalf was $404,321.82. As indicated to you, our commission was 3.5% and we gave you credit for the payments made on account.**

35. Shortly after receiving the final account, K.G. hired a new solicitor to proceed with an assessment of the Member's Statement of Account. K.G. did not proceed with the assessment and made an agreement with the Member, who refunded her $7,000.00.

36. On March 10, 2016, the Member advised the Law Society he had overlooked Rule 1502(b) which prohibits the charging of a contingency fee on a matrimonial property matter.

PRIOR HISTORY

37. The Member has no prior discipline history.