RE: A LAWYER 00/12

Discipline hearing:
Dates: March, 1999 and January, 2000
Panel: Peter J. Keighley, as a one-Bencher panel by consent
Report: April 16, 1999 (findings of fact and verdict) and January, 2000 (penalty)
Indexed as [1999] LSBC 15

Judicial review:
Date: April 10 and 11, 2000
Reasons: June 7, 2000

Counsel:
Todd R. Follett and Jessica S. Gossen (hearing) and Gerald A. Cuttler and Catherine M. Esson (judicial review), for the Law Society
William B. McAllister, Q.C., for the respondent

Summary

The respondent lawyer was involved in an acrimonious matrimonial litigation with his former spouse and law partner. He was, in the same time period, a potential witness for the spouse in a separate personal injury action. The respondent had three conversations with the lawyer who represented the spouse in her personal injury action. A Law Society discipline hearing panel found that, in those conversations, the respondent intended to indicate that he would trade favourable evidence in his spouse's personal injury matter for a satisfactory settlement of the matrimonial matter. The hearing panel found that this conduct constituted professional misconduct and conduct unbecoming a member of the Law Society and ordered that the respondent be suspended for three months and pay costs. On application by the respondent, the B.C. Supreme Court subsequently set aside the panel's verdict and ordered that the Law Society not proceed further on the citation on the basis that delays in the case resulted in procedural unfairness and an unreasonable decision. The Law Society plans to appeal the judicial review decision to the B.C. Court of Appeal.

Facts

The respondent and his spouse (who was also his law partner) separated in 1994 and dissolved their partnership in 1995. Matrimonial litigation between the two began in April, 1995 and was ongoing for the remainder of the year. This litigation was acrimonious.

The respondent's spouse was the plaintiff in a personal injury action following injuries she suffered from an accident in 1990. A trial was set to proceed in December, 1995. The spouse was represented by lawyers R and L in this action. The respondent was a potential witness in the personal injury action because he had seen the accident, because he was cohabiting with her at the time and could testify as to the effects of her injuries and because, as her partner, he could testify as to loss of income.

With respect to conversations between the respondent and lawyers R and L, the Law Society hearing panel found the following:

- On November 9, 1995 the respondent met with lawyers R and K respecting the personal injury action, about one month before trial. The respondent told R and K that if his spouse (their client) did not cooperate and come to a settlement of the matrimonial case, he would allege she had misappropriated funds from the partnership. The respondent went on to say in effect that if he was to appear on the witness stand, his spouse should make a matrimonial settlement that week or the next.

- On November 14 the respondent called lawyer R's office. In the course of that conversation the respondent said in effect that he had 90% of the information to prove theft by his spouse and the rest of the documentation was on his desk. The respondent suggested that he was a risk to the respondent's spouse in her civil proceeding. If the spouse would agree to the terms of a separation agreement he had drawn up, he would not use the final 10% of the documentation that would prove a misappropriation.

- On December 3 lawyer R telephoned the respondent in an attempt to have him withdraw his motion to have himself added as a plaintiff in his wife's lawsuit. In the course of that conversation, the respondent noted that he could be a good witness for his spouse, but was not inclined to do a good job if she were to use his testimony to fight him later on in the matrimonial matter. He noted that, if a subpoena in the personal injury matter showed up without a separation agreement, he would disclose the documents that showed his spouse stole money from him. If he received a separation agreement, however, he would throw away those documents so the defence would not have them.

The hearing panel concluded that in the respondent's conversations of November 9, November 14 and December 3 with lawyer R, the respondent intended to indicate his willingness to trade favourable evidence in the personal injury matter for a satisfactory result in the matrimonial matter. On each of these occasions he was agitated as a result of his domestic and financial pressures.

