

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

GERHARDUS ALBERTUS PYPER

RESPONDENT

**DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION**

Hearing date: November 22, 2018

Panel: Dean Lawton, QC, Chair
Haydn Acheson, Public representative
Richard Lindsay, QC, Lawyer

Discipline Counsel: Kathleen Bradley
No-one appearing on behalf of the Respondent

- [1] These reasons follow upon a single day hearing on November 22, 2018. The Respondent (Mr. Pyper) did not attend the hearing.
- [2] This matter has a lengthy history as described in this Panel's decision on Facts and Determination issued on March 15, 2018 (2018 LSBC 10). In that decision this Panel found Mr. Pyper had committed professional misconduct in relation to the following allegation in the citation against him:
1. In the course of representing your client, WF, in both a criminal and a civil matter, you engaged Dr. M to provide opinion evidence ... and you failed to respond to communications from Dr. M ... In particular:

- (b) you failed to respond substantively or at all to letters dated June 11, 2013, July 23, 2013, September 10, 2013, and December 3, 2013.
- [3] The Panel was satisfied that Mr. Pyper had been served with the Notice of Hearing. Exhibit 1 at the hearing on November 22, 2018 was the affidavit of Michelle Robertson, Hearing Administrator for the Law Society of British Columbia deposing that she had caused a Notice of Hearing to be served on Mr. Pyper at his last known electronic address in accordance with Rule 10-1(1)(c) of the Law Society Rules (the “Rules”). A copy of the Notice of Hearing was appended as Exhibit “B” to Ms. Robertson’s affidavit.
- [4] The hearing was convened at 9:30 a.m. on November 22, 2018 in accordance with the Notice of Hearing. Mr. Pyper did not attend, and no counsel attended on his behalf.
- [5] The Panel adjourned the hearing for 15 minutes and reconvened thereafter. Mr. Pyper was not in attendance following the brief adjournment.
- [6] Pursuant to section 42(1)(b) and 42(2) of the *Legal Profession Act*, the Panel, being satisfied that Mr. Pyper had been served with the Notice of Hearing, proceeded with the hearing in his absence.
- [7] At the time of the hearing on November 22, 2018, Mr. Pyper was a former member of the Law Society.
- [8] The Law Society submits that the appropriate disciplinary action in respect of Mr. Pyper’s proven misconduct is a suspension of two or three months.
- [9] The Law Society seeks costs of \$9,606.88, payable by April 30, 2019, or such other date as the Panel may order.
- [10] The Law Society also seeks a non-disclosure order under Rule 5-8(2) of the Rules that portions of the exhibits containing confidential client information or privileged information not be disclosed to members of the public.
- [11] The Law Society submits the proposed sanction reflects an appropriate balancing of the principles and factors relevant to the assessment of sanction in the circumstances of this case. In this context the Law Society says the proposed sanction provides necessary denunciation and deterrence, and sends the correct message to the profession and the public.
- [12] In helpful written submissions, Ms. Bradley invited the Panel to review academic writing, and commentary of previous Law Society hearing panels. In particular,

she referred to the following passage from MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline*, loose-leaf (Toronto: Carswell, 1993), at p. 26-1:

The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

This extract was cited with approval in *Law Society of BC v. Hordal*, 2004 LSBC 36 at para. 51.

