



Law Society
of Saskatchewan

JOSEPHINE DE WHYTELL
HEARING DATE: July 16, 2020
DECISION DATE: September 28, 2020
Law Society of Saskatchewan v. de Whytell, 2020 SKLSS 7

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF JOSEPHINE DE WHYTELL,
A LAWYER OF VAUGHAN, ONTARIO

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

Committee: Beth Bilson, Q.C (Chair), Jill Drennan, Kaitlynn McArthur
Counsel: Timothy Huber, for the Conduct Investigation Committee
Timothy Hawryluk, Q.C., for the Member

INTRODUCTION

1. The hearing of the Formal Complaint in this matter was heard by teleconference on July 16, 2020. The Hearing Committee consisted of Beth Bilson, Q.C. (Chair), Jill Drennan and Kaitlynn McArthur. The Conduct Investigation Committee was represented by Timothy Huber and the Member was represented by Timothy Hawryluk, Q.C.
2. The Formal Complaint dated March 21, 2019, alleges that the Member
 - a. **did, in the course of professional practice send correspondence to M.G. that was abusive, offensive or otherwise inconsistent with the proper tone of professional communication from a lawyer.**
3. No objections were raised to the composition or jurisdiction of the Hearing Committee, and there were no other preliminary applications or objections.
4. The Member acknowledged that the charge outlined in the Formal Complaint was well-founded, and the evidence was presented to the Hearing Committee in the form of an Agreed Statement of Facts. This statement read as follows:

Jurisdiction

1. *Josephine de Whytell (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 confirming the Member status.

2. The Member is currently the subject of a Formal Complaint initiated by the Law Society dated March 21, 2019. The Formal Complaint contains the single allegation noted above. Attached at Tab 2 is a copy of the Formal Complaint along with proof of service. The Member intends to plead guilty to the allegation set out in the Formal Complaint.

Background of Complaint

3. The Law Society began an investigation into the Member after receiving a complaint from D.J. on or about November 21, 2018. D.J. was a victim of a domestic assault at the hands of the Member's client, M.G. The Member represented M.G. in relation to the criminal assault charge. D.J.'s complaint centered around the nature of communications between the Member and M.G., of which D.J. had become aware.

Particulars of Conduct

4. On or about January 21, 2014, M.G. was charged with committing an assault against his spouse, D.J. M.G. was released on an Undertaking restraining contact with D.J. and requiring him to relinquish firearms and other weapons in his possession. Ultimately, M.G. pled guilty to the assault allegation and his matters proceeded through the Domestic Violence Court process.

5. On April 30, 2014, prior to M.G.'s matters being concluded, M.G. was in Provincial Court waiting to appear on his matter. The Member was planning to appear via phone.

6. The Member and M.G. began an e-mail exchange (in reverse chronological order at Tab 3) at 9:45 a.m. with a question from M.G. about whether the Member was ready for court. The Member responded at 9:55 a.m. that she was waiting by her phone for them to call. M.G. noted at 9:57 a.m. that "[Ms. X]" was there, referring to Prosecutor [Ms. X]

7. The next communication (contained within Tab 3) was a reply from the Member at 10:02 a.m. as court was in session. The reply included a lengthy poem written by John Cooper Clarke that contained vile, inappropriate and derogatory language included violent themes.

8. M.G. responded to the poem at 10:07 a.m. saying, "Yep, pretty much says it all about her and their process."

9. The Member's final communication to M.G. was sent at 10:09 a.m. and read as follows:

Haha, that's a poem by a guy called John Cooper Clarke. I just happen to have it saved on my desktop because it reminds me to find fun in these idiots rather than let them get me down.

10. *Subsequent to the e-mail exchange, D.J. discovered the e-mails.*

11. *After receiving the complaint of D.J., the Member provided a written response (undated) attached at Tab 4. Further detail was sought from the Member and the Member provided a further response on January 23, 2019, attached at Tab 5.*

JOINT SUBMISSIONS

5. The submissions placed before the Hearing Committee included the citation of a number of cases in which the significance and appropriate weight to be attached to joint submissions were considered. These cases included both cases from the criminal courts and decisions of bodies considering breaches of professional disciplinary rules. The predominant theme in these cases is that a court or adjudicative body should not reject the joint submissions made by parties to a proceeding unless these submissions are unreasonable or inappropriate in some way. For example, in *Law Society of Upper Canada v. Orzech*, [1996] L.S.D.D. No. 56 at p.6., the hearing body commented as follows:

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 when they are responsive both to the type of conduct established and the particular circumstances of the Solicitor, it is the Committee's view that only in rare circumstances and with considerable caution should the Committee disregard such joint submissions concerning penalty.

