Lawyer J 97/1

West Vancouver, B.C.
Called to the bar: June 30, 1960
Retired from practice: December 31, 1995

Discipline hearing panel: November 20, 1995 and May 17, 1996
W.M. Trotter, Q.C., Chair, K.F. Warner and R.S. Tretiak

M. Baird, for the Law Society
R. Sugden, Q.C., for Mr. J

Summary

While representing plaintiffs in a difficult litigation, Mr. J learned from the trial coordinator that the trial, set to begin three days later, had been removed from the trial list. He told the coordinator that he would inform opposing counsel, but he did not do so promptly because he did not want to jeopardize any remaining opportunity to settle. He instead faxed his clients' latest settlement offer to opposing counsel (Ms. P) that same day in the hope that the defendants would instruct her to settle. Mr. J intended to tell counsel of the trial adjournment before concluding any settlement and by 3:00 p.m. in any event. He called Ms. P at 2:00 p.m. to see if she had received the settlement offer; he did not inform her of the adjournment. Shortly thereafter, opposing counsel learned, from her secretary's call to the court registry, that the trial had been adjourned and that Mr. J had agreed to pass on this information. When she subsequently called Mr. J to ask why he had not informed her, Mr. J implied that he had only recently found out himself, which was untrue and intended to mislead her about the knowledge he had at the time of their earlier telephone conversation. Ms. P wrote to Mr. J, taking him to task. When he later wrote back, Mr. J said that he had been motivated by his desire not to jeopardize any remaining opportunity to settle. Mr. J's conduct in failing to advise counsel of the adjournment and in misleading counsel about when he had learned of the adjournment constituted professional misconduct.

Facts

Mr. J represented plaintiffs in a complex and difficult litigation, scheduled for trial on December 6, 1993. In the month before trial, momentum toward settlement began to build. At a November settlement conference, the defendants offered $50,000 to settle the plaintiffs' claim of $370,000. On November 26 the defendants offered $110,000. On November 30 the plaintiffs offered to settle for $191,000. On December 2 the defendants offered $120,000. Mr. J's clients then instructed him to present an offer to settle for $163,500. Mr. J prepared the document on the morning of December 3.

At that point, the gap between offers of the parties had closed though negotiation, from $370,000 versus $50,000 at the beginning of November, to $163,500 versus $120,000 by December 3.

Before presenting his clients' new offer to Ms. P, who was counsel for the defendants, Mr. J received a telephone call from the Supreme Court trial coordinator at 11:45 a.m. on December 3. The coordinator said that the trial had been taken off the December 6 trial list because it appeared that the trial would take more than the allotted time and a judge was not available. She asked Mr. J to inform defendants' counsel of the adjournment, and he agreed to do so.

Mr. J did not immediately inform Ms. P. He explained that he was most concerned, in the interests of everyone, including the court and the defendants, that momentum towards settlement not be lost and he feared that the defendants might not take the offer to settle seriously if they knew of the adjournment. At about noon on December 3, Mr. J faxed Ms. P the offer to settle. He hoped that the defendants would consider the offer and give Ms. P instructions to settle before learning of the adjournment. Mr. J planned to inform Ms. P of the adjournment before concluding any settlement so that she and her clients could change

their position if they chose. Furthermore, if he had not heard back from Ms. P by 3:00 p.m., Mr. J planned to call her and inform her of the adjournment.

At the time he made this plan, Mr. J turned his mind to his ethical obligations both to his clients and to the court, which he saw to be in conflict.

At around 2:00 p.m. on December 3, Mr. J telephoned Ms. P to check whether she had received the offer to settle. Ms. P said that she had just received it and would review it and discuss it with her clients before getting back to him. Mr. J said nothing in that conversation about the trial being bumped; he knew that Ms. P was unaware of the adjournment.

At 2:40 the same afternoon, Ms. P's secretary contacted the court registry to enquire about Monday's trial. She learned that the case had been removed from the trial list, that Mr. J had been informed and that Mr. J had told the registry he would tell Ms. P.

Ms. P called Mr. J at about 3:00 p.m. She told Mr. J that she had heard from the registry that the trial had been bumped and she was disturbed that Mr. J had been informed that morning but had not told her. She asked why. Mr. J's response implied, if it did not explicitly state, that he had not known of the adjournment until after his 2:00 p.m. conversation with Ms. P. His response was untrue and was intended to mislead Ms. P.

Ms. P wrote to Mr. J, taking him to task. When he later wrote back to Ms. P, Mr. J said that he had been motivated by his desire not to jeopardize any remaining opportunity to settle.

Decision

When he told the trial coordinator that he would inform opposing counsel of the adjournment, Mr. J was bound to do so promptly. His situation was not analogous to that of a lawyer possessed of information developed during the adversarial process for the use of his client. He did not have the freedom to delay in passing the information for his own ends, or those of his clients. Had Mr. J told the trial coordinator that he would not pass on the information, or do so promptly, the coordinator would then have promptly informed Ms. P. Mr. J's assurance to the court garnered power that he used to keep opposing counsel ignorant, and his conduct constituted professional misconduct.

Mr. J also displayed a lack of candour amounting to professional misconduct when he implied to opposing counsel that he had not known of the adjournment at the time of their earlier telephone conversation.

Penalty

The hearing panel found that Mr. J's conduct in this instance was out of character.

Mr. J had for decades been counsel of the highest standing in all courts of B.C., as well as counsel before the Supreme Court of Canada. He was seen by many as an ornament of the profession — a paradigm of the skilled, honourable, successful, tenacious and dedicated lawyer.

He had served selflessly on several Law Society committees. In the 1970s he took, without pay, the case of a client against the Special Compensation Fund. As a result of lengthy litigation, he achieved a major policy improvement in administration of the Fund.

On the basis of prior discipline cases, the hearing panel determined that a one- or two-month suspension would be justified, but was not an option because Mr. J had already retired from practice.

The panel ordered that Mr. J pay:

1. an $8,000 fine;

2. $3,000 toward the cost of the discipline proceedings.

Mr. Jeffrey applied to the Benchers for a review of penalty under section 47 of the *Legal Profession Act*. He agreed to an adjournment of the review and later withdrew his application in December, 1996.