

2020 LSBC 17
Decision issued: April 6, 2020
Citation issued: June 14, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MARK ALAN HOPKINSON

RESPONDENT

**DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION**

Hearing date: February 10, 2020

Panel: Dean P.J. Lawton, QC, Chair
Lindsay R. LeBlanc, Lawyer
Lance Ollenberger, Public representative

Discipline Counsel: Sarah Conroy
No-one appearing on behalf of the Respondent

BACKGROUND

[1] On June 14, 2019, a citation was issued against the Respondent (the “Citation”) and directed that this Panel inquire into the Respondent’s conduct as follows:

1. Between approximately August 2017 and May 2018, in the course of acting for your client MB in relation to a United States patent application (the “Patent Application”), you failed to provide the quality of service required of a competent lawyer, contrary to one or both of rules 3.1-2 and 3.2-1 of the *Code of Professional Conduct for British Columbia*, by failing to do one or more of the following:

(a) keep your client reasonably informed regarding the status of the Patent Application;

- (b) disclose to your client that you had received a Notice of Allowance and her obligations pursuant to that Notice;
- (c) answer the Notice of Allowance, which required a reply;
- (d) take steps to pay or cause to be paid the required fee on behalf of your client, so that the value of the work to her was maintained;
- (e) respond to reasonable requests from your client for information on January 11, February 17, April 5, April 30 and May 15, 2018;
- (f) respond to your client's telephone calls; and
- (g) take appropriate steps to reinstate the Patent Application, which you promised to your client you would do.

This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

2. Between approximately November 2017 and May 2018, after discovering that your client MB's United States patent application (the "Patent Application") had been deemed "abandoned" due to your error or omission, you either failed to readily rectify your error or omission by reinstating the Patent Application, or you failed to do one or more of the following contrary to rule 7.8-1 of the *Code of Professional Conduct for British Columbia*:
 - (a) promptly inform your client of the error or omission without admitting legal liability;
 - (b) recommend that your client obtain independent legal advice concerning the matter, including any rights she may have arising from the error or omission; and
 - (c) advise your client of the possibility that, in the circumstances, you may no longer be able to act for her.

This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

3. Between approximately September 6, 2018 and June 5, 2019, you failed to cooperate in the Law Society's investigation of the complaint of MB, contrary to one or more of Rules 3-5(7) and (11) of the Law Society Rules and rule 7.1-1 of the *Code of Professional Conduct for British Columbia*, and in particular you

failed to respond substantively or at all to some or all of the following communications from the Law Society:

- (a) voicemail messages left on September 6 and 25, 2018;
- (b) email messages dated September 11 and October 30, 2018; and
- (c) letters dated October 3 and November 1, 2018.

This conduct constitutes professional misconduct or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

4. Between approximately January 25, 2019 and June 5, 2019, while you were suspended from the practice of law, you represented on the website www.coastpatent.com that you were qualified and entitled to practise law by referring to your business as “Hopkinson Intellectual Property Law” and “Patent & Trademark Agency & Law Firm”, contrary to one or both of section 15 of the *Legal Profession Act* and rule 4.2-5 of the *Code of Professional Conduct for British Columbia*.

This conduct constitutes professional misconduct or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

APPLICATION TO PROCEED

[2] On February 4, 2020, the Respondent communicated in an email that:

- (a) he had resigned his membership in the Law Society effective January 1, 2020;
- (b) the underlying Citation relates to patent agent practice and not the practice of law;
- (c) the Citation is moot given his resignation from the Law Society; and
- (d) if the hearing goes ahead, it will be in the Respondent’s absence.

[3] The Respondent did not attend the hearing. The Law Society submitted that the hearing should proceed in the Respondent’s absence, as authorized by section 42 of the *Legal Profession Act* (the “Act”). That section permits a hearing panel to proceed in the absence of a respondent if the panel is satisfied that the respondent has been served with the notice of hearing.

