

Vancouver, B.C.

Called to the Bar July 10, 1984

Discipline hearing panel: May 18, 19 and 20, 1993, June 28, 1994 and July 4, 1995
H.R. Berge, Chair, C.C. Locke, Q.C. and N.A. MacDonald

G.A. Cuttler, for the Law Society

W.B. McAllister, Q.C., for Mr. Pierce, and Mr. Pierce, on his own behalf

Summary

From January, 1991 to February, 1992, during which time he became involved in a fee dispute with a client, Mr. Pierce wrongfully withheld in trust \$3,483.53 of the client's funds, even though he conceded that the money belonged to the client and even though the client and the client's new lawyer had demanded its return. In a different matter, Mr. Pierce distributed to clients and non-clients an issue of his law firm newsletter that contained mistakes and omissions: an inaccurate statement that the firm had recovered \$5,000 for a client when it had only recovered \$2,500; claims that the firm had achieved "great success" and "substantial settlements" for clients when these statements were unverifiable; and an article that implied that clients who obtained a second opinion from Mr. Pierce's firm had obtained greater results or satisfaction than from other law firms, in a way that created unreasonable expectations of potential clients. The panel noted, however, that the inaccuracies in Mr. Pierce's marketing statements did not amount to falsity, which required either an intent to be inaccurate or reckless carelessness as to accuracy. The discipline hearing panel found that Mr. Pierce was guilty of professional misconduct by wrongfully withholding client money and by including in his marketing material statements that were inaccurate and unverifiable and that tended to harm the standing of the legal profession.

Facts

Withholding client funds

In 1989 Mr. Pierce began representing B, a plaintiff in real estate litigation. He and the client entered into a fee agreement whereby B would pay discounted hourly fees to a maximum of "(i) \$5,000 through examinations for discovery; and (ii) \$10,000 through trial," plus a bonus if Mr. Pierce were successful. B paid a \$5,000 retainer.

In January, 1991, two weeks before trial, the case settled for \$101,000. Mr. Pierce wrote to B, billing him \$13,483.53 for fees at the hourly rate, plus disbursements. Mr. Pierce added a note on the bill asking B for his recollection of whether the maximum fee was \$10,000, or whether the fees of \$5,000 for representation through examinations for discovery and \$10,000 for representation through trial were cumulative, thereby allowing a maximum fee of \$15,000. The client wrote back, taking the position that Mr. Pierce was entitled to a maximum \$5,000 fee in the circumstances, since the case had settled before one of the examinations for discovery was held.

Mr. Pierce wrote to B again, enclosing a final bill of \$25,358.08 for all fees and disbursements. He noted in his letter that he had retained in his trust account \$3,483.53 and stated that "we are of the view that a correct reading of our contingency fee agreement entitles you to a refund of \$3,483.55, but not the larger amount that you are claiming." He sent the client a cheque for \$29,641.92, representing the difference between the \$55,000 settlement proceeds received to date, and the fee billing of \$25,358.08. A day later Mr. Pierce received the balance of the settlement funds, and forwarded these to B. He did not return to B the \$3,483.53.

In April, 1991 the client retained a new lawyer who served Mr. Pierce with an appointment in October for a review of his fees before the registrar. The new lawyer wrote in April and July asking Mr. Pierce for return of the \$3,483.53. Mr. Pierce responded that he did not intend to reply to the letter.

Despite these requests and a further request from B's lawyer, Mr. Pierce did not return the \$3,483.53. In September, 1991 B brought a small claims action to recover the money, but the matter was adjourned pending the fee review. In October the fee review began, but was also adjourned.

B complained to the Law Society in November; Mr. Pierce was cited in July, 1992.

In February, 1992, Mr. Pierce paid the \$3,483.53 into court. In a civil proceeding respecting the bill, the court ordered that these funds be paid out to the client.

During his discipline hearing, Mr. Pierce testified that he was concerned that the fee review might result in a challenge to his fee agreement. In his view, if the agreement were set aside and fees were calculated on a quantum meruit basis, the client would have no immediate right to return of the funds.

The panel found it clear that, as of January 29, 1991, Mr. Pierce had conceded that the client was entitled to a refund of \$3,483.53, but did not provide the client with the funds or with an explanation for withholding the funds. As the client had demanded return of these funds, Mr. Pierce's failure to pay over the money was wrong.

Improper marketing statements

In the fall of 1990, Mr. Pierce distributed to his firm's clients and other people an issue of his law firm newsletter that contained mistakes and omissions, specifically:

- an inaccurate statement that the firm had recovered \$5,000 for a client when it had, in fact, recovered \$2,500;
- claims that the firm had achieved “great success” and “substantial settlements” for clients when these claims were unverifiable;
- a statement that eight clients had switched to Mr. Pierce's law firm over a two-month period when one of these clients did not, in fact, retain the firm; and
- an article that implied that clients who obtained a second opinion from Mr. Pierce's firm had obtained greater results or satisfaction than from other lawyers, thereby creating unreasonable client expectations and implying that Mr. Pierce's firm could achieve results not achievable by other lawyers.

Mr. Pierce was cited in September, 1992 with respect to these marketing activities.

The panel found that the client testimonials in the newsletter did not refer to net recoveries, which also had the effect of creating unjustifiable expectations by potential clients. The panel noted, however, that the inaccuracies in Mr. Pierce's marketing statements did not amount to falsity, which required either an intent to be inaccurate or reckless carelessness as to accuracy.

The panel determined that, while the law firm newsletter was not itself an objectionable marketing tool, this specific issue of the newsletter was offensive to the standards of forthrightness required of lawyers and tended to harm the standing of the profession.

Decision

Mr. Pierce was guilty of professional misconduct by failing to pay over money belonging to his client after the client had asked for its return and by making statements in his marketing materials that were unverifiable and inaccurate and that tended to harm the standing of the legal profession.

Penalty

For Mr. Pierce's misconduct in wrongfully withholding trust money from a client, the panel ordered that he:

1. pay a \$10,000 fine and
2. pay costs of the discipline proceedings.

For Mr. Pierce's misconduct in marketing activities, the panel ordered that he:

1. be reprimanded;

2. pay a \$3,000 fine and
3. pay costs of the discipline proceedings.

With respect to costs, the panel invited further submissions from Mr. Pierce and Law Society counsel in view of the fact that another proceeding had resulted in the dismissal of a citation against Mr. Pierce.

Mr. Pierce submitted written argument to the panel on September 18, 1995; Law Society counsel responded with written argument on October 17, 1995.

On April 17, 1996 the panel determined that, under section 55 of the *Legal Profession Act*, when an adverse finding is made against a member, the Law Society's entitlement to costs is restricted to costs that relate to the hearing. However, when a citation is dismissed, the entitlement of a member to costs is not restricted to costs of the hearing, and the member should be entitled to full indemnity for costs from the receipt of the complaint to conclusion of the hearing, including the panel's decision on costs.

The panel asked Mr. Pierce and Law Society counsel to prepare proposed schedules of costs for ultimate decision by the panel. It ordered that the amount awarded to the Society be reduced by the amount awarded to Mr. Pierce and, in the event that Mr. Pierce's costs exceed those of the Society, the net balance be set off against the amount owing on his \$10,000 fine.

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