

2005 LSBC 27

Report issued: July 15, 2005

Oral Reasons: May 30, 2005

Citation issued: June 23, 2003

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

Gregory Allan Smith

Respondent

Decision of the Hearing Panel

Hearing date: May 30, 2005

Panel: Dirk J. Sigalet, Q.C., Chair, Warren Wilson, Q.C., Joost Blom, Q.C.

Counsel for the Law Society: Brian McKinley

Counsel for the Respondent: Jerome Ziskrout

Background

[1] On June 23, 2003, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation directed that this Panel inquire into the Respondent's conduct as follows:

1. In the course of your representation of your client, L.U., you failed to respond to communications from staff of Manulife Financial made between April 16, 2001 and November 6, 2002.

Agreed Statement of Facts

[2] An Agreed Statement of Facts was filed as Exhibit 3 in these proceedings. It provides as follows:

1. Gregory Allan Smith was called to the Bar of British Columbia on February 12th, 1985.
2. From the time of his call Mr. Smith initially practiced as an associate with Griffiths & Co., and then with Becker, Mathers initially as an associate and then as a partner. Since February 1996 Mr. Smith has practiced through Greg Smith Law Corporation initially with an associate working with him and currently with a partner, Dot Wilkinson.
3. Mr. Smith represented L.U. in a third party action for injuries suffered in a motor vehicle accident that occurred on September 14th, 1999. Between September 15th, 1999 and November 17th, 1999, Manulife Financial (" Manulife") paid disability benefits of \$2,977.71 to L.U.
4. Manulife asked L.U. to execute a subrogation agreement (the " Agreement") by letter dated October 21st, 1999.
5. Mr. Smith wrote to Manulife on October 27th, 1999 requesting a copy of the contractual provisions

requiring his client to sign the Agreement.

6. By letter dated November 1st, 1999, Cathy Simpson of Manulife provided Mr. Smith with a copy of contract pages as they related to subrogation.

7. Manulife wrote to Mr. Smith again on December 7th, December 30th, 1999, April 4th, May 10th and July 6th, 2000 requesting the completed and signed Agreement.

8. By letter dated October 3rd, 2000, Mr. Smith's office returned the executed Agreement to Manulife.

9. Manulife returned the Agreement to Mr. Smith by letter dated October 17th, 2000 with a request that it be properly signed and witnessed.

10. By letter dated November 14th, 2000, Mr. Smith returned the Agreement, properly signed and witnessed. L.U. executed the Agreement on September 27th, 2000. Under clause 6 of the Agreement, L.U. irrevocably authorized and directed Mr. Smith to pay Manulife out of monies received pursuant to judgment or settlement within 30 days of receipt and prior to disbursement to her. Under clause 7, she directed Mr. Smith to forward to Manulife a copy of judgment, reasons for judgment, award, minutes of settlement, settlement confirmation letter or any other document showing a breakdown of the damages and the amounts related to costs, interest, and loss of income, within 15 days of receipt thereof.

11. By letter dated November 23rd, 2000, Cathy Simpson of Manulife wrote to Mr. Smith, reminding him of the Agreement and requesting an indication from him as to when the lawsuit was expected to settle or go to trial.

12. Mr. Smith wrote Manulife on December 21st, 2000, requesting a copy of the Insurance Contract.

13. By letter dated December 29th, 2000, Manulife staff provided another copy of portions of the disability contract in issue and repeated their request for an indication of timing.

14. By letter dated January 8th, 2001, Mr. Smith wrote to Manulife indicating that negotiations of L.U.'s third party action were currently underway.

15. On January 18th, 2001, Mr. Smith received funds in his trust account to settle the third party action on behalf of L.U. On February 8th, 2001, L.U. signed the necessary release for the defendants. Mr. Smith did not advise Manulife of the receipt of funds or the settlement of the claim.

16. By letter dated February 8th, 2001, following a telephone call from Mr. Smith's office, Manulife confirmed the amounts and dates of payments made to L.U.

17. On April 16th, 2001, staff at Manulife contacted Mr. Smith's office by telephone to inquire about the outcome of the settlement negotiations. A message was left for Mr. Smith to return the call.

18. On May 1st, 2001, staff at Manulife spoke to Anita, an employee at Mr. Smith's office, who indicated that the third party action had been settled at the end of February 2001.

19. Staff at Manulife contacted Mr. Smith's office by telephone on June 27th, 2001 to follow up on Manulife's subrogation interest, and left a message with Lisa, an employee of Mr. Smith's office.

20. On July 26th, 2001, staff at Manulife contacted Mr. Smith's office and spoke to Anita who said that the action had settled and that a cheque had been written to Manulife. However, Anita indicated that she would confirm the information that same day, and would call Manulife back.

21. Staff at Manulife contacted Mr. Smith's office by telephone on July 27th, 2001, August 30th, 2001, January 18th, 2002, March 1st, 2002, March 14th, 2002, March 22nd, 2002, April 2nd, 2002, and April

19th, 2002. Mr. Smith did not respond to any of these communications.

22. On April 23rd, 2002, Mr. Smith returned a telephone call from Cathy Simpson, Short Term Disability Adjudicator at Manulife. He apologized for the delay and advised that he would do a complete file review and get back to her. Ms. Simpson advised him that she would contact him again in three weeks and he assured her it would not take that long. Ms. Simpson sent a fax transmission to Mr. Smith on May 14th, 2002 to confirm and remind him of their discussion. She sent another fax transmission on June 5th, 2002. Mr. Smith did not respond to either fax.

23. On June 28th, 2002, Ms. Simpson contacted Mr. Smith by telephone. He apologized for not reviewing the file and advised that he would do so and asked her to call him back "next Wednesday".

