Law Society
of Saskatchewan

MERVIN CLAYTON PHILLIPS
PRELIMINARY MOTION DATE: June 27, 2016
PRELIMINARY MOTION DECISION DATE: September 2, 2016
HEARING DATE: December 12, 2017
ORAL SUBMISSIONS DATE: March 5, 2018
DECISION DATE: April 17, 2018
PENALTY HEARING DATE: July 12, 2018
PENALTY HEARING DECISION: December 10, 2018
***Law Society of Saskatchewan v. Phillips*, 2018 SKLSS 7**

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF MERVIN CLAYTON PHILLIPS,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION ON THE PRELIMINARY MOTION BY THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Counsel for Mervin Clayton Phillips: Merrilee D. Rasmussen, Q.C.
Counsel for the Law Society of Saskatchewan: Timothy F. Huber

1. By an Amended Formal Complaint dated January 8, 2016, Mervin Clayton Phillips stands charged with conduct unbecoming a lawyer in that he:

> **1. did fail to be frank and candid with S.H. in relation to the anticipated costs of S.H.'s legal matter;**
> **2. did fail to serve his client, S.H., in a conscientious, diligent and efficient manner as follows:**
> **a. he spent time unnecessarily in connection with issues S.H. had instructed him to abandon; and**
> **b. he required S.H. to make unnecessary and excessive personal attendances at his office;**
> **3. did charge a fee to S.H. that was not fully disclosed, fair and reasonable.**

2. The Conduct Investigation Committee seeks to introduce into evidence a decision of Judge Bogdasavich dated January 4, 2013 as *prima facie* proof of the charges contained in the Amended Formal Complaint. Phillips Legal Professional Corporation commenced an action in Small Claims Court against SLH for outstanding legal fees. The end result was the decision of Judge Bogdasavich.

3. Mr. Phillips objects to the introduction into evidence of Judge Bogdasavich's decision. By a Notice of Motion dated May 30, 2016, Mr. Phillips' counsel frames the application as follows:

> **1. An Order that the decision of the Provincial Court of Saskatchewan between Phillips Legal Professional Corporation and SLH dated January 4, 2013 may not be introduced into evidence before the Hearing Committee in relation to the Formal Complaint on the grounds that:**
>
> **a) *The Legal Profession Act, 1990* does not authorize the use of findings made in the course of other legal proceedings as proof of facts alleged to constitute conduct unbecoming;**
>
> **b) the particular findings that the Counselling and Investigation Committee (sic) relies on to establish the elements comprising the formal complaint were made by the Learned Provincial Court Judge in excess of the jurisdiction granted to the Provincial Court of Saskatchewan pursuant to The Small Claims Act, 1997; and**
>
> **c) the allegations of conduct unbecoming were brought to the Member's attention after the appeal period had expired, thus depriving the Member of an opportunity to raise, inter alia, the jurisdictional issue with the Court of Queen's Bench on appeal.**

4. The Hearing Committee convened by telephone on June 27, 2016 and heard the submissions of counsel. In advance of those submissions, the Hearing Committee had the benefit of Briefs of Law.

FACTUAL BACKGROUND

5. The Affidavit of Mervin Clayton Phillips sworn May 30, 2016 was filed in support of the Notice of Motion. The Affidavit attaches the complete decision of Judge Bogdasavich. It also provides background about the complaint to the Law Society.

6. The complaint came directly from the Law Society. By letter dated February 7, 2013, Jody Martin, complaints counsel, wrote to Mr. Phillips enclosing Judge Bogdasavich's decision and advising that the matter would be forwarded to the Conduct Investigation Committee.

7. The Law Society can initiate a review and investigation of a member's conduct without waiting for a complaint. This is clear from section 40 of *The Legal Profession Act, 1990*:

> 40(1) Where the society:
>
> (a) receives a complaint with respect to a member, alleging conduct unbecoming;
>
> (b) otherwise becomes aware of conduct by a member that is or may be conduct unbecoming;
>
> (c) receives a complaint questioning the competence of a member but not alleging conduct unbecoming; or
>
> (d) otherwise becomes aware of conduct by a member that may display incompetence, but that does not constitute conduct unbecoming;

a person designated by the benchers shall review the conduct of the member.

8. Based on Mr. Phillips' Affidavit, the Hearing Committee understands that Judge Bogdasavich's decision came after a contested hearing in Small Claims court. At the Small Claims Hearing, Brad Tilling and Mr. Phillips represented Phillips Legal Professional Corporation. SLH was represented by Mervin Ozimy. The Hearing was approximately five days long. Mr. Phillips testified as did other witnesses for the Plaintiff, Phillips Professional Legal Corporation.

ISSUES AND ANALYSIS

9. The conduct of regulated professionals may lead to both civil and/or criminal proceedings as well as disciplinary proceedings. Such scenarios raise questions as to whether a previous finding should be considered and, if so, how they should be introduced into current hearings. Bryan Salte in *The Law of Professional Regulation* addresses these questions succinctly at pages 169 and 170:

> **In some situations the conduct of a professional may result in both a disciplinary hearing and a court decision. Can the tribunal rely upon the court's decision to establish the facts in evidence? Can the tribunal rely upon the statements made by the court in giving judgment?**
>
> **It appears recent decisions support the position that not only is it unnecessary in administrative proceedings to relitigate findings of fact made by a court; it is an abuse of process to attempt to do so.**

10. Salte refers to the case of *Law Society of Upper Canada v Dzelme*, 2014 ONSC 4652. Dzelme was not a member of the Law Society but the Law Society argued that he was practising law and as a result, brought an injunction application. As part of its case in the injunction application, the Law Society included a Small Claims court decision in which Dzelme had sued a client for outstanding fees. The Small Claims court dismissed Dzelme's action, finding that he was claiming fees for legal services which was in violation of *The Law Society Act*. In the injunction application, Myers, J. of the Ontario Superior Court of Justice stated at paragraph 21:

> **21. Justice Tzimas has already held that the services provided by Mr. Dzelme are 'legal services' in respect of the client matter that was before her. It is not open to Mr. Dzelme to relitigate that finding. At the hearing of this application, Mr. Dzelme argued that the findings of Tzimas J. are *res judicata* which he said prevents the Law Society from seeking the prohibition that it seeks in this Court. Correctly understood however, the doctrine of *res judicata* and the related doctrine of issue estoppel do not to (sic) prevent the applicant from bringing these proceedings. The Law Society was neither a party nor a privy to Mr. Dzelme or his former client whom he sued for fees. Moreover, the findings made by Tzimas J. were not adverse to the Law Society's interest. <u>However, the final orders made in the Small Claims Court proceeding do prevent Mr. Dzelme from challenging the findings made against him that the services he provided to that client amounted to legal services provided in breach of the Act.</u>**

11. *Groia v Law Society of Upper Canada*, [2013] LSDD No. 186 is the well known and frequently cited case that deals with civility of lawyers. The origin of the Law Society proceedings began with a Judge's critical comments of Groia in a highly contested and adversarial securities proceeding where Groia was representing the accused. The Judge's critical comments about

Groia were entered into evidence at his disciplinary hearing. In his appeal to the Law Society Appeal Panel, Groia argued that the Hearing Panel ought not to have considered the Judge's comments and that he ought not to have been prevented from contesting the Judge's statements.

12. At page 171 of *The Law of Professional Regulation*, Salte provides a good summary of the decision of the Law Society Appeal Panel:

> The court's comments were of limited use in the discipline proceeding. The fact that a court has concluded that a lawyer's conduct in court was improper, unacceptable, irresponsible or unrestrained does not, standing alone, answer the question of whether that conduct is professional misconduct.
>
> There were fairness concerns in preventing Groia from challenging the court's findings and characterization of his conduct:
>
> 1. Groia was not a party to the prosecution and had no mechanism to appeal the 'findings' made against him in the two decisions.
> 2. Groia was not a witness in those proceedings and his first opportunity to give evidence to explain his conduct took place during the discipline hearing.
> 3. Defending Groia's conduct was not the primary focus of Felderhoff's legal team in the judicial review proceedings, which resulted in the court's comments about Groia's conduct.