- [4] This hearing was originally scheduled to proceed on September 24, 2019. On September 20, 2019, the Respondent requested an adjournment. After hearing submissions on the request and being notified of the Law Society's consent, the hearing panel adjourned the hearing to February 10 to 12, 2020, peremptory on the Respondent.
- [5] The following factors are to be considered in applying s. 42 of the *Act*:
- (a) whether the respondent has been provided with notice of the hearing date;
 - (b) whether the respondent has been cautioned that the hearing may proceed in his or her absence;
 - (c) whether the panel adjourned for 15 minutes;
 - (d) whether the respondent has provided any explanation for not attending;
 - (e) whether the respondent is a former member of the Law Society; and
 - (f) whether the respondent has admitted the underlying misconduct.
- [6] The Respondent was provided with notice of the hearing date in person on September 24, 2019, and on subsequent separate occasions, he was emailed confirmation of the date, time and location of the hearing. The Respondent's email of February 4, 2020 also confirms that he was aware of the hearing date.
- [7] The Respondent was cautioned, most recently on December 6, 2019, that the hearing would proceed.
- [8] The Panel waited 30 minutes after convening the hearing without the Respondent attending.
- [9] The Respondent has not provided a supportable reason for his non-attendance at the hearing. Within his email of February 4, 2020, the Respondent raised matters of health and privacy for his anticipatory non-attendance along with questioning the jurisdiction of the Law Society. No details are provided relating to the cited health and privacy concerns, and the Panel cannot give any weight to the statements.
- [10] With respect to the jurisdiction of the Law Society, section 21.1 of the *Act* provides as follows:

Prohibition on resignation from membership

21.1 (1) lawyer may not resign from membership in the society without the consent of the benchers if the lawyer is the subject of

- (a) a citation or other discipline process under Part 4,
- (b) an investigation under this Act, or
- (c) a practice review under the rules.

(2) In granting consent under subsection (1), the benchers may impose conditions.

[11] The Law Society also referred the Panel to *Law Society of BC v. Pyper*, 2019 LSBC 21, in which the panel found that section 38(4)(b)(v) of the *Act* gave a hearing panel the jurisdiction to make a finding of professional misconduct against a former member based on conduct that would, if the respondent were a member, have constituted professional misconduct.

[12] The Panel concluded that, in light of all the factors considered, it would be in the best interests of the public to proceed with the hearing notwithstanding the Respondent's absence.

FACTS

[13] The Panel was provided with a Notice to Admit containing 229 paragraphs and 66 documents. As the Respondent did not respond to the Notice to Admit, the truth of the facts and the authenticity of the documents are deemed admitted, under Rule 4-28(7).

[14] A summary of the facts is provided below.

[15] The Citation was authorized on June 5, 2019 and issued on June 14, 2019.

[16] On January 21, 2016, MB met with the Respondent and retained him to conduct patent searches. The Respondent conducted the patent searches, and on January 29, 2016, he advised MB of the outcome of the searches.

[17] After receiving instructions from MB, the Respondent filed a trademark application for MB on February 24, 2016.

[18] On February 25 and March 3, 2016, the Respondent forwarded to MB confirmation emails that were received from CIPO regarding the trademark application.

- [19] On March 18, 2016, MB emailed the Respondent and advised that she wanted to proceed with the design patent application process. On March 22, 2016, the Respondent filed the US Patent Application with the U.S. Patent & Trademark Office.
- [20] On March 29, 2016, the Respondent emailed MB and notified her of the official filing receipt and advised that he would keep her informed of any developments on the file.
- [21] The Respondent and MB continued communications on trademark-related matters between March and November, 2016.
- [22] On November 29, 2016, the Respondent took further steps to complete the US Patent Application and invoiced MB for his services. The invoice was paid by MB, who kept her account paid and current throughout.
- [23] Further exchanges between the Respondent and MB continued between November 2016 and June 2017. The Respondent notified MB that he would let her know when he heard from the US Patent & Trademark Office, and he confirmed the steps that would be required based on the decision received.
- [24] On or shortly after August 14, 2017, the Respondent received the Notice of Allowance from the US Patent & Trademark Office and was advised that an issue fee of \$140 would be required by November 14, 2017 or his application would be regarded as abandoned.
- [25] The Respondent did not advise MB of the August 14, 2017 Notice of Allowance and did not submit the \$140 fee on behalf of MB. As a consequence, the US Patent Application was deemed abandoned.
- [26] On January 11, 2018, MB emailed the Respondent to inquire about the status of the US Patent Application. MB did not receive a response from the Respondent regarding the status, and on January 18, 2018, she called the Respondent and left a message asking for a return call. The Respondent did not return MB's call.
- [27] MB emailed the Respondent again on February 17, 2018 requesting an update, and the Respondent did not respond to this email.
- [28] Between January 12 and April 5, 2018, MB continued to try to contact the Respondent by telephone, but the Respondent did not answer her calls or return her messages.