6. In *R. v. Dorsey* (1999), 123 O.A.C. 342, the Ontario Court of Appeal held at page 345 that:

a joint submission should be departed from only where the trial judge considers the joint submission to be contrary to the public interest and, ... if accepted, would bring the administration of justice into disrepute.

7. It is clear from these decisions that a hearing committee is expected to assess joint submission to ensure that they reflect an adequate concern for the protection of the public and the credibility of the legal profession. At the same time, the committee should accord deference to the efforts of the parties and their representatives to reach an accord on a reasonable outcome. The rationale for this deference is based on the idea that it will encourage co-operation by members with the disciplinary process and represent an effective stewardship of resources by obviating the need for extensive hearing of evidence.

RELEVANT CODE OF CONDUCT PROVISIONS

8. Counsel drew the Hearing Committee's attention to a number of provisions from the *Code of Professional Conduct*, which we agree have a bearing on an assessment of the Member's conduct in this case:

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 honorably and with integrity.

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

7.2-4 A lawyer must not, in the course of professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer

9. Counsel also noted the following passages from the commentary to section 2.1-1:

[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 favorably 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.

10. We were also reminded of the Hearing Committee's authority under section 113 of *The Rules of the Law Society of Saskatchewan* to assess penalties in disciplinary proceedings. This section indicates that the committee may consider the past disciplinary history of a member, and that both parties should be invited to make submissions concerning the appropriate penalty. The section goes on to outline types of penalties that are usually imposed, including fines and an order for costs, and also gives a committee latitude in crafting penalties that are not enumerated in the list.

ANALYSIS

11. As the Agreed Statement of Facts indicates, this complaint was triggered by the discovery of an e-mail exchange between the Member and her client, M.G., which took place slightly prior to and during a court proceeding in which M.G. stood charged with an assault against his spouse. The e-mail exchange began with the client confirming that the Member was ready for the proceeding to commence and indicating that the prosecutor was present in the courtroom. The Member then sent M.G. a satirical poem by John Cooper Clarke. It is not necessary to reproduce that poem here, but it is notable for its use of vulgar language, references to death, suicide and killing, and violent metaphors. M.G. responded that the poem "says it all about her and their process." In the final e-mail in the chain, the Member said that she had saved the poem on her desktop "because it reminds me to find fun in these idiots rather than let them get me down."

12. Whatever its artistic merits – and we do not deny that sharp, even vicious, satire has its place in the literary canon – it is clear that the sentiments expressed in it, and the manner in which they were expressed, were a singularly inappropriate component of communication between the Member and M.G. in circumstances where they were preparing for a criminal proceeding arising from a charge of spousal assault. It is not entirely clear whether M.G. was referring to the prosecutor, the judge or perhaps his estranged spouse when he talked of "her and their process", or who the Member meant to identify when she referred to "these idiots," but it is not necessary to resolve this question to conclude that these communications constituted conduct unbecoming on the part of the Member.

13. In her initial response to the complaint, the Member indicated that she had been trying to make a connection with her client, and that she often used stories and metaphors in her dealings

with clients in order to help them understand their situation and to clarify the options open to them. She conceded that sharing such provocative material with clients was “not optimal practice” without establishing a context, but she said that she had developed a relationship of trust with M.G., and on the basis of this relationship, she thought he was in a position to understand her intentions when she sent him the poem.

14. It is true that a lawyer has an obligation to develop a relationship with a client that will allow the client to feel that the lawyer understands their legal situation and will act in the best interest of that client. A client must be confident that the lawyer will act as a champion and a guide. It is also true, however, that it is the obligation of a lawyer to model for clients a respect for the gravity and importance of legal proceedings, and to contribute to decorum and an environment of mutual civility. Though a lawyer’s clients may owe no loyalty to the justice system, and may approach legal proceedings with sentiments ranging from bafflement to hostility, a lawyer does have an obligation not to undermine public confidence in the justice system. Whatever her personal views on the shortcomings of the justice system, it was not appropriate for the Member to engage her client in this critique. It is open to her to seek other ways to press for reform.