13. Unlike Groia, Mr. Phillips through his legal corporation was a party to the Small Claims proceedings. He was an active participant in that litigation, testifying himself and calling other witnesses.

14. In *Rosenbaum v Law Society of Manitoba*, [1983] MJ No. 53, Rosenbaum sought to prohibit a Law Society hearing panel's use of a court decision in a civil proceeding in which Rosenbaum was one of the defendants. Rosenbaum testified in that civil proceeding. The trial judge made a finding of fact that Rosenbaum had falsely denied making substitutions and alterations to the corporate records. That factual finding by the trial judge led to discipline charges before the Law Society of Manitoba.

15. Rosenbaum brought a prohibition application before the discipline proceedings began, seeking to prohibit and prevent the Law Society from accepting the trial judge's findings as conclusive proof of the discipline charges.

16. Mr. Justice Scollin dismissed Rosenbaum's prohibition application. As a starting point, Mr. Justice Scollin stated that disciplinary bodies are not bound to apply "the whole panoply of procedural and evidentiary constraints which apply to the courts". At paragraph 13 of the decision:

> **13. The Committee, like any other professional disciplinary body, is bound to conduct its proceedings fairly, but it is not bound by the whole panoply of procedural and evidentiary constraints which apply to the courts. Subject only to observance of its paramount duty to be fair to the lawyer, the Committee is entitled to arrive at its decision on any reliable source of facts of which the lawyer is made aware in advance and can challenge, and it is for the Committee to assess the weight or cogency to be accorded to the**

> **evidence given in a prior proceeding to which the lawyer was a party and to take proper account of the conclusions, of fact arrived at by the judge.**

17. That statement applies to Law Society discipline proceedings in Saskatchewan. Further, section 48(10) of *The Legal Profession Act, 1990*, provides:

> **48(10) A hearing committee may accept any evidence that it considers appropriate and is not bound by the rules of law concerning evidence**

18. Mr. Justice Scollin concluded at paragraph 15 of the decision that the hearing committee could consider the previous civil proceeding:

> **... Much will depend on the particular circumstances in which the proceedings were conducted; provided the lawyer is given fair opportunity to adduce further evidence and to submit argument to dispute the accuracy of specific solemn and considered findings, the Committee is entitled to exercise its discretion to rely upon the civil proceedings as evidence in support of the charge.**

19. This decision was upheld by the Manitoba Court of Appeal (1983) CarswellMan 183.

20. The *Rosenbaum* decision is consistent with the approach taken by the Law Society of Upper Canada in a case called *Law Society of Upper Canada v. Marler*, [2010] LSDD No 156. Marler was found guilty of professional misconduct and conduct unbecoming. He appealed that decision to the Law Society Appeal Panel, raising multiple grounds of appeal. A number of his grounds related to the admission into evidence and use of a judicial decision in a civil case in which Marler was a party. The Law Society of Upper Canada Appeal Panel concluded:

> **19 In our view, the Society was entitled to rely on judicial findings to make out its case, without presenting the underlying evidence in support. The appellant was a party to those proceedings, and actively participated in each. He testified. On certain key issues, he was disbelieved. The findings were made on the balance of probabilities. The law is now clear that this is the same standard imposed on the Society to prove professional misconduct and conduct unbecoming: See *F.H. v. McDougall*, [2008] S.C.J. No. 54**
>
> **20 In our view, the hearing panel was entitled, at a minimum, to treat the findings of fact made against the appellant as *prima facie* proof of those facts: Re Rosenbaum and Law Society of Manitoba (1984), 150 D.L.R. (3d) 352, 6 C.C.C. (3d) 472, [1983] 5 W.W.R. 752; affirmed 3 D.L.R. (4th) 768n, 8 C.C.C. (3d) 255 n, [1984] 4 W.W.R. 95; leave to appeal to S.C.C. refused 27 Man. R. (2d) 159n.**
>
> **23 . . . The judicial findings of fact made against the appellant in proceedings to which he was a party and in which he participated constituted prima facie proof of those facts. It follows that an evidentiary burden rested upon the appellant to tender evidence to displace those findings, failing which he would be unsuccessful in the discipline proceedings. The ultimate burden continued to rest on the Society throughout to prove its case on a balance of probabilities.**

21. The Hearing Committee agrees with and adopts the approach set out in *Rosenbaum* and *Marler*.

22. Mr. Phillips argues that there is nothing in *The Legal Profession Act, 1990* that "authorizes the use of findings made in the course of other legal proceedings as proof of facts alleged to constitute conduct unbecoming". Strictly speaking this is correct. Mr. Phillips points out that *The Legal Profession Act, 1990,* unlike other professional regulatory statutes in Saskatchewan, contains no provision at all for the admission into evidence of the fact of a criminal conviction. From the Brief filed by counsel for Mr. Phillips:

> **13. In the same way, the fact that the Saskatchewan Legislature has provided explicit authority to permit the use of criminal convictions to establish proof that the conduct has occurred in 35 other statues governing self-regulating professions leads to the conclusion that the absence of such a provision in *The Legal Profession Act, 1990* means that a power to base discipline proceedings on a criminal conviction cannot be implied. And the presence of this explicit provision relating to the use of criminal convictions in all of these Acts leads also to the conclusion that a power to base discipline proceedings on the findings made in the court of legal proceedings other than criminal proceedings cannot be implied either. Having singled out criminal proceedings for this specific treatment, the Legislature cannot have intended to allow the findings in any other legal proceeding to be used in this way.**

23. The Hearing Committee rejects that analysis. The fact is section 48(10) of *The Legal Profession Act, 1990* allows a hearing committee to "accept any evidence that it considers appropriate ... ". Further, and most significantly, admission into evidence of a civil or criminal proceeding involving a lawyer where the lawyer was a party is consistent with the case law. In *Marler, Dzelme* and *Rosenbaum,* the Law Society legislation did not explicitly allow for the admission into evidence of the decision from a civil proceeding.

24. In defending the conduct unbecoming charges, Mr. Phillips would be entitled to lead evidence to "displace" (to use the word from *Marler)* the findings of fact made by Judge Bogdasavich that the Conduct Investigation Committee may rely on as *prima facie* proof of the discipline charges. Whether Judge Bogdasavich made jurisdictional errors in his decision is not relevant for the purposes of the Hearing Committee and this discipline hearing. It is the findings of fact made by Judge Bogdasavich that serve as *prima facie* proof. Further, Mr. Phillips argues that had he known a Law Society complaint would result, he would have appealed the decision of Judge Bogdasavich. That argument is also irrelevant for the purposes of this hearing.

25. The application is dismissed and the decision of Judge Bogdasavich dated June 3, 2013 may be introduced into evidence by the Investigation Committee as *prima facie* proof of the charges as set out in the Amended Formal Complaint.

Dated this "2nd" day of September, 2016.

"Robert Heinrichs, Q.C.", Chair

"Darcia G. Schirr, Q.C."

"Dr. Greg Stevens"

DECISION OF THE HEARING COMMITTEE FOR THE LAW SOCIETY OF SASKATCHEWAN

Members of the Hearing Committee: Robert Heinrichs, Q.C. (Chair)
Darcia Schirr, Q.C.
Judy McCuskee

Counsel: Timothy Huber for the Conduct Investigation Committee
Merrilee Rasmussen, Q.C., for the Member

INTRODUCTION

26. Mervin Clayton Phillips (the Member) is the subject of an Amended Formal Complaint dated October 14, 2016 alleging that the Member:

1. did fail to be frank and candid with S.H.)Ji relation to the anticipated costs of S.H. 's legal matter;
2. did fail to serve his client, S.H., in a conscientious, diligent and efficient manner as follows:
a. he spent time unnecessarily in connection with issues S.H. had instructed him to abandon; and
b. he required S.H. to make unnecessary and excessive personal attendances at his office;
3. did charge a fee to S.H. that was not fully disclosed, fair and reasonable.

27. The evidentiary hearing on the merits of the Complaint was held in person in Regina, Saskatchewan on December 12, 2017. There were no objections to the constitution of the Hearing Committee.