- [29] On April 5, 2018, MB sent another email to the Respondent requesting an update. The Respondent did not respond.
- [30] Having received no communication from the Respondent between July 2017 and April 2018, MB contacted the US Patent & Trademark Office and was advised that the Notice of Allowance had been sent months ago and that the US Patent Application had been abandoned. MB then called the Respondent to notify him that the US Patent Application had been abandoned and requested that he get back to her. Again, the Respondent did not return her message.
- [31] Sometime between April 5 and 19, 2018, a colleague of MB attended the Respondent's office on two to three occasions and discovered it was locked. On April 19, 2018, the colleague attended the Respondent's office a further time and left his business card with the Respondent and asked him to call him as the Respondent appeared to be meeting with another person at the time. A short time after, the Respondent contacted MB's colleague. During this call, the Respondent was told that the US Patent Application had been abandoned and that MB had been trying to reach the Respondent regarding this. The Respondent said that he would contact MB right away and fix the issue.
- [32] In emails dated April 19 and 20, 2018, the Respondent advised MB that he would prepare a reinstatement package for the US Patent Application, he would "eat" the reinstatement fee of \$400 and he would get back to her the following Monday or Tuesday.
- [33] After not hearing from the Respondent the following Monday or Tuesday, MB emailed the Respondent requesting an update and expressing her frustration and anxiety over the situation. The Respondent emailed MB back indicating that the reinstatement package was not complete; however, he would not work on anything else until it was submitted. This was the last email MB received from the Respondent.
- [34] On April 30, 2018, MB emailed the Respondent asking to be informed on the progress of the reinstatement.
- [35] Having received no communication from the Respondent, MB continued to telephone and email the Respondent without reply.
- [36] The Respondent did not reinstate the US Patent Application and did not report to MB that he was not going to submit the reinstatement package.

- [37] The Respondent did not advise MB to obtain independent legal advice upon discovering that the US Patent Application had been abandoned and did not advise MB that he was no longer acting on her behalf.
- [38] On May 16, 2018, MB filed a complaint against the Respondent.
- [39] On June 29, 2018, the Respondent sent an email to the Law Society attaching an application for non-practising membership, which was approved by the Law Society on June 30, 2018.
- [40] On August 15, 2018, the Respondent received a letter from the Law Society advising that he must complete a final trust report and finalize other matters. A deadline of November 30, 2018 was imposed. The Respondent did not respond to the August 15, 2018 letter or comply with any of the conditions required. The file was assigned to the Law Society Investigations, Monitoring and Enforcement Group (“IME”).
- [41] The Respondent did not respond to a September 6, 2018 voicemail message, September 11, 2018 email, September 25, 2018 voicemail message, September 25, 2018 email, October 3, 2018 correspondence and additional email, October 30, 2018 email, November 1, 2018 letter, December 7, 2018 letter, January 3, 2019 letter or January 11, 2019 letter from IME or the Law Society.
- [42] On January 25, 2019, the Respondent was suspended from the practice of law under Rule 3-6(1) for failing to respond to the outstanding requests included in the August 15, 2018 letter. Notice of the suspension was couriered to the Respondent and posted on the Law Society member portal.
- [43] The January 25, 2019 notice advised the Respondent that he must disable all online profiles.
- [44] On January 30, 2019, the Law Society opened a new complaint file to investigate the Respondent’s conduct in continuing to hold himself out as a lawyer entitled to practise law while suspended.
- [45] By email dated January 30, 2019, the Respondent was advised that he must immediately disable all online profiles that refer or imply that he is entitled to practise law. The Respondent did not respond to this email. The online profiles were not disabled.
- [46] On February 1, 2019, the Respondent was suspended from the practice of law under Rule 3-81(1) for failing to submit his completed final trust report. This was communicated to the Respondent by letter the same day. In this letter, the

Respondent was asked to contact the manager of the Law Society Custodianships department. The Respondent did not respond to this request.

