Lawyer B 01/16

Bowser, B.C.
Called to the Bar: May 17, 1991
Became non-practising member: October 6, 1999

Discipline hearing:
Date: November 16 and 17, 2000
Panel: William M. Everett, Q.C., as a one-Bencher panel by consent
Report: June 15, 2001
Hearing report indexed as [2000] LSBC 30

Counsel:
Mark Skwarok, for the Law Society
Peter Freeman, Q.C., for Mr. B

Summary

Mr. B acted in a family law matter for a stepfather who was seeking interim access to a child. Mr. B told a master of the Supreme Court that opposing counsel, who represented the child's mother, had consented in principle to access and that the only question was who should supervise the access. In fact, this was untrue, as opposing counsel had not consented to access. Later, during a Law Society complaint investigation, Mr. B told the Law Society staff that he had not represented to the master that opposing counsel had consented in principle to access. This was untrue. The hearing panel found that Mr. B, in making misrepresentations to the court and to the Law Society, was negligent and reckless and displayed a casual disregard for the truth. The hearing panel found that his conduct constituted professional misconduct and ordered that he be suspended for 90 days.

Facts

In March, 1997 Mr. B began acting for H in a family law action (*H* v. *K)*. H sought interim access to his stepchild. He had previously been represented by another lawyer in the matter. The child's mother was represented by lawyer L. The issues at stake were very emotional, the discussions between counsel were at times acrimonious and the litigation was hard fought.

Throughout this matter, H was subject to a Provincial Court restraining order that prohibited him from having any access to K or the child, except as permitted by further court order.

In the Fall of 1986 (prior to H retaining Mr. B), counsel for the parties discussed whether H might be permitted access on certain conditions. There was no agreement on this issue.

In November, 1996, lawyer L advised that K was not prepared to agree to any access to the child and wished to leave that decision to the court.

In January, 1997 a Supreme Court master adjourned an application by H for interim access, pending completion of an access report by a family counsellor. H later learned that this report would likely take between nine months and 1½ years to complete. In March lawyer L wrote to the lawyer then representing H to remind him that H was subject to a restraining order and was not permitted to speak to the child.

When H retained Mr. B to represent him in seeking interim access, Mr. B did not ask H to provide his entire file, did not speak to H's former lawyer to gain an understanding of the matter or to obtain the file and did not search the court registry for copies of the pleadings.

On March 25, 1997 Mr. B filed a praecipe in Supreme Court to set down H's application for interim access for April 2. He failed to formally serve the praecipe on lawyer L or to file or serve a notice of change of solicitor. When lawyer L saw the praecipe, she was surprised because the April 2 hearing date had been set without prior discussion with her office. Lawyer L immediately faxed a letter to Mr. B to advise that she was not available on April 2, and she suggested that they schedule a mutually convenient time.

Mr. B had been out of the office and, although lawyer L's fax was received in his office on March 25, he did not see it prior to the April 2 hearing. He decided to proceed on the motion on April 2 and wrongfully assumed that the principle of supervised access was not being opposed, even though he had no reasonable basis for this assumption.

The Supreme Court master who heard the motion expressed surprise that no one was in court to represent K. Mr. B advised the master that there did not seem to be any objection in principle from opposing counsel to giving H access to his stepchild and that it was only a question of who should supervise the access. When the master asked whether the matter was proceeding by consent, Mr. B replied that the principle of access was going by consent, but there was a question over who would supervise access. Mr. B made this representation without any reasonable, objective basis for believing it to be true.

The master made an interim order for supervised access, on the condition that the opposing side approve the access supervisor. Mr. B subsequently left a message with lawyer L's staff to advise what had happened in chambers. Soon after, he found lawyer L at the courthouse and asked whether her client would accept a form of supervised access. Lawyer L told Mr. B that her client would not agree to any access and that the matter should be rescheduled for court. Mr. B did not tell her that he had already appeared in court to obtain a consent order. Lawyer L did not learn of this fact until returning to her office from court that day. She was perplexed, consulted with two Benchers and made a complaint to the Law Society on April 7.

In one of his letters responding to the complaint against him, Mr. B told the Law Society that he had not represented to the court that an agreement had been reached with respect to access. In fact, this was untrue as he had made that representation.

While Mr. B's statements to the court and to the Law Society might not be characterized as lying, he displayed gross negligence, recklessness and a casual disregard for the truth.

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Mr. B ceased practising law and became a non-practising member in 1999.

Decision

Mr. B's conduct, in making misrepresentations to the court and to the Law Society, constituted professional misconduct.

The hearing panel noted that the *Canons of Legal Ethics* impose various duties on a lawyer, including an obligation of "candour and fairness" to the court, and that Chapter 2 of the *Professional Conduct Handbook* prohibits "dishonourable or questionable conduct that casts doubt on the lawyer's profession integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice." Clearly the justice system would fall into disrepute, and the regulation of the legal profession would be seriously compromised, if members did not have an unequivocal obligation to take care to be truthful in all written and oral representations to the courts and the Law Society.

Penalty

The hearing panel considered various aggravating and mitigating factors in determining penalty. It noted that, in determining an appropriate penalty, consideration must be given to the need to maintain public confidence in the Law Society discipline process.

Mr. B's misconduct in making misrepresentations to the court and to the Law Society was serious. The panel noted that Mr. B was not a neophyte out of law school at the time of the incident. Since his call to the bar in 1991, he had been the subject of complaints reflecting diverse problems in his practice and he had undergone two conduct reviews. He had a tendency to become competitive, argumentative and difficult, as reflected in his treatment of lawyer L. Not until the close of the penalty hearing did Mr. B tell the hearing panel how sorry he was or apologize to the court and to the Law Society.

The panel ordered that Mr. B be suspended for 90 days beginning June 15, 2001. In light of Mr. B's difficult financial circumstances, the panel made no order on costs.