- [13] Many hearing panels refer to what have become known as the “Ogilvie factors” in considering appropriate guidelines for sanctions or penalties to be imposed on lawyers who are found to have committed professional misconduct. The Ogilvie factors stem from a 1999 discipline matter and are set out in detail in paragraphs 9 and 10 of that decision. (See *Law Society of BC v. Ogilvie*, 1999 LSBC 17.) The Ogilvie factors – 13 in total – are not exhaustive, and reciprocally, they need not all be applied to each case where sanction or penalties are being considered for imposition upon a lawyer having committed professional misconduct.
- [14] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the panel in that case emphasized two of the Ogilvie factors having high importance, namely the protection of the public (including public confidence in the disciplinary process and public confidence in lawyers generally), and the rehabilitation of the lawyer. We agree with that emphasis and note, as stated in *Lessing*, where there is a conflict between these two factors, the protection of the public will prevail.
- [15] More recently a hearing panel reviewed the Ogilvie factors and their application to other cases with the objective of providing some simplification of the process in which they are considered. In *Law Society of BC v. Dent*, 2016 LSBC 05, the panel suggested it was appropriate to consolidate the Ogilvie factors into four general spheres, namely:
- (a) Nature, gravity and consequences of the conduct;
 - (b) Character and professional conduct record of the respondent;
 - (c) Acknowledgement of the misconduct and remedial action;
 - (d) Public confidence in the legal profession including public confidence in the disciplinary process.

- [16] While this Panel recognizes the assistance and validity of the approach in *Dent* when considering the Ogilvie factors, we remain mindful that the panel in *Dent* was not advocating the supplanting of the Ogilvie factors, and it remains our obligation to explain why we choose to apply specific principles and factors in this case.

Nature, gravity and consequences of the conduct

- [17] With respect to the nature, gravity and consequence of the conduct, we are concerned that Mr. Pyper ignored, over many months, both multiple written and telephone enquiries from Dr. M, a consultant he had engaged. A panel in another hearing aptly stated, “[T]he obligation to respond promptly to professional communications that require a response is key to the proper functioning of the legal profession” (See *Law Society of BC v. Niemela*, 2013 LSBC 15). Delay, unnecessary expense and potential legal prejudice are examples of the mischief created when a lawyer fails to respond promptly to professional communications requiring a response.

Character and professional conduct record of the respondent

- [18] With respect to character and professional conduct record considerations, the Panel draws no conclusions about Mr. Pyper’s character; indeed his character was not in issue in the citation against him. His Professional Conduct Record (“PCR”) however is relevant, significant and troubling in its extent. It consists of the following as provided by Law Society counsel in her submissions to us:

- (a) Recommendation from Practice Standards: On December 6, 2012, the Practice Standards Committee of the Law Society (the “PSC”) adopted recommendations focused on reducing Mr. Pyper’s file load and ensuring retainer agreements and client instructions were better documented. On April 10, 2014, the PSC adopted further recommendations designed to ensure succession of his files and reduce his file load;
- (b) PSC Costs: On April 14, 2014, the PSC ordered costs of \$2,100 to be paid by Mr. Pyper. To date, this amount remains outstanding;
- (c) Conduct Review: In November 2012 Mr. Pyper attended a Conduct Review to discuss his conduct breaching client confidentiality by providing opposing counsel with affidavits and exhibits detailing communications between Mr. Pyper and his client without first obtaining his client’s consent to do so;

- (d) Rule 3.7-1 Interim Order: (now Rule 3-10): On March 20, 2014, a panel of Benchers imposed a number of interim restrictions and conditions on Mr. Pyper's practice, including a requirement that he eliminate trust shortages and enter into a trust supervision agreement. On May 23, 2014, the panel ordered that Mr. Pyper be suspended primarily because he had not satisfied the panel that he had eliminated his trust shortages as required. On September 10, 2014, the panel cancelled the suspension but imposed new interim practice restrictions, including that he not operate or be a signatory to any trust accounts. The September 10, 2014 order was rescinded by the panel of three Benchers on September 1, 2015 by consent, as Mr. Pyper had become a former member of the Law Society and the underlying matters leading to the proceedings were referred to his member file to be considered if he applied for reinstatement of his membership;
- (e) Professional Development Late Completion Fee: Pursuant to Rule 3-31(1)(c) and Schedule 1 of the Rules, Mr. Pyper was assessed with a professional development late completion fee of \$525 for failing to comply with Rule 3-29 (professional development) by December 31, 2014. To date this amount remains outstanding;
- (f) Citation (Facts and Determination, 2016 LSBC 01): On January 11, 2016, a hearing panel found that Mr. Pyper had committed professional misconduct by practising law while suspended between May 23, 2014 and June 13, 2014;
- (g) Court of Appeal (2017 BCCA 113): On March 3, 2017, the British Columbia Court of Appeal dismissed Mr. Pyper's appeal of the January 11, 2016 decision. The Court found that the hearing panel was not personally or institutionally biased, that the panel had the jurisdiction to make its findings, and that the panel did not err in determining that Mr. Pyper's actions constituted the "practice of law";
- (h) Appeal Costs: Costs, payable forthwith, were assessed at \$4,989.41 in relation to the appeal. Mr. Pyper has not paid these costs;
- (i) Injunction (2017 BCSC 1197): Pursuant to sections 15 and 85 of the *Legal Profession Act*, on July 7, 2017, the Supreme Court of British Columbia issued an injunction against Mr. Pyper, prohibiting him from practising law;