- [47] The Respondent has not completed the requirements of the Law Society as per the August 15, 2018 letter.
- [48] On February 8, 2019, further communication was sent to the Respondent advising him that he was suspended and that a new complaint file had been opened. The letter was sent by mail and posted to the Law Society member portal.
- [49] The February 8, 2019 letter was hand delivered to the Respondent on February 20, 2019, and the Respondent was asked to be in touch with the Law Society.
- [50] The Respondent first communicated with the Law Society by email dated February 20, 2019. Among other things, he advised that the web page “Hopkinson.ca” would be immediately removed and that a message had been sent to lawyer.com requesting immediate removal.
- [51] On March 25, 2019, the Custodianships department of the Law Society wrote to the Respondent regarding his suspension and seeking information regarding his law practice. The Respondent did not reply.
- [52] The Respondent continued to operate a website at the domain name www.coastpatent.com. The Respondent did not respond to Law Society staff regarding questions about the website. The Respondent continued to hold himself out on the website as a lawyer entitled to practise law until mid-September 2019.

ONUS AND STANDARD OF PROOF

- [53] The Law Society has the onus of proving the allegations in the Citation and the standard of proof is the balance of probabilities: *Foo v. Law Society of BC*, 2017 BCCA 151, at para. 63.

PROFESSIONAL MISCONDUCT TEST

- [54] The test for what constitutes professional misconduct is “whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members”: *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171.

ANALYSIS

Allegations #1 and #2 – failing to provide quality service and failing to inform the client

[55] In *Law Society of BC v. Harding*, 2014 LSBC 52 at para. 88, the hearing panel identified the following factors to be considered when the allegation is a failure to provide the quality of service required of a competent lawyer:

- (a) gravity of the misconduct requires a consideration of:
 - i. the length of the delay or lack of activity;
 - ii. whether the delay or lack of activity was coupled with representations to the client about the case that were not true or failing to communicate with the client; and
 - iii. the nature of the steps that could or should have been taken to advance the case;
- (b) duration of the misconduct also requires a consideration of the length of the delay or lack of activity;
- (c) the number of breaches takes into account whether the citation is based on a single incident or a series of incidents that should be considered together;
- (d) the presence or absence of *mala fides* requires an assessment of the reasons for the delay or lack of activity; and
- (e) the harm caused by the respondent's conduct requires an assessment of the consequences to the client in not advancing the case.

[56] On August 14, 2017, the Respondent received the Notice of Allowance, but he never informed MB. The Respondent knew or ought to have known before April 2018 that the US Patent Application had been abandoned due to his failure to pay the issue fee, but he did not inform MB. MB discovered this information on her own initiative.

[57] Between August 14, 2017 and May 16, 2018, the date MB filed the complaint, the Respondent engaged in a pattern of non-communication. The delay was inordinate and inexcusable.

- [58] The Respondent advised MB that he would reinstate the US Patent Application. MB trusted that the Respondent would do what he said he would do. However, there is no evidence of any steps having been taken by the Respondent to reinstate the application.
- [59] The harm caused by the Respondent's conduct was the abandonment of MB's US Patent Application. The evidence discloses that MB, while patient with the Respondent, was distraught and stressed with the status of the file. Additionally, any amounts MB would have paid for the US Patent Application were lost when it was abandoned.
- [60] Upon being advised by MB's colleague that the US Patent Application had been abandoned, the Respondent did not inform MB that she should obtain independent legal advice. The Respondent ought to have known that the interests of MB were compromised due to his failure to pay the issue fee and that he had a duty to inform MB to obtain independent legal advice.
- [61] In *Law Society of BC v. Pyper*, 2018 LSBC 28 at para. 90, the hearing panel made the following finding:
- As for allegation 3, we find that the failure to advise his client to obtain independent legal advice was also professional misconduct. The Respondent had clearly made a professional error in letting the NOCC expire, and it was his duty at that point to draw this to the client's attention and advise the client to seek independent legal advice. The Respondent did not do so, and his failure continued for a year, during which he improperly appeared for his client on the application to renew the NOCC. We conclude that, in these circumstances, the Respondent's failure to advise the client to obtain independent legal advice was a marked departure from his obligations as a lawyer and amounted to gross culpable neglect of his duties to his client.
- [62] Taking all of these factors into consideration, the Panel finds that the Respondent failed in providing legal services in a conscientious and diligent manner, and to the manner required of a competent lawyer.
- [63] The Respondent's failure to advise MB to obtain independent legal advice was contrary to his obligations as a lawyer and amounts to a neglect of his duties to MB.
- [64] The Respondent's conduct is a marked departure from the standard expected of lawyers and constitutes professional misconduct.