28. Preliminary matters raised before the commencement of the hearing proper included:

a) An application by the Conduct Investigation Committee (hereinafter sometimes referred to as CIC) to exclude the public from the hearing on the grounds that the possible disclosure of intimate personal matters would outweigh the desirability of allowing the public to be present during the hearing pursuant to section 49(6)(b) of *The Legal Profession Act, 1990.* That application was granted by the Hearing Committee.

b) An Agreed Statement of Facts and Admissions was filed and in the course of the proceedings marked as Exhibit P-3.

c) · A timeline was established for the exchange and filing of written submissions.

d) A discussion was held clarifying and limiting the "issues" referred to in Allegation 2(a) of the Amended Formal Complaint to be medical issues only.

e) Counsel for the Member raised the issue that in the Member's evidence, they intended to present hearsay evidence which she argued the Hearing Committee could consider pursuant to s. 48(10) of *The Legal Profession Act, 1990.* CIC Counsel advised he would be objecting to the admission of that evidence at such time as it would be proffered during the course of the hearing.

f) A brief discussion was held concerning the timing of the calling of witnesses during the hearing.

DECISION

29. For the reasons set out below, the Hearing Committee finds the Amended Formal Complaint to be well founded in relation to Allegations I and 3 and to not be well founded with respect to Allegations 2(a) and (b).

THE AGREED STATEMENT OF FACTS

30. A summary of the facts is as follows:

a) The complainant in these matters is The Law Society of Saskatchewan and the genesis of the complaint is outlined at paragraph 2 of The Agreed Statement of Facts. The allegations forming the basis of the Amended Formal Complaint came to the attention of the Law Society as a result of a decision of the Provincial Court of Saskatchewan under *The Small Claims Act.* This was a decision as a result of a claim made by the Member against S.H. for payment of legal fees in relation to S.H.'s family law matters.

b) In February 2008 S.H. was referred to the Member by her father, who was a longstanding client of the Member, in relation to S.H.'s matrimonial problems. The Member continued to represent S.H. in this matter until November 16, 2009 when the Member received a letter and Notice of Change of Solicitor from S.H. 's new counsel. S.H.'s father passed away on March 21, 2009. At the initial meeting between the Member, S.H. and her father, the Member was advised by S.H. of the details of her matrimonial difficulties. A petition was prepared by the Member which was issued the following day for the purpose of crystalizing S.H.'s claims with respect to division of matrimonial property, child support, and spousal support. The Member also prepared a letter to S .H.' s estranged husband outlining their initial position and a new will was prepared by the Member for S.H. As noted in paragraph 7 of the Agreed Statement of Facts, at the initial meeting S.H.'s father advised the Member in the presence of S.H. that he would assist with the expenses. S.H.'s father was aware of the Member's hourly rate of $350.00 from past experience with the Member.

c) S.H. was struggling with depression at the outset of her family matter and letters were requested and obtained by the Member from various physicians upon whom S.H. attended throughout the conduct of the file beginning on May 22, 2008 and continuing until August, 2009.As indicated in paragraph 36 of the Agreed Statement of Facts, S.H. indicated to the Member on January 19, 2009 that she no longer believed her medical condition was worth pursuing as an aspect of her claim for spousal support. However, some months later in the summer of 2009 S.H. continued to attend medical appointments some distance from home at the request of the Member and continued to contact the Member concerning her medical issues.

d) S.H. did not reside in Regina and had to travel to attend at the Member's office when requested. As noted in paragraph 63 of the Agreed Statement of Facts, S.H. had other reasons for attendances and appointments in Regina which coincided,

with appointments at the Member's office on the dates as specified in the Agreed Statement of Facts.

e) S.H. first requested an account from the Member's law office on August 8, 2008. An interim account totalling $4,118.92 (comprising $3,000.00 in fees plus taxes and disbursements) and a summary of services totalling 49 .80 hours both dated Octobers 31, 2008 was provided by the Member to S.H. by letter of November 6, 2008. The interim account had only one entry under the "DESCRIPTION" column which said:

> TO OUR PROFESSIONAL SERVICES RENDERED on your behalf; to all personal & telephone attendances; to all correspondences; to attendances for Mediation, to court attendances; etc., to all matters not included above; TO OUR INTERIM ACCOUNT HEREIN;
>
> A cheque dated October 24, 2008 from S.H. 's father to the Member's law firm was receipted by the Member's law firm on October 27, 2008. A further "Sample Account" was e-mailed by the Member to S.H. following a request from her on October 28, 2009. The "Sample Account" was comprised of 10 pages and indicated time recorded and disbursement charges but not the dollar amount and shortly thereafter S.H. asked the Member about his hourly rate. (See the Agreed Statement of Facts at paragraphs 55 and 56).

f) Following receipt in November, 2009 of the Notice of Change of Solicitor, the Member rendered a final account dated December I, 2009 totalling $24,349.04 (comprising $21,500.00 in fees plus taxes and disbursements). The final account referred to billing all time on file and included an adjustment for $3,000.00 paid as part of the interim account. Further, the final account enumerated all time expended by the Member from the commencement of the file on February 21, 2008 to November 5, 2009.

g) Ultimately, S.H.'s family matter was resolved while she was represented by her new solicitor just prior to a scheduled pre-trial conference some eighteen months later.

THE HEARING

31. An interim application was made by way of Notice of Motion dated May 30, 2016 in which the Member sought an order that the decision of the Provincial Court of Saskatchewan not be admissible into evidence. Following argument in that matter and upon an analysis of relevant cases and authorities, the Hearing Committee decided that the Provincial Court of Saskatchewan Small Claims Court decision could be introduced into evidence by the Conduct Investigation Committee as *prima facie* proof of the allegations set out in the Amended Formal Complaint but that the Member would be entitled to lead evidence to "displace" the findings of fact made by the Provincial Court judge. Accordingly at the hearing of this matter the Small Claims Court decision was entered into evidence as Exhibit P-2. In that decision, the presiding judge found that the Member acted in his firm's monetary self-interest by:

a. not expressly advising S.H. on February 21, 2008 or within a reasonable time thereafter of the Member's hourly fee, his billing procedure and some range of what his total bill might be;

b. rounding up the time spent on telephone and other attendances; and,

c. engaging in unnecessary work on S.H.'s family law file and requiring S.H. to attend at the Member's Regina law office on numerous occasions.

32. CIC Counsel called S.H. as its only witness. She testified that she first met the Member on February 21, 2008 on her father's recommendation as he had been a client of the Member's and S.H. did not know any other lawyers. At that time S.H. was in a poor emotional state - feeling depressed and stressed as a result of her marital breakdown, her husband's extramarital affair, the fact that her mother had passed away and her ongoing medical problems **[REDACTED**]. Prior to their marriage, S.H. **[REDACTED].**

33. She testified that her father attended only the initial meeting which she had with the Member. At that meeting, S.H. recalled her father stating be would help with payment of her legal fees. She was adamant that she was the client - not her father. She was not aware if her father had ever provided any instructions to the Member or received any progress reports or correspondence from the Member in regards to her file. She also testified that upon hearing of the **[REDACTED]**, the Member advised S.H. that was an issue they should be pursuing as it would be debilitating to her **[REDACTED]** as a result of this complicating health issue. It was the main reason for her to claim financial support in her petition. Following that initial meeting S.H. stated that she was willing to pursue her estranged husband as suggested by the Member. She continued to trust the Member's advice as time progressed because in her mind her parents were very close to the member and he treated her very kindly and she saw no reason to question his advice at the time.

34. S.H. had not had much contact with lawyers prior to this involvement aside from minimal involvement with her parents' estate planning. She said there was no mention at the first meeting of the Member's hourly rate or fees. She did not sign any retainer contract. Her father had not told her what the Member's hourly rate was. She candidly admitted that she did not know why she did not ask those questions at that first meeting.

