Conduct reviews

THE PUBLICATION OF conduct review summaries is intended to assist lawyers by providing information about ethical and conduct standards.

A conduct review is a confidential meeting between a lawyer against whom a complaint has been made and a conduct review subcommittee, which may also be attended by the complainant at the discretion of the subcommittee. The Discipline Committee may order a conduct review pursuant to Rule 4-4, rather than issue a citation to hold a hearing regarding the lawyer's conduct, if it considers that a conduct review is a more effective disposition and is in the public interest. The committee takes into account a number of factors, including:

- the lawyer's professional conduct record;
- the need for specific or general deterrence;
- the lawyer's acknowledgement of misconduct and any steps taken to remedy any loss or damage caused by the misconduct; and
- the likelihood that a conduct review will provide an effective rehabilitation or remedial result.

DELIVERY OF CONTRABAND TO CORRECTIONAL FACILITIES

A lawyer sent deemed contraband to his client in a correctional facility, contrary to rules 2.1-1(a) and 3.27 of the *Code of Professional Conduct for British Columbia*, and failed to supervise his assistant in connection with how the envelope containing the deemed contraband was marked. The lawyer received a hard drive from a third party for delivery to his client in jail. He asked his assistant to send it, and she did so by labelling the envelope in the usual way, as "solicitor-client privileged." The hard drive was examined at the correctional facility, and contraband was discovered on it. The lawyer conceded to a conduct review subcommittee that his supervision of his employee was not what it could have been; he did not think about the consequences and simply told his office to mail it to his client, mistakenly assuming that the hard drive would be vetted in due course. He accepted that he was delinquent and displayed a casual indifference to the contents of the package. He did not blame his employee and accepted responsibility without hesitation. The subcommittee accepted his forthright admissions as genuine and his assertions that he will take steps to prevent this occurring in the future, but explained the inappropriateness of his conduct and that he could be cited should a similar situation occur in the future. (CR 2016-01)

In another case, a lawyer unwittingly sent an illegal drug to his client in a correctional facility, contrary to rules 2.1-1(a) and 3.27 of the *Code of Professional Conduct for British Columbia*. Letters and photographs had been delivered to the lawyer's office from a friend of the client for transmission to the client who was being held at a correctional facility. After inspecting the material and finding nothing suspicious, the lawyer sent the letters and photographs to his client by mail. The envelope was examined upon arrival at the institution and an illegal drug was discovered on one of the pieces of paper. The contraband was likely sprayed on the paper and the recipient would chew the paper to ingest the drug. A conduct review subcommittee advised the lawyer that his conduct was inappropriate because he accepted a package from a third party to send to his client. He carefully inspected the package, but was still unwittingly taken advantage of by his client. He accepted without reservation that his conduct had fallen below the appropriate standard. The subcommittee accepted his assertion that he has taken steps to prevent this from occurring in the future but explained that the lawyer could be cited should a similar situation occur in the future. (CR 2016-02)

LAND TITLE ACT ELECTRONIC FILINGS

A lawyer failed to strictly comply with the *Land Title Act*, Law Society Rule 3-64(8)(b) and rule 6.1-5 of the *Code of Professional Conduct for British Columbia* regarding the use of his personal digital signature in electronic filings. During a compliance audit of the lawyer's practice, it was discovered that he had permitted his assistant to routinely affix his digital signature to documents that were submitted to the Land Title and Survey Authority. He admitted his error and corrected it immediately. A conduct review subcommittee advised the lawyer that his conduct was inappropriate. He told the subcommittee that he now understood the underlying reason for the confidentiality of passwords and importance of lawyers personally affixing the electronic signature after the documents have been reviewed. The lawyer had not previously read the relevant sections of the *BC Code* and was not aware of the many warnings published in E-Brief and *Benchers' Bulletin*. He was also not aware at the time that other lawyers had been disciplined for similar conduct. He has now changed his office procedures to comply with his obligations. (CR 2016-03)

