

This is a hypothetical case scenario and does not represent a real hearing, individuals, or circumstances.¹

Law Society of Alberta v. Harris

Approximately one year ago, the Law Society of Alberta (LSA) received a complaint (“Complaint”) from Dr. Michel Hernandez against Jackson Harris, a member of the LSA, who had represented Dr. Hernandez’s former spouse, Felicia Hernandez, in a family law matter. Upon completion of a review and investigation of the Complaint, the Conduct Committee determined that there was sufficient evidence of conduct deserving of sanction to refer the matter to the Hearing Committee in respect of the following Citations:

1. It is alleged that you failed to take adequate steps to recommend to the Complainant, an unrepresented person, that he obtain independent legal counsel, which is conduct deserving of sanction.
2. It is alleged that you failed to ensure that the Complainant was not proceeding under the impression that you would protect his interests, which is conduct deserving of sanction.
3. It is alleged that you failed to correct the Complainant’s misapprehension regarding your client’s plans to return to work after you became aware that material representations made by you or your client became inaccurate.
4. It is alleged that you failed to treat the Complainant in a courteous and professional manner, which is conduct deserving of sanction.

Mr. Harris denied all of the Citations. On June 1, the Hearing Committee held a contested hearing into whether he was guilty of conduct deserving of sanction in respect of the Citations. The case presenter for the LSA was Terence Abel. Sarah Wynn represented Mr. Harris.

Evidence of the Complainant, Dr. Hernandez (LSA witness)

Dr. Hernandez testified he was a family physician. He and Mrs. Hernandez were married in 2000 and have three children of the marriage, a son age 13 and two daughters ages 11 and 7. Mrs. Hernandez was a registered nurse prior to the marriage and worked for the first few years of their marriage, but never returned to work after their son was born.

Dr. Hernandez said Mrs. Hernandez asked for a divorce four years ago but hoped to keep it amicable for the children’s sake. Dr. Hernandez agreed that they should cooperate as much as possible to make the transition easy for the children and also to preserve family assets. To him, this meant trying to work out a deal without lawyers and getting a lawyer at the end of negotiations only to do the necessary paperwork. Thus, he was surprised to learn that Mrs. Hernandez had retained Mr. Harris as her lawyer. When he questioned the move, Mrs. Hernandez downplayed it, saying that she was not looking for a fight, she was only looking for some assistance in navigating divorce law. Dr. Hernandez met with Mr. Harris and found him to be polite and pleasant and someone he thought he could deal with.

¹ Prepared by James T. Casey, QC and Lily Nguyen of Field Law

Dr. Hernandez testified that Mr. Harris discouraged him from retaining his own lawyer. Mr. Harris did not go so far as to tell Dr. Hernandez not to get a lawyer outright. Instead, he stressed how expensive it was to get a lawyer and how big a drain this would be on the family's assets. Dr. Hernandez said Mr. Harris would often say things like, "You think it's expensive for a divorcing couple to pay for *one* lawyer. Well, it's at least double for two. Because when two lawyers get involved, that's when the fights start and you rack up the legal fees." Mr. Harris would then tell him horror stories of other couples whose assets were entirely consumed by legal battles. He also sent him copies of cases in which a divorcing couple fought multiple applications and appeals, resulting in huge legal bills. Dr. Hernandez characterized this as a subtle psychological ploy to persuade him not to retain his own lawyer.

According to Dr. Hernandez, his lack of legal counsel greatly prejudiced him in the divorce proceedings with respect to the division of matrimonial property and child custody arrangements. This was because while he was confident in his ability to reach a reasonable agreement, he was unprepared for Mr. Harris's "underhandedness."

Dr. Hernandez said the greatest family asset was the couple's \$1-million custom-built home with a mortgage of \$300,000 on it. In the matrimonial property agreement ("Agreement"), he relinquished his claim to half the home equity, or \$350,000, in exchange for a waiver of spousal support. The major remaining asset of approximately \$200,000 in RRSPs and TFSAs was divided 50/50. As for custody arrangements, he agreed that his wife would be the primary caregiver with physical custody and he would pay \$4,000 a month in child support, in line with the *Federal Child Support Guidelines*.