24. On July 3rd, 2002, Ms. Simpson called Mr. Smith's office and was advised he was in court and would be back in the office on July 12th, 2002.

25. On July 12th, 2002, Ms. Simpson called Mr. Smith. He advised that he had started to read the file but had not finished.

26. On July 30th, 2002, Ms. Simpson called Mr. Smith again. He advised that he had not looked at the file. On August 13th, 2002, Ms. Simpson referred her file to Alice Heinrich (then Howes-Jones) a paralegal with Manulife's legal department.

27. Ms. Heinrich wrote to Mr. Smith on August 19th, 2002 setting out the history of their attempts to obtain information from him and demanding a response by September 3rd, 2002.

28. Ms. Heinrich wrote directly to L.U. on September 5th, 2002.

29. Ms. Heinrich wrote again to Mr. Smith on October 3rd, 2002, advising that she had also written to his client on September 5th, 2002, but had not received a response from either him or his client. She advised that if they had not received a response from him by October 17th, 2002, they would contact the Law Society of B.C.

30. On November 6th, 2002, Ms. Heinrich wrote to the Law Society to complain about the lack of response of Mr. Smith.

31. Ms. Heinrich is a paralegal in the legal department at Manulife. She works under the supervision of several lawyers. She has responsibility to deal with subrogation matters for all of Canada, to deal with collections matters for all business divisions, and to handle litigation involving Small Claims matters. She advised that the L.U. matter was a file that would not in the ordinary course be referred to a supervising lawyer, unless there was an apparent dispute over the calculation of the subrogation amount.

32. Mr. Smith responded to inquiries from the Law Society by way of his letter dated January 24th, 2003.

33. Mr. Smith provided a further response to the complaint in his letter to the Law Society dated March 3rd, 2003, in which he states, in part:

"As I understand matters, Manulife asserts a right to a subrogated claim. While there is no dispute respecting the right to assert a claim, there is significant dispute as to the amount of the entitlement. Funds have been retained to protect the claim, but Manulife has not satisfied me as to their entitlement.

The efforts to resolve the dispute led to the Law Society being notified. I do not see the Law

Society as a method of resolving the entitlement dispute. I do not consider myself as retained by Manulife. The uncertainty as to their entitlement arises from the wording of their agreement. I do not see it as my client's responsibility to clarify such confusion.

The amount of entitlement would normally be resolved either by court action or negotiations. To date I have been contacted by a legal assistant on behalf of Manulife, but not by a lawyer."

34. By letter from the Law Society dated March 7th, 2003 Mr. Smith was requested to provide a response to the allegation that he failed to respond to communications from Manulife. Mr. Smith did not provide a substantive response to this letter.

35. Mr. Smith provided a report to Manulife Financial on August 26th, 2004. His report contained his calculations and he forwarded a trust cheque to Manulife in the amount of \$1,103.47. Manulife accepted that payment in full satisfaction of their subrogated claim.

Discussion

[3] The Panel has noted that the file management situation reflected by these above facts were also part of another situation in the Respondent's practice wherein, at approximately the same time as these facts were occurring, the Respondent had failed to comply with the Law Society trust accounting rules. See *Smith 2004 LSBC 29*. The Panel in that case fairly characterized the trust accounting situation by saying:

" The breaches of the rules committed by the Respondent were several and, while not resulting in any loss to a client or done with any dishonest intent, not insignificant. The breaches were the result of the respondent paying little attention to the administrative side of his practice."

[4] The Penalty in that case was: a \$2,000 fine; attend a remedial accounting course; and, pay \$7,500 costs.

[5] The file management situation as presented to this Panel reflects a time in the Respondent's life when he was busy with his personal injury practice, particularly because his law partner was seriously ill. The Respondent was at a stage in his family life with young and active children when he was enjoying, and still does, a rewarding family life with the commensurate family time and effort needed to produce these rewards. In this demanding situation, civility was the casualty and Mr. Smith mistakenly and inappropriately excused his delayed responses by saying the inquirer was not a lawyer. He contritely acknowledges that both his delay and his excuse were not appropriate. The Respondent clearly sees that silver lining in this discipline cloud when he says this in Exhibit 4, page 3:

" ... three days later, on April 28th, Mr. Caldwell [a Law Society staff lawyer] called me again. During this second phone call he was obviously and genuinely concerned about my situation and my apparent inability to address the Law Society concern. It was a powerful wake up call. I can not properly express my gratitude for this phone call."

[6] The Respondent acknowledges without reservation that, during the course of representation of his client, L.U., he failed respond to communications from the staff of Manulife Financial. These communications were made by Manualife staff between April 16, 2001 and November 6, 2002.

[7] The Panel finds that this conduct constitutes professional misconduct.

[8] The Panel emphasizes that the duty for all members to respond promptly is a duty that is owed not only to fellow members and to the Law Society but also to lay persons with whom the member may be dealing with in course of acting for a client.

Penalty

[9] Counsels' submissions as to penalty have been considered and are placed in the context of the trust accounting situation by the decision in *Smith supra*. The Panel has concluded that the practice management situation reflected in the Agreed Statement of Facts is part of the trust accounting situation. Consequently the Panel is not treating these as two discrete, separate incidents. Instead, the Panel treats the trust accounting situation and this practice management situation as one situation. The Panel then considered the Respondent's unblemished record and his general conduct of practice. The Panel concluded that the Respondent is a decent and hard working lawyer and not likely to repeat this behavior. Accordingly, this Panel orders as follows:

- (a) the Respondent be and is hereby reprimanded; and,
- (b) the Respondent must pay, immediately, the costs in an amount to be agreed by counsel or, failing agreement, counsel are at liberty to apply to this Panel for a determination.