2004 LSBC 26
Report issued: August 12, 2004
Citation issued: July 9, 2002
Citation amended: February 12, 2004

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

Danine Lorraine Geronazzo

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: March 9, 10, 11 and 12, 2004

Panel: David Zacks, Q.C., Chair, Joost Blom, Q.C., Dirk Sigalet, Q.C.

Counsel for the Law Society: Gerald Cuttler and Sharna Searle
Counsel for the Respondent: Christopher Hinkson, Q.C.

Background

[1] On July 9, 2002 a citation was issued against Danine Lorraine Geronazzo (the " Respondent") pursuant to the *Legal Profession Act* (the " Act") and Rule 4-15 of *The Law Society Rules* by the Executive Director of the Law Society pursuant to the direction of the Chair of the Discipline Committee. The citation, which was amended in February, 2004 pursuant to Rule 4-31(2)(a), directed this Panel to inquire into the following alleged conduct of the Respondent:

1. Your conduct in that you attempted to mislead Kelley McCullagh, a partner at your employer law firm, Carfra & Lawton, by representing to Ms. McCullagh that you had prepared and sent a response as requested by a Manitoba client " R" to the client on or about July 15, 1999 when you knew this representation was untrue.

(In these reasons " Count 1")

2. Your conduct in that you attempted to mislead Mr. Carfra, Q.C. in relation to client " M.I.A." by asserting to Mr. Carfra that:

a) you had had telephone contact with Mr. K., an employee with the Township of Esquimalt, when you knew you had not done so;

b) you had prepared and sent an affidavit to Mr. W., an employee with the Township of Esquimalt when you knew you had not done so.

(In these reasons " Count 2")

3. Your conduct in that you attempted to mislead Kelley McCullagh by representing to Ms. McCullagh that a submission on the " H" file had been sent to Workers' Compensation Board in September 1999 when you knew this representation to be untrue.

(In these reasons " Count 3")

4. Your conduct in attempting to mislead the Law Society in the course of responding to its inquires pursuant to the complaint of James Carfra, Q.C. by:

a) representing to the Law Society that you had prepared and sent a response to client " R" on or about July 15, 1999 when you knew this representation was not true;

b) representing to the Law Society that, in relation to client " M.I.A." you:

i) had telephone contact with Mr. K. when you knew you had not, and;

ii) had prepared and sent an affidavit to Mr. W. when you knew you had not done so;

c) representing to the Law Society that you had prepared and sent a submission on the " H" file to the Workers' Compensation Board when you knew this representation was untrue.

(In these reasons " Count 4")

5. Your conduct in that you attempted to mislead Nicholas A. Mosky, a partner at your employer law firm, Waddell Raponi, between in or about March and August 2001, by representing to Mr. Mosky that you had filed an appointment to assess the accounts of Waddell Raponi regarding the " R" clients, that you had served the clients by mail with the Appointment, and that the assessment hearing had been adjourned and reset, when you knew that these representations were untrue.

(In these reasons " Count 5")

Law

[2] The burden of proof is upon the Law Society. The standard to be met is a high one. It is beyond a mere balance of probabilities but is not as high as the criminal standard of beyond a reasonable doubt. The standard slides upwards and may come close to the criminal standard, as the consequences from a finding of professional misconduct grow more severe.

Hirt v. College of Physicians and Surgeons of British Columbia, [1985] B.C.J. No. 2739, para. 21.

McKee v. College of Psychologists of British Columbia, [1991] B.C.J. No. 3288.

Jory v. College of Physicians and Surgeons of British Columbia, [1985] B.C.J. No. 320, para. 14.

[3] On matters of credibility, counsel for the Respondent urged us to follow the test set out in *R*. v. *W.(D.)* 63 C.C.C. (3d) 397 at page 409. The principle in that case applies here and we accept that even if we disbelieve the Respondent's testimony, there may still be room to find that the Law Society has not proved its case to the requisite standard. However, the present case is not a criminal case. What *R*. v. *W.(D.)* says about reasonable doubt must be modified to meet the onus required of the Law Society. Also, in assessing the credibility of testimony, we bear in mind the test set out by the Court of Appeal in *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354, where, at page 357, O'Halloran, J.A. said:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real

> test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say " I believe him because I judge him to be telling the truth" , is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[4] Counsel for the Respondent submitted that, when determining whether or not the Law Society had met the requisite standard, this Panel must consider the evidence with respect to each count separate and apart from the evidence on the other counts. This Panel agrees.

[5] In reaching the conclusions set out below, this Panel has instructed itself in accordance with the foregoing.

EVIDENCE AND DISCUSSION

General

[6] The Respondent was called to the Bar of British Columbia on September 8, 1998.

[7] In or about October, 1998 the Respondent commenced employment as an associate lawyer with the law firm of Carfra & Lawton.

[8] Carfra & Lawton terminated the Respondent's employment on or about December 10, 1999.

[9] The Respondent commenced employment with Waddell Raponi on or about February 1, 2000.

[10] The Respondent's employment with Waddell Raponi ended on or about November 2, 2001 when she got married.

Count 1

Evidence

[11] On June 16, 1999, Kelly McCullagh, a partner at Carfra & Lawton, received a fax from R, the representative of a client in Manitoba, asking for comments on a legal memo he was forwarding. (Transcript Volume 1, page 24)

[12] On June 21, 1999, the Respondent received an assignment from Ms. McCullagh to respond to the June 16 fax, and forward an opinion letter to the client within two weeks. (Transcript Volume 1, page 24)

[13] On June 21, 1999, the Respondent wrote a memo to file, confirming Ms. McCullagh's request. (Exhibit 2, Tab 1)

[14] In late August, 1999, Ms. McCullagh was preparing to do an Examination for Discovery in connection with this matter and noticed that there was no response by the Respondent to the client. She did not ask the Respondent about it at that time. (Transcript Volume 1, pages 25-26)

[15] In early September, 1999 Ms. McCullagh was reporting to the client on the discovery which she had conducted and needed to refer to the opinion, which she understood the Respondent had prepared and sent to the client. Ms. McCullagh was unable to find the opinion and asked the Respondent about it. (Transcript Volume 1, pages 26-27)

