



THE LAW SOCIETY OF MANITOBA

ADMISSIONS AND EDUCATION COMMITTEE (APPEALS SUB-COMMITTEE)

IN THE MATTER OF:

STACIA NICHOLE FRANZ

Appellant

-and-

AND IN THE MATTER OF: A DECISION OF THE DIRECTOR OF EDUCATION
dated April 21, 2020

AND IN THE MATTER OF: THE LAW SOCIETY RULES
Appeal pursuant to the Rules on Referral under Rule 5-28(1)

REASONS FOR DECISION

Panel: Vivian E Rachlis, Chair
 Gerri Wiebe, Bencher
 Patricia Kloepfer, Lay Bencher

Hearing date: September 25, 2020

Appearances: Rocky Kravetsky and Ayli Klein for the Law Society of Manitoba
 Gavin Wood for the Appellant

REASONS FOR DECISION

Introduction, Regulatory Framework, Jurisdiction and Standard of Review

This is an appeal under Part 5 of The Law Society Rules¹, arising from a decision of the Director of Education dated April 21, 2020 (the “Director’s Decision”) to expel the Appellant from the Law Society’s then education program, known as the CPLED Legacy Program (“CPLED”)².

At issue in the Director’s decision to expel the Appellant, and in this appeal, was the Appellant’s alleged breach of the Professional Integrity Policy (the “PIP”) applicable to the CPLED program; in particular, that the Appellant had breached the following clause of the CPLED Legacy Program Agreement (the “CPLED Agreement”) associated with the PIP:

“7. Breaches of professional integrity, including plagiarism, are not tolerated by CPLED and may result in investigation, suspension, failure in the program and disciplinary action by CPLED, or referral to the Law Society of Manitoba for investigation and disciplinary action.”

At all times material to this appeal, successful completion of CPLED was a necessary ingredient of a call to the Manitoba Bar. The Director’s decision to expel the Appellant from CPLED, and the timing of this appeal relative to the subsequent bar admission intake, combined to prevent the Appellant from being called to the Manitoba Bar with her 2019-20 articling and bar admission cohort. As explained later in these reasons, the Director’s Decision does not necessarily mandate a permanent obstacle to a subsequent call to the Manitoba Bar.

Part 5 of The Law Society Rules deals with the “Protection of the Public.”³ Division 1 of Part 5 governs admissions to membership in the Law Society, including admissions via the Law Society’s bar admissions program. Rule 5-28 and subrules thereunder apply to appeals of admissions decisions made under Division 1 and provides the framework that governed this panel’s process in this appeal.

There was no issue as to the standard of review arising from Rule 5-28, applicable to this appeal:

Decision of panel 5-28(7)

The panel may dismiss the appeal, make any decision the chief executive officer⁴ could have made, or allow the appeal with or without conditions. A decision of the panel is final, except a decision to refuse to issue a practising certificate or a

¹ <https://lawsociety.mb.ca/wp-content/uploads/2020/01/Rules-Update2020-05-29.pdf> . This link is to a May 2020 update however none of the Law Society Rules applicable to this appeal were amended in such update.

² The panel heard evidence that the 2019 – 2020 CPLED Legacy Program was so-named as it was the final year of many years of “CPLED” programs; to be replaced in 2020 – 2021 and onward with a new program, “PREP”.

³ <https://lawsociety.mb.ca/wp-content/uploads/2020/01/Part5-Rules-Update2020-05-29.pdf>

⁴ In this case, the Director acted as the CEO’s delegate.

practising certificate free of conditions, which decision may be appealed to the Court of Appeal pursuant to section 76 of the Act.

As stated by the Law Society's counsel in his brief, the standard of review therefore:

- Falls between a standard of correctness and a hearing *de novo* or fresh hearing; and
- No special deference is to be accorded to the Director's decision with respect to findings of fact, application of legislation and Rules, or exercise of discretion.⁵

This panel's decision is to dismiss the appeal and uphold the decision of the Director to expel the Appellant from the CPLED course. Our reasons follow.

