



The Law Society of Saskatchewan

DARBY BACHYNSKI

HEARING DATE: May 7, 2018

DECISION DATE: May 29, 2018

Law Society of Saskatchewan v. Bachynski, 2018 SKLSS 5

**IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF **DARBY BACHYNSKI,**
A LAWYER OF REGINA, SASKATCHEWAN**

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

I. INTRODUCTION

1. A Hearing was conducted by teleconference on May 7, 2018 before a Hearing Committee comprised of Sean Sinclair (Chair), Greg Chovin, and David Rusnak, Q.C. Darby Bachynski ("the Member") was unrepresented at the Hearing. Timothy F. Huber represented the Conduct Investigation Committee ("the CIC"). There were no objections to the constitution or jurisdiction of the Hearing Committee. There were no preliminary applications or objections.

2. The Formal Complaint against the Member alleges the Member is guilty of conduct unbecoming a lawyer in that she:

(a) Did fail to provide competent, diligent, and efficient services to her client, F.M., by failing, within a reasonable time, to inform F.M. that a decision of the Court had been released in connection with F.M.'s legal matters;

(b) Did fail to be honest and candid with her client, F.M., by intentionally concealing from F.M. the existence of a decision released by the Court in connection with F.M.'s legal matter and affecting F.M.'s interests; and

(c) Did, in relation to F.M., knowingly mislead a fellow member of the Law Society (primary counsel for F.M. within her firm) as to the status and nature of a court decision in relation to F.M.

3. At the Hearing, the Member entered guilty pleas to all three counts. The Hearing Committee is prepared to accept the Member's guilty pleas.

4. An Agreed Statement of Facts (the "Agreed Statement of Facts") was filed by agreement between the parties, which are predominantly recited under part II FACTS herein and is attached to the Decision.

5. The parties did not enter into a joint submission on penalty.

II. FACTS

6. The facts are set out in full in the Agreed Statement of Facts. Some of the most important facts will be detailed below.

7. The Member was at all material times engaged in the private practice of law in Regina, Saskatchewan with McKercher LLP (herein after referred to as Firm).

8. The Member had been an associate with the Firm from on or about October, 2013 to November, 2016.

9. During the course of her employment, the Member was asked by a senior partner (herein after referred to as Partner) of her firm to defend a summary judgment application for a Firm client. The matter was argued in May of 2016 and a decision rendered on June 14, 2016.

10. The decision rendered was not favourable for the Firm's client. The Court commented unfavourably on the material filed by the Member on the application. Summary judgment was granted against the Firm's client along with an order for costs.

11. The Member received the decision on June 14, 2016.

12. Because the decision was unfavourable, the Member hid the outcome from her client and the Partner who had assigned the work to her.

13. For several months, the Member fielded inquiries from the client and from the Partner who had assigned the file about the status of the court application. The Member told them both, each on approximately three occasions, that the decision had not yet been rendered by the Court.

14. The Member ultimately advised the client of the decision on October 17, 2016. She advised the Partner in her Firm who had assigned her the work about the outcome of the decision on October 25, 2016. When the Member advised the Partner of the Firm about the outcome, the Member lied and indicated that the decision had only recently been provided to her.

15. The Member ceased working with her firm in November, 2016.

16. On November 29, 2016, the Law Society received a report from McKercher LLP about the misconduct and a self-report from the Member.

17. A further letter was received by the Law Society from the Member on December 14, 2016 clarifying information from the correspondence of November 29, 2016.

18. In the Member's letter of December 14, 2016, the Member acknowledged that she did not advise the client or the Partner of the Firm about the decision in a timely manner. She further indicated that she was embarrassed by the outcome of the decision and thus, deceived the other parties in order to hide the outcome of the matter.

19. The Member has not previously been subject to prosecution by the CIC. However, the Member was subject to and reprimanded in conjunction with an issue of plagiarism in the context of her involvement in the Canadian Centre for Professional Legal Education Program ("CPLED"), which is sometimes referred to as the Bar Course. That decision was rendered on April 2, 2013.

20. The Member was administratively suspended from the Law Society of Saskatchewan for failing to pay her practice fees in January, 2017. She has not paid her fees for 2018. It appears that she has effectively not been practicing since tendering her resignation from McKercher LLP in November, 2016. During the course of the Hearing, the Member indicated that she was unsure as to whether she would apply to be re-admitted to the Law Society. She indicated that it was unlikely that she would seek a position in private practice.

III. POSITION OF THE PARTIES

21. The position of the CIC in regards to penalty is:

(a) In these circumstances, the appropriate range for the delay in the Member's ability to re-apply to become a Member of the Law Society of Saskatchewan is 3-6 months. The CIC takes the position that it is appropriate to be on the higher end of that range; and

(b) The Member should be responsible for the costs of the Hearing. A draft Bill of Costs was filed as an exhibit at the Hearing which shows total costs of \$3,300.00.

