



DISCIPLINE CASE *DIGEST*

Case 07-10

Member:	Robert Ian Histed
Jurisdiction:	Winnipeg, Manitoba
Called to the Bar:	June 20, 1991
Particulars of Charges:	Professional Misconduct (3 counts) <ul style="list-style-type: none">▪ Breach of Chapter 6 of the <i>Code of Professional Conduct</i> (acting for a client in respect of a guardianship application when his own personal interests were in conflict with his duty to his client)▪ Breach of Chapters 2 and 12 of the <i>Code</i> (failing to serve client in a conscientious, diligent and efficient manner by failing to facilitate the transfer of a client matter to a successor lawyer)▪ Breach of Chapter 2 of the <i>Code</i> (failing to serve client in a conscientious, diligent and efficient manner by failing to represent the client at a hearing and failing to communicate his intentions not to represent the client)
Date of Hearing:	October 22, 29, November 1, 8, 9, 10, 2004 and February 24, 2005
Panel:	<ul style="list-style-type: none">▪ Christopher W. Martin (Chair)▪ Wolf W.A. Riedel, Q.C.▪ Todd A. Rambow
Disposition:	<ul style="list-style-type: none">▪ Conviction on Counts 1 and 2▪ Acquitted of Count 3▪ 1 mo. Suspension▪ Costs of \$18,000.00
Counsel:	<ul style="list-style-type: none">▪ C. Kristin Dangerfield for The Law Society of Manitoba▪ Member Unrepresented

Conflict of Interest / Failure to Serve Client

Facts

Mr. Histed represented a client in opposing the application of a Child and Family Services Agency (CFS) for an order of permanent guardianship of her infant child. The client was initially represented by a Legal Aid staff lawyer, but also sought the advice of Mr. Histed. He advised Legal Aid that he was prepared to represent the client, but only if he was paid at the government

lawyer rate of \$150.00 per hour, plus all reasonable and necessary disbursements. Legal Aid refused to pay the hourly rate requested.

Subsequently, Mr. Histed filed a Notice of Constitutional Question seeking an order, among other things, that he be appointed to argue that certain provisions of the *Legal Aid Services Act* were unconstitutional. His motion for an order to compensate him to argue this application was denied. At the hearing of his motion, Mr. Histed went on the record for the client with respect to the pending CFS trial and did not seek an adjournment. At a subsequent pre-trial conference, the hearing of the constitutional challenge was set for the first day of trial and two additional trial dates were set. Following argument, the trial judge denied the constitutional challenge. Immediately following the delivery of this decision, Mr. Histed sought to withdraw as counsel for the CFS guardianship proceeding, and was permitted to do so. He remained as counsel for the appeal of the order denying the constitutional challenge. The judge adjourned the trial to June 2003 and requested that CFS counsel contact Legal Aid to advise that the court had directed Legal Aid to find alternative private bar counsel for the client for the trial.

Legal Aid notified the client that a new lawyer had been appointed to represent her. Thereafter, Mr. Histed wrote to the newly appointed Legal Aid lawyer and instructed that lawyer (a) to adopt the position on behalf of the client that the proceedings should be adjourned; (b) not to communicate with CFS, except through him; and (c) not to communicate with or relay any information about the client to any third parties except through him.

Mr. Histed's subsequent explanation for instructing the lawyer as he did was to avoid the appeal on the constitutional challenge becoming moot in the event that the Legal Aid appointed lawyer was to go on the record for the client, or alternatively, if the client were to turn down that lawyer's assistance. The Legal Aid lawyer refused to accept Mr. Histed's instructions and was unable to obtain instructions from the client.

Mr. Histed attended a pre-trial conference in March 2003, at which time he was advised to ensure that he did not leave his client without counsel at the last minute. In April, 2003, the trial judge dismissed the motion for a stay of the trial pending the outcome of the appeal of the constitutional challenge and confirmed that Mr. Histed was not acting on the client's behalf in the upcoming trial. The Manitoba Court of Appeal dismissed the appeal on the constitutional challenge on May 30, 2003. On that same date, Mr. Histed advised the client for the first time that he would represent her at trial, but only on condition that she follow the recommendations contained in a psychiatric assessment. She refused to accept his representation on that basis. The CFS trial proceeded on June 2, 2003 and an order of permanent guardianship was granted.

Plea

The member entered a plea of not guilty to each of the charges.

Decision and Comments

The discipline panel convicted Mr. Histed of Counts 1 and 2 of the Citation and dismissed Count 3.

With respect to Count 1, the panel concluded that Mr. Histed's personal objective and agenda, which was to win the constitutional question for the benefit of the general public, was in conflict with his client's specific interest, legal representation at the CFS guardianship application.

With respect to Count 2, the panel found that Mr. Histed took calculated, deliberate steps to actively deter any lawyer from taking the client's case. He used his continuing role as counsel in

respect of the constitutional question to dominate the strategy respecting the pending CFS guardianship file, which was entirely inappropriate.

With respect to Count 3, the panel concluded that there had been sufficient communication by the member to his client prior to May 30, 2003 that he would not be representing her interests at the CFS hearing.

Penalty

The panel ordered that Mr. Histed be suspended for one month and ordered that he pay \$18,000.00 to the Society as a contribution toward the costs of the investigation, prosecution and hearing of the matter.

Mr. Histed's appeal to the Manitoba Court of Appeal of both the conviction and the sentence was dismissed on September 13, 2006. An application for leave to the Supreme Court of Canada was dismissed on April 12, 2007.