Factual Background

The notices, discussions and submissions, culminating in the Director's Decision, took place via letters and emails during March and April, 2020. These matters reflected serious allegations of a breach of integrity and culminated in serious findings and a profound outcome to the Appellant. The Law Society argued that the matters under appeal are not in the same category as disbarment and are not, in themselves, a bar to admission to membership in the Law Society. At the same time, this panel understands that the consequences of the Director's Decision, and this panel's decision in this appeal, presents tangible risk to the Appellant's ability to practice the profession of law in Manitoba and elsewhere, entry to which she has no doubt committed herself for a lengthy period.

The events relevant to this appeal also occurred during a time of unusual fragility due to the COVID-19 pandemic (and a time of fragility for the Appellant – see *post*). Whether or not the process followed reflected the Director's ongoing practice in relation to matters arising under the PIP, or occurred by this means exceptionally because of an adaptation in operational approaches due to COVID-19, was not specifically before this panel. As the process followed has relevance to our initial procedural decision and frames the facts relevant to this appeal, we summarize the relevant process steps and associated evidence within the table below.

DATE (all dates 2020)	TYPE	SENDER	RECIPIENT	SUMMARY
March 11	Letter	LSM/Director	Appellant	Notifies Appellant of investigation, identifies general concerns (that she used precedent documents created and submitted by previous student AB - not the student's actual initials), identifies the three modules associated with the three assignments under review, refers to

⁵ *Sahota v. The Law Society of Manitoba* 2018 MBL 5; *The Law Society of Manitoba v. Haque*, 2017 MBL 1.

				Clause 7 of the CPLED Agreement, requests written response within 14 days.
March 23	Email	Appellant	Director	Refers to voicemail left, requests extension as Appellant is away from the office.
March 23	Email	Director	Appellant	Requests the reason for the absence from the office.
March 24	Email	Appellant	Director	States she has been dealing with multiple medical issues, attaches doctor's note, states she has been advised to remain off work until reassessment on April 6, 2020
March 24	Email	Director	Appellant	Director is prepared to give an extension to April 1; should more time be necessary, Director will require a better understanding of how Appellant's circumstances necessitate more time to respond. Notes that Appellant has during the last couple of weeks completed a further CPLED module.
March 31	Cover letter only Memorandum (undated)	Appellant's legal counsel Appellant (memorandum)	Director	Appellant provides some explanation based on processes within law firm re use of previous student's precedents. Denies actions were done intentionally. States she has been experiencing mental health issues, current circumstances have prompted Appellant to make time for treatment immediately. Requests Director's advice and next steps as to how she can correct error, demonstrate competency in the submissions in question.
April 2	Letter	Director	Appellant's legal counsel	Seeks clarification on various questions (Appellant's copy/paste techniques, how she could have overlooked CPLED identifiers in precedents used, Appellant's specific mental health diagnosis, how such condition impacted ability to exercise judgment). 14- day deadline for reply.
April 16	Cover email only Memorandum (undated)	Appellant's legal counsel Appellant (Memorandum)	Director	Responds to Director's April 2 nd questions. Appellant has been diagnosed with depression and anxiety disorder by family physician, has been prescribed medication, is taking weekly counselling and will be taking cognitive behaviour therapy, when appointments become available in view of COVID-19. States she only retrospectively understands how her mental health issues affected her focus, work, attention to details that she should

				have noticed. Explains in greater detail how she worked with office precedents.
April 17	Notes of telephone conversation between Director and former student AB			AB apparently explains that although her previous CPLED work was saved on the firm's document system, it would have been difficult for Appellant to find ABV's assignments unless she was specifically looking for same.
April 21	Letter (via email to Appellant's legal counsel)	Director	Appellant	<p>Decision under appeal. Director <u>does not accept</u> Appellant's explanations that:</p> <ul style="list-style-type: none"> • locating and copying from previous CPLED submissions was inadvertent; • she was not aware that the assignments used were the work of a previous student; and • her mental health situation prevented her from knowing what documents were being used or that it was wrong. <p>Director concludes that Appellant's actions did not constitute an isolated lapse in judgment, in fact her actions were repeated breaches of the Policy over an extended period (3 assignments, October and November, 2019 and January 2020); further she had addressed the very scenario during an intervening Ethics and Professionalism evaluation. Director permits Appellant to complete term of articles. Points out that her actions may reflect on any "good character requirement" applicable to future applications to participate in a bar admission program or for a call to the bar. Notified of right to appeal.</p>
May 4	Notice of Appeal			Grounds outlined below.