35. In October of 2008 her personal life had improved. Her estranged husband had been paying his share of mortgage and car payments although he had paid no spousal or child support. Although she was not certain when she started asking about the legal costs, she did ask the Member on three different occasions about costs. On each occasion, the Member responded that she should not worry about it. To her recollection, the August 8, 2008 request for some idea of what her account would be, may or may not have been the first time that she asked but she believed she asked the Member a second time in a face to face meeting in his office. When she received the October 31, 2008 interim account which showed $3,000.00 fees owing plus GST, PST and disbursements for a total of $4,118.92, she thought she was paid up-to-date from the $5,000.00 payment made by her father at that time. She concluded this because the interim account showed a "NIL" balance due. Further the October 31, 2008 summary of services, detailed 49.80 hours expended by the Member, but provided no indication of fees. S.H. simply thought everything was paid up.

36. She estimated 75-80 % of face to face time with the Member was spent discussing **[REDACTED]** medical issues. She attended on various physicians, including a British Columbia

psychiatrist. at the instruction of the Member. She did not receive another bill from the Member until after she had dismissed him *as* her lawyer and in that December, 2009 final billing it noted a balance due of $24,349.04 (after a courtesy discount of $25,095.00) and 141.7 hours spent. At that time she did the math and calculated that his hourly fee was $350.00. She described progress made on the file between October 31, 2008 and December 1, 2009 as "Nothing".

37. As the medical reports continued to come in with questionable relevance to the spousal support issue, S.H. began to question the reason for pursuing them. In the beginning of 2009 she stated that she told the Member to leave the health problems alone and get on with the matter, but the Member reacted resistantly stating that the medical reports were not good enough and that due diligence had to be completed.

38. S.H. also confirmed that at the Small Claims trial, she testified that she had made 31 in-person visits to the Member's office. These meetings were, for the most part, instigated by the Member. Some of the meetings lasted 5 to 10 minutes but required multiple hours of driving to and from her residence. She was not certain she voiced any concerns to the Member regarding the amount of travel and number of in-office visits she had to make because she trusted his advice and assumed that was what had to be done. In cross-examination S.H. stated it was her decision to obtain legal representation outside of her home community. She also stated that she had been attending upon physicians for some period of time prior to retaining the Member as a result of experiencing severe headaches and later depression. She noted that her emotional state prior to and during the time the Member represented her was "kind of a roller coaster; being okay, and then not okay, and okay and not being okay." and she would have sought some medical attention irrespective of any divorce or legal proceedings. Finally, she also noted that there were some times when her face to face appointments with the Member would have overlapped with occasions when she was already in Regina for other unrelated reasons.

39. In a brief re-examination, S.H. confirmed the Member never volunteered information directly to her about his hourly rate, the estimated expense or about his billing arrangement nor did he reply to any of her enquiries regarding his hourly rate.

40. The Member then testified confirming that he had conducted many files on behalf of S.H.'s parents and particularly her father which were all on an hourly billing basis. Although his practice was to normally enter into written retainer contracts with clients, he did not follow that practice with long term clients like S.H. father as “it would be considered an insult”. He confirmed that S.H.'s father initially called him on February 20, 2008 to arrange an appointment with S.H. and that S.H. and her father both attended that initial February 21, 2008 meeting. He confirmed what work was completed at that meeting including reviewing the information and discerning what needed to be done, preparation of the petition, discussing what would happen next, and the preparation of a new will, Power of Attorney and Health Care Directive for S.H. He testified that S.H. and her father were going to be providing him with instructions and that " they", meaning the father and the Member, would do everything they could to protect S.H., especially in relation to the fact that she had a serious depression which was the biggest issue. It was clear to the Member that S.H.'s father was helping because of her circumstances and her distressed emotional state. The Member testified that it was important for him during that meeting to clarify "... that we had dealt with her family for a significant period time, but it was her case."

41. It should be noted that the hearsay evidence proffered during the Member's testimony about discussions with S.H.'s father carries no probative value to this Committee and has not been considered in reaching its conclusion. While section 48(10), of *The Legal Profession Act, 1990* empowers the Hearing Committee to consider any evidence that it considers appropriate

and does not bind the Committee to the evidentiary rules of law, this Committee does not consider the proffered hearsay evidence as appropriate. There is no way of corroborating statements in a situation such as this where the speaker has passed away, leaving the impugned evidence so prone to being self-serving that it carries no weight.

42. The Member stated that between the time of issuance of the petition in February, 2008 and service of the petition in June, 2008, there remained hope for reconciliation and that was the goal.· However, with instruction received from S.H. to issue the petition at the end of June, the nature of the file changed. S.H. 's depression, in his opinion, had worsened at that time to the point where he prepared a letter signed by S.H. authorizing him and his law firm to seek assistance on her behalf in the event of suicidal thoughts or actions.

43. The Member testified that when he met with S.H. on October 24, 2008 and she raised the issue of the account, he indicated she should speak with her father. He testified that there was never any indication that it was going to be a large bill or a massive bill. He prepared the interim account to show no balance outstanding in an effort to not distress S.H., but attached the summary of services to show what work had been done. He also testified that in June of 2009, while he did not recall a specific enquiry from S.H. regarding his hourly rate, he did recall her asking about the cost connected with going to a pre-trial conference. He stated that prior to her father's death there were discussions in anticipation of his death that the Member would not render an account until the matter was settled or litigated. He further testified that in September of 2009 while at a meeting partly to discuss S.H. 's father's estate there was a discussion about the concern for S.H. in terms of what the costs were going to be and there was discussion about her father's estate and about helping her out in regard to costs. There were no specific discussions about an hourly rate. The Member stated that by the end of October, 2009 when S.H. requested an account and asked about the hourly rate, he queried why she was asking about that given all of the earlier discussions and steps that had been taken. He felt they were not communicating. In his opinion she knew his hourly rate was $350.00 because he always charged her father $350.00 per hour. In regards to the significant discount included in the final account, the Member explained that he had told S.H.'s father he would not bill the file until it was over and as he had always provided discounts to the family in the past, he wanted to continue to honour that tradition. His practice was also to provide "discounts" to account for errors in billing times as the billing system they used involved approximations.

44. Regarding the medical issues, the Member estimated time spent on them to be 25-30% of total time expended. This included time spent on the issue of her depression. He did admit that S.H. had on some occasions stated that she doubted whether spousal maintenance should be claimed particularly in January, 2009 when a discussion was happening and some medical reports were received that caused her to feel more optimistic about her matters. But when other problems occurred, for example parenting problems with one of her children, he testified that S.H. would again assert that she wanted her estranged husband to pay spousal support. On the issue of requiring S.H. to attend numerous appointments at his office, the Member testified that they tried to schedule her appointments while she was already in Regina.

45. Under cross-examination, the Member characterized both S.H. and her father as clients akin to a joint retainer. He did concede, however, that payment of an account on behalf of a client does not elevate the payor to the status of a client.

46. The Member intended to call an expert witness to give evidence on the factors to be taken into account in making a claim for spousal support, the process of four-way meetings, mediation in family law practice, to comment specifically on the number of meetings/attendances and the

circumstance of having the parent pay for the child's divorce. The Committee declined to hear the expert evidence citing rules 432(9) & (10) of *The Law Society of Saskatchewan Law Society Rules* which state that:

> **(9) The Hearing Committee shall not permit a witness to testify unless the name of that witness, a summary of that witness' evidence, and, if the witness is called to give expert evidence, a summary of that witness' qualifications has been disclosed in accordance with subrule (2) or (8) of this Rule. The Hearing Committee shall not permit a document to be entered into evidence unless the information respecting that document has been disclosed in accordance with subrule (1) or (8).**
>
> **(10) Notwithstanding subrules (1) and (2), if the Hearing Committee is satisfied that the failure to disclose the required information arose through inadvertence, or that the information was not in the possession of the party at the time that disclosure was required, or that for any other compelling reason it would be manifestly unfair to exclude evidence or documents not disclosed as required, or if the opposing party consents, the Hearing Committee may permit such evidence to be given, or such documents to be introduced into evidence. This may be done on such terms or conditions as the Hearing Committee may determine, including the following:**
>
> **(a) the Committee may adjourn the hearing for such time as the Committee considers reasonable to permit the other party the opportunity to respond to such evidence;**
> **(b) the Committee may require the party who requests the introduction of such evidence to agree to pay an amount of costs, as estimated by the Committee , which may be incurred by the member or the Society as a result of the failure to disclose such evidence in accordance with subrule (1) or (2) or (8).**

47. The rule is mandatory dictating that the Hearing Committee shall not permit a witness to testify unless proper disclosure has been made. The three saving provisions in Rule 432(10) - that the failure to disclose arose through inadvertence; or that the information was not in the possession of the party at the time that disclosure was required; or that for any other compelling reason it would be manifestly unfair to exclude the evidence - do not apply in this case. CIC Counsel did not consent and the Hearing Committee had no choice but to disallow the proposed expert testimony.