Dr. Hernandez said these arrangements were premised on Mrs. Hernandez's and Mr. Harris's representations to him that she wanted to stay home with the children until the youngest entered junior high school at least 5 years from now. They also informed him that after that happened, Mrs. Hernandez would need a transition period of several years to re-qualify as an RN and work her way up to full-time employment again. He said Mr. Harris told him, "You're not going to get a better deal than this." Mr. Harris also said, "I'm not your lawyer, but if I was, I would recommend that you take it." Dr. Hernandez decided to take the deal.

Two weeks after the settlement meeting, Mr. Harris sent Dr. Hernandez two unsigned copies of the Agreement, an acknowledgment form ("Acknowledgment") required under s. 38 of the *Matrimonial Property Act* to make the Agreement enforceable, and a form of Certificate of Independent Legal Advice ("Certificate"). The documents were accompanied by a letter that briefly stated: "Please attend upon a lawyer to get these executed and return to me as soon as possible. I will arrange for execution by Mrs. Hernandez." Dr. Hernandez had no other discussion with Mr. Harris about the documents prior to the signing.

In the course of unrelated discussions with his wife, Dr. Hernandez learned she was meeting with Mr. Harris to sign the documents. She agreed that he could attend at the same time.

When Dr. Hernandez arrived at Mr. Harris's office, he was told by Mr. Harris for the first time that he needed his own lawyer to complete the documents. Mr. Harris then referred him to another lawyer in his building, Charles Lu, to sign the Acknowledgment and the Certificate. Mr. Harris telephoned Mr. Lu and sent Dr. Hernandez over to his office with a copy of the documents and a letter to Mr. Lu, which stated: "As discussed, attached for execution is the agreement between Dr. Hernandez and Mrs. Hernandez. Please assist Dr. Hernandez in completing the documents. We will pay your reasonable account upon receipt of an invoice." Dr. Hernandez said he met with Mr. Lu for about 20-30 minutes, which he thought was a "pointless formality" since Mr. Lu knew little about family law and nothing about his matter. He returned with the executed documents and an invoice from Mr. Lu for \$100, which

he gave to Mr. Harris. Dr. Hernandez has since filed a complaint to the LSA against Mr. Lu, which is under investigation. The letter to Mr. Lu, signed documents and invoice were entered as exhibits.

Dr. Hernandez testified that shortly after the Agreement was signed, he learned that Mrs. Hernandez had obtained her mortgage associate license while they had been negotiating the Agreement but never disclosed this fact to him. The divorce was finalized two years ago, and within two months, Mrs. Hernandez was working full time for her uncle, who owned a mortgage brokerage. For child care, she hired a live-in nanny at the cost of \$2,000 a month plus room and board and Dr. Hernandez had to pay for 90% of it as an extraordinary expense under section 7 of the *Federal Child Support Guidelines* on top of the \$4,000/month in child support. Mrs. Hernandez has been very successful and in the last year her income was almost on par with his and continues to rise. As a result, as of this year, his share of the cost of the nanny was reapportioned to 55%, with Mrs. Hernandez paying the other 45%.

Dr. Hernandez said had he known Mrs. Hernandez had any plans to return to work immediately, he would not have entered into the Agreement or agreed to give Mrs. Hernandez full custody, but would have sought a shared parenting regime and “probably” would have consulted a lawyer about his options on how to protect himself if Mrs. Hernandez returned to work earlier than planned. If he had known of her plans to return to work right away, he would not have agreed to pay spousal support through relinquishing his claim to half the home equity. Dr. Hernandez said he now has a lawyer and is trying to have the Agreement set aside and get a new custody arrangement, but it is an uphill and expensive battle.

Dr. Hernandez said shortly after he learned Mrs. Hernandez had breached their understanding, he tried to contact Mr. Harris for an explanation, but Mr. Harris did not respond. After two weeks of no reply, Dr. Hernandez was so upset that he went to Mr. Harris’s office and confronted him there. He testified that Mr. Harris yelled at him, called him a “f***ing moron” and threatened to call the police if he did not leave the office.