Position of the Appellant on appeal:

The grounds for appeal can be summarized as follows:

- a) The Director failed to accept the explanation that locating and copying from former student AB's previous submissions was inadvertent.
- b) The Director was incorrect in finding that the Appellant deliberately searched through the directory of former student AB for the purpose of plagiarizing.

- c) The Director failed to accept the Appellant's explanation of the steps taken by the Appellant whereby she made use of the precedents.
- d) The Director erred in [not]⁶ finding that the Appellant's anxiety and depressed condition resulted in her failing to realize she was inadvertently using the work of former student AB.
- e) The Director was incorrect in finding that the Appellant had deliberately deleted previous CPLED identifying information and replaced it with details from the current assignments for the purpose of plagiarizing.
- f) The Director erred in finding that as the actions were a repeated breach, they were accordingly deliberate, thereby disregarding the Appellant's explanation that on these occasions she did not realize she had been drawing on the work of a previous CPLED student.

As the panel interprets the Appellant's position on appeal, the Appellant:

- Does not deny performing searches, locating the precedents in question, and utilizing them to complete the three assignments in question.
- Does deny having any awareness at the time that these precedents constituted previous student CPLED work.
- Describes a belief *at the time* that the materials were client work, and that use of client work precedents is permitted under the PIP; and
- States that these beliefs about the nature of the materials were associated with compromised mental processes due to anxiety and depression.

The focus of this panel's work was on the degree of advertence associated with the Appellant's *prima facie* breach of the PIP and the CPLED Agreement, and the credibility of her explanation in relation thereto.

The Hearing

Law Society Rule 5-28(3) governs the conduct of an appeal of a decision relating to the CPLED program, and the evidence that may be considered by a panel in such an appeal:

Hearings

5-28(3) A panel must conduct an appeal based on a consideration of written submissions and other relevant materials, except where the chairperson of the committee directs or the appellant requests an oral hearing. During an oral hearing, neither the appellant nor any other person may give oral evidence, except with leave of the appeal panel and then only in such exceptional circumstances as the appeal panel may determine. The testimony of an appellant or any other person at an oral hearing must be taken under oath unless the chairperson of the panel waives the requirement. An oath must be administered by the chairperson of the panel.

⁶ There appears to have been a typographical error in the grounds of appeal.

[Emphasis added]

The panel was struck by the Chair of the Admissions and Education Committee; in due course the panel was advised that the appeal would proceed as an oral hearing, and that the Appellant would have a preliminary motion for the panel to hear oral evidence at the hearing. Both the preliminary motion and the merits of the appeal were heard on September 25, 2020. Given COVID-19 restrictions at this time, which continue as at the date of this decision, the parties and the panel agreed to have the matter heard by video conference.

Counsel for the Law Society and for the Appellant submitted a joint record as well as detailed materials and briefs in support of each of their positions on the preliminary motion and on the merits of the appeal. The panel members had an opportunity to review the materials in detail prior to and subsequent to the hearing.

Preliminary Motion

The Appellant's request to give oral evidence required leave of the panel pursuant to Rule 5-28(3). The Appellant's request was contested by the Law Society. The panel dealt with the matter as a preliminary matter at the outset of the hearing. Following argument, the panel granted the Appellant's motion for leave to give oral evidence, indicating that the panel had concluded that exceptional circumstances existed as contemplated by Rule 5-28(3), and that full reasons would issue as part of the main reasons.

The panel's reasons on the admission of the Appellant's oral evidence therefore follow.