[16] The Respondent assured Ms. McCullagh that she had completed the opinion and that it had been faxed to the client on or about July 15, 1999. (Transcript Volume 1, pages 26-27)

[17] The Respondent was unable to produce the opinion for Ms. McCullagh. (Transcript Volume 1, page 27)

[18] A copy of the opinion was not in the file. Carfra & Lawton's computer system was checked but there was no record of a completed opinion on the Respondent's computer or on Ms. McCullagh's secretary's computer. (Transcript Volume 1, pages 28-29)

[19] The Respondent suggested to Ms. McCullagh that the inability to produce the opinion was attributable to a computer virus that had destroyed the document. (Exhibit 1, Tab 2; Transcript Volume 2, pages 389-390 and Volume 3, pages 406-408)

[20] After she was unable to find the opinion Ms. McCullagh requested that the client provide her with a copy, but the client was unable to do this. (Transcript Volume 1, pages 30-32, Exhibit 2, Tabs 4 and 5)

[21] The computer directory for this particular client contained a document entitled " letter [sic] to adjusters 15 July 99" . When opened by both the Respondent and, immediately thereafter, by Ms. McCullagh's secretary, the document contained no text (Exhibit 1, Tab 2; Transcript Volume 2, pages 392-393). A search of the document's historical properties indicated that this document was created on August 3, 1999 and last modified within an hour later on the same day. The Respondent cannot explain the discrepancy in these dates and she denies creating it on August 3 (Transcript Volume 2, page 393).

[22] Ms. McCullagh admitted that if the file was created on August 3, it was before she was aware of any issue as to whether the opinion had been done. (Transcript Volume 1, page 88)

[23] A computer virus had been experienced at the Carfra & Lawton office in June, 1999. However, according to the evidence of Ms. McCullagh and Mr. Carfra, the problem was remedied by approximately June 17, 1999, four weeks before the time that the Respondent says she prepared the opinion. (Transcript Volume 1, pages 45-46, 55-58 and Volume 2, pages 204-205)

[23] Neither Ms. McCullagh nor Mr. Carfra recall the Respondent making a complaint about the computer during July, 1999. (Transcript Volume 1, pages 45-46 and Volume 2, pages 204-205)

[24] The Carfra & Lawton telephone/fax bills for July, August and September 1999 indicate transmissions to the client's fax and office phone numbers as follows:

[intentionally left blank]

June 16 08:55 am	250-381-7804 to	2.18 (min. sec) (fax)

July 15 10:17 am	250-381-7188 to	.42
July 15 1:14 pm	250-381-7188 to	4.12
July 19, 11:52 am	250-381-7804 to	1.24 (fax)
July 19 11:57 am	250-381-7804 to	1.42 (fax)
Aug 11 08:18 am	250-381-7804 to	.54 (fax)
Oct 15 09:19 am	250-381-7804 to	1.30 (fax)
Oct 15 09:49 am	250-381-7804 to	5.36 (fax)

(Exhibit 2, Tab 3)

[26] There is only one transmission to the fax number which is unaccounted for (dated July 19, 1999 lasting 1:24 minutes).

[27] After Ms. McCullagh concluded that the requested opinion had not been received by the client, she and Mr. Lawton met with the Respondent. Ms. McCullagh told the Respondent that the client advised her that the requested opinion had not been received. (Transcript Volume 1, pages 50-52)

[28] During the meeting with Ms. McCullagh and Mr. Lawton the Respondent forcefully insisted that she had done the work and sent the opinion (Transcript Volume 1, page 128). The Respondent was given approximately 48 hours to " redo" the opinion. The Respondent offered to tell Ms. McCullagh, off the top of her head, what was in the July opinion as a way of convincing her that she had done the work when she said (Transcript Volume 2, page 387 and Volume 3, page 405). She delivered a draft of the opinion on October 1, 1999, which was revised and sent the same day. The Respondent says that this was done in no more than five hours which would not have been possible if she had not already done the opinion. (Exhibit 1, Tab 2; Transcript Volume 3, page 411)

[29] In letters to the Law Society, the Respondent stated that she did the work and sent the opinion in July, 1999. She wrote: " In short, I did the work, I researched it when I said I did, corroborated by the date of download (from Quicklaw) on my hard drive. I faxed it and should have been more careful about obtaining a file copy" . (Exhibit 1, Tab 2) The Respondent also stated that during the meeting with Ms. McCullagh, she provided Ms. McCullagh with copies of the cases she used in her original research bearing download dates in July, 1999, corresponding with the time that she says she did the work. (Transcript Volume 2, pages 386-387 and Volume 3, page 424)

[30] Ms. McCullagh does not recall being provided with these cases. There are no cases in the file that have dates of download in June or July of 1999. (Transcript Volume 1, pages 53-55)

[31] Carfra & Lawton's Quicklaw billing records only show research being done (for this opinion) on October 1, or later. There is no record of any Quicklaw research between June 21 and July 15, 1999 on this file by the Respondent or anyone else. (Exhibit 2, Tab 8)

[32] There was no time entered by the Respondent for this file on the Carfra & Lawton computer system during June, July or August, 1999. (Transcript Volume 1, pages 45 and 46)

[33] The Respondent stated in her letter to the Law Society of April 3, 2000 that she got into the habit of

keeping a separate list logging the work she was doing. (Exhibit 1, Tab 2) The Respondent has never produced any such list or time log to the Law Society. Neither Mr. Carfra nor Ms. McCullagh has ever seen any such list or time log.

Discussion

[34] There is nothing in any of Carfra & Lawton's files which indicates that the Respondent prepared the opinion at all, let alone when she says that she did. There is no copy of the opinion (not even of a draft opinion), there is no fax record to the client (other than the telephone record of Carfra & Lawton for July 19), there are no time entries, there are no copies of the cases upon which the Respondent said she relied for her opinion. The Respondent's testimony that a computer virus destroyed the computer copy of her opinion is not borne out by the evidence. The Respondent has no credible explanation for the absence of the other material.