The following additional documents were entered into evidence:

- An e-mail from Mr. Harris to Dr. Hernandez dated a month after Mrs. Hernandez retained Mr. Harris, which attached a number of high-conflict, expensive divorce cases. The subject line was “high-cost divorce cases” and the body of the e-mail read: “As we discussed. I don’t think either party wants to see this happen.”
- A reply e-mail from Dr. Hernandez which said: “You’re right. We should be able to work this out like civilized people for the sake of our family. I don’t want to waste what I worked so hard to build up.”
- Dr. Hernandez’s handwritten notes regarding the settlement meeting with Mrs. Hernandez and Mr. Harris, which support Dr. Hernandez’s understanding that Mrs. Hernandez intended to stay home with the children for at least five more years.
- An e-mail from Mr. Harris to Dr. Hernandez titled “nursing program” dated shortly after the settlement meeting in which Mr. Harris embedded links to an 8-month nursing refresher program and wrote in the body of the e-mail: “See links. This is the program that Mrs. Hernandez would need to take.”
- An e-mail from Mr. Harris to Dr. Hernandez dated two weeks after the settlement meeting, which attached a document titled “draft Agreement.” It states: “Here is the draft agreement. I think this is a fair deal on all sides. Nobody gets everything that they want. Please confirm your agreement in

principle and I will prepare the final draft for signing.” The draft substantially accords with the actual Agreement, with minor formatting changes.

- A copy of the Agreement and Acknowledgments and Certificates signed by the parties. The Agreement characterized the unequal division of assets as “compensatory spousal support.” and was silent about Mrs. Hernandez’s return-to-work plans.
- A number of e-mails dated after Mrs. Hernandez began full-time work in which Dr. Hernandez demanded an explanation from Mr. Harris. The tone is increasingly hostile.

On cross-examination, Dr. Hernandez acknowledged receiving an introductory letter from Mr. Harris in which he introduced himself as “counsel for Mrs. Hernandez.” The letter, entered as an exhibit, also informed Dr. Hernandez that “you have the right to retain your own legal counsel and I highly recommend that you do so.”

Dr. Hernandez admitted on cross-examination that he never looked closely at the form of the Acknowledgment and Certificate before he arrived at Mr. Harris’s office to sign the documents. He also admitted that Mr. Harris was surprised to see him there with the documents unsigned. He said Mr. Harris referred him to Mr. Lu only after he requested a referral.

Finally, Dr. Hernandez acknowledged that when he later went to Mr. Harris’s office to confront him, he was very upset and raised his voice and swore at Mr. Harris and also at his legal staff. Dr. Hernandez admitted that his behaviour might have frightened Mr. Harris’s legal staff.

Evidence of James White, Mortgage Broker (LSA witness)

Mr. Abel next called James White, Mrs. Hernandez’s uncle and the owner of a mortgage brokerage. Mr. White testified that he intended to retire in the next 5-8 years and had been looking for a successor. He first raised the idea of his niece coming to work for him about 5 years ago, when his niece told the family that she wanted a divorce, but was afraid to leave for financial reasons. She initially responded dubiously, but he encouraged her to consider it because he thought she was a real “people person” who had the makings of a good broker.

Mr. White said he continued to discuss the possibility with his niece and over time she became more open to the idea. However, she did not begin to take it seriously until about 3 years ago, when she agreed to train as a mortgage associate at his expense. It was only after the divorce was finalized that Mrs. Hernandez accepted the job and signed an employment contract. Mr. White said he had never communicated with Mr. Harris.

On cross-examination, Mr. White agreed that he would not have paid for Mrs. Hernandez’s training if he had not received a “fairly firm” commitment from her that she would take the job.

Evidence of Mrs. Hernandez (witness for Mr. Harris)

Ms. Wynn called Mrs. Hernandez as her first witness.

