

**Discipline hearing panel:** August 13, 1998

Russell S. Tretiak, Q.C., as a one-Bencher panel by consent

Kimberley S. Campbell, for the Law Society

Christopher Hinkson, Q.C., for the respondent

Discipline hearing report indexed as [1999] LSBC 45

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### **Summary**

The respondent lawyer and his client were scheduled to appear on an application in court. Because his client had not given him instructions, the respondent could not proceed with the application and he believed his staff consequently arranged an adjournment. On the morning of the hearing, the respondent learned that the matter had not, in fact, been adjourned. He instructed his staff to call opposing counsel to request the adjournment. The respondent relied on his staff relaying this message to opposing counsel and assumed that the matter would be adjourned generally. In fact, opposing counsel did not receive the message in advance of leaving for court that day. The application proceeded. As the respondent's client had not appeared at the hearing, a bench warrant was issued for his arrest. Opposing counsel called and wrote to the respondent to advise him of the warrant, but the respondent did not receive these messages due to staff misfiling and/or error. He accordingly did not advise his client of the warrant or take steps to have it set aside. The client was arrested some months later under the warrant. A subsequent civil claim by the client against the respondent was settled. In the discipline proceedings, the hearing panel found that the respondent was negligent in failing to follow up and confirm the adjournment. He maintained a reasonable standard of competence in his practice overall, however, and a finding of incompetence required, on the authorities, a pattern of error. Accordingly, this one instance of negligence did not amount to incompetence. The citation was dismissed.

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### **Facts**

In 1993 the respondent acted for a client (R) in a matrimonial matter. The opposing party applied for maintenance from R, and the court hearing was scheduled for September 13, 1993. The respondent made repeated attempts to persuade R to come to his office to prepare for the application before that date, but R refused. The respondent could not obtain instructions from R, who was difficult and uncooperative. The respondent believed that his secretary consequently arranged for the hearing to be adjourned. He did not, however, advise his client not to attend the hearing.

On the morning of the hearing, the respondent realized that the matter had not been adjourned. He asked his secretary to call opposing counsel to request the adjournment. As he had previously practised with opposing counsel and believed that certain comity existed between them, he was of the view that the matter would be adjourned generally.

In fact, opposing counsel did not receive the telephone message requesting the adjournment before leaving for court that morning. The hearing proceeded, without the respondent or R in attendance. A bench warrant was issued for R's arrest.

Opposing counsel called the respondent's secretary to say that a bench warrant had been issued. The respondent did not receive this message. A follow-up letter from opposing counsel advising of the bench warrant was placed on a subfile concerning R but not concerning this matter and did not come to the respondent's attention. He did not advise R of the warrant as a result.

R was arrested six months later under the warrant and was briefly incarcerated. He later made a civil claim in negligence against the respondent, which settled for \$7,500.

## **Decision**

The respondent was negligent in assuming that there had been a general adjournment of the court proceedings without following up with opposing counsel to confirm this. Overall, however, he maintained a reasonable standard of competence in his practice and this one instance of negligence did not amount to incompetence according to the authorities. Also, in the circumstances, R contributed to his own misfortune as he knew of the court date but did not attend. The citation was dismissed.

*\* Law Society Rule 4-38(1)(a) (in effect December 31, 1998) requires publication to the profession of summaries of citation dismissals, as well as citations resulting in disciplinary action. Rule 4-38(2)(c) provides that citation dismissals must be published anonymously unless the respondent lawyer consents in writing to being identified.*

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