SUBMISSIONS AND ANALYSIS

48. Counsel for the CIC submitted that the first and third allegations are founded on Chapter XI of the Code of Professional Conduct, the relevant portion of which read as follows from the Code that was applicable at the time:

> **The lawyer shall not:**
>
> **(a) Stipulate for, charge or accept any fee that is not fully disclosed, fair and reasonable;**

From the commentary complementary to that rule the following is listed:

Factors to be Considered

1. A fair and reasonable fee will depend on and reflect such factors as:

(a) the time and effort required and spent;
(b) the difficulty and importance of the matter;
(c) whether special skill or service has been required and provided;
(d) the customary charges of other lawyers of equal standing in like matters and circumstances;
(e) in civil cases the amount involved, or the value of the subject matter;
(f) in criminal cases the exposure and risk to the client;
(g) the results obtained;
(h) tariffs or scales authorized by local law;
(i) such special circumstances as loss of other employment, urgency and uncertainty of reward;
(j) any relevant agreement between the lawyer and the client.

A fee will not be fair and reasonable and may subject the lawyer to disciplinary proceedings if it is one that cannot be justified in the light of all pertinent circumstances, including the factors mentioned, or is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty, or undue profit. The spirit of the rule and commentary as noted by the CIC requires fairness, candor and full disclosure surrounding the fee arrangement based on the fiduciary relationship that exists between lawyer and client.

Allegation #1

49. CIC submitted that with respect to Allegation 1, the Member is guilty of conduct estimate for the matter or even a range of fees which the client could incur depending on whether the matter turned out to be more or less difficult to conduct and conclude. The Member's counsel argued that the wording of this allegation imported an element of intention and that no evidence existed to prove intentional misconduct on the part of the Member. She based her submission on dictionary definitions of the words "frank" and "candid" contained in the allegation, noting that the definitions required acts marked by sincere expression or suggesting sincere honesty and the absence of deception, free from bias, prejudice or malice. Allegation I therefore alleged that the Member was insincere, dishonest, deceptive and malicious, thereby importing a *mens rea* requirement into the allegation, which would require proof of intentional misconduct.

50. With respect, the Committee rejects the Member's argument. The Saskatchewan Court of Appeal in *Merchant v. Law Society of Saskatchewan (2014 SKCA 56)* stated at paragraph 69:

> **In this case, the Law Society did not insert any words that would indicate the conduct unbecoming charge hinged on a finding of intention. Examples of such words are "intentionally" or "knowingly". The charges in this case merely say "did" (breach) and "did"** (**counsel and/or assist). "Did" merely refers to the action of doing something and does not, in itself, impart any type of mental element.**

51. The words "conduct unbecoming" are defined in *The Legal Profession Act, 1990*

as follows:

> **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;**
>
> **and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii).**

52. What constitutes "conduct unbecoming" varies on the facts of the case and is usually considered, absent the wording noted earlier, a strict liability offence. This summary of conduct unbecoming taken from *The Law Society of Saskatchewan v. Hesje (2013 SKLSS 13)* was also followed in *The Law Society of Saskatchewan v. Phillips (2015 SKLSS 8).* The Committee adopts that summary in the case at bar.

53. In this case while The Agreed Statement of Facts notes the client's father was aware of the Member's hourly rate, the *viva voce* testimony is clear that S.H. was not aware of the Member's hourly rate until she saw the December, 2009 final billing and did the math to calculate that hourly fee. By that time the existing relationship between the Member and S.H. was over.

54. The Member insisted in his testimony that he had a joint retainer with S.H. and her father and that, as far as he was aware, her father told S.H. the hourly rate. The Committee rejects that version of events. The concept of the joint retainer appears to have been a complete construct made up by the Member after the fact.

55. S.H. and her father only attended one meeting together with the Member which was the initial meeting which occurred because S.H.'s father referred her to his lawyer.

56. Not only was there no clear disclosure of the anticipated costs, but the information regarding costs was confusing. The October 31, 2008 interim account states a nil balance owing after application of the $5,000.00 payment made by S.H. 's father and yet the summary of services bearing the same date shows 49.8 hours expended. Dividing the October 31, 2008 fee total of $3,000.00 by that number of hours would lead to an hourly rate of just over $60.00. The October 28, 2009 "Sample Account" provided to S.H. by the Member in response to her request included hours, but with no corresponding monetary amounts and it was not until the December I, 2009 final account was rendered, following termination of the solicitor-client relationship between S.H. and the Member, that the full story of the costs of the matter was revealed.

57. On the evidence contained both in the Agreed Statement of Facts and given at the hearing of the matter, this Committee concludes that the Member's conduct in advising S.H. as to the anticipated costs of the legal matter fell short of the standard that would be expected and amounts to conduct unbecoming.

Allegation #3

58. The third allegation (while also dealing with fees and emanating from the alleged breach of the same Code of Professional Conduct rule as the first allegation), is focused on the actual fee charged rather than disclosure of the anticipated cost.

59. Similar arguments were made by the Member's counsel with respect to the wording of the allegation importing a *mens rea* element. The impugned word from this allegation is "fair" and in the dictionary definition provided by the Member's counsel, means "marked by impartiality and honesty ... " The Member argued that the allegation is therefore that the Member was dishonest and as there was no evidence of the intentional element of dishonesty on the Member's part, it must be dismissed. There is no need to reanalyze that argument, as the Committee rejects it based on the same reasons as provided earlier in this decision with respect to the first allegation. The third allegation takes its wording directly from the relevant Code of Professional Conduct provision and does not import an element of intent.

60. While the commentary to the Code of Conduct rule underpinning the first allegation anticipates fees so disproportionate to the services rendered as to introduce an element of fraud or dishonesty, that is not what is alleged in this case. Rather, the wording in the Amended Formal Complaint before this Committee alleges conduct unbecoming because the Member did not fully disclose, to use the words of the underpinning rule, "a fee that was fair and reasonable."

61. CIC Counsel focused on the factors to be considered as listed in the commentary to the Code of Professional Conduct rule XI. CIC Counsel also relied on the finding of the Small Claims Court as *prima facie* proof that the Member's account was unreasonable.

62. The Member's counsel also focused on the commentary factors to be considered and argued that the evidence on the relevant factors displaced the findings of the Small Claims judge. To support that contention she noted that:

1. (a) time and effort required and spent - the Member spent numerous hours on S.H.'s family law file over the course of his representation which included efforts aimed at reconciliation as well as establishing a legal basis for spousal support;

(b) difficulty and the importance of the matter - while some of the matters were quite straightforward such as accounting of the family property, others such as parenting issues were more complex;

(c) whether special skill or service has been required and provided -the immediate issuance of the petition thereby crystallizing S.H.'s claims with respect to the division of family property, child support and spousal support, required a special skill of an experienced family law practitioner;

(d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances - the Member noted that while the Provincial Court decision found a $350.00 hourly rate to be reasonable, the expert relied on by the opposing side in the Provincial Court decision did not have the benefit of reviewing the Member's file and would not have been aware of all of the services provided during his period of representation;

(e) in civil cases the amount involved, or the value of the subject matter -the value of the property was significant;

(f) in criminal cases the exposure and risk to the client - not relevant;

(g) the results obtained - the Member's efforts resulted in the protection of the client's property interests; ensured medical evidence was obtained to support a claim for

spousal support if medical circumstances prevented her from returning to work; and put in place satisfactory interim financial arrangements;

(h) tariffs or skills authorized by the Law Society of Saskatchewan - not relevant;

(i) such circumstances as loss of other employment, urgency and uncertainty of reward - the Member's counsel argued special circumstances existed because S.H. was not initially working and had a reduced income on disability thereby elevating her need for interim support; there was an urgent need for medical attention relating to her depression and anxiety and there were parenting issues;

(j) any relevant agreement between the lawyer and the client – the Member's counsel noted that he testified he was jointly retained by S.H. and her father, with S.H. to provide instruction on the final direction and her father to be responsible for payment of accounts.