Mrs. Hernandez confirmed she had worked as an RN until the children were born. Mrs. Hernandez denied she had misled Dr. Hernandez in any way. She said both of her older children had struggled at school and required some homeschooling, which she provided. She had expected to have to homeschool their youngest as well to some extent, but after seeing how well her youngest daughter adapted to playschool, she began thinking she could return to work earlier. This realization came on gradually through the period of settlement talks.

Mrs. Hernandez also stated that she had fully intended to re-train as an RN, which she characterized as the “safe” course. She characterized work for her uncle as “taking a big risk.” She acknowledged that she had taken the mortgage associate course to qualify for a license while in settlement talks with Dr. Hernandez, but had no clear plans about what she intended to do with it. She only abandoned her plan to re-train as an RN after she started working as a mortgage associate and was “amazed” at her success. She attributed her success to her uncle’s mentorship and support.

Mrs. Hernandez testified that Mr. Harris knew of her plans to get licensed as a mortgage associate and was aware when she received her license two weeks before the settlement meeting. However, he could not have known she intended to work full-time because she did not know herself until it actually happened.

Mrs. Hernandez said she and Mr. Harris had many discussions where Mr. Harris complained about Dr. Hernandez not having his own lawyer and how complicated it made everything.

Mrs. Hernandez said she had never intended to hide her mortgage associate training from Dr. Hernandez and assumed their children would have mentioned it since she studied at home. Mrs. Hernandez also stated that Dr. Hernandez “must have known” that she intended to work at least part-time while their youngest daughter was still in elementary school because otherwise, her only income was the child support, which was not enough to live on. She said she did not want to dip into her RRSPs and TFSAs because she was saving them for retirement.

On cross-examination, Mrs. Hernandez acknowledged that she never disclosed to Dr. Hernandez any change in her plans to return to work and become a mortgage associate. Mrs. Hernandez confirmed that she was now taking the course to become a mortgage broker with the expectation of taking over her uncle’s business. She expected her income would continue to rise.

Evidence of Mr. Harris

Mr. Harris was the last witness called. He confirmed that he dealt with Dr. Hernandez frequently over the course of about 8 months of negotiations. He said he followed up his introductory letter to Dr. Hernandez with verbal recommendations that Dr. Hernandez find his own legal counsel. He said these were largely ignored by Dr. Hernandez who “only hears what he wants to hear.”

Mr. Harris testified that because Dr. Hernandez refused to retain his own lawyer, he often felt put in the awkward position of explaining divorce law to Dr. Hernandez. He said he struggled to walk the line between being forthright with Dr. Hernandez and also loyal to his own client. Mr. Harris denied giving Dr. Hernandez any legal advice and said it was not up to him to look out for Dr. Hernandez’s interests, especially to the detriment of his own client.

Mr. Harris denied that his intent in sending Dr. Hernandez an e-mail attaching high-cost divorce cases was to dissuade him from retaining his own counsel. His only purpose was to encourage the parties to co-operate rather than get into high-conflict battles.

Mr. Harris said he knew Mrs. Hernandez was taking the mortgage associate course to get licensed, that her uncle was a mortgage broker and that she planned to work for him. However, he assumed that this would consist of part-time work “on the side” while their youngest was still in elementary school. He inferred this from Mrs. Hernandez’s statement that working for her uncle would give her “lots of flexibility” and her consistent statements about re-training as an RN after five years at home. He denied

that he had any knowledge that she intended to work on a full-time basis immediately or that her uncle hoped to hand over his mortgage business.

In any case, Mr. Harris characterized this information as protected by “solicitor-client confidentiality” and said he could not disclose it even if he was fully aware of Mrs. Hernandez’s future intentions. Mr. Harris also stated that Dr. Hernandez “should be happy” that Mrs. Hernandez was so successful as a mortgage associate since this reduces Dr. Hernandez’s share of section 7 costs.

Mr. Harris admitted he did not discuss with Dr. Hernandez, prior to the signing date, his need to get his own lawyer to complete the Acknowledgment or Certificate. He stated, “It slipped my mind. Anyway, I’m not his lawyer. Anyone who read the form would know what was needed.” He was annoyed and frustrated when Dr. Hernandez showed up with the unsigned documents.