CONFLICT OF INTEREST

A lawyer acted in a conflict of interest by failing to give undivided loyalty when he acted for a company in a debt action. He also acted for the director and 50 per cent shareholder of that same company in a separate family law proceeding where the company's assets were the subject of a division of assets claim. He failed to advise or consider whether it was in the company's best interest to file a response in the debt action. These actions were contrary to Chapter 6, Rule 1 of the *Professional Conduct Handbook* then in force. The lawyer admitted to acting in a conflict of interest to a conduct review subcommittee, but expressed no intention or awareness of how to remediate or otherwise prevent future occurrences of similar concern. At the subcommittee's

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Discipline digest

BELOW ARE SUMMARIES with respect to:

- Grant David Axworthy
- Kevin Alexander McLean
- Eric John (Jack) Woodward
- Christopher Roy Penty
- Ian David Reith
- John David Briner
- Gary Russell Vlug
- Catherine Ann Sas, QC
- Douglas Edward Dent
- Maureen Joyce Wesley
- Thomas Paul Harding

For the full text of discipline decisions, visit the Hearing decisions section of the Law Society website.

GRANT DAVID AXWORTHY

Vancouver, BC

Called to the bar: August 28, 1992

Discipline hearing: September 23, 2015

Panel: Lynal Doerksen, Chair, Shona Moore, QC and Lois Serwa

Decision issued: October 27, 2015 (2015 LSBC 46)

Counsel: Kieron Grady for the Law Society; no one appearing on behalf of Grant David Axworthy

FACTS AND DETERMINATION

The Law Society began an investigation of Grant David Axworthy as a result of complaints from two of his clients. The investigators advised Axworthy of the complaints and asked for his reply. After initially responding to the first complaint, he became less responsive and timely and ultimately ceased to respond at all. He also failed to provide the materials requested by the Law Society. He did not respond to the second complaint.

Axworthy did not communicate with the Law Society for six months continuing up to the date of the hearing. He provided no explanation and did not attend the hearing.

The panel determined that Axworthy's persistent failure to respond to Law Society communications, promptly or at all, constituted professional misconduct.

DISCIPLINARY ACTION

The panel ordered that Axworthy:

1. pay a fine of $3,000;
2. pay $1,236.25 in costs; and
3. provide a complete response to the Law Society's inquiries within 14 days.

KEVIN ALEXANDER MCLEAN

Vancouver, BC

Called to the bar: August 27, 2010

Not in good standing: January 1, 2015

Ceased membership: April 10, 2015

Disbarred: June 29, 2015

Discipline hearing: July 29 and September 24, 2014 and March 6 and June 5, 2015

Panel: Elizabeth J. Rowbotham, Chair, Paula Cayley and Carol Hickman, QC

Decisions issued: January 12 (2015 LSBC 01) and November 3, 2015 (2015 LSBC 47)

Preliminary question: June 2, 2014 (oral reasons: June 2, 2014; decision issued: September 3, 2014; 2014 LSBC 38)

Panel: Martin Finch, QC, Chair, Ralston Alexander, QC and Woody Hayes

Review on jurisdiction (written submissions): August 28, 2015

Decision issued: January 27, 2016 (2016 LSBC 04)

Review board: Lee Ongman, Chair, Satwinder Bains, Dean Lawton, John Lane, Graeme Roberts, John Waddell, QC and Sandra Weafer

Counsel: Alison Kirby for the Law Society; Kevin Alexander McLean appearing on his own behalf with respect to preliminary question; otherwise, no one appearing on behalf of McLean

FACTS

A citation was issued against Kevin Alexander McLean alleging that he failed to respond promptly to communications from a client's previous counsel.

Before the hearing began, McLean applied to have Law Society counsel removed. A hearing panel found that it had no jurisdiction to remove counsel and refused to make the order. As a result of its review, the panel decided to recuse itself as it had received prejudicial information.

The hearing was reconvened with a new panel. The panel found that:

- On July 2, 2012, McLean was retained to act on behalf of a client in connection with a motor vehicle accident claim. At that time, the client was represented by another lawyer.
- On August 8, 2012, the client's former lawyer sent a letter to McLean accompanied by correspondence, medical documents and a record of disbursements. The letter imposed undertakings

on McLean, including paying the previous lawyer for disbursements and services rendered, and filing a Notice of Change of Solicitor.