* * *

At the outset of the hearing, the respondent made three preliminary motions. The first was for a citation dismissal based on the fact that his former spouse (also the complainant)

had withdrawn her complaint prior to commencement of the hearing. This was rejected by the panel, which noted that a complaint is a mechanism by which an investigation may be undertaken, and a citation is not rescinded by a complainant withdrawing a complaint, subject to the right of the respondent to apply to the Discipline Committee for a citation rescission.

The second motion was that one count on the citation be stayed because of late disclosure. The circumstances were that in 1996 the respondent has requested the notes of lawyer R about the conversations on November 9 and 14 and December 3, 1995. The Law Society forwarded a copy of these notes in September, 1996, but unfortunately one page of the notes of the December 3 conversation was missing through a faxing error in lawyer R's office. Lawyer R discovered the error in May, 1998 and provided the missing page to the Law Society, which was then forwarded to the respondent. The hearing panel rejected the respondent's argument that, had he had received the full notes in September, 1996, this might have triggered any recollection he had of the December 3, 1995 conversation. The panel was not able to translate this hypothesis into a finding of prejudice or reasonable apprehension of prejudice. The panel noted that the Law Society had alleged the nature of the misconduct when it wrote to the respondent in July, 1996 and that correspondence would likely have tripped any recollection.

The respondent's third motion alleged a failure to disclose notes of any comments made by the complainant to her personal injury lawyers respecting the respondent's attitude. The panel rejected this motion, as any such notes were subject to privilege that the complainant was not prepared to waive and the notes were not documents within the possession or control of the Law Society.

Decision

The hearing panel found that the respondent's conduct constituted professional misconduct and conduct unbecoming a member of the Law Society. *[This decision was subsequently set aside by the B.C. Supreme Court on judicial review: see page 3.]*

Penalty

In considering the nature and gravity of the respondent's conduct, the hearing panel noted that his proposal to refrain from giving evidence detrimental to the respondent's former spouse's credibility and character in return for a favourable resolution of the matrimonial dispute goes to the very root of his obligations as a minister of justice and an officer of the courts. The respondent had hoped to gain a significant advantage in his matrimonial proceeding by threatening his spouse, through her counsel, with harmful evidence should he be called to testify (although there was no evidence he did obtain an advantage).

The panel considered that the respondent had undergone several conduct reviews and four previous discipline citations that resulted in fines against him. The panel expressed concern that he did not appear to have followed up on earlier suggestions that he pursue counselling or some other form of assistance with interpersonal issues. The panel said it

was also left with a lingering sense that the respondent did not fully understand the basic immutable duties of the practising lawyer set out in the preamble to the *Canons of Legal Ethics.*

The panel decided that the respondent's misconduct could be addressed, and the public adequately protected, by a significantly less drastic penalty than disbarment. Given the lack of specific information as to the respondent's income and given the amount he had already paid in fines and costs as a result of previous discipline, the panel was not convinced that a fine represented a significant deterrent to him. The panel ordered that the respondent be suspended for three months and pay costs of the discipline proceedings. The Discipline Committee resolved to apply to the Benchers for a review of this penalty.

* * *

Judicial review

The respondent made application to the Supreme Court of B.C. for a judicial review of the hearing panel decision on findings of fact and verdict. On February 3, 2000 the Discipline Committee resolved to consent to an interim injunction to stay the penalty against the respondent until after hearing of the judicial review.

On June 7 the B.C. Supreme Court determined that a delay by the Law Society in 1996 in notifying the respondent that a complaint had been made against him and a subsequent delay in disclosing one page of notes from the December 3 telephone conversation resulted in procedural unfairness. The Court found that the evidence of the December 3 conversation could not be relied on in the circumstances. When considering only admissible and properly weighted evidence and applying the standard of proof, the Court found there was not evidence cogent enough to make it safe to uphold the panel's findings against the respondent.

The Court found that the verdict of the hearing panel was unreasonable and ordered that the verdict be set aside and that the Law Society be prohibited from proceeding further with any part of the citation.

The Law Society plans to appeal the judicial review decision to the B.C. Court of Appeal.