Mr. Harris said he knew Mr. Lu practises mainly criminal law, but he made the referral because he knew Mr. Lu was in his office and both the Hernandezes wanted to get the Agreement signed. He confirmed that he paid Mr. Lu’s \$100 invoice, and said he billed the cost as a disbursement on Mrs. Hernandez’s statement of account.

Mr. Harris said that after the divorce was finalized, Dr. Hernandez attempted to contact him while he was on vacation. By the time he reviewed the e-mails and voice mail (which were forwarded by his assistant), the tone had become rude and hostile. Mr. Harris decided there was no point in dealing with it on vacation so he waited until he was back to contact Dr. Hernandez. Before he could do so, Dr. Hernandez showed up at his office and was loud and abusive to his staff. Mr. Harris became angry and ordered Dr. Hernandez to leave the premises. He testified that he spoke angrily to Dr. Hernandez because he had been abusive to his staff. He denied calling him a “f***ing moron,” saying that is not the type of language he would use. On cross-examination, Mr. Harris was asked about the statement he had provided to the Law Society’s investigator in which he acknowledged that he probably did call Dr. Hernandez a “f***ing moron”. Mr. Harris testified that he had thought more about that day as the Law Society hearing came closer and on reflection he is pretty sure he did not use the word “f***ing”. He did acknowledge that he called Dr. Hernandez “a moron”.

Among the exhibits entered into evidence were:

- Mr. Harris’s notes of the settlement meeting, which recorded Mrs. Hernandez’s “preliminary plan” to stay home until their youngest was in junior high, then work as an RN.
- Phone messages from Mr. Harris’s assistant of Dr. Hernandez’s increasingly sarcastic and hostile telephone calls. The last phone message reported that Dr. Hernandez demanded a return phone call and said he did not want to listen to her “stupid excuses.”

In cross, Mr. Harris acknowledged that despite his serious concerns about Dr. Hernandez’s misapprehension of his role, he did not make any other effort to clarify Dr. Hernandez’s understanding in writing.

Mr. Harris also admitted that he could have asked Mrs. Hernandez for more details of her intentions to work as a mortgage associate but did not do so. He agreed that he had never mentioned the possibility of Mrs. Hernandez working as a mortgage associate to Dr. Hernandez.

Closing Arguments

In closing arguments, Mr. Abel for the LSA argued that in the circumstances, Mr. Harris needed to make greater efforts to make Dr. Hernandez aware of his need for independent legal counsel. While he

acknowledged the initial letter from Mr. Harris recommending Dr. Hernandez obtain independent legal counsel, he argued that this needed to be reiterated as matters proceeded. In particular, Mr. Harris should have re-affirmed the need for legal counsel when Mr. Harris became aware of Mrs. Hernandez's mortgage associate training. Referring Dr. Hernandez to Mr. Lu did not discharge Mr. Harris's obligation in this regard because Mr. Harris knew that Mr. Lu did not practice family law, and Mr. Harris should have known that Mr. Lu could not offer adequate or independent legal advice given the circumstances of the referral, the short meeting, Mr. Lu's inexperience in family law, the low rate charged by Mr. Lu and the fact that Mr. Harris paid Mr. Lu's invoice.

Mr. Abel stated that the course of the proceedings established that Mr. Harris had given Dr. Hernandez the impression that Mr. Harris would look out for his interests. This was apparent from Mr. Harris discouraging Dr. Hernandez from obtaining his own legal counsel from the outset, his recommendation that he sign the Agreement as a "fair deal," and his arrangement of and payment for Mr. Lu's legal representation.

Mr. Abel argued that Mr. Harris had misled Dr. Hernandez about Mrs. Hernandez's return-to-work plans. In such case, it was incumbent on him to correct the misapprehension of fact instead of exploiting it by obtaining favourable terms in the Agreement. Even if Mr. Harris was not certain about Mrs. Hernandez's return-to-work plans, he had an obligation to disclose the possibility of an alternate career path so that Dr. Hernandez could take steps to protect himself against the contingency. Mr. Abel noted that Mr. Lu's advice to Dr. Hernandez would have been tainted by the same misapprehension of fact.