- Between August 8 and December 10, 2012, the previous lawyer sent four letters and made three telephone calls to McLean. McLean did not respond.
- McLean made his first response on February 17, 2013, after the previous lawyer filed a complaint with the Law Society. This was approximately six months after the initial letter sent to McLean in August 2012.

DETERMINATION

Chapter 11, Rule 6 of the *Professional Conduct Handbook* then in force states that "a lawyer must reply reasonably promptly to any communication from another lawyer that requires a response." (This obligation is continued in rule 7.2-5 of the current *Code of Professional Conduct for British Columbia*.)

The transfer of a client's file and a letter of undertaking from one lawyer to another are significant matters and must be dealt with in a timely fashion. McLean did not provide a response to the previous lawyer for approximately six months and only responded after the previous lawyer had complained to the Law Society.

The panel concluded that McLean was in breach of the *Professional Conduct Handbook* then in force, and that his conduct constituted professional misconduct.

On February 10, 2015, McLean delivered a notice of review of the facts and determination decision, stating that he did so pursuant to section 47 of the *Legal Profession Act* and Law Society Rules 5-13 and 5-15. Before the review board, the Law Society submitted that there was no jurisdiction for a section 47 review of the facts and determination decision at this stage of the proceedings.

The review board found that McLean was not entitled to a section 47 review of the facts and determination decision prior to issuance of the decision on disciplinary action. The review board quashed the notice of review and ordered McLean to pay costs of $1,300.

DISCIPLINARY ACTION

McLean did not attend the hearing on disciplinary action on March 6, 2015. The hearing was adjourned to give Law Society counsel time to consider whether to make submissions on ungovernability.

On April 10, 2015, McLean ceased to be a member of the Law Society. The hearing panel retained the jurisdiction to discipline a former member for misconduct that occurred when the person was a member of the Law Society, pursuant to sections 1 and 38 of the *Legal Profession Act*.

When the hearing reconvened on June 5, 2015, Law Society counsel did not make submissions based on ungovernability. The hearing proceeded on the basis of the panel's finding of professional misconduct.

The panel ordered that McLean pay:

1. a fine of $10,000; and
2. costs of $15,912.50.

On June 29, 2015, a separate discipline hearing panel, ruling on a matter pertaining to an unrelated citation, ordered that McLean be disbarred on the basis of ungovernability.

ERIC JOHN (JACK) WOODWARD

Campbell River, BC

Called to the bar: November 13, 1979

Discipline hearing: August 13, 2015

Panel: Lee Ongman, Chair, Dan Goodleaf and Carol Hickman, QC

Decision issued: November 9, 2015 (2015 LSBC 49)

Counsel: Kieron Grady for the Law Society; David M. Rosenberg, QC for Eric John (Jack) Woodward

FACTS AND DETERMINATION

In 2011, Eric John (Jack) Woodward issued cheques on two accounts, when he knew that there were insufficient funds to satisfy some or all of the cheques, for the purpose of concealing that there were insufficient funds in one or both accounts.

At the time, Woodward had business interests outside of his legal practice. In addition to being the director of Jack Woodward Law Corporation, he was the sole director and shareholder of a hotel on Salt Spring Island. The law firm had an account with a credit union strictly for the personal use of Woodward and not for the practice of law. The hotel also had a current account with the same credit union.

Prior to 2011, Woodward had a history of exceeding his authorized credit limit. He would ask the credit union to cover cheques he had already written on the hotel account, usually in amount of around $10,000. In January 2009, the credit union temporarily increased his line of credit from $150,000 to $185,000. Woodward continued to write cheques in excess of the line of credit and requested an extension, which the credit union granted. When it expired in February 2009, he asked for a further extension, and the credit union declined. In one instance in early 2009, Woodward used the credit union's ATM to process cheques between his hotel account and personal account, knowing that there were insufficient funds in the accounts to cover the cheques. Credit union staff advised him not to do so again.

In June 2009, Woodward asked the credit union to cover $15,000 for payroll cheques he wrote on the hotel account. The credit union approved the request, but credit union staff met with him in August 2010 to let him know that no additional credit would be extended.

Between January 1 and October 27, 2011, Woodward issued 417 cheques back and forth between his personal account and the hotel account. The majority of the cheques on the personal account had

insufficient funds to cover the amounts. He exceeded his authorized limit of $150,000 on his line of credit on 94 per cent of the days the cheques were written.