- (j) Citation (Disciplinary Action 2017 LSBC 35): On August 11, 2017, in relation to the finding that Mr. Pyper had committed professional misconduct by practising law while suspended, a hearing panel ordered that he be suspended for two months commencing on the date on which he is readmitted in the future to the Law Society of British Columbia;
- (k) Citation Costs: (2017 LSBC 35): The hearing panel ordered costs in the amount of \$10,484.16 to be paid on or before April 1, 2018. Mr. Pyper has not paid these costs;
- (l) Citation (Facts and Determination 2018 LSBC 28): On September 25, 2018, a hearing panel determined that Mr. Pyper committed professional misconduct in providing inadequate quality of service to his client, and in failing to recommend to the client that he obtain independent legal advice about the expiry of a Notice of Civil Claim. The disciplinary action hearing is currently scheduled for January 16, 2019. Although this decision on Facts and Determination was referred to in Mr. Pyper's PCR, we have placed little or no weight on it in our determination at this hearing because the panel in that matter has not yet determined the disciplinary action to be taken, which would indicate the seriousness of the matter;

[19] Counsel for the Law Society submitted to us that Mr. Pyper's PCR is an aggravating factor because it demonstrates his ongoing unwillingness to address his failures to meet the minimum accepted standards of legal practice. We agree with that submission.

[20] Counsel for the Law Society submitted that many of the entries in Mr. Pyper's PCR occurred after the misconduct in this case, and those entries are relevant because a panel is entitled to consider all of a respondent's discipline history, including misconduct that arose after the misconduct in question.

[21] Counsel for the Law Society submitted that, given Mr. Pyper's PCR, a suspension in the range of two to three months is appropriate and consistent with the principle of progressive discipline, the need for specific and general deterrence, and the protection of the public. We agree with that submission.

Acknowledgement of the misconduct and remedial action

[22] The Panel considered whether there were any mitigating or aggravating factors in this case that may affect our determination of an appropriate disposition of the discipline phase of this matter. We find there are no mitigating factors; however,

there was an aggravating factor of concern to us. During the Facts and Determination hearing Mr. Pyper accused the Law Society of institutional bias and having “dirty hands” in the course of the prosecution of the citation issued against him. These remarks were baseless and insulting to Law Society counsel (not Ms. Bradley) with the result that this Panel informed Law Society counsel at the conclusion of the hearing that we found no substance in these accusations.

- [23] The allegation of bad faith conduct inherent in Mr. Pyper’s unwavering assertion that the Law Society had “dirty hands” in its dealings with him in the Facts and Determination hearing leads us to conclude that rehabilitation and remediation will be unlikely in Mr. Pyper’s case.