Finally, Mr. Abel argued that the Hearing Committee should find that Mr. Harris called Dr. Hernandez a "f***ing moron" as testified by Dr. Hernandez. In the interview with the investigator, Mr. Harris acknowledged that he probably did so. This language is inappropriate and constitutes a failure to treat the Complainant courteously and professionally.

Mr. Harris's counsel, Ms. Wynn, argued that the case was built on Dr. Hernandez's unreasonable expectations of Mr. Harris, who had clearly communicated in his initial letter that he was adverse in interest to Dr. Hernandez. No lawyer should be expected to do more. There was nothing wrong with Mr. Harris pointing out the high legal expenses where parties are unable to arrive at a reasonable solution.

Ms. Wynn pointed out that Dr. Hernandez had received forms of the Acknowledgment and Certificate ahead of time and should have inferred from them that he needed independent legal counsel. It was Dr. Hernandez's own stubbornness and negligence in looking out for his interests that caused him to retain Mr. Lu at the last minute. Dr. Hernandez also could have postponed the signing, but chose to forge ahead. Ms. Wynn said any lawyer dealing with an unrepresented party in litigation faces difficult challenges and risks. The Law Society needs to ensure that it does not establish unrealistic expectations.

On the charge of failure to correct a material misapprehension, Ms. Wynn argued Mrs. Hernandez's plans were up in the air throughout the period of negotiation, and therefore there was nothing to correct until after the Agreement had been signed and the divorce finalized. Mr. Harris was as surprised as Dr. Hernandez at Mrs. Hernandez's return to full-time work and her immediate success. In any case, her return-to-work plans were covered by solicitor-client confidentiality and Mr. Harris did not have the right to divulge this information.

Ms. Wynn argued that Mr. Harris had in fact obtained independent legal representation from Mr. Lu and had the requisite forms completed. Given that Mr. Lu accepted the role of providing independent legal advice, it was his responsibility rather than Mr. Harris' to ensure that Dr. Hernandez was aware of his rights. Any problems with respect to whether Mr. Lu provided proper independent advice to Dr. Hernandez must rest with Mr. Lu and not with Mr. Harris.

Ms. Wynn argued that the Law Society had not established that Mr. Harris used the language “f***ing moron”. On reflection, Mr. Harris is sure that he only used the language of “moron.” While this is harsh language, using the word “moron” by itself is not the subject of the Citation. In the alternative, Ms. Wynn argued that if the Hearing Committee finds that Mr. Harris used the language of “f***ing moron” then this does not constitute conduct deserving of sanction given the circumstances. Mr. Harris was justifiably provoked and angry about Dr. Hernandez behaviour. While the comment may have been a mistake, it was an isolated one and not every mistake rises to the level of conduct deserving of sanction.

Finally, Ms. Wynn argued that there is no evidence that the Agreement was a bad one at the time it was signed and giving up \$350,000 in home equity in exchange for a spousal support waiver was fair and reasonable in the circumstances, as Dr. Hernandez himself implied when he testified he was satisfied at the time he signed the Agreement. Dr. Hernandez knew the risks involved or, if he did not, it was incumbent on Mr. Lu to explain those risks to him. Mrs. Hernandez’s success as a mortgage associate was unexpected and the Complaint was simply a way for Dr. Hernandez to get a piece of Mrs. Hernandez’s “windfall.”

You are a member of the Hearing Committee that heard this case. At the workshop you will be asked to complete the following assignments:

1. Meet with your Hearing Committee and discuss how your caucus will proceed. Think about the tips on how to have an effective caucus and obtain agreement among members of the Hearing Committee on how to proceed.
2. For each of the four Citations, identify:
 - a. The important evidence with respect to the Citation.
 - b. The major issues to be determined with respect to each Citation and the arguments on “both sides”.
3. Each Hearing Committee will be assigned one Citation. Prepare the part of the Hearing Committee Report on “Decision Regarding Citations” for the assigned Citation. Assign one member of the Hearing Committee to prepare the reasons in discussion with the Hearing Committee. For the purpose of this assignment, the reasons only need to be a few paragraphs long. Assign one member of the Hearing Committee to verbally read or summarize the reasons for the attendees.
4. Assume that the Hearing Committee has found all four Citations to be proven. With respect to sanction, the Law Society argues that a short suspension of one month would be appropriate and an order to pay costs. Counsel for Mr. Harris argues that the Hearing Committee should only order a reprimand. Caucus with your Hearing Committee, consider all the circumstances including aggravating and mitigating factors, and determine the appropriate sanction to order. Summarize the reasons for your decision. Assign one member of the Hearing Committee to briefly report your orders and reasons to the attendees.