63. As noted earlier in this decision, this Committee rejects the notion that there was a joint retainer for the reasons already given.

64. Additionally, while it could be argued that the expert testimony accepted in the Small Claims decision was of less weight than it would have been had the expert had the benefit of reviewing the Member's file in full, this Committee is not satisfied that sufficient evidence was given in this hearing to displace the Small Claims Court on the issue of the reasonableness of the Member's fees. Much was made by the Member of the amount of work required to attend a series of four-way meetings between himself, his client and the opposing party and lawyer. However this factor was also considered by the Small Claims Court which still found that little progress had been made on the file. The Committee notes that at paragraph 61 of that decision, the court states:

> **[61] I am satisfied that this file was more difficult than either Mr. Hunter or Mr. Rusnak believed it to be. The plaintiff did conduct negotiations with counsel for the defendant's husband and had to prepare for and attend a number of "four-way meetings" in an attempt to settle issues in dispute between the defendant and her husband. However, "the results obtained" were abysmal. The plaintiff had made little progress on the file.**

65. Additionally, it is clear from the Small Claims Court decision that the court heard similar evidence with respect to time spent by the Member on S.H.'s medical issues and evidence focusing on the factors of the difficulty and importance of the matter and the results obtained. This Committee can come to no different result as to the issue of the reasonableness of the fee charged. The Committee finds Allegation #3 to be well founded.

Allegation #2(a)(b)

66. The allegations contained in 2(a) and (b) differ from 1 and 3 in that they focus on time spent on the matter by the Member rather than on fees.

67. As noted earlier, allegation 2(a) was restricted to medical issues in a discussion which occurred during the preliminary portion of the hearing. Counsel for the CIC submitted that that time spent was excessive and fruitless, pointing out the various medical reports, none of which concluded that S.H. 's medical issues would be a debilitating matter going forward in her life.

68. On the issue of time spent unnecessarily on medical issues, the Member's counsel noted that a client's instructions to legal counsel in a family law matter typically evolve over the course of a file as circumstances and priorities change. When S.H. initially consulted the Member, she was on disability as a result of her medical issues and it appeared a claim for compensatory and non-compensatory spousal support was important. She noted that at no time did S.H. unequivocally instruct the Member to abandon her spousal support claim for any reason.

69. The Committee finds that this allegation is not made out. The evidence does not indicate that S.H. had clearly and unequivocally instructed the Member to abandon his pursuit of the spousal support claim based on medical issues. In fact, S.H. testified that her emotional state during the relevant times was like that of a roller coaster, vacillating from "okay to not okay" to use S.H.'s words. Indeed it appears that in the beginning of 2009, she instructed the Member to abandon her health problem claims and "get on" with the matter. However by that summer, the parenting issues and the possible recurrence of health issues resulted in a contrary approach by S.H. to the conduct of the file. Consequently, it is the opinion of this Committee that S.H. did not clearly or consistently instruct the Member to abandon the health issues and his efforts in that regard do not amount to conduct unbecoming.

70. With respect to allegation 2(b) that the Member required S.H. to make unnecessary and excessive personal attendances at his office, the Committee is again of the view that the Member's behaviour does not amount to conduct unbecoming. Paragraph 63 of the Agreed Statement of Facts states that S.H. kept the Member advised when she had to be in Regina for reasons unrelated to her legal case. Appointments were scheduled around those dates if possible. S.H. also testified that it was her decision to retain a lawyer outside of her home community. It was also clear from S.H.'s evidence that while she said the numerous office attendances were an inconvenience for her because she had to take time off work without pay, it is noted that in 2008 she was off work with a disability. In 2009 many of the attendances were scheduled for the summer months when she was not working. She also testified that she did not recall ever voicing any concern to the Member about the number of attendances at his office.

71. Additionally, the Small Claims Court, while commenting on the fact that the Member had an obligation to minimize S.H.'s round trips, also stated that a number of her attendances at the Member's office were occasioned by a legitimate need to meet with him and for the purposes of obtaining initial medical reports.

72. The Committee therefore finds that the Member is not guilty of conduct unbecoming in requiring S.H. to attend at his office unnecessary and excessively.

73. A Penalty Hearing with respect to allegations 1 and 3 will be scheduled in due course.

Dated this "17th" day of April, 2018.

"Robert Heinrichs, Q.C.", Chair

"Darcia G. Schirr, Q.C."

"Judy McCuskee"

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

Members of the Hearing Committee: Robert Heinrichs, Q.C. (Chair)
Darcia Schirr, Q.C.
Judy McCuskee

Counsel: Timothy Huber for the Conduct Investigation Committee
Merrilee Rasmussen, Q.C. for the Member

INTRODUCTION

74. By a decision of the Hearing Committee of the Law Society of Saskatchewan dated April 17, 2018 and following a hearing of *viva voce* evidence on December 12, 2017 and oral submissions on March 5, 2018, Mervin Clayton Phillips (the "Member") was found guilty of conduct unbecoming a lawyer in that he:

> **1. did fail to be frank and candid with S.H. in relation to the anticipated costs of S.H.'s legal matter**;
> **3. did charge a fee to S.H. that was not fully disclosed, fair and reasonable.**

75. In relation to another allegation numbered 2 (a)(b) in the Amended Formal Complaint dated October 14, 2016, no finding of conduct unbecoming a lawyer was made by the Hearing Committee.

76. Accordingly, a penalty hearing with respect to the Hearing Committee's finding of conduct unbecoming was held on July 12, 2018.

77. Proof of service of the Notice of Penalty Hearing was filed.

78. Written submissions on behalf of the Conduct Investigation Committee and on behalf of the Member were provided to the Hearing Committee and Counsel both made oral submissions and addressed questions from the Hearing Committee.

SUBMISSIONS REGARDING PENALTY

79. On behalf of the Conduct Investigation Committee, Mr. Huber submitted that the Hearing Committee impose the following penalties:

> a. that the Member be suspended for a period of thirty days;
> b. that the Member be required to pay the costs of the investigation and hearing.

80. Cases referred to by the Conduct Investigation Committee in its penalty recommendation included the following:

> *Law Society of Manitoba v. Lee [1998] L.S.D.D. No. 22*
> This case involved a lawyer who admitted to charging a fee which was not fully disclosed, fair and reasonable and which could not be justified in light of the pertinent circumstances contrary to the Law Society rules and Code of Professional Conduct provisions. The Hearing Committee accepted a joint submission of counsel that the appropriate penalty was a reprimand and full costs of the prosecution. This lawyer's unblemished record over two decades of practice, his cooperation with the prosecution and expressed regret were relevant factors in

the Hearing Committee accepting the joint submission. They found the conduct unbecoming an isolated error in judgment.

Law Society of Saskatchewan v. Tapp [2011] L.S.D.D. No. 267
The relevant portion of this case involved a lawyer who spent approximately twenty minutes on the telephone with a client, the results of which required the client to pay $1,100.00 immediately as a deposit with further installments to be paid thereafter. The lawyer generated an invoice and receipted the $1,100.00 deposit into his general account the same day and no real work was reflected on the file outside of the telephone attendances. The Hearing Committee in that case, relying on a joint submission, suspended the Member for fifteen days to run concurrently with a separate fee-related complaint that led to a forty-five-day suspension period. The Committee did note that but for the joint submission they would likely have imposed consecutive suspensions on the two unrelated complaints.

Law Society of Manitoba v. Troniak [1997] L.S.D.D. No. 62
This case involved a lawyer pleading guilty to four counts of professional misconduct, in that on four separate occasions he charged excessive fees to clients. The Hearing Committee by a majority decision noted that the Member in that case was motivated by personal gain and took advantage of vulnerable clients and imposed a sixty-day suspension and a costs award.