22. Some of the considerations that were highlighted by counsel for the CIC included:

(a) While there are several decisions in which members have received reprimands and costs for misleading a client or a member of his or her office, such as *Law Society of Saskatchewan v. Megaw* [2004] L.S.S. 04-05, *Law Society of Saskatchewan v. Wolfe*, 2015 SKLSS 5, and *Law Society of Saskatchewan v. Martens*, 2016 SKLSS 12, these decisions were rendered with joint submissions on penalty, and, more importantly, there had been no prior integrity offences. Further, the aforementioned cases did not involve multiple occasions spanning several months where individuals were being misled. Thus, counsel for the CIC indicates that the *Megaw*, *Wolfe*, and *Martens* decisions are distinguishable;

(b) One of the primary aggravating factors was how long the deception occurred and on how many occasions. Both the client and Partner of the Firm were misled over approximately four months;

(c) The Member has a history of issues involving integrity and trustworthiness, given the prior admissions in the education decision;

(d) Counsel for the CIC suggests that the more appropriate cases are:

(i) *Law Society of British Columbia v. Smiley* [2006] L.S.D.D. No. 161

The Law Society in that case suspended a member for one month and required that the member pay costs of \$2,000.00 for misleading a client with respect to whether certain tax forms had been filed with CRA.

(ii) *Law Society of Upper Canada v. Iannetta*, [1995] L.S.D.D. No. 176

The member in this case lied to two separate clients over a period of approximately four years about whether certain work had been completed on their files. The member created documents to support his lies. The client suffered financial loss as a result of the member's actions. The member received a three-month suspension and was required to pay costs in the amount of \$3,000.00. Counsel for the CIC suggests that in the present day this type of conduct might yield a more severe penalty.

(iii) *Law Society of Upper Canada v. Tareo*, [1997] L.S.D.D. No. 165

Again, in this case, a lawyer had engaged in a lengthy pattern of misleading and covering-up his own failures to advance his client's legal matters. The deception lasted approximately two years. The lawyer received a suspension of six months and was required to pay costs in the amount of \$400.00.

(iv) *Law Society of British Columbia v. Poschmann*, [2001] L.S.D.D. No. 43

In this case, the hearing committee determined that, had the lawyer been practicing, he would have received a one-year suspension as a result of misleading two clients and a fellow lawyer in the context of three immigration matters. The member created documents which he knew to be false.

(v) *Law Society of Saskatchewan v. Tilling*, [2013] SKLSS 12

The lawyer in this case was found guilty of conduct unbecoming in relation to misleading three clients on three separate matters over the course of several years. The member was covering up the fact that he was unable to complete work on the files. There was a prior record relating to misleading for which he had received a one-month suspension. As a result, he was given a nine-month suspension and costs were granted in the sum of \$4,130.00.

23. Although these are certainly not the only cases involving lawyers misleading clients or fellow lawyers, the CIC indicated that these were the most salient matters.

24. The Member had no substantive comments with respect to the appropriate sanction. She indicated that she was remorseful. She provided no justification for her actions. She indicated that she would leave it to the Hearing Committee to determine the appropriate sanction.

IV. ANALYSIS

25. The relevant provisions of *The Legal Profession Act, 1990* are as follows:

53(3) If a hearing committee finds that a formal complaint is well founded, the hearing committee may, by order, do one of the following:

(a) assess any penalties or impose any requirements that it considers appropriate, including but not limited to:

(i) directing that the member be disbarred and setting the period, not exceeding five years, during which the person is not eligible to apply for reinstatement;

(ii) suspending the member from practice for a specified period or until specified requirements are met, including requirements that the member:

(A) successfully complete specified classes;

(B) obtain medical treatment or treatment for addiction to drugs or alcohol;

(iii) specifying conditions under which the member may continue to practise, including conditions that the member:

(A) not do specified types of work;

(B) successfully complete specified classes;

(C) not have exclusive control of the member's trust account;

(D) obtain medical treatment or treatment for addiction to drugs or alcohol; ·

(E) practise only as a partner with, or as an associate or employee of, one or more members that the committee may specify; 34 c L-10.1 LEGAL PROFESSION, 1990

(iv) imposing a fine in any amount that the committee may specify;

(v) requiring the member to pay:

(A) the costs of the inquiry, including the costs of the conduct investigation committee and hearing committee;

(B) the costs of the society for counsel during the inquiry; and

(C) all other costs related to the inquiry;

(vi) reprimanding the member;

(vii) permitting the member to resign from the society;

(b) If the formal complaint that has been determined to be well founded relates to the transfer of identified property or funds in an ascertainable amount, require the member to transfer the property or the amount to the rightful owner;

(c) make any direction or set any requirement that the committee considers appropriate.