Relevant Legislation and *Code of Conduct* Provisions and the Certificates Completed by Mr. Lu

Law Society of Alberta *Code of Conduct*:

Courtesy and Good Faith

6.02 (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.

Commentary

...

Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system....

Correcting Misinformation

6.02 (5) If a lawyer becomes aware during the course of a representation that:

- (a) the lawyer has inadvertently misled an opposing party, or
- (b) the client, or someone allied with the client or the client's matter, has misled an opposing party, intentionally or otherwise, or
- (c) the lawyer or the client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,

then, subject to confidentiality, the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.

Commentary

"Subject to confidentiality" (see Rule 2.03, Confidentiality)

Briefly, if correction of the misrepresentation requires disclosure of confidential information, the lawyer must seek the client's consent to such disclosure. If the client withholds consent, the lawyer is obliged to withdraw. The terminology used in this rule is to be broadly interpreted. A lawyer may have provided technically accurate information that is rendered misleading by the withholding of other information; in such a case, there is an obligation to correct the situation. In paragraph (c), the concept of an inaccurate representation is not limited to a misrepresentation that would be actionable at law.

Communications

6.02 (6) A lawyer must not, in the course of a 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.

6.02 (11) When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

- (a) advise the unrepresented person to obtain independent legal representation;
- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
- (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary

If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

When dealing in a professional capacity with a non-lawyer representing another person, or with a person not represented by counsel, a lawyer has the same general duties of honesty, courtesy and good faith that are owed to professional colleagues.

The reference in this rule to unrepresented party is not intended to include professional advisors or persons having special qualifications who are retained for the purposes of negotiation, such as insurance adjusters and bank managers.

The lengths to which a lawyer must go in ensuring a party's understanding of these matters will depend on all relevant factors, including the party's sophistication and relationship to the lawyer's client and the nature of the matter.

Matrimonial Property Act, RSA 2000, c M-8

Agreements between spouses

37(1) Part 1 does not apply to property that is owned by either or both spouses or that may be acquired by either or both of them, if, in respect of that property, the spouses have entered into a subsisting written agreement with each other that is enforceable under section 38 and that provides for the status, ownership and division of that property.

(2) An agreement under subsection (1) may be entered into by 2 persons in contemplation of their marriage to each other but is unenforceable until after the marriage.

(3) An agreement under subsection (1)

(a) may provide for the distribution of property between the spouses at any time including, but not limited to, the time of separation of the spouses or the dissolution of the marriage, and

(b) may apply to property owned by both spouses and by each of them at or after the time the agreement is made.

(4) An agreement under subsection (1) is unenforceable by a spouse if that spouse, at the time the agreement was made, knew or had reason to believe that the marriage was void.

Formal requirements for agreement

38(1) An agreement referred to in section 37 is enforceable if each spouse or each person, in the case of persons referred to in section 37(2), has acknowledged, in writing, apart from the other spouse or person

(a) that the spouse or person is aware of the nature and the effect of the agreement,

(b) that the spouse or person is aware of the possible future claims to property the spouse or person may have under this Act and that the spouse or person intends to give up these claims to the extent necessary to give effect to the agreement, and

(c) that the spouse or person is executing the agreement freely and voluntarily without any compulsion on the part of the other spouse or person.

(2) The acknowledgement referred to in subsection (1) shall be made before a lawyer other than the lawyer acting for the other spouse or person or before whom the acknowledgement is made by the other spouse or person.

