

Kelowna, B.C.

Called to the Bar: May 10, 1983

**Discipline hearing**

*Dates:* September 18, 1996, May 6 and December 21, 1999, July 13, 2000 and February 9, 2001

*Panel:* Warren T. Wilson, Q.C., Chair, Karl F. Warner, Q.C. and Kristian P. Jensen

*Reports:* November 6, 2000 (facts and verdict) and February 9, 2001 (penalty)

Indexed as [2000] LSBC 28

**Counsel**

Herman Van Ommen, for the Law Society

Richard R. Sugden, Q.C., for Mr. Penty

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**Summary**

Mr. Penty represented a client incarcerated in the United States who sought to recover money that had been seized by Canadian justice authorities and forfeited to the Crown as proceeds of crime. The B.C. Supreme Court denied the client's application to recover the money and Mr. Penty filed an appeal of that decision. Mr. Penty had not been paid for his representation, and he advised his client by letter that, unless he were paid, he would have little choice but to abandon the appeal. Although he had no instructions from the client to abandon the appeal, Mr. Penty did so. In a subsequent application by the client's new lawyer to reinstate the appeal, Mr. Penty swore a false affidavit that he had obtained instructions from the client to abandon the appeal, although this statement was untrue. The hearing panel found that Mr. Penty's conduct in abandoning the appeal without client instructions and swearing a false affidavit constituted professional misconduct. The panel ordered that Mr. Penty be reprimanded, be suspended for two months, beginning June 1, 2001, apologize to his former client and the client's lawyer and pay costs.

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**Facts**

In May, 1990 Mr. Penty was retained by C who sought to recover between \$800,000 and \$1 million US that had been seized by Canadian justice authorities and forfeited to the Crown as proceeds of crime. C was incarcerated in the United States and he communicated with Mr. Penty by telephone and mail.

In June, 1992 the B.C. Supreme Court determined the seized funds were the proceeds of crime and properly forfeited to the Crown. Mr. Penty applied for leave to appeal. He also applied to have part of the seized funds released to conduct the appeal, but that application was unsuccessful. Mr. Penty then applied for legal aid funding. He wrote to

C's American lawyer that, if his legal aid application was denied and unless C could come up with \$50,000 US to pay his fees and disbursements, Mr. Penty would have little choice but to abandon the appeal.

C subsequently wrote to Mr. Penty on a couple of occasions to request that, if his case was not proceeding, his money (a few thousand dollars) be sent to his father's address. C later advised Mr. Penty that he purported to convey all rights to the seized money to a Native trust, which assignment he believed would bring the US Bureau of Indian Affairs into the matter to pursue the case. C told Mr. Penty that he would recommend the Bureau of Indian Affairs retain Mr. Penty for legal work, but that would be their decision.

Mr. Penty wrote to C to advise him that he would not continue to work for free and was left with no option but to abandon the appeal. Mr. Penty in fact attempted to file in court a notice of conveyance of C's interest in the seized money, but this was rejected by the Registrar of the Court of Appeal. Mr. Penty advised C and reiterated that he would abandon the appeal and that the prosecutor was pressuring him to either pursue the appeal or abandon it. C did not receive this letter, apparently because he was being moved to another prison.

Mr. Penty abandoned the appeal on December 14, 1992 and then successfully applied for the release of approximately \$3,800, which he applied toward his fees. He sent C a letter to advise him, but that letter did not reach him.

C learned that the appeal had been abandoned in February, 1993. He retained a new B.C. lawyer to reinstate the appeal.

In May, 1993 Mr. Penty provided C's new lawyer with an affidavit in which he swore that he had obtained instructions from C to abandon the appeal and seek the return of money held in trust. This statement was false as he had not obtained instructions from C.

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The panel rejected Mr. Penty's application to dismiss the discipline proceedings on grounds of unreasonable delay, noting that delay in the hearing in fact arose from numerous proceedings brought by Mr. Penty relating to the taking of evidence of an American witness in the case and subsequently awaiting the outcome of Court of Appeal decisions in that respect. Mr. Penty had waived his right to raise unreasonable delay in connection with such proceedings. The Court of Appeal determined that the Law Society was entitled to take the testimony of the witness in the State of Oklahoma pursuant to an order the Society received from a U.S. District Court under the *United States Code: Penty v. The Law Society of B.C.* 1999 BCCA 630.

## **Decision**

The hearing panel found that Mr. Penty's conduct in abandoning an appeal without instructions from his client to do so, and in swearing a false affidavit, constituted

professional misconduct.

## **Penalty**

The panel noted that Mr. Penty did not have a mere lapse of judgement, but had very seriously transgressed his obligations. His false statement in an affidavit had an adverse impact on his former client. While Mr. Penty had been punished by the length of time the matter had been before the Law Society and the publicity given to the verdict in his community, the panel found it necessary to send a message to other lawyers that that this conduct was unacceptable and would result in serious penalty. A suspension at the lower end of the range was appropriate in the circumstances, given that Mr. Penty had an otherwise unblemished career, had endured significant adverse publicity in his area of practice and had apologized to the panel.

The panel ordered that Mr. Penty:

1. be reprimanded;
2. be suspended for two months, beginning June 1, 2001;
3. apologize to his former client and his lawyer; and
4. pay \$12,500 towards the costs of the discipline proceedings, in equal annual instalments within three years from the date the suspension expires.

*Discipline Case Digest — 2001: No. 08 March (Penty)*