[35] The Respondent argues that Carfra & Lawton's records indicating a fax of July 19 to the client is evidence that this could have been the fax of her opinion. The fax of July 19 does not accord with the date on which the Respondent says she sent the opinion and took significantly less time than it took to fax her opinion October 1. Even if the Law Society had to meet a test of proof beyond a reasonable doubt (which it does not) this suggestion would not raise that doubt. There is just too much other evidence to support the Law Society's position.

[36] This is not just an instance of the credibility of the Respondent versus the credibility of Ms. McCullagh and of Mr. Carfra. It is as much an instance of the credibility of the Respondent when viewed with the evidence as a whole. Her story does not accord with the preponderance of probabilities " which a practical and informed person would readily recognize as reasonable in the circumstances" .

[37] The Respondent represented to Ms. McCullagh that she had prepared and sent the opinion on or about July 15, 1999 when she knew that this was not true.

[38] The Law Society has met the burden of proving Count 1 and we find that the Respondent professionally misconducted herself.

Count 2

Evidence

[39] In early April, 1999, Mr. Carfra asked the Respondent to prepare an Affidavit for a Rule 18A application. (Transcript Volume 2, pages 194-195) Carfra & Lawton's client, " X" , was responding to a claim by " Z" and others, against the client's insured, " E" , and against a second defendant, " V" (the " Z file").

[40] The Respondent recorded that she " reviewed [the Z] file; prepar[ed] draft Affidavits, Motion" on April 15, 1999 and that this took her 3.5 hours. (Exhibit 5, Tab 7)

[41] On April 19 and 29, 1999 the Respondent and Mr. W., " E's" Treasurer and Deputy Administrator, exchanged telephone calls. Mr. W. and the Respondent spoke regarding an Affidavit to be drawn. (Exhibit 5, Tab 3) On May 20 and 24 the Respondent left messages for Mr. W. concerning the appropriate person to give the Affidavit. (Exhibit 5, Tab 3) Mr. W. referred her to Mr. K. Mr. W. did not recollect the specifics of the conversation with the Respondent (Transcript Volume 2, page 234-235, 244). He did recall telling the Respondent that some of the information in the Affidavit would have to come from Mr. K. (Transcript Volume 2, pages 240, 247-248)

[42] On April 19, 1999, Mr. W. faxed certain documents to the Respondent. (Exhibit 5, Tab 1)

[43] The Respondent's own note in the file (Exhibit 5, Tab 3, Note of May 3, 1999) says she told Mr. W. she would fax a draft the next day and she says she did so. (Transcript Volume 3, pages 424-425). She may not have sent the fax herself (Transcript Volume 3, pages 425-426). Under examination by Law Society counsel the Respondent said she had no actual recollection of sending, or causing to be sent, the fax on May 4, 1999. Instead, the Respondent was relying on the evidence of her file note which said she would send it later. Then, when this evidence is combined with evidence of the Respondent's later file notes of telephone messages she left for Messrs. W. and K., the combined effect is somehow greater than these evidentiary parts thereby allowing the Respondent to develop her belief that " ...a draft affidavit was faxed to Mr. W." . (Transcript Volume 3, pages 426-427). The Respondent, when asked by the Panel about the absence of any fax cover sheet from the file, said she did not recall who had sent the fax and did not know the secretarial staff well enough to say whether they would always have used a cover sheet (Transcript Volume 3, pages 548-549). The Respondent testified, on the basis of the notes in the file, that she had called Mr. W. at least twice after the fax was sent on May 4, the last call being on May 20, but did not recall doing any further work on the file (Transcript Volume 3, pages 427-428).

[44] In or about October, 1999, the Respondent told Mr. Carfra that she had done a draft Affidavit and sent it to Messrs. W. and K. but was having difficulty getting further needed information from them, Mr. K. in particular. Mr. Carfra reviewed the file in October, 1999 to find out what work had been done. Mr. Carfra found no draft Affidavit or any indication that one had been sent over. There were some notes of the Respondent's indicating contacts with or attempts to contact Mr. W. and Mr. K. (Transcript Volume 2, pages 195-198)

[45] Mr. Carfra confronted the Respondent with his concerns about the file. Ms. McCullagh and later, Mr. Lawton, were both present when Mr. Carfra spoke with the Respondent. The Respondent advised him that she had prepared a draft Affidavit, faxed it to Mr. W. and was waiting for information from the building inspection fieldworker (Mr. K.) about his inspection schedule, but he was not responding.

[46] In cross-examination, Mr. Carfra mentioned that some business licences and other things of that kind, which came from Mr. W. and could only have been requested by the Respondent, were in the file. (Transcript Volume 2, pages 216- 217) Mr. Carfra identified the material in Exhibit 5, Tabs 1-3, as having been in the file. (Transcript Volume 2, pages 223-225) Also in cross-examination, Mr. Carfra said that he had indicated to the Respondent at some point before October, 1999 that the matter had lost urgency because the plaintiff's counsel had indicated that the client might be let out of the action. (Transcript Volume 2, pages 221-222)

[47] In mid-October, 1999, Mr. Carfra spoke to Mr. W. and Mr. K. Mr. W. told Mr. Carfra that he and Mr. K. had reviewed their files and that there was no Affidavit in them. Mr. K. told Mr. Carfra that he never spoke with the Respondent, did not know who she was and had never received any Affidavit from her. (Transcript Volume 2, pages 198-199)

[48] Mr. W. does not recall seeing an Affidavit from the Respondent. There is nothing in his file, or the property file in the Planning and Engineering Department, to indicate an Affidavit had ever been received. (Transcript Volume 2, pages 236-239)

[49] There are no written records or references in the files of " E" of contact between Mr. W. and the Respondent from after April 19, 1999, up to October 13, 1999, when he received a copy of the fax from the Respondent to the insurer. The only other document on file was an email printout dated October 14, 1999, from the insurer to him, with a copy to the Respondent.

[50] In 1999 Mr. W.'s practice was (and still is) to respond to his messages promptly.

