2005 LSBC 23
Report issued: June 1, 2005
Citation issued: September 1, 2004

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Brian John Kirkhope

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: January 17, 2005

Panel: James Vilvang , Q.C., Chair, David Zacks, Q.C., Dirk Sigalet, Q.C.

Counsel for the Law Society: Todd Follett
Counsel for the Respondent: Jerome Ziskrout

Background

[1] On September 1, 2004 a citation was issued against Mr. Kirkhope. The amended Schedule to the citation alleged:

> 1. Your client L.F. had, prior to your retainer on the matter, made a recording of a telephone conversation without the consent of either party to the conversation. This telephone conversation was between your client's wife and counsel for your client's wife. Counsel for your client's wife became your opposing counsel when you began to act for L.F. in litigation with his wife. You engaged in dishonourable conduct regarding this recording in that you:
>
> 1. accepted the recording from your client,
>
> 2. caused a transcript to be made of the recording, and
>
> 3. used the transcript to prepare for an Examination for Discovery.
>
> contrary to Chapter 2, Ruling 1 of the *Professional Conduct Handbook* .

[2] On January 17, 2005, the hearing was held. The parties relied on an Agreed Statement of Facts. Salient portions are set out below:

> 2. Mr. Johnston represented the Plaintiff, S.B.F., in a divorce action against L.F., the Defendant.
>
> 3. On January 16, 1998, L.F. recorded a confidential, privileged telephone conversation between S.B.F. and her lawyer, Mr. Johnston ("the recording") .
>
> 5. The recording occurred without the consent or knowledge of either S.B.F. or Mr. Johnston.
>
> 6. On or about March 11, 1999, L.F. retained the Respondent as his lawyer in the divorce action against S.B.F., commenced March 12, 1999. At this point Mr. Johnston became opposing counsel in this divorce action between L.F. and S.B.F.

7. During approximately April or May, 1999, after being retained by L.F., the Respondent accepted the tape containing the recording from L.F. L.F. advised the Respondent that the tape contained a recording of a conversation between S.B.F. and Mr. Johnston.

8. On May 13, 1999, the Respondent caused a transcript to be made of the recording by having his secretary type the transcript from the tape.

9. The Respondent read the transcript of the recording as part of his preparation for the Examination for Discovery of S.B.F. that was held on February 2, 2000.

10. On or about September 2, 1999, Mr. Johnston delivered to the Respondent a Demand for Discovery of Documents and Notice to Produce.

[3] Section 193(1) of the *Criminal Code of Canada* provides:

> Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, or the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, willfully
>
> (a) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or
>
> (b) discloses the existence thereof
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Legal Analysis and Reasoning

[4] It is apparent that the Respondent violated the *Criminal Code of Canada* s. 193(1)(a). However, more troublesome is the Respondent's failure to recognize that the private communication was protected by solicitor-client privilege.

[5] Mr. Ziskrout, on behalf of the Respondent, conceded that the Respondent had made a serious mistake in accepting and using the tape but says the conduct was not so far below the appropriate standard as to constitute professional misconduct.

[6] The Respondent told us that before this incident he had received taped conversations between spouses, and had had clients report on overheard conversations. He had also had lawyers disclose tapes and provide transcripts of taped conversations. But he had never received an intercepted communication. He stated that he was not aware of the provisions of s. 193 of the *Criminal Code*. The Panel accepts his evidence on that point.

[7] Our findings of fact against the Respondent are:

> (a) That he was unaware that the electronic interception of private communications violated the *Criminal Code*; and
>
> (b) That he was unaware that the conversation that had been intercepted was privileged.

But we are left with the question: is that an acceptable excuse?

[8] It is trite to say that ignorance of the law is no excuse.

[9] Exacerbating the matter is the fact that this intercepted communication was between lawyer and client. The client expected that it would be a privileged and confidential conversation.

[10] The Respondent told the Panel that he considered the privilege issue. He stated that he believed that the solicitor-client relationship was based on a retainer. He stated that because he was unaware Mr. F. had previously paid his wife's legal bills and because there was no litigation in progress at the time the conversation between Mrs. F. and her lawyer was intercepted, he believed that Mrs. F. had not retained her lawyer and that therefore there would be no solicitor-client relationship and no privilege. The Panel accepts the Respondent's evidence on this point as well.

[11] We want to be clear that in our view for conduct to be considered professional misconduct it must be "morally blameworthy" . We do not believe lawyers should be disciplined for mere negligence. But, where a lawyer fails to arm himself with the basic knowledge needed to function as a lawyer and that failure leads him or her into error, that can be seen as "morally blameworthy" .