Law Society of Upper Canada v. Bagambiire [2008] L.S.D.D. No. 61
This was a case of a lawyer charging excessive and unreasonable fees. The case involved a significant amount of money with the lawyer withdrawing over $100,000.00 in legal fees without adequately accounting to the clients. Both the Law Society and the Member's Counsel recommended a suspension albeit of different lengths. The Society sought a suspension of between one to three months while the Member and his Counsel sought a suspension of an indeterminate length to be determined by the Hearing Panel. Both parties were agreed on the amount of costs to be paid. The Hearing Panel in that case determined that the three general principles to be considered in determining the appropriate penalty were: general deterrence; specific deterrence; and, protection of the public confidence. Despite the Hearing Panel noting the Member was cooperative with the Law Society throughout the investigation and hearing process by consenting to an agreed statement of facts and despite the lawyer having no previous record of problems with the Law Society of Upper Canada (although the Panel was aware of problems with the Law Society of Nova Scotia that in their view were neither serious nor similar to the case which was before them), public confidence in the profession would be shaken unless the penalty was moderately severe and they therefore imposed a two month suspension with conditions upon return to practice.

Law Society of Upper Canada v. Daley [1992] L.S.D.D. 59
Referred to in the *Bagambiire* case, *Daley* involved a lawyer retained by clients with respect to an investigation into an alleged conspiracy to traffic in narcotics. These same clients were the subject of organized crime proceedings in the United States. The case before the Law Society of Upper Canada contained an agreed statement of facts. The lawyer's billing history on the file was aggressive and significant, totalling in the hundreds of thousands of dollars. As a result of an assessment of solicitor's accounts, the lawyer's firm repaid a large amount of funds to the clients. The case also involved the lawyer attempting to take advantage of

vulnerable clients, not in the normal sense of the word, but in the sense that given the high-profile criminal allegations against them, they did not want to have any publicity which the lawyer attempted to leverage in requesting excessive and unreasonable fees from them. Finding that the lawyer billed and paid out of trust funds his retainer fee of $20,000.00 for no services and his attempt to leverage additional significant funds from the clients failing which he said he would not act further for them, the Committee recommended that the solicitor be suspended for six months and pay costs of the Law Society. In doing so, the Committee noted that the excessive fees and disbursements were "grossly excessive".

81. Ms. Rasmussen on behalf of the Member submitted as follows with respect to the cases relied on by the Conduct Investigation Committee:

Law Society of Manitoba v. Lee [1998] L.S.D.D. No. 22
It was submitted on behalf of the Member that this case was the most similar to the case at bar involving, as it did, one allegation of charging a fee that was not fully disclosed, fair or reasonable; a Member with no previous disciplinary history and the conduct being characterized by the Hearing Committee as an isolated error in judgment. Lee was reprimanded and ordered to pay costs. Member's Counsel submitted this case as the basis for their submission that the penalty should be comprised of a formal reprimand, fine and costs.

Law Society of Saskatchewan v. Tapp[2011] L.S.D.D. No. 267
The Member noted this was the only Saskatchewan case cited by the Conduct Investigation Committee and submitted that since *Tapp* involved two clients with four separate complaints it was unlike the case at bar which involved one client and no actual complaint. The Member also noted that *Tapp* was resolved by joint submission and the factors underpinning the reason for the penalty are therefore not known. She did note, however, that at paragraph 70 of the *Tapp* decision, the Committee stated that "precedents dealing with excessive billing indicated a range of sentences from reprimand to a two-year suspension".

Law Society of Manitoba v. Troniak [1997] L.S.D.D. No. 62
Counsel for the Member submitted that this case was distinguishable on the grounds that *Troniak* involved a Member with a history of fee-related discipline. She also noted that in the second proceedings against *Troniak*, a finding was made that an element of "undue profit" motivated the Member and acted as an aggravating factor.

Law Society of Upper Canada v. Bagambiire [2008] L.S.D.D. No. 61
The Member's Counsel distinguished this case on the basis that it dealt with a lawyer receiving trust funds into their general account following the preparation of one-line accounts which were never delivered to clients. Additionally it was noted the Member in *Bagambiire* had a previous discipline history.

Law Society of Upper Canada v. Daley [1992] L.S.D.D. No. 59
Again distinguishing this case from the case at bar, the Member's Counsel noted that *Daley* billed $20,000.00 shortly after meeting the client without having done any work; the case involved vast amounts of money with one-line bills and an attempt by the Member to bargain away the complaint. She submitted that given those significant differences, the case was not applicable to the case at bar.

82. In addition to the above, the Member referred the Committee to the following cases:

Nova Scotia Barristers' Society v. Jordan 1995 NSBS3
Ms. Rasmussen referred the Committee to this case of excessive billing as authority for the proposition that the effect a suspension could have on a Member's practice as a sole practitioner should be considered by the Panel in determining the appropriate penalty.

Law Society of Upper Canada v. Doucet File No. LCN101/11
This excessive fee case resulted in the lawyer receiving a reprimand and a costs award against him. No reasons for the decision by the Law Society of Upper Canada were provided to this Committee although the agreed statement of facts filed in that case was provided.

Law Society of Manitoba v. Crane Case 14-02
This case involved a joint recommendation on disposition resulting in a fine and costs award with respect to a lawyer who failed to obtain informed consent of the executor/client with respect to legal fees which the client was charged in an estate matter.

ANALYSIS

83. This Committee's authority to assess penalties in matters of this sort emanates from *The Legal Profession Act, 1990* as follows:

> 53(3) If a hearing committee finds that a formal complaint is well founded, the hearing committee may, by order, do one or more 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 of more members that the committee may specify;
>
> (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.

84. The overriding interest directing this Committee in determining the appropriate penalty is found in sections 3.1 and 3.2 of *The Legal Profession Act, 1990* which says:

> 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.

85. These guiding principles differentiate sentencing within the professional regulation context from other proceedings such as sentencing within the criminal justice context. This fundamental difference was noted in *Law Society of Saskatchewan v. Abrametz 2017 SKLSS 4* at paragraph 106 where the Committee referred to the Saskatchewan Court of Appeal decision in *Merchant v. Law Society of Saskatchewan 324 Sask R 108* at paragraph 98-99:

> … the sentencing approach in disciplinary proceedings is different than in criminal courts. In *Law Society of Upper Canada v. Kazman*, the Law Society Appeal Panel considered the philosophy of sentencing in disciplinary matters and its unique considerations. The panel quoted extensively from *Bolton v. Law Society*. The critical distinction between sentencing in criminal matters and sentencing in disciplinary matters is highlighted in this paragraph:
>
> > A criminal court judge … is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the accused licensee's peer group – the legal profession. According to *Bolton*, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law society's discipline process. It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind.

86. It is clear that this Committee, in determining the penalty, must give paramount consideration to the protection of the public as well as ethical and competent practice over the interests of the Member as directed by section 3.2 of *The Legal Profession Act, 1990*.

87. Against this philosophical backdrop, the imposition of a penalty is necessarily a fact sensitive exercise. The case law can provide a range of penalty options for cases involving similar conduct but ultimately the decision must be based on the facts of the case as found by the Hearing Committee.

88. The interplay between precedent and facts was noted by the Saskatchewan Court of Appeal in *Peet v. The Law Society of Saskatchewan 2014 SKCA 109* [at para. 90]. The court noted the importance of the context within which a specific act of misconduct occurs by referring to its own decision in *Merchant 2014* where it was explained as follows:

> [121] In deciding on whether a decision is reasonable, one must look to penalties imposed for similar actions as well as any relevant aggravating or mitigating factors. Although the following should be noted:
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> > [T]he penalties imposed for similar cases of misconduct differ widely, both within and among jurisdictions. This is largely due to the fact that one of the main purposes of the process is to protect the public. It may be entirely appropriate that a lawyer who has proven to be incorrigible be disbarred for the same conduct for which a different lawyer is reprimanded. [Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline*, looseleaf (Toronto: Carswell, 2011) at 26-43]
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> Thus, the reasonableness of a sentence will largely depend on the specific circumstances of the offence and the offender.