[51] Mr. K. was cross-examined on the phone message/voicemail system in his office. He testified that a call could have been left on voicemail or a note taken of it by a secretary. The notes would have been kept. (Transcript Volume 2, pages 254-259) He testified that it had never been brought to his attention that he had failed to receive a message. (Transcript Volume 2, pages 258-259)

[52] The Respondent's evidence, based on her notes (Exhibit 5, Tab 3), is that she called Mr. K. several times and spoke with him on June 4, 1999. (Transcript Volume 3, page 434) Her statements to Mr. Carfra that Mr. K. was not answering calls were based on her subsequent efforts to contact him on June 8 and 15, 1999.(Transcript Volume 3, page 435)

[53] The Respondent did not record any time or billing entries referencing any telephone calls to Mr. K. (Transcript Volume 2, pages 201-208)

[54] Mr. K. took steps to have all of his message pads, records and files inspected, in case the Affidavit had been misfiled, but could find no trace of any messages or documentation having been received from the Respondent. (Transcript Volume 2, pages 251-253)

[55] In 1999 Mr. K.'s practice was, and still is, that when a message was received he would write the name and number down in his diary and check that name and number off after he returned the call. Mr. K.'s practice was, and still is, to respond to telephone messages as soon as possible. (Transcript Volume 2, page 253)

[56] When Mr. Carfra asked the Respondent about the lack of any sign that she had done the draft Affidavit, she said that she had been in communication with Messrs. W. and K., that she had prepared the documentation and she had sent it to them. She could not produce it and had no explanation for its absence. (Transcript Volume 2, pages 199, 228-229)

[57] The Respondent offered, when confronted on the issue, to tell Mr. Carfra and the other firm members what she had put in the Affidavit. She did that, rather than offer to look for the Affidavit or call Mr. W., because they had already told her that Mr. W. had said he had not received it. (Transcript Volume 3, pages 436-438)

[58] The Respondent was asked to find the computer file, which would have been on Mr. Carfra's secretary's computer, and could not do so. (Transcript Volume 2, pages 230-231) The Respondent testified that she must have saved the two documents she prepared on April 15, 1999 in the computer, but she had no direct recollection of having done so. (Transcript Volume 3, pages 430-431) She did not remember looking specifically for the Notice of Motion as distinct from the Affidavit and said that the Notice of Motion had never been an issue. (Transcript Volume 3, page 432)

Discussion

[59] There is no evidence in the files of Carfra & Lawton that the Respondent prepared an Affidavit and sent it to either Mr. W. or Mr. K.

[60] The Respondent's notes of her messages and conversations with Messrs. W. and K. were in the file at the time it was reviewed by Mr. Carfra. We do not believe that these were fabricated by the Respondent. We cannot say that the conversations did occur, but we find that the Law Society has not met the onus required of it in respect of Count 2(a) that she misled Mr. Carfra about her conversations with Mr. K.

[61] Both Messrs. W. and K. were clear in their testimony that they did not receive a draft Affidavit from the Respondent. On this point, the Panel prefers their testimony to that of the Respondent. Their testimony is in

harmony with the preponderance of the probabilities and the Respondent's is not.

[62] We find that the Law Society has met the onus required of it in connection with Count 2(b) and that the Respondent professionally misconducted herself in misleading Mr. Carfra by stating that she had sent an Affidavit to Mr. W. when she knew that she had not done so.

Count 3

[63] In April, 1999, Ms. McCullagh asked the Respondent to proceed with an application to the Workers' Compensation Board (" WCB") for a " Section 11 determination" . The decision on the application would determine whether an incident, which was the subject matter of a Supreme Court action against a client of Carfra & Lawton, a person insured by " I" , was in fact covered by the workers' compensation legislation.

[64] On April 8, 1999, the WCB wrote to Ms. McCullagh requesting that the Section 11 submissions be provided by April 29, 1999, and that a copy of the submissions also be provided at the same time to opposing counsel and any interested parties. (Exhibit 7, Tab 1)

[65] On April 16, 1999, the Respondent spoke with the WCB seeking an extension for her firm's submissions to June 11, 1999, on the basis that discoveries had been scheduled for May 17, 1999. This was confirmed by a letter of the same date from the Respondent to the WCB, with a copy to the two other counsel involved. (Exhibit 7, Tabs 2 and 3)

[66] On May 18, 1999, the Respondent wrote to the WCB, advising that discoveries had to be rescheduled and requesting an extension to early August for the Section 11 submissions. The letter was copied to the other two counsel. (Exhibit 7, Tab 4)

[67] On June 9, 1999, the Respondent spoke for the first time with Mr. Andrew Roznicki, the Appeal Officer at the WCB who had taken over the file. Mr. Roznicki granted an extension to August 9, 1999, for the Section 11 submissions. This was confirmed by a letter from the Respondent to Mr. Roznicki on June 10, 1999, with a copy to the other two counsel. (Exhibit 7, Tabs 5 and 6)

[68] On June 11, 1999, Mr. Roznicki wrote to the Respondent confirming their June 9, 1999 conversation and the August 9, 1999 extension, as well as the Respondent's letter and conversation of April 16, 1999 with the WCB's Ms. W. (Exhibit 7, Tab 20)

[69] On June 17, 1999, the Respondent wrote to Mr. Roznicki in reply to his letter of June 11, 1999, confirming Examination for Discovery dates and enclosing a filed copy of their Statement of Defence. (Exhibit 7, Tab 7)

[70] On August 5, 1999, the Respondent spoke with Ms. Anne Toews at the WCB. The Respondent advised that she had just discovered that a condensed version of the plaintiffs discovery transcript was not included with the original transcript, and that she intended to attach and refer to it in her submissions. Ms. Toews granted a 14-day extension to August 23, 1999, so that the Respondent could avail herself of the condensed version of the transcript. This was confirmed by a faxed letter from the Respondent to Ms. Toews on the same day, with copies to the other two counsel. (Exhibit 7, Tabs 8 and 9)

[71] On August 23, 1999, the Respondent sent a fax to Mr. Roznicki stating: " I write to confirm that the Defendant/Applicant's materials will be sent via courier today." . This fax was not copied to the other two counsel. (Exhibit 7, Tab 11)

[72] On August 25, 1999, Mr. Roznicki received a call from the Respondent, who advised him that the submissions had not been sent because her secretary was sick. Mr. Roznicki gave her until Friday, August

27, 1999, to provide the submissions. (Exhibit 7, Tab 20)