The facts relied on relating to the preliminary motion were uncontested; the Appellant's affidavit in support of the preliminary motion detailed a similar sequence of events set out earlier in this decision. The Appellant's affidavit attached as an exhibit a June 5, 2020 medical report of Dr. Kevin R. Coates. In his medical report Dr. Coates indicated that he had been the Appellant's family physician since 2005. Additionally, Dr. Coates medical report presented a diagnosis and reported matters apparently reported to him by the Appellant and:

- Confirmed a diagnosis of "1) Generalized Anxiety Disorder [and] 2) Depression."
- Advised of a significant symptom complex with both physical and mental health concerns/issues, worsening over the previous year, affecting general health and work performance.
- Detailed physical symptoms, mental indecisiveness, anxiousness, forgetfulness, difficulty with problem solving with lack of focus and concentration, alteration in mood and emotions with sadness, irritability, panic with resulting frustration and embarrassment.
- Described stress factors which included workplace demands/long hours 6-7 days each week, personal financial issues, challenging and frustrating family dynamic that included fear and shame.

- Resulted in impaired information processing with lack of focus and necessary attention to detail.

In submitting that the panel should allow leave to give evidence, the Appellant argued:

- The “exceptional circumstances” contemplated by Rule 5-28(3) existed in this case such that the panel ought to hear oral evidence from the Appellant.
- A high standard of justice applied to the proceedings before the panel; to preclude the panel from hearing the Appellant’s oral evidence would not accord a proper, effective and necessary mechanism to present the appeal.
- The reference to “exceptional circumstances” in Rule 5-28(3) requires a broad inquiry which includes a consideration of whether the Appellant would otherwise have the ability to effectively put forward the case.
- The critical issue in the appeal was the Appellant’s credibility, that is, whether the Appellant had been telling the truth in written explanations provided to the Director.
- Given the significance of credibility in the appeal, to deprive the Appellant of the ability to provide oral evidence to the panel would deprive the Appellant of procedural fairness and fundamental justice.
- The Appellant had understood from the exchange of written communications with the Director that there would be further component to the investigation; in fact the investigation performed was so minimal that upon culmination with the Director’s Decision, the Appellant was surprised that the investigation was at an end.
- The effect of an expulsion will delay and may extinguish the Appellant’s ability to complete the Law Society’s requirements necessary to practice law in the Province of Manitoba. The nature of the interests at stake in the appeal require the panel to better ensure that a just conclusion be reached.

The Law Society argued that:

- The circumstances in the instant case were not unusual or exceptional as required by Rule 5-28(3). The exchange of documentation reflects the “normal process” whereby a student is investigated for breaching the PIP. In the instant case, the Director considered the Appellant’s submissions and then reached a final determination.
- The Fair Registration Practices Code enacted by *The Fair Registration Practices in Regulated Professions Act* C.C.S.M. c. F12 allows a profession to specify the means by which submissions in an appeal are to be submitted: orally, in writing, or electronically.
- The Law Society’s counsel acknowledged that the interpretation of “exceptional circumstances” in Rule 5-28(3) has not been settled, and that the objective of the exercise, for all parties, is to allow a fair hearing.
- Counsel pointed to case law applicable to administrative decision makers, urging the panel to find the balance between the requirement for adequate

communication by the parties and the need for efficient, effective, economic and speedy performance of a tribunal's purpose.

- The appeal process contemplated by Rule 5-28 is for the panel to consider the same information as had been before the Director, supplemented by any new information provided by the parties in writing.⁷
- While acknowledging that the Appellant's credibility was central to this appeal, counsel submitted that determinations as to the Appellant's credibility does not mandate oral evidence and can be assessed by reference to the assertions made by the parties in their written materials (summarized *infra*). The reasonableness of the Appellant's explanation has been already clearly communicated within the written materials already before the panel.

Counsel for the Law Society relied on the decision of a previous appeal panel in *Sahota*⁸. In that case, the appeal panel denied the motion for oral evidence, stating that the Appellant had been given ample opportunity to provide a full version of events, from his perspective, to the Director.

In determining that the Appellant had made a case for the admission of oral evidence under Rule 5-28(3), this panel agrees with the panel in *Sahota* that:

"The Appeal process, in the normal course, requires the panel to consider information that was before the Director at the time of her decision, and which ultimately led her to draw the conclusions that she did and arrive at the findings set out in her decision."⁹

At the same time, it is clear from the decision of the panel in *Sahota* that prior to reaching her decision in that case, the Director conducted a lengthy series of interactions and communications which included:

- Exchanging correspondence with the Appellant from October 2016 through January 2017;
- Speaking to the Appellant on the telephone on November 1, 2016;
- Meeting with the Appellant in person on December 12, 2016; and
- Culminating in her decision on January 30, 2017.