26. The applicable sections of the *Code of Professional Conduct* read as follows:

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

[1] Integrity is the fundamental quality of a person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

[2] The principle of integrity is a key element of each rule of the Code.

[3] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

[4] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

3.2-2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

27. In this case, there is no question that the Member's conduct violated all of the code provisions set out above. Honesty and integrity are absolutely essential for lawyers to be able to carry out their roles for the public.

28. It is very troubling that the Member in this case has now, on more than one occasion, violated the trust and integrity expected of the profession. As noted in the Admissions and Education decision involving Ms. Bachynski:

38. The need for Integrity and honesty in those operating within the legal system is emphasized in key decisions dealing with student breaches of Integrity (e.g. the *Law Society of Alberta v. Cattermole*, [2008] L.S.D.D. No. 168.; *LSS v. DeMaria and Mercier*, and *LSS v. Frost-Hinz*, 2012 SKLSS 7). Cattermole underscored this point most directly when at para. 29 It is stated that "Next to stealing, cheating and lying are the most egregious activities a lawyer can engage in."
29. The Member's more recent issue with integrity occurs only three years after the Admissions and Education decision was rendered. Clearly, the Member has not understood the severity of these breaches of integrity.
30. The Hearing Committee believes that the high range suggested by counsel for the CIC is appropriate.
31. In coming to that determination, this Hearing Committee considers the following to be significant aggravating factors:
- (a) The most troubling issue is the prior issues with integrity that have occurred in such proximity to the more recent conduct by the Member;
 - (b) The extent and duration of the misleading statements by the Member;
 - (c) The fact that the misconduct appears to be motivated by a desire to hide a poor result; and
 - (d) The Member, in the prior integrity offence, was delayed in becoming a lawyer for approximately four months as a result of her actions. Thus, a more significant sanction was warranted given that this is a second offence.
32. If the Member had continued to be a practicing member of the Law Society of Saskatchewan, a suspension would have been warranted. The delay in being able to apply to be re-admitted to the Law Society of Saskatchewan is being used as a substitute to the suspension to reflect the need to express a message of general deterrence for this type of conduct. Although a delay in being able to re-apply is not an equivalent to suspension, in that there is not the same need to rearrange client matters and less of a financial penalty involved, this is the closest parallel for a member no longer in practice.
33. If the Member were to re-enter practice, it would behoove her to seek assistance from other practitioners and a mentor, as it appears that there were some issues of general competence given the decision from Justice Megaw in the case that led to this misconduct. The Member should take it upon herself to seek out assistance when she confronts a new or difficult case.
34. The Hearing Committee further believes that it is appropriate that the Member pay the costs of this proceeding in the sum of \$3,300.00, as requested by the CIC. The Member has eighteen months in which to pay the aforementioned sum for the costs of this proceeding. In

addition, the Member shall not be entitled to re-apply for re-admission to the Law Society of Saskatchewan until the costs, as set out above, are paid in full.

IV. ORDER

35. The Hearing Committee makes the following penalty:

(a) The Member shall not be entitled to reapply for admission to the Law Society of Saskatchewan for a period of six months from the date of this Decision;

(b) The Member shall pay costs in the sum of \$3,300.00 which shall be paid on or before December 1, 2019. Until the costs set out above are paid in full, the Member shall not be entitled to apply for re-admission to the Law Society of Saskatchewan.

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated July 6, 2017 alleging that Darby Bachynski, then of the City of Regina, in the Province of Saskatchewan, is guilty of conduct unbecoming a lawyer in that she:

- 1. did fail to provide competent, diligent and efficient services to her client, F.M., by failing, within a reasonable time, to inform F.M. that a decision of the Court had been released in connection with F.M.'s legal matters;**
- 2. did fail to be honest and candid with her client, F.M., by intentionally concealing from F.M. the existence of a decision released by the Court in connection with F.M.'s legal matter that affected F.M.'s interests; and**
- 3. did, in relation to F.M., knowingly mislead a fellow member of the Law Society (primary counsel for F.M. within her firm) as to the status and nature of a Court decision in relation to F.M.**

JURISDICTION

36. Darby Bachynski (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").

37. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated July 6, 2017. The Formal Complaint is comprised of the three allegations noted above. The Formal Complaint was served upon the Member on February 3, 2018. Attached at **Tab 1** is a copy of the original Formal Complaint along with proof of service. The Member intends to plead guilty to all three allegations set out in the Formal Complaint.