[12] For example, it would be no defence for a lawyer to say "I didn't know what an undertaking was" or "I didn't know I wasn't entitled to treat money in my trust account as if it were my own" . This level of knowledge is expected of all lawyers. Certainly there may be circumstances where a lawyer might not understand the precise requirements of a certain undertaking and might make an honest and understandable mistake as to his duties. Such a situation would probably not constitute professional misconduct. But a prudent lawyer would not simply proceed on a course of action presuming he is right unless he was well and properly armed with knowledge or had sought guidance from others.

[13] Here, the Respondent failed to acquire adequate knowledge of some of the fundamental information he needed to properly practice law. He also failed to seek guidance or even consider that he might be proceeding in error. These failures, in the circumstances of this case, constitute professional negligence.

[14] Here, the Respondent was ignorant of the law.

[15] We accept that every lawyer cannot be expected to know every law. For example, the day after the rule was passed by the Bencher's prohibiting lawyers from accepting $10,000 or more in cash from a client except in certain circumstances, it would be understandable that many lawyers would not be aware of that new rule. If a lawyer accepted more than $10,000 on that day, then said they were unaware of the requirement, it might be an excusable error. Six months later the same error becomes less understandable and excusable. The lawyer should have acquired the necessary knowledge. The laws that the Respondent was unaware of were not new. Section 193(1)(a) of the *Criminal Code* have been in place since about the late 1970's, and the concept of the privilege attached to solicitor-client communications is much older than that.

[16] In the case of *LSBC v. Hops* (review) 1999 LSBC 29, the Benchers held:

> The Benchers are of the opinion that the Member's contention that he acted improperly out of carelessness or ignorance can not excuse him if the actions or inactions of the Member amount to a defence to almost any allegation of professional misconduct. **(p. 8, para. 35)**
>
> and
>
> From a review of the development of the legislation and the decisions of the Benchers going back to 1983 (no index being available prior to that year) it is clear that the Benchers have decided that members should be disciplined for offences less serious than those which would have required only suspension or disbarment as late as 1955. After 1955, the concept of a reprimand had entered into the

> legislative scheme but no power to fine the member had been added. From the legislative development, the definitions set out above from Oxford and the decisions of the Benchers, it can only be concluded that the Benchers have recently determined it to be appropriate to broaden the scope of professional misconduct in order to more closely regulate the activities of its members. These developments also allow less draconian punishments from those which were available when the standard of disgraceful or dishonourable conduct was required for a finding of professional misconduct. If the standard for professional misconduct still requires "disgraceful'or "dishonourable'conduct the Benchers have lowered the level of impropriety to attract those descriptions. c.f Prescott quoted in Paragraph 10 hereof. It is clear that conduct matching those descriptive adjectives is no longer required for a finding of professional misconduct. **(p. 14, para. 45)**

[17] The majority went on to refine those apparently broad statements by finding:

> (a) The member ignored signs of trouble with the corporate capacity of his client to issue the bonds which were the supposed raison d'etre for the deposits to the members trust account (Underlining added)
> **p. 16, para. 53**
>
> (b) The very peculiar nature of the circumstances by which large sums of money are flowing through the Member's trust account, from unknown sources, for an unknown purpose, must raise for the Member the applicability of Ruling 1, Chapter 4 of the Handbook.
> **p. 17, para. 58**

By the use of the word "ignored" the majority in *Hops* was conveying the sense of a deliberate, willful, disregard.

[18] The other paragraphs quoted above from the majority decision in *Hops* in our view, further illustrate the Benchers conclusion that for conduct to be professional misconduct or conduct unbecoming, it must be more than negligent. It must contain an element of advertence to the fact that what the member is doing is wrong or willful blindness to that fact. In short, the conduct must be blameworthy to a greater degree than the "blame" that would be placed upon a lawyer who was merely negligent. Where a lawyer fails to arm himself with the basic knowledge needed to function as a lawyer and that failure leads him or her into error, that can be seen as "morally blameworthy" .

[19] In the Panel's view it should be plain to any lawyer that, when receiving a tape of a conversation, the first question that the lawyer should ask themselves is whether or not the lawyer is permitted to use the tape in any way. This is especially the case when the tape is obtained without the consent of the parties to the conversation. It is even more essential when the tape is of a conversation between a non-lawyer and a lawyer. Most non-lawyers would understand this just from watching television. A lawyer should not have to think about it; the question should be obvious and natural.

[20] If the Respondent had undertaken some investigation to determine what he could or could not do with the tape, then he might be merely negligent if he came to the wrong conclusion. By his actions and his admissions he did not do this. It is therefore this Panel's view that the Respondent can be said to have been willfully blind to the fact that what he was doing was wrong.

[21] Accordingly, we find that the Law Society has proved its case to the requisite standard and that the Respondent's actions constitute professional misconduct.