Suspension and conditions or limitations on the Respondent’s practice

- [24] Although Law Society counsel canvassed other cases in which a fine had been imposed by a panel with the objective of motivating a lawyer to modify their behaviour or gain professional conduct insights, the Law Society does not seek a fine in this case. Given Mr. Pyper’s PCR we do not think a fine would result in any meaningful change in Mr. Pyper’s conduct.
- [25] Section 38(5) of the *Legal Profession Act* states that, if an adverse determination is made at a hearing of a citation, the panel must do one or more of a number of things, including suspending the respondent and imposing conditions or limitations on the respondent’s practice. In *Law Society of BC v. Martin*, 2007 LSBC 20 at para. 41, the panel in that case considered behavioural elements in deciding if a suspension ought to be ordered in a particular case. One of the elements was whether a respondent had significant professional conduct issues. In Mr. Pyper’s circumstances he has had both significant and repeated professional conduct issues. We conclude that the history of events leading to the finding of professional misconduct at the Facts and Determination hearing in this case, combined with Mr. Pyper’s PCR, warrant a suspension of three months, and we so order.
- [26] Further, we remain attentive to our obligation to protect the public, and in this context, given Mr. Pyper’s significant PCR and his apparent refusal or inability historically to modify his conduct to meet appropriate professional standards, we think it necessary to impose conditions on him should he ever seek to be reinstated as a practising member of the Law Society. Pursuant to s. 38(5)(c) of the *Legal Profession Act*, we direct that Mr. Pyper must not practise law except in a setting and in a capacity approved by the Practice Standards Committee and on such conditions as that Committee might fix.

Timing of suspension

- [27] Mr. Pyper has been a former member of the Law Society since January 2015. In our opinion, determining when a suspension begins is necessary and incidental to ordering a suspension.
- [28] In *Law Society of BC v. Pyper*, 2017 LSBC 35, a hearing panel determined that, because Mr. Pyper was not a member of the Law Society and he was not then seeking readmission, a suspension while he was not a member would serve no purpose. The panel observed that, since Mr. Pyper had no licence to practise, there was no licence in existence to suspend. Consequently the panel directed that Mr. Pyper's suspension would begin on the date he is readmitted to the Law Society in the future.
- [29] Counsel for the Law Society submitted that, in light of Mr. Pyper's already existing order of suspension, any suspension order we might make should be consecutive to that ordered in 2017 LSBC 35. We agree with that submission and direct that the three-month suspension we have ordered is to commence immediately following the last day of the suspension ordered in 2017 LSBC 35. Further, following the conclusion of the suspension we have ordered, Mr. Pyper is not to resume practice until he has complied with the conditions or limitations directed by the Practice Standards Committee as set out in paragraph 26 of these reasons.

COSTS

- [30] The Law Society seeks an order for costs in the amount of \$9,606.88.
- [31] Under Rule 5-11, a panel may order that a respondent pay the costs of a hearing, and may set a time for payment. Further, that Rule requires us to have regard to the tariff of costs in Schedule 4 to the Rules in calculating the costs payable. Disbursements, reasonably incurred, may be added to the costs payable under the Rule.
- [32] Exhibit 4 in this hearing was the Bill of Costs of hearing of the Law Society. The Bill of Costs provides a particularized description of the tariff fee items claimed for costs, the range provided for them in the tariff, the units claimed, and the amounts claimed for the items.
- [33] We have considered the tariff items and the amounts claimed in the Bill of Costs and think them reasonable in the amount of \$8,000 as claimed.

[34] We have likewise considered the list of disbursements in the Bill of Costs and think them reasonable in the amount of \$1,606.88 as claimed.

[35] Accordingly, we order total fees and disbursements payable in the amount of \$9,606.88.

NON-DISCLOSURE ORDER

[36] Subject to an order of the panel excluding some or all members of the public, members of the public were entitled to attend the hearing of this matter. The Panel made no order for exclusion, and no member of the public attended the hearing.

[37] At the hearing, the Law Society sought an order under Rule 5-8(2) that portions of the exhibits containing confidential client information or privileged information not be disclosed to the public, and a permanent order (the “Permanent Order”) preventing the release of the transcript of the proceeding to a non-party.

[38] In considering the non-disclosure application, the Panel recognizes that, during the Law Society’s investigation and hearing processes, it can compel lawyers to disclose to the Law Society privileged and confidential information. In this context Sections 87 and 88 of the *Legal Profession Act* contain numerous provisions protecting the disclosure of privileged and confidential information and directing the non-disclosure of privileged and confidential information.