89. Most of the cases cited by Counsel were not from Saskatchewan. However, the similarity of the facts in those cases to this case is more important than the jurisdiction from which the case originates.

90. The cases cited do indicate a range of sentences from a reprimand to a two-year suspension. Some of the cases indicate the sanction was based on a joint submission. The Committee has considered those cases, recognizing that joint submissions are the product of a number of factors, not all of which are reflected in the tribunal's written decision.

91. It is relatively easy to distinguish the cases cited from the case for decision based on differences in facts. What does emerge from the cases, however, is that more often than not, the facts in fee-related complaints will, when combined with certain aggravating factors, result in a suspension rather than a reprimand or fine.

92. In *Tapp* there was a complete disconnect between the work done and the bill rendered. The result was a suspension.

93. In *Troniak* there was an element of undue profit acting as a serious aggravating element.

94. *Daley*, while dealing with much higher dollar values than this case, involved a lawyer seemingly taking advantage of a client's sensitive position to bill far more than the work justified.

95. In this case, this Committee found that the Member failed to be frank and candid in relation to the anticipated costs of the matter. Further, not only was there no clear disclosure of the anticipated costs but the information that was provided was confusing. (April 17th, 2018 decision at paragraph 31).

96. In relation to the other finding of conduct unbecoming in this case, this Committee affirmed the views of the Small Claims Court decision that gave rise to the complaint. The Member's results obtained for the client were abysmal and little progress had been made on the file.

97. In addition to reviewing the range of penalties imposed in similar cases, the Committee reviewed the aggravating and mitigating factors cited in *Law Society of BC v Ogilvie,* [1999] LSBC 17, to determine which apply in this particular case.

98. The Committee considers the nature and gravity of the Member's conduct an aggravating factor with respect to count #1 in that the failure to disclose anticipated costs occurred over a period of nearly two years, in spite of repeated requests for information from the Member's client, and was evidenced by a series of confusing accounts issued by the Member. On any one of those accounts, the original failure to be candid and frank in relation to costs could have easily been remedied, but it was not.

99. The Committee considers the nature and gravity of the conduct proven a mildly aggravating factor with respect to count #3, in that the overbilling as determined by the Small Claims Court decision represented 64% of the amount billed, but the amount of the over-billing was less than $20,000.00 which is in the mid-range of the excess fees in the cases cited by Counsel. Those cases varied widely.

100. The age and experience of the Member was considered as neither an aggravating nor mitigating factor. Based on his Counsel's submission, the Member has engaged in substantial continuing legal education and professional development. It is just as logical to propose that the Member's length of experience and advanced education should have given him the ability to avoid the conduct of which he was found guilty as it is to propose that his length of experience and advanced education should mitigate the penalty for such conduct.

101. With respect to the previous character of the Member and prior discipline, the Member has been practicing for 37 years with one prior finding of conduct unbecoming. On March 20, 2015, the Member was found guilty of conduct unbecoming in that he did, after receiving notice of termination of his retainer from his clients, attempt to impose inappropriate conditions upon the release of his clients' files. The Member received a reprimand and an order to pay costs. The fact that the Member, less than three years ago, was found guilty of conduct unbecoming is an aggravating factor that must be considered in fashioning a penalty in this case.

102. The victim in this matter is the Member's client. Member's Counsel characterizes the impact on the client as the financial impact of the excess billing, and as such was remedied by the Small Claims Court decision. The Committee finds there was substantial financial impact on the client, who had to defend an extensive Small Claims action and faced financial uncertainty over a legal bill approximating $30,000.00 from 2008 until 2013. During the Member's representation of the client, she was ill and in a very stressful situation. The Committee accepts the submissions of the Conduct Investigation Committee that the client was vulnerable medically,

emotionally, and financially. The Member's failure to render accurate and timely accounts, even after the client's repeated requests, may have prolonged her family law dispute and certainly made it impossible for his client to plan her financial commitments or to make informed decisions about the conduct of her matter, adding to her stress. The Committee considers this a significant aggravating factor.

103. The Member gained a financial advantage of approximately $20,000.00 through overbilling, as determined in the Small Claims Court Decision.

104. It is a mitigating factor that the offending conduct occurred with respect to only one client. However, that conduct was not limited to one occurrence, but occurred throughout the legal matter, both with respect to Count #1 and Count #3, making this an aggravating factor.

105. The Committee considered whether the Member has acknowledged the misconduct and taken steps to disclose and redress the wrong. The Committee accepts that the Agreed Statement of Facts reduced the hearing time and the attendant stress on the Member's client and considers this a mitigating factor. Member's Counsel submits that the Member has improved billing practices and tried to take steps to require written retainer agreements. Such steps and improvements, however, are neither acknowledgement of misconduct nor steps to disclose or redress the wrong done to the Member's client and cannot be considered a mitigating factor. On the contrary, the Committee finds that the Member has not acknowledged his misconduct and that this is an aggravating factor.

106. The possibility of remediating or rehabilitating the Respondent is considered neither an aggravating nor mitigating factor in this case.

107. The impact on the Respondent of criminal or other sanctions or penalties is not relevant to this case.

108. Although the Committee accepts that a suspension will have a significant impact on the Member, no information was submitted that this impact would be any greater than that on any small practitioner. The overriding interest in evaluating mitigating and aggravating factors must remain the public interest, not the Member's. Any potential impact on the Member's clients can be significantly reduced by allowing flexibility in the timing of a suspension.

109. Fairness and transparency in fees and billing are essential if the public is to have confidence in the integrity of the legal profession. From this arises the need for specific and general deterrence.

110. Counsel for the Conduct Investigation Committee tendered a summary of the costs along with a time breakdown (Exhibit P3). The total costs are $18,053.50 based on P3. Time spent by legal counsel for the Conduct Investigation Committee is identified as $12,200 (61 hours x $200 an hour). The disbursements total $5,853.50. The Conduct Investigation Committee proposes that the fees be reduced by one-third to reflect that one of the three counts the Member faced was dismissed. No reduction is proposed for disbursements. With this proposed reduction, the total would be $13,986.84 which is broken down as $8,133.34 in time spent by legal counsel plus $5,853.50 in disbursements.

111. The Member proposes that costs of $10,000.00 would be appropriate, arguing there were really four counts facing the Member and that only two were made out.

112. The Committee accepts the submissions of the Conduct Investigation Committee. These proceedings entailed the hearing of a preliminary motion, one full day of testimony, the hearing of submission on liability and finally, the hearing of submissions regarding sanction. The reduction in costs suggested by the Conduct Investigation Committee is appropriate given the dismissal of allegation 2. The Committee does not see allegation number 2 as containing two separate components but instead, allegation number 2 set out two particulars to the broad allegation of failure to serve the client in a conscientious diligent and efficient manner.

113. The costs proposed here are neither prohibitive or punitive but instead, are appropriate and fair.

114. The rationale for a costs order has been set out in many cases. In *Hoff v Pharmaceutical Assn. (Alberta)* (1994) 17 Alta L.R. (3d) 387:

> **As a member of the pharmacy profession the appellant enjoys many privileges. One of them is being part of a self-governing profession. Proceedings like this must be conducted by the respondent association as part of its public mandate to assure to the public competent and ethical pharmacists. Its costs in so doing may properly be borne by the member whose conduct is at issue and has been found wanting.**

115. Those principles apply equally to the legal profession.

116. Having considered the range of penalties established in case law and having considered the aggravating and mitigating factors at work here and giving consideration to the public interest and the reputation of the administration of justice, this Committee orders that:

(a) The Member be suspended for a period of thirty days with the period of suspension to commence on a date as agreed between Counsel for the Conduct Investigation Committee and Counsel for the Member but such period of suspension to commence no later than July 1, 2019;

(b) The Member to pay costs in the sum of $13,986.84 to the Law Society of Saskatchewan on or before July 1, 2019 failing which an additional suspension from practice will be imposed until full payment has been made.

Dated this "10th" day of December, 2018.

"Robert Heinrichs, Q.C.", Chair

"Darcia G. Schirr, Q.C."

"Dr. Greg Stevens"