BACKGROUND OF COMPLAINT

38. The Law Society began an investigation into the Member on November 29, 2016 when two letters were received in relation to the Member. One letter was from a partner within the Member's then firm [Tab 2] raising concerns about the Member's conduct surrounding an unsuccessful court application and her failure to disclose the results of that application to her client and another lawyer within her firm. The other letter was a "self-report" by the Member in relation to that same conduct [Tab 3].

PARTICULARS OF CONDUCT

39. The Member was asked by a senior partner in her firm to defend a summary judgment application on behalf of firm client, F.M. The matter was argued in May of 2016 and a decision was rendered on June 14, 2016.

40. The decision, attached at Tab 4, was not favorable for the Member. The summary judgment claim brought by the opposing party was granted against her client. Further, the court commented on the materials filed in support of counter-claim initiated by the Member as being deficient and "wholly inadequate".

41. The decision was emailed to the Member on June 14, 2016 [Tab 5]. The Member received and reviewed the decision on that same day and recorded a time entry in relation to it. Attached at Tab 6 is a billing record in relation to the time entry made.

42. Because the court decision was not favourable, the Member chose to hide the outcome from her client and from the partner who had assigned the work to her. On August 30, 2016 the Member engaged in a further review of the decision and a Bill of Costs prepared by the opposing party. On that date the Member also had contact with F.M. via email. The Member had not yet disclosed the decision to F.M. or the partner in her firm who had assigned the file to her.

43. For several months, the Member fielded several inquiries from the client and from the partner who had assigned the file about the status of the court application. The Member told them both, each on approximately three occasions, that the decision had not yet been rendered by the court. For example, on October 4, 2016 [Tab 7] the Member informed the partner that, **"With respect to the [F.M.] matter, we are awaiting the decision. I will call to the court and see about getting a timeline. I will keep you updated."**

44. The Member did not advise F.M. about the decision until October 17, 2016. At that time, she provided F.M. with both an oral synopsis via phone and written synopsis via email [Tab 8]. The partner in her firm inquired about the matter again on October 25, 2016 [see Tab 7]. In response the Member informed the partner that the decision had been received and that she had reported to the client. The partner asked why the Member had not informed her that the decision had come down, the Member stated that, **"the decision was sent to me on Monday and that is when I spoke with "F.M.". I apologize for not coming to speak with you first."**

45. The Member ceased working with her firm in November of 2016. On December 14, 2016 [Tab 8] after receiving a copy of the report about her conduct sent by her former firm, she corrected the details in her self-report to reflect that she had in fact informed F.M. via phone that the decision had not been released. In her initial self-report, the Member indicated that she had

not informed the client directly that the decision had not been released but rather that she simply ignored his inquiries.

46. On December 15, 2016 a further letter was received by the Law Society from the Member [Tab 9]. The following are excerpts from the Member's December 15, 2016 letter:

...In my view, it was an unfavourable decision for the client and I was fearful of informing the client or the partner responsible for the file about the outcome so I sat on the decision for some time.

...

The client was very strong willed. Prior to appearing in chambers, my advice was to settle matters. The client believed strongly in the merits of the case and met this suggestion with resistance. When I reviewed the decision upon returning to the office from holidays I realized that it was unfavorable to the client and that the client would be upset. I felt that I had let the client down and that he would blame me for the outcome of the decision and the resulting loss. I wanted to prolong bringing negative news to the client and that resulted in a split second decision to tell the client the decision had not yet come in when asked during a telephone conversation on another matter.

The partner responsible for the matter also inquired about the status of the decision on several occasions and I denied that the decision had been received. I told the partner I would follow up with the court. Poor communication existed[sic] between the partner and myself prior to my handling the file. It[sic] was stressed, and I was aware, from the beginning of working on this file that this client was important to the partner and the firm. When I received the unfavourable decision, I felt ashamed that I had let down the client, partner, and the firm. I was embarrassed by the outcome of the decision and felt that informing the partner would result in an argument whereby the partner would doubt my skills as a lawyer and communicate this to other partners in the firm. I did not believe that a sympathetic conversation about the outcome of the decision could be had with the partner. As a result, I intentionally avoided informing the partner of the decision.

PRIOR HISTORY

47. This is the Member's first discipline prosecution. However, this is not the first time the Member's integrity has been called into question. In 2012, in the context of the Canadian Centre for Professional Legal Education Program ("CPLED"), sometimes referred to as the Bar Course, the Member (then an articling student) was subject to academic sanctions for plagiarism. A decision of the Admissions and Education Committee was rendered on April 2, 2013 in connection with that issue and is attached at **Tab 10**.