Federal Child Support Guidelines, SOR/97-175

(enacted pursuant to the *Divorce Act*, RSC 1985, c 3)

Presumptive rule

3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

Special or extraordinary expenses

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

ACKNOWLEDGEMENT

RE: MATRIMONIAL PROPERTY ACT, R.S.A. 2000, C. M-8

I, _____, being married to _____, acknowledge:

1. THAT I am aware of the provisions, nature and effect of the attached Agreement.

2. THAT I am aware of the possible future claims to property that I may have under the *Matrimonial Property Act*, R.S.A. 2000, c. M-8, and that I intend to waive and give up these claims to the extent necessary to give effect to the within Agreement.

3. THAT I am executing the within Agreement freely and voluntarily without any compulsion on the part of my Husband/Wife, _____.

*

CERTIFICATE OF ACKNOWLEDGEMENT BY SPOUSE

1. This document was acknowledged before me by _____, apart from his Wife/her Husband.

2. _____ acknowledged to me that he/she:

- (a) is aware of the provisions, nature and effect of the attached Agreement;
- (b) is aware that by executing the attached Agreement he/she is waiving and giving up any and all future claims he/she may have under the *Matrimonial Property Act*;
- (c) is executing the attached Agreement freely and voluntarily without any compulsion on the part of his Wife/her Husband, _____.

DATED at the City of Edmonton, in the Province of Alberta, this _____ day of _____, 201_.

*

Barrister and Solicitor

CERTIFICATE OF INDEPENDENT ADVICE

I, _____, of the City of Edmonton, in the Province of Alberta, Barrister and Solicitor, DO HEREBY CERTIFY:

THAT I was this day consulted in my professional capacity by _____, named in the within instrument, being a Minutes of Settlement and Property Agreement dated the ____ day of _____, 201_, separate and apart from _____, as to his/her legal rights and liabilities under the terms and conditions of the same, and that I acted solely for him/her and explained fully to him/her the nature and effect of the Minutes of Settlement and Property Agreement, and he/she did execute same in my presence, and did acknowledge and declare that he/she was executing the same of his/her own volition and without any fear, threats, compulsion or influence from _____, or any other person.

DATED at the City of Edmonton, in the Province of Alberta, this _____ day of _____, 201_.

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Barrister and Solicitor

Excerpt from Law Society of Alberta Hearing Guide: Relevant Factors When Determining Sanction

69. A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.

- a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.
- b) Specific deterrence of the member in further misconduct.
- c) Incapacitation of the member (through disbarment or suspension).
- d) General deterrence of other members.
- e) Denunciation of the conduct.
- f) Rehabilitation of the member.
- g) Avoiding undue disparity with the sanctions imposed in other cases.

In one way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.

70. More specific factors may include the following.

- a) The nature of the conduct:
 - (i) Does the conduct raise concerns about the protection of the public?
 - (ii) Does the conduct raise concerns about maintaining public confidence in the legal profession?
 - (iii) Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties to the court, other lawyers or the Law Society)
 - (iv) Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?
- b) Level of intent: the appropriate sanction may vary depending on whether the member acted intentionally, knowingly, recklessly or negligently. In some cases, the need to protect the public or maintain the public confidence in the legal profession may require a particular sanction regardless of the state of mind of the member at the time.
- c) Impact or injury caused by the conduct.
- d) Potential injury, being the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.
- e) The number of incidents involved.
- f) The length of time involved.
- g) Whether and to what extent there was a breach of trust.
- h) Any special circumstances (aggravating/mitigating) including the following:

- prior discipline record
- risk of recurrence
- member's reaction to the discipline process (acknowledgement of wrongdoing, guilty plea, self-reporting, refusal to acknowledge wrongdoing, etc.)
- restitution made, if any
- length of time lawyer has been in practice
- general character
- whether the conduct involved taking advantage of a vulnerable party.
- a dishonest or selfish motive
- personal or emotional problems
- full and free disclosure to those involved in the complaint and hearing process or cooperative attitude toward proceedings
- physical or mental disability or impairment
- delay in disciplinary proceedings
- interim rehabilitation
- remorse
- remoteness of prior offences