[73] According to a Carfra & Lawton business record, during August, 1999 the only employee absences around the time in question were Mr. Carfra's secretary, L.R., on August 19, 20, 23, and 24, 1999, P.L. for a one-half day on August 12, 1999 and S.T., M.A.M.'s secretary, on August 24, 1999. (Exhibit 7, Tab 22)

[74] In her letter of April 3, 2000 to the Law Society, the Respondent stated that:

> On August 23rd, 1999, I faxed a letter to Mr. A. Roznicki confirming that our submissions would be sent by courier. In approximately the first week of September I was going through a pile of documents relating to another large file ... when I came across the WCB submissions. I became very upset and called Mr. Roznicki, the Appeals Officer. I explained that the materials did not go out as I thought and accepted full responsibility for this lapse...I did not tell Ms. McCullagh about my error nor did I tell the adjuster. I do not recall if I carried the submissions to the front desk or if I asked someone to do this. I believed the submissions were sent out immediately. I did not follow up with the WCB to ensure it had received our submission.
>
> (Exhibit 1, Tab 2)

[75] The Respondent says she immediately either brought the submissions or had them brought to the firm's front desk to be sent out to the WCB. No cover letter was included. (Transcript Volume 2, pages 348-350). The Respondent did not follow-up with the WCB to see if the package had been received. (Exhibit 1, Tab 2, page 9) The Respondent said that she did not have the submissions copied because multiple copies would have been made originally (Transcript Volume 2, pages 361-362 and Transcript Volume 3, page 559). When asked if she took one copy out for couriering the Respondent said she could not remember what specifically she did; she had the entire file and she " sent that for being couriered" . (Transcript Volume 2, page 362) In response to a question from the Panel, the Respondent said there was one copy in the file, which was sent to the WCB; no copy was sent to the client at that stage because institutional clients were sent reports on a periodic basis (Transcript Volume 3, pages 566-567). There is no reference to a new copy being made.

[76] Mr. Roznicki testified that he reviewed the relevant WCB file and did not find any record of any submissions from Carfra & Lawton being received in August or September, 1999.

[77] Mr. Roznicki did not recall the Respondent phoning him to say she had just discovered the submissions had not gone out (the call referred to at paragraph [74] above). The Respondent suggested in her oral testimony (Transcript Volume 2, pages 342-44, 347-48, and Volume 3, page 558) that the call might have been made earlier than the first week of September, and could have been the call that Mr. Roznicki noted as having received from her on August 25, 1999. (Exhibit 7, Tab 20, Attachment No. 5) Mr. Roznicki's note and recollection (Transcript Volume 2, pages 306-07) of that conversation is that the Respondent said the submissions had not gone out because her secretary was sick. Nor did Mr. Roznicki have any record or recollection of any subsequent phone call in which the Respondent told him about having just discovered the submissions had not gone out. (Exhibit 7, Tab 2, page 3, point 6; Transcript Volume 2, page 307)

[78] On October 1, 1999, Ms. McCullagh emailed the Respondent inquiring as to the status of the file. (Transcript Volume 1, page 63)

[79] On October 4 or 5, the Respondent informed Ms. McCullagh that " the submissions were done and assured her that the 'ball was in WCB's court'." . (Transcript Volume 1, page 63, Exhibit 7, Tab 2)

[80] On October 5, 1999, Mr. Roznicki spoke with the Respondent. (Exhibit 7, Tabs 12 and 20)

[81] Mr. Roznicki made a handwritten memo of the conversation and documented the October 5, 1999 conversation between himself and the Respondent on that day as follows:

> Returned call to Danine and advised that I am still waiting for their submissions to arrive further to her fax memo of Aug 23/99. Danine advised that she will send this again as she was sure they were sent. As she is leaving on vacation, she requested 2 weeks to get this to us as their submissions are quite extensive. Advised that upon receipt, I will be reviewing them to see if there is an employer to invite on the plaintiff's side.
>
> (Exhibit 7, Tab 20)

[82] Mr. Roznicki reviewed the contents of the relevant file but found no submissions or any further communication in it from the Respondent following the October 5, 1999 telephone call referred to above. (Exhibit 7, Tab 20, Transcript Volume 2, page 311)

[83] In her letter to the Law Society of April 3, 2000, the Respondent's account of this conversation is, in part, as follows:

> I asked him about the timeline for our response to the other parties' submissions ... He told me that the end of October would be the earliest date for our response. I asked about the timeline for the WCB's decision and he said that it was unlikely before Christmas.
>
> He also wanted to know if we were making submissions on behalf of the 'employer'. I told him we were the employer and he said he has something in his file notes that he should be sure to invite submissions from a government agency ... He said something like 'maybe it will be clear from your submissions.' I believed that he had received our submissions but hadn't read them. I did not understand from him that he had not received my clients' submissions ...
>
> (Exhibit 1, Tab 2, Transcript Volume 2, pages 363-364)

[84] In her letter of April 3, 2000, the Respondent stated that right after her conversation of October 5, 1999 with Mr. Roznicki, she wrote to the client. She stated:

> Immediately following this call I wrote to the adjuster to advise about the timeline. I definitely told the adjuster that I had made the submissions in our October 5 telephone call. I am attaching my letter to the adjuster dated October 5th which, I understand, the firm believed to be my attempt to mislead the client.

[85] The letter to the adjuster, dated October 5, 1999, states in part:

> Further to our telephone conversation of today's date, I confirm that the Workers Compensation Board is not in a position to provide us with a timeline for its decision. However, the Appeals Officer handling this file indicated that it is unlikely a decision will be made before the new year.
>
> (Exhibit 7, Tab 13)

[86] In approximately mid-November, 1999, Ms. McCullagh had occasion to look at the file and observed that there were no submissions to the WCB on the file and no correspondence to the WCB. (Transcript Volume 1, page 64)

[87] Shortly thereafter, on November 18, 1999, Ms. McCullagh telephoned the WCB and left a message

asking if she could have a copy of the WCB submissions sent to Carfra & Lawton. (Transcript Volume 2, page 312)

[88] On November 18, 1999, Mr. Roznicki returned Ms. McCullagh's call and left a message advising her that he (i.e., the WCB) was " still waiting for submissions" . Mr. Roznicki made " scratch notes" which included a note that the Respondent's submissions as continuing to remain outstanding, when he returned Ms. McCullagh's telephone call. (Exhibit 7, Tab 20, Transcript Volume 2, page 312)