The panel acknowledges that the depth of investigation and degree of personal interaction between the Director and a student facing such investigation will vary on a case by case basis. The panel also acknowledges the ability of an Appellant to file additional information, during the appeal process, that will form part of the Record on Appeal. In the circumstances, nothing prevented the Appellant from filing additional

⁷ In argument on the merits, Law Society Counsel acknowledged there was no issue as to whether Dr. Coates' medical report was properly before the panel.

⁸ Interim order, *Sahota and The Law Society of Manitoba*, March 16, 2018.

⁹ *Ibid* at p. 2.

written explanations, for example, to further explain the word processing-related steps taken on the firm's computer system and her related thought processes.

Finally, the panel did not take lightly the requirement in Rule 5-28(3) that allowing oral evidence on appeal was a decision to be exercised "exceptionally."

The panel nonetheless remained troubled as to whether the record presented in this appeal revealed either a degree of investigation commensurate with the severity of the allegations and associated potential consequences; or that the Appellant initially fully appreciated that the Director (and the panel) may crave answers underpinning the critical credibility assessment to be made relating to the use of AB's materials.

As acknowledged by the Law Society, the objective of the exercise is to allow a fair hearing, keeping in mind the need for efficient, effective, economic and speedy performance of a tribunal's purpose. In all of the circumstances, the panel concluded that the balance weighed in favour of allowing the Appellant to provide any further commentary she wished to provide orally. The panel concluded that the circumstances were exceptional within the meaning of Rule 5-28(3), and so ruled.

In keeping with Rule 5-28(3), the Chair facilitated the Appellant affirming her evidence. Her evidence was directed by her counsel and she was cross examined by counsel for the Law Society.

Decision on the Merits

Without taking away from its ruling on the preliminary motion, the panel found little in the evidence of the Appellant that cast any further light on, or departed from, what we learned from the record describing the use of AB's precedents. This evidence has been summarized previously in these reasons. The panel struggled to understand how the Appellant could not have gathered that she was using an earlier student's CPLED work in a manner prohibited by the PIP and the CPLED Agreement.

In disposing of this matter, the starting point is again the standard of review. The panel has the jurisdiction to dismiss the appeal, make any decision the chief executive officer (ie. the Director, in this case) could have made, or allow the appeal with or without conditions. There is no "deference" standard in relation to the Director's Decision.

As argued by the parties, the options available to the panel coalesced into two disparate options:

1. Argued by the Law Society:

Disbelieve the Appellant's evidence and find, as the Director found, that with knowledge of and in deliberate contravention of her obligations under the PIP and the CPLED Agreement, the Appellant deliberately turned her mind to retrieving and/or making use of a previous student's CPLED assignments, retrieved the three sets of materials in question, and went forward to amend the materials and submit them as her own. She actively plagiarized.

2. Argued by the Appellant:

The Appellant's searches were solely designed to find firm client work precedents, permissible under the PIP. In relation to the obvious red flags highlighted by the Law Society, the Appellant admits (as she must inevitably):

- a. A similarity in unique facts as between the CPLED fact scenarios and what she states she felt were client precedents (example: a transaction relating to a "wilderness store"); and
- b. The presence of certain identifying flags (example: @cpled.ca extension on the AB assignment email address).

The Appellant was not deliberately plagiarizing, she was merely reckless; due to her mental health issues, she failed to appreciate that she had stumbled onto a previous student's assignment.

What occurred mechanically was that when she stumbled onto the assignments, she performed an immediate "Save As," and didn't notice when she blocked out and overwrote text that was "red flag" in nature.

Due to her compromised functioning during the period from October – January, the Appellant was unable to recognize the red flags; she did not actively seek out and plagiarize student AB assignments, and/or was so impaired by her mental health circumstances that she failed to appreciate what she was doing.

Based on the repetitiveness of very similar conduct - initially occurring in October 2019, then repeated in November and January 2020 - the Appellant's position (that she stumbled onto student AB's work, assumed it was not student work because of the Law Society's requirement that student work not be saved on a shared drive, and so assumed it was client-related firm work), reasonably strains credulity.