[65] The Law Society has proved allegations #1 and #2 on a balance of probabilities.

Allegation #3 – failing to respond to Law Society

[66] The Respondent failed to respond to communications from the Law Society in regards to its investigation of MB’s complaint on six separate occasions using three different methods of communication. The Respondent was also unresponsive to requests for information from the Law Society’s Trust Assurance and Custodianships departments.

[67] Rules 3-5(7) and (11) require a lawyer to cooperate fully in an investigation by all available means.

[68] In *Law Society of BC v. Dobbin*, 1999 LSBC 27, the majority of the Benchers on Review stated at paras. 20 and 25 that:

... [the duty to reply] is a cornerstone of our independent, self-governing profession. If the Law Society cannot count on prompt, candid, and complete replies by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society’s paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society’s regulation of the practice of law and it is essential to the Law Society’s mandate to uphold and protect the interest of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.

... unexplained persistent failure to respond to Law Society communications will always be *prima facie* evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct. The circumstances which led the member to fail to respond are peculiarly within his or her means of knowledge. It cannot be a part of the evidentiary burden of the Law Society to show both that the member persistently failed to respond and the reasons for that failure.

[69] The Respondent appears to attribute his lack of response to his status as a non-practising lawyer. A lawyer’s obligation to respond to the Law Society is not relieved by an interim suspension or by ceasing membership (see *Law Society of BC v. Geronazzo*, 2006 LSBC 37, at para. 11).

- [70] This Panel also takes notice that the Law Society attempted to communicate with the Respondent at the address provided on the non-practising application submitted to the Law Society by the Respondent.
- [71] The lack of response has not been explained by the Respondent, and the Respondent's persistent failure to respond to Law Society communications as set out in the Citation constitutes professional misconduct.
- [72] The Law Society has proved allegation #3 on a balance of probabilities.

Allegation #4 – holding out as entitled to practise law while suspended

- [73] By email dated January 30, 2019, the Law Society advised the Respondent that he must immediately disable all online profiles that refer or imply that he is entitled to practise law.
- [74] While under suspension with the Law Society, and notwithstanding receiving notice on January 30, 2019, the Respondent maintained the website www.coastpatent.com and described his firm as “Hopkinson Intellectual Property Law” and “Patent & Trademark Agency & Law Firm.”
- [75] No other lawyers were listed on the Respondent's website.
- [76] The *Act* has a definition of “practice of law” that includes, at section 1(1)(g), “making a representation by a person that he or she is qualified or entitled to do anything referred to in paragraphs (a) to (e),” which includes giving legal advice.
- [77] Rule 4.2-5 of the *Code of Professional Conduct for British Columbia* restricts against marketing activity that is false, inaccurate and reasonably capable of misleading the public.
- [78] Using the terms “intellectual property law” and “law firm” would easily mislead the public into considering that the Respondent was entitled to practise law.
- [79] In the Respondent's February 4, 2020 email, he asserted that he was maintaining a “patent agent practice.” While a patent agent may provide a patent agent service, and not be a lawyer, a patent agent is not entitled to advertise that it is a “law firm” or mislead the public on the nature of the services being provided.
- [80] The Respondent knew that he was required to remove all online profiles that promoted the Respondent as a lawyer entitled to practise law. The Respondent demonstrated a disregard for the restrictions contained in the *Act* and the *Code of Professional Conduct for British Columbia*.

[81] Considering the Respondent's conduct as a whole with respect to allegations #1, #2 and #3, and the deemed admission of professional misconduct, the Panel finds that the Respondent has committed professional misconduct.

[82] The Law Society has proved allegation #4 on a balance of probabilities.

NON-DISCLOSURE ORDER

[83] After hearing submissions from the Law Society, the Panel issued a non-disclosure order over information that is protected by client confidentiality and solicitor-client privilege in any exhibit filed in these proceedings and in the transcript of these proceedings and with respect to any personal information contained in tab 47 of exhibit 6B.

CONCLUSION

[84] The Law Society has proven the Respondent committed professional misconduct with respect to each of allegations #1, #2, #3 and #4 of the Citation.