[89] After Ms. McCullagh received the message on November 18, 1999 that the submissions remained outstanding, the relevant file, the Respondent's computer and her secretary's computer (i.e., the secretary she was sharing with an associate) were reviewed. The review revealed no record of any submissions ever having been prepared. There was a single page start on a draft submission that had little more on it than a style of cause. A review of the Respondent's time sheets indicated no time recorded at or about the time that she indicated the submission had been concluded and sent. (Transcript Volume 1, page 69)

[90] Carfra & Lawton's billing records do not show time for preparation of submissions billed to this file by the Respondent between the holding of the discovery on July 5 (Exhibit 7, Tab 16, page 1 of 7/6/99) and the end of August (Transcript Volume 1, pages 66-69, and Exhibit 7, Tabs 16 and 17). In cross-examination the Respondent conceded that it was possible that some of the Respondent's time would not have made it into the file if the Respondent's handwritten notes were not posted. (Transcript Volume 1, page 110)

[91] The Respondent says that she was researching and preparing the submissions in the days before August 23, 1999. The Respondent worked on the computer and her normal practice would have been to save the files (Transcript Volume 2, pages 356-358).

[92] Carfra & Lawton's long distance records reveal the following calls and faxes to the WCB Appeal Division's general number, 604-276-3067 and the WCB fax machine, 604-276-3349, and no other significant long distance fax or phone activity thereafter:

a. August 5 03:58 pm	250-381-7188 to 604-276-3067	4.18 mins
b. August 5 04:37 pm	250-381-7188 to 604-276-3349	1.0 mins (fax)
c. August 23 04:07 pm	250-381-7188 to 604-276-3349	.42 mins (fax)
d. August 25 09:50 am	250-381-7188 to 604-276-3067	2.24 mins

(Exhibit 7, Tab 10)

[93] According to Carfra & Lawton's courier records there were no couriers sent to WCB between August 15, 1999 and September 30, 1999. (Transcript Volume 1, page 71, pages 110-113)

[94] On November 24, 1999, Ms. McCullagh and Mr. Lawton met with the Respondent and said there was no indication the Respondent had done the submissions. The Respondent maintained that she had done it. The Respondent suggested that a hard copy might be in another file, the " A" file. The Respondent went to her office to look for that file. The Respondent reported back that it was not in her office and that it might be at her home or in her car. (Transcript Volume 1, pages 72-74 and pages 130-131) Though instructed to find the submissions and report back, the Respondent did not get back to Ms. McCullagh. (Transcript Volume 1, pages 74-75)

[95] In her letter of April 3, 2000, the Respondent's account of that meeting, is as follows, in part:

> On November 24 Ms. McCullagh called me into her office with Mr. Lawton. She told me there wasn't a copy of the submissions in the file (the file was kept in her filing cabinet). I told her there should be 2 extra copies ... I recalled that I had clients coming in at the end of the week on a small claims action which dealt with the exact same provision of the WCB act and may have pulled a copy of the submissions for that file. On November 29 I had a copy of the WCB submissions in my possession and referred to them in front of my clients.
>
> (Exhibit 1, Tab 2; Transcript Volume 2, pages 369-370)

[96] On December 2, 1999, Mr. Roznicki wrote to the Respondent. In his letter he stated:

> I write further to your telephone call of October 5, 1999.
>
> You advised in our telephone conversation that your submissions, which our office was to have received as per your letter of August 23, 1999, would be sent before October month-end. As to date, our office has not received your submissions, nor any further communication from you. I have, however, received a telephone call on December 1, 1999, from plaintiff's counsel, Mr. G., inquiring as to the status of this matter, wherein he expressed his concern over the delays to date.
>
> Could you please advise me as to the status of this matter. Is your submission shortly forthcoming or, instead, whether you are abandoning your request for a section 11 determination in this matter. If you are not abandoning your request for a section 11 determination, I would ask to receive your submission on or before December 16,1999.
>
> (Exhibit 7, Tabs 10 and 14)

[97] Ms. McCullagh says (Transcript Volume 1, page 75) she met with the Respondent on December 6, 1999 and the Respondent told her then that she had the document in her hands on November 29, 1999 when meeting with the client on the " A" file but did not have it now.

[98] The Respondent testified that she told Ms. McCullagh on December 6, 1999, that on November 29, 1999 she had a copy of the submissions and referred to them in the presence of the clients on the " A" file. (Exhibit 1, Tab 2, page 10) The Respondent says she found them shortly before she met with those clients. (Transcript Volume 2, page 373) The Respondent has no specific recollection of where she found it, but thinks it was in her other briefcase in the car. (Transcript Volume 2, page 376) That was the file copy. (Transcript Volume 3, page 559) In the interval between finding the document and the meeting with the other clients, the Respondent took no steps to secure the document because she had it in her office. (Transcript Volume 2, pages 376-378) The Respondent did not see the document again after the meeting. (Transcript Volume 2, pages 382-384)

[99] On December 9, 1999, by internal office memo of that date, the Respondent brought Mr. Roznicki's letter and the December 16, 1999, deadline to Ms. McCullagh's attention. In the memo, the Respondent wrote:

> I went through my office and I suspect that the insureds in the (" A") file may have inadvertently picked up the copy of our submissions. I would prefer to retrieve the original submissions because they benefited from Michael's input; he has done several successful appeals.
>
> (Exhibit 7, Tab 15)