15. In her comments to the Hearing Committee, the Member indicated that, though her intent had been to reinforce M.G.’s confidence and candour in his relationship with her, she recognized that the way she had chosen to do this went beyond the boundaries of appropriate conduct. She said she was ashamed of her conduct, and acknowledged that she had adopted a mistaken strategy.

PENALTY

16. The penalty proposed in the joint submissions was a fine of \$1000, and the payment of costs in the amount of \$1000.

17. In the submissions, counsel referred us to the principles of sentencing we should be considering in assessing whether the proposed penalty is reasonable. The main objectives of sentencing in this context are those of specific deterrence – impressing on a member the need to ensure that future conduct is compliant with the Rules – and general deterrence – reminding other members of the profession of the possible consequences of failure to observe the requirements of the Rules and the Code.

18. In the submissions, counsel described the aggravating factors that should be considered in assessing the penalty as follows:

a. The primary aggravating factor is the potential injury that could have arisen from a communication that incited violence towards (or at very least dehumanized) a victim of a physical assault and/or the players in the justice system (the crown). This was particularly problematic due to the fact that the Member knew that her client was sitting in court at the time she sent her communications; and

b. The conduct has the effect of eroding public respect for the profession

19. The mitigating factors were enumerated as follows:

a. In the course of the investigation, the Member has been co-operative. The Member entered into an Agreed Statement of Facts and entered guilty pleas to the allegations herein. She has acknowledged her misconduct.

20. We would also note that no prior record of discipline against the Member was put before us.

21. As we noted earlier, the direction in the disciplinary and judicial decisions provided to us by counsel is that we should take a position of deference to joint submission made to us, unless we conclude that the submissions lie outside the range of what is appropriate in the circumstances. Counsel provided us with a number of disciplinary decisions concerning uncivil or otherwise inappropriate communications. Though the specific facts in these cases led to slightly different outcomes in terms of the details of the penalties, we see nothing in those cases that would suggest the penalty proposed here would deviate significantly from the range indicated in those cases. We have concluded that the joint submissions in this matter should be respected.

22. We should note that at the time of the hearing, counsel for the Member requested that she be given a reasonable amount of time to pay the fine and costs. After deliberation among the Hearing Committee, the committee relayed to counsel for both parties by e-mail our decision to accept the joint submissions, and directed that the Member pay the fine and costs on or before October 14, 2020.

DATED at Saskatoon the 28th day of September, 2020.

“Beth Bilson, Q.C.” (Chair)

“Jill Drennan”

“Kaitlynn McArthur”

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated March 21, 2019 alleging that Josephine de Whytell, of the City of Toronto in the Province of Ontario is guilty of conduct unbecoming a lawyer in that she:

- a. did, in the course of her professional practice send correspondence to M.G. that was abusive, offensive or otherwise inconsistent with the proper tone of professional communication from a lawyer.**

Jurisdiction

23. Josephine de Whytell (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 confirming the Member status.

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Member's client, M.G. The Member represented D.J. in relation to the criminal assault charge. D.J.'s complaint centered around the nature of communications between the Member and M.G., of which D.J. had become aware.

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27. On April 30, 2014, prior to M.G.'s matters being concluded, M.G. was in Provincial Court waiting to appear on his matter. The Member was planning to appear on the matter via phone.

28. The Member and M.G. began an email exchange [in reverse chronological order at **Tab 3**] at 9:45 am with a question from M.G. as to whether the Member was ready for court. The Member responded at 9:55 am that she was waiting by her phone for them to call. M. G. noted at 9:57 am that "[Ms. X]" was there, referring to Prosecutor [Ms. X].

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30. M.G. responded to the poem at 10:07 am saying "**Yep, pretty much says it all about her and their process**".

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32. Subsequent to the email exchange, D.J. discovered the emails.

33. After receiving the complaint of D.J., the Member provided a written response (undated) attached at **Tab 4**. Further detail was sought from the Member and the Member provided a further response on January 23, 2019, attached at **Tab 5**.

Prior History

34. The Member has no prior findings of conduct unbecoming.