Of the 417 cheques, 414 of them were deposited into non-credit union ATMs, which extended the clearing time of the cheques to create unauthorized credit. By late October 2011, Woodward's personal account was in overdraft by approximately $535,000.

The credit union decided to end its business relationship with Woodward and cancelled all ATM cards for his accounts. On November 1, 2011 Woodward met with credit union staff and counsel, apologized for his conduct and promised to repay his debt. On December 13, 2011, Woodward's counsel delivered a trust cheque of $686,724.77 to the credit union, inclusive of penalties and interest.

ADMISSION AND DISCIPLINARY ACTION

Woodward admitted, and the panel accepted, that his behaviour was conduct unbecoming a lawyer. By writing cheques back and forth with the knowledge that there were insufficient funds, Woodward failed to act, in his private life, in a way that maintains the confidence and respect of the public.

The panel took into consideration that Woodward had been practising law for 35 years and had no professional conduct record. He took action to rectify the situation as soon as the credit union notified him that his conduct would not be tolerated, prior to the complaint and investigation by the Law Society. The credit union ultimately suffered no loss and was repaid in full. The panel also considered the number of times the conduct occurred and the significant financial benefit Woodward gained in writing the cheques.

The panel ordered that Woodward:

1. be suspended for one month; and
2. pay $1,736.20 in costs.

CHRISTOPHER ROY PENTY

Kelowna, BC

Called to the bar: May 10, 1983

Discipline hearing: October 8, 2015

Panel: David W. Mossop, QC, Chair, J.S. (Woody) Hayes and Gavin Hume, QC

Decision issued: November 12, 2015 (2015 LSBC 51)

Counsel: Alison Kirby for the Law Society; Christopher Roy Penty on his own behalf

FACTS

Christopher Roy Penty was retained by clients in November 2009 to work on an ongoing civil action. His legal assistant began to work on the civil action later that month. In February 2010, his clients instructed him to work on foreclosure proceedings, and his legal assistant began working on the foreclosure proceedings in May 2010. There was no written retainer agreement with respect to the civil action or the foreclosure proceedings. The clients were aware that Penty's legal assistant was working on their files.

In May 2011, Penty ceased to act for the clients and issued two final legal bills for services rendered for the civil action and the foreclosure proceedings. The time spent and services rendered by Penty's legal assistant were described as Penty's time and services and billed at his hourly rate of $300.

At the registrar's review in May 2012, Penty stated the files predated the start of the legal assistant's employment and he did not have much involvement other than towards the end of the projects. Penty reviewed the transcript of the hearing and his client files in the following months, and he did not correct his misrepresentation to the court.

In November 2012, Penty admitted in his written supplemental submissions that he billed his legal assistant's time as his own from time to time. He stated the bulk of the time was his own and, since his legal assistant had 20 years of experience as a lawyer, it would be appropriate to bill his time at a lawyer's rate. He emphasized that this was a very minor part of the time billed.

The registrar held that Penty's conduct was unacceptable. The registrar stated that Penty was only entitled to bill his legal assistant's time at $150 per hour and he was not entitled to bill for services that were secretarial in nature. The registrar was only able to identify 2.8 hours of legal assistant time from the statement of account for the civil action and reduced the amount by $420.

Penty and his legal assistant's timesheets reflect that approximately 31 per cent of the time billed on the civil action and 56 per cent of time billed on the foreclosure proceedings was related to work performed by the legal assistant.

ADMISSION AND DISCIPLINARY ACTION

Penty admitted to committing professional misconduct by misrepresenting the amounts he was entitled to bill his clients and making misrepresentations orally and in writing to the court. The panel accepted his admission.

The panel found that Penty's conduct showed dishonesty and a lack of integrity that suggests a suspension would be the appropriate sanction. The panel considered Penty's professional conduct record, which consisted of a prior citation and two conduct reviews and showed a pattern of misleading the court and making false representations. It also considered the personal profit he gained as a result of the misconduct.

The panel ordered that Penty:

1. be suspended for four months; and
2. pay $2,500 in costs.