[100] The Respondent testified that when she got Roznicki's letter of December 2, 1999 she already knew,

from her conversation with Ms. McCullagh and Mr. Lawton on November 24, that there was no copy of the submissions in the file and no evidence it had been sent. (Transcript Volume 3, pages 574-575) The Respondent said she gave Mr. Roznicki's letter to Ms. McCullagh on December 6, 1999. (Exhibit 1, Tab 2, page 10) Ms. McCullagh said that it was faxed to the firm on December 2, 1999 and the hard copy received on December 6, 1999. (Transcript Volume 1, page 79) The Respondent's memo to Ms. McCullagh about Mr. Roznicki's letter is dated December 9, 1999; she said that she could not find the submissions in her office but thought that the insured in the " A" file might have taken them by mistake. (Memo is Exhibit 7, Tab 15) Ms. McCullagh said (Transcript Volume 1, pages 76-77) that on December 9, 1999, when the Respondent brought her the memo and the letter, was the first time she had seen Mr. Roznicki's letter. The Respondent said at that time she had called the clients on the " A" file to see if they might have inadvertently taken the copy. Those clients subsequently told the Respondent that they recalled seeing a submission with a coloured cover but did not take it. (Exhibit 1, Tab 2) Mr. Lawton also called the other clients on December 9, 1999 and raised with them the possibility that they might inadvertently have taken the document. After receiving a reply from these clients, Carfra & Lawton decided the Respondent should leave the firm immediately. (Transcript Volume 1, pages 131-135)

Discussion

[101] With respect to Count 3, the evidence is overwhelming that the WCB did not receive the Section 11 submissions from the Respondent. There is nothing in the Carfra & Lawton files to indicate that the Respondent worked on this Submission or that, if she did, it was sent to the WCB.

[102] The Respondent asked the WCB for a number of extensions for filing the submissions. One of these gave her until August 23 and she communicated to the WCB on that date that the submissions would be sent by courier on that date. Then, purportedly because her secretary was sick, she telephoned Mr. Roznicki on August 25 to tell him that they had not been sent. He gave her until August 27. Nevertheless, because the Respondent did not have a dedicated secretary, we find it not believable that the illness of one secretary, even if allegedly the Respondent's secretary of the moment, would result in submissions not being sent. In any event, the Respondent conveniently cannot recall if she told Mr. Roznicki of her sick secretary so as to avoid, we suggest, being confronted with contradictory evidence.

[103] About a week later, in early September, the Respondent was reviewing two large files where, she says, she found the WCB submissions. She testified that she was upset and immediately called Mr. Roznicki to explain. She did not tell anybody at Carfra & Lawton of what had happened. She then testified that the submission was " sent out immediately" . The Respondent admits to not following " up with the WCB to ensure it had received our submission" .

[104] In these circumstances, a practical and informed person would find that the behavior described below was not reasonable:

> (a) failure to immediately and with a significant demonstration of relief, tell her seniors (who are obviously concerned about the submissions' whereabouts) at Carfra & Lawton that the submissions had been finally been located in another file;
>
> (b) her casual indifference to the method of delivering the submission, which is perplexing in the context of a serious and time sensitive situation;
>
> (c) her failure to make numerous additional copies to not only demonstrate to all concerned that the submissions had finally been located but also to have multiple back up copies for a submission that had been so previously elusive;

(d) her failure to accompany the alleged delivery of the submissions with a note or letter offering, at the very least, a thank you for accommodating previous delays and, at the most, an apology for the inconvenience and her related failure to make appropriate copies to other interested parties so as to explain the delay,

and, accordingly we do not accept the Respondent's evidence that she caused the submissions to be delivered to the WCB.

[105] The Respondent suggested that her letter of October 5 to the client is evidence that she sent the submissions to the WCB. This letter is not close to being conclusive of this fact. The Respondent's suggestion directly contradicts the notes that Mr. Roznicki made of his conversation with the Respondent which is what led to the letter. The Respondent's suggestion might have some credence if there were any other evidence to support her story, but there is none.

[106] In November, 1999 when the Respondent was questioned about the status of this matter by Mr. Carfra and Ms. McCullagh, she stated that she had shown the submissions to another client and that client may have inadvertently taken the file. There is no evidence that this in fact happened.

[107] As stated previously, the onus is on the Law Society to prove the case against the Respondent. This is not always an easy thing to do and it is especially difficult in the context of this Hearing because it means that the Law Society must prove that some act did not happen.

[108] To cast doubt on the Law Society's case with respect to Count 3, the Respondent offers up a number of explanations. Each by itself and all of them collectively are not enough to cast enough doubt on the evidence submitted by the Law Society. That evidence establishes overwhelmingly that the Respondent attempted to mislead Ms. McCullagh on this matter. The Law Society's evidence is consistent with the preponderance of the probabilities. We do not believe that the Respondent prepared the Section 11 submissions. We find that the Respondent professionally misconducted herself with respect to the matters alleged in Count 3.

Count 4

[109] This count concerns the Respondent's explanation to the Law Society in respect of the complaints from her former employer Carfra & Lawton. Those complaints form the foundation for Counts 1, 2 and 3.

[110] The explanations given by the Respondent are found in Exhibit 1, Tabs 2, 3, 9, 17 and 22. The Respondent's testimony was largely consistent with these written explanations.

[111] We have found that the Respondent professionally misconducted herself in respect of Counts 1, 2(b) and 3. As we have stated, the preponderance of the evidence does not support the Respondent's explanations. We find that her statements and testimony are not credible. The only evidence that the Respondent offers are her statements (either written in Exhibit 1 or under oath in her testimony) that she did not do the things of which she is accused. The onus is on the Law Society to prove its case and the burden is not light. In this case the proof is made more difficult by the fact that the Law Society must prove a negative event.

[112] We find that the Law Society has met the burden and that the Respondent professionally misconducted herself by attempting to mislead the Law Society in the course of responding to its inquiries in the manner set out in Count 4 other than in respect of the matter set out in Count 4(b)(i).

Count 5

[113] On November 20, 2000 Mr. Nicholas Mosky, a partner with Waddell Raponi, sent a memo to the Respondent asking her to attend to the assessment of certain outstanding accounts and to obtain Certificates of Judgment. (Exhibit 3, Tab 2, Transcript Volume 1, pages 149-150)

[114] With respect to one particular account, the Respondent took no action until January 22, 2001 (Transcript Volume 3, page 449) when she made certain telephone calls (Exhibit 3, Tab 2). According to her notes (Exhibit 3, Tab 2), she spoke with the account debtor in question on January 22.