The Law Society argued that the repetitiveness of the events confirms an element of deliberation by the Appellant. If, as argued by the Appellant, her conduct was merely reckless rather than a deliberate attempt to plagiarize, an earlier Director's audit may have made for an earlier discovery of the mental health concerns and any associated frailties associated with the Appellant's approach. Earlier discovery may have also resulted in a more remedial approach by the Director and a more remedial outcome for the Appellant, before the facts ripened up into a series of three repetitive PIP breaches that are now admittedly difficult to explain in a benign manner.

That the Appellant could have used the precedents in the benign manner she asserted, on three occasions, each time overlooking the obvious red flags, demonstrates a degree of cavalier disregard for her obligations as a CPLED student. Based on the totality of the evidence, the panel is not prepared to go further, and make the express finding, invited by the Law Society, that the Appellant deliberately cheated and plagiarized the three assignments.

The panel would like to stress that its finding that the Appellant was in cavalier disregard for PIP and CPLED Agreement obligations, while short of a finding that she deliberately cheated, is itself a very serious finding. The panel also wants to make it clear it has taken into account the Appellant's and Dr. Coates' evidence around the Appellant's mental health, cognition and functioning. The panel is more than mindful of the need to take these factors into account, both for legal and compassionate reasons.

Students seeking entry to the legal profession are subject to the protection of the public mandate inherent in Part 5 of the Rules and the Law Society's entire regulatory scheme. In this case, this framework has required a balance between a consideration of the Appellant's mental health factors and the Law Society's need to uphold and protect the public interest in the delivery of legal services with competence and integrity:

Purpose

[3\(1\)](#) The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.

Duties

[3\(2\)](#) In pursuing its purpose, the society must

- (a) establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practise law in Manitoba; and
- (b) regulate the practice of law in Manitoba.¹⁰

Given its decision as to the Appellant's cavalier disregard of her obligations, with some regret the panel has concluded that the appropriate outcome is to uphold the Director's Decision to expel the Appellant from the Legacy CPLED program. Accordingly the panel dismisses the appeal and upholds the decision of the Director to expel the Appellant from the CPLED course.

The panel understands that its jurisdiction includes an ability to set conditions relating to its ruling. The Law Society argues, and we accept, that the appeal record was insufficient to facilitate the fashioning of specific conditions relating to the panel's ruling.

The panel appreciates – and the Law Society was transparent in acknowledging - that depending on the steps taken by the Appellant in response to this ruling, she may at some point again be in a position of depending on the Law Society's assessment of her character. In the circumstances the panel wishes to state that the Appellant impressed us as a committed individual who did not fit the picture of the "cheater" or person of bad character she was made out to be by the Law Society.

Instead, it seemed far more likely that the Appellant's mental health issues – hoped to be transient and treatable – were the major contributing factors to poor decisions that we were optimistic were not representative of the Appellant's fundamental character. We

¹⁰ *The Legal Profession Act*, <http://web2.gov.mb.ca/laws/statutes/ccsm/pdf.php?cap=1107>

trust and expect that the Appellant will be able to move forward in view of this ruling, and commit herself to her recovery and treatment, any further necessary post-graduate legal education and a potential future call to the bar, all with a view to contributing to the administration of justice in the Province. The panel sincerely wishes her well in this journey.

Conclusion

The panel has determined that the appeal is dismissed, and the decision of the Director is affirmed. The panel wishes to thank counsel for the Law Society and for the Appellant for their evident cooperation in the preparation and presentation of the record and detailed submissions, which were of great assistance to the panel; for the orderly manner in which the motion and appeal were scheduled and presented; and for their patience with the virtual hearing format.

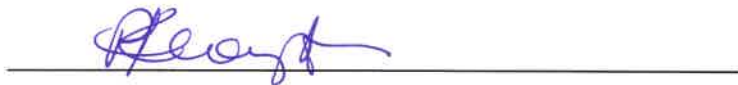
November 3, 2020



Vivian E Rachlis – Panel Chair



Gerri Wiebe – Bencher and Panel Member



Patricia Kloepfer – Lay Bencher and Panel Member