[39] Rule 5-9(1) states that, subject to solicitor-client privilege or an order under Rule 5-8(2), any person may, at their own expense, obtain a transcript of a hearing that they were entitled to attend. Rule 5-8(1) states that every hearing is open to the public, but the panel or review board may exclude some or all members of the public in any circumstances it considers appropriate. The Panel recognizes that Rule 5-8(1) exists to ensure the openness and transparency of proceedings in the Law Society hearing process, and at the same time leaves discretion in the panel or review board to balance or limit public access to some or all of the proceedings in appropriate circumstances.

[40] Following the oral hearing of this matter the Panel invited written submissions about why the Law Society was seeking the Permanent Order. This invitation for written submissions was delivered both to counsel for the Law Society and to Mr. Pyper at his last known address for electronic service of documents.

[41] Pursuant to the request of the Panel, Law Society counsel delivered written submissions on January 2, 2019. In those submissions the Law Society amended its request for the Permanent Order, and requested the following order in its place:

Pursuant to Rule 5-8(2), if any person other than a party seeks to obtain a copy of a transcript of the proceedings, that client names, identifying information, and any information protected by solicitor-client privilege be redacted from the transcript before it is disclosed to that person.

[42] Mr. Pyper did not deliver submissions following the Panel's invitation to do so respecting the Permanent Order sought by the Law Society.

[43] Although not bound by them, we consider helpful some statements in other Law Society discipline decisions. In *Law Society of BC v. McTavish*, 2018 LSBC 02, the panel dealt with an application for an order to protect confidential and privileged information. At para. 84 in the decision, the panel made this observation:

... [T]he Rules ... recognize that there may be legitimate reasons to restrict public access to a hearing or to exhibits filed at a public hearing. For example, a person's ability to obtain a copy of an exhibit is expressly subject to solicitor-client privilege. Rule 5-8(2) permits a panel to make an order that specific information not be disclosed in order to "protect the interests of any person".

[44] In the present case client names, identifying information and information protected by solicitor-client privilege were all available in the course of the hearing process but should not be available to members of the public. We therefore agree with counsel for the Law Society that a limited non-disclosure order should be made in this case; however, we will not make the Permanent Order originally sought by the Law Society because we believe such an order is overly broad and would not be in accordance with principles of transparency respecting Law Society discipline decisions.

[45] With respect to non-disclosure, we order pursuant to Rule 5-8(2) the following:

- (a) If any person other than a party seeks to obtain a copy of any exhibit filed in these proceedings, client names, identifying information, and any information protected by solicitor-client privilege must be redacted from the exhibit before it is disclosed to that person; and
- (b) If any person other than a party seeks to obtain a copy of a transcript of the proceedings, client names, identifying information and any information protected by solicitor-client privilege must be redacted from the transcript before it is disclosed to that person.

SUMMARY OF ORDERS MADE

[46] We make the following orders:

- (a) Pursuant to section 38(5)(d) of the *Legal Profession Act*, Mr. Pyper is suspended from the practice of law for three months, commencing the first business day following the completion of the suspension ordered in 2017 LSBC 35;
- (a) Pursuant to section 38(5)(c) of the *Legal Profession Act*, following the suspension Mr. Pyper must not practise law except in a setting and in a capacity approved by the Practice Standards Committee and on such conditions as that Committee might fix;
- (b) Mr. Pyper must pay costs to the Law Society in the amount of \$9,606.88;
- (c) If any person other than a party seeks to obtain a copy of any exhibit filed in these proceedings, client names, identifying information, and any information protected by solicitor-client privilege must be redacted from the exhibit before it is disclosed to that person; and
- (d) If any person other than a party seeks to obtain a copy of a transcript of the proceedings, client names, identifying information and any information protected by solicitor-client privilege must be redacted from the transcript before it is disclosed to that person.