[115] On January 23, 2001 Mr. Mosky emailed the Respondent asking her for an update. (Exhibit 3, Tab 2, Transcript Volume 1, pages 150-151)

[116] The Respondent's note of January 25 (Exhibit 3, Tab 2) says that she spoke with Mr. Mosky about this particular matter and told him of a proposed repayment plan. Mr. Mosky has no recollection of this conversation. (Transcript Volume 1, page 152)

[117] On February 15, 2001 Mr. Mosky emailed the Respondent, asking her to move with reasonable dispatch to get a judgment. (Exhibit 3, Tab 2) He does not recall any response until the March 15, 2001 email described in paragraph [118]. (Transcript Volume 1, page 153)

[118] On March 15, 2001 the Respondent emailed Mr. Mosky. She stated, among other things:

> The documents have been dictated and the Certificate of Fees should be filed by Tuesday.

In the same message, the Respondent suggests a repayment agreement with the account debtor. (Exhibit 3, Tab 2, Transcript Volume 3, pages 451-452)

[119] Mr. Mosky responded the same day (Exhibit 3, Tab 2) agreeing to the proposed repayment schedule and asking the Respondent what she meant by a Certificate of Fees. He did not receive a response. (Transcript Volume 1, pages 153-154) The Respondent does not recall making further contact with the account debtors. (Transcript Volume 3, pages 451-452)

[120] The Respondent testified that she prepared an appointment to have the matter set down for taxation. (Transcript Volume 3, page 440) She said that she prepared the appointment based on a precedent given to her by Mr. Raponi and had the appointment filed. (Transcript Volume 3, pages 440-441) She does not recall attending to the filing herself. She testified that when she attended for the taxation, she discovered that her copy of the appointment had the date stamp crossed off and that the matter had not been set down because the necessary fees had not been paid. (Transcript Volume 3, page 441)

[121] The only evidence in the firm file of an appointment for a taxation is an apparent draft that is headed the " R" matter but has a court registry number that is not related to any file on which a lawyer in the Waddell Raponi firm was working. (Exhibit 3, Tab 3, Transcript Volume 3, page 444) The Respondent has no recollection of creating this document, nor did she remember whether this was a document that was in her file. (Transcript Volume 3, pages 468-469)

[122] The Respondent testified (Transcript Volume 3, pages 554-555) that after she attended for the taxation, she spoke with the Registrar and that Exhibit 3, Tab 2, page 4 is the undated note of her conversation with the Registrar.

[123] On April 17, 2001 Mr. Mosky emailed the Respondent asking her for an update. (Exhibit 3, Tab 2)

[124] On May 22 and 24, 2001 Mr. Mosky emailed the Respondent requesting further updates. (Exhibit 3, Tab 2)

[125] On June 6, 2001 the Respondent emailed Mr. Mosky. She stated, among other things:

> I am sorry for the horrendous delay in getting back to you. I am resetting the application which I had previously adjourned for Tuesday the 21st. I'll confirm the date by the end of this week.
>
> (Exhibit 3, Tab 2)

[126] The Respondent testified that she spoke with Mr. Mosky about the matter in question and on other files before June 6, 2001. (Transcript Volume 3, page 452) She recollected having lots of informal contact with Mr. Mosky, but she had no recollection of the details of any conversations. (Transcript Volume 3, pages 550-552) Mr. Mosky testified that it was possible that he and the Respondent " would have had some, in passing discussions, just in the hallway" . (Transcript Volume 2, page 153)

[127] On July 3, 2001 Mr. Mosky emailed a question mark (" ?") to the Respondent regarding the file. (Exhibit 3, Tab 2)

[128] Thereafter, Mr. Mosky left a handwritten note for the Respondent which stated " Danine, I'd like to see the [R] file if you can get it to me" . (Exhibit 3, Tab 2)

[129] The Respondent did not provide the relevant file to Mr. Mosky until on or about July 11, 2001. When Mr. Mosky finally reviewed it, he saw that it contained no stamped or filed Appointment and no correspondence with the clients. The Respondent apologized. She told Mr. Mosky that there were documents that were not in the file but were in her office and that she would provide copies of the material. After this meeting, Mr. Mosky emailed the Respondent asking her to:

> Please provide any further documents you have for the [R] file ASAP.
>
> (Exhibit 3, Tab 2)

[130] On July 12, 2001 Mr. Mosky emailed the Respondent asking for the balance of the file " today" . On July 13, 2001 Mr. Mosky emailed the Respondent. He stated:

> I'm looking for the filed Appointment and the letter to the [Rs]. I have not seen anything yet.
>
> (Exhibit 3, Tab 2)

[131] On July 18, 2001 the Respondent sent a memo to Mr. Mosky indicating that she could not find the documents. She attached one handwritten note to the memo dated April 18, 2001 referring to her conversation with Mr. Mosky and to having set the taxation for April 22. (Exhibit 3, Tab 2)

[132] On July 24, 2001 Mr. Mosky emailed the Respondent to set out his understanding of what took place regarding this file. The Respondent replied on August 2, 2001 saying she thought that some email exchanges between them were missing from the file and that she was " quite certain that she advised him that the June 21 appointment was tentative and she wanted written confirmation from him that the date was OK" . (Exhibit 3, Tab 2)

[133] The file which the Respondent provided to Mr. Mosky contained an unfiled form of Appointment bearing the Victoria Registry File No. 000195. According to the Waddell Raponi computer this document was created on July 5, 2001. (Transcript Volume 2, page 175)

[134] Victoria Registry File No. 000195 does not relate to the assessment in question or to any other file at Waddell Raponi. (Exhibit 3, Tab 4, Transcript Volume 2, pages 175-176)

Discussion

[135] The Respondent's testimony on this count was evasive. In our view, this is because she did not do anything for which she could have any recollection.

[136] Notwithstanding the "appointment" on the file and notes of a purported meeting with the Registrar, the vagueness of the Respondent's testimony and the lack of documentary evidence makes it difficult for the Respondent to establish, even to the most minimal standards of evidence, that she attended the Registry. Accordingly, we do not believe that this meeting actually occurred.

[137] The Respondent continuously mislead Mr. Mosky as to the status of what was a very simple matter. We do not believe the Respondent's testimony that she did any of the things which she said she did. The overwhelming preponderance of evidence indicates otherwise.

[138] This Panel finds that the Law Society has met the burden of proving Count 5 and that the Respondent professionally misconducted herself in respect of this matter.