

2020 LSBC 32
Decision issued: June 30, 2020
Citation issued: March 8, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DOUGLAS BERNARD CHIASSON

RESPONDENT

DECISION OF THE HEARING PANEL

Written Materials: December 10, 2019

Panel: Tony Wilson, QC, Chair
Darlene Hammell, Public representative
Lindsay R. LeBlanc, Lawyer

Discipline Counsel: Ilana Teicher
Appearing on his own behalf: Douglas B. Chiasson

BACKGROUND

[1] On March 8, 2019, a citation was issued against the Respondent (the “Citation”) directing that this Panel inquire into the Respondent’s conduct as follows:

1. Between April 2013 and May 2018, you failed to provide KH, (the “Client”), with the quality of service expected 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*. In particular you failed to:
 - (a) take any substantive steps to advance the Client’s file;
 - (b) answer reasonable requests from the Client for information;
 - (c) provide the Client with progress updates as to the status of her file; and
 - (d) make all reasonable efforts to provide prompt service to the Client.

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

- [2] Pursuant to a Practice Direction issued April 6, 2018, the Respondent and the Law Society have requested to conduct the hearing on the written record rather than have an oral hearing. That order was granted on January 24, 2019.
- [3] This matter comes before the Panel pursuant to Rule 4-30, which provides that the respondent to a citation can make a conditional admission of professional misconduct and consent to proposed disciplinary action. Rule 4-30 requires that a hearing panel consider the conditional admission and proposal and, if the panel finds them acceptable, impose the proposed disciplinary action.
- [4] The Respondent admits that, as set out in the Citation, he failed to provide the Client with the quality of service expected of a competent lawyer, contrary to rules 3.1-2 and 3.2-1 of the *Code of Professional Conduct of British Columbia* (the “Code”) and that his conduct is a marked departure from the standard the Law Society expects of lawyers.
- [5] The Respondent proposed disciplinary action comprising a fine of \$10,000 and costs of \$1,000.
- [6] The Discipline Committee of the Law Society considered and accepted the Respondent’s Rule 4-30 proposal and, pursuant to Rule 4-30(4), instructed discipline counsel to recommend the acceptance of the proposal to the Panel.
- [7] For the reasons that follow, the Panel finds that the Respondent’s conduct constitutes professional misconduct and accepts that the proposed disciplinary action is appropriate.

FACTS

- [8] The Citation was authorized on February 28, 2019 and issued on March 8, 2019.
- [9] The Respondent admits that he was served with the Citation on March 11, 2019.
- [10] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 18, 1990. Since October 1999, he has practised as a sole practitioner in Squamish, British Columbia. He practises primarily in the areas of family law, residential real estate law, civil litigation, including motor vehicle plaintiff work, and wills and estates.

- [11] On May 17, 2013, the Client attended the Respondent's office to discuss a potential claim and subsequently instructed the Respondent to commence a civil claim for sexual assault. The Respondent discussed with the Client that the claim should be brought in Small Claims Court, but did not discuss any possible attendant employment or human rights issues.
- [12] The Client's file is the only sexual assault file the Respondent has ever taken on.
- [13] On May 22, 2013, the Client delivered a retainer cheque in the amount of \$1,130 to the Respondent.
- [14] Between May 22, 2013 and September 16, 2016, the Client followed up with the Respondent via hand-delivered letters and voicemails; however, the Respondent did not respond to the Client until September, 2016.
- [15] Email exchanges between the Client and the Respondent between September 16, 2016 and March 1, 2018 disclose that the Client continued to follow up with the Respondent with increasing frustration and urgency. The Respondent either did not respond or advised that a response would be forthcoming without following through.
- [16] Between May 17, 2013 and May 2018, the Respondent took no substantive steps on the Client's file and did not answer the Client's reasonable requests for information.
- [17] On May 1, 2018, the Law Society received a complaint from the Client in relation to the Respondent, and on June 5, 2018, the Law Society notified the Respondent about the complaint.
- [18] In response to the complaint, the Respondent wrote a letter to the Law Society in which he agreed that (a) the Client communicated with him and he failed to respond to the Client's requests; and (b) he failed to engage and act on the Client's behalf and no actions were commenced on the Client's behalf.
- [19] The Respondent has sent a personal apology and returned the \$1,130 retainer to the Client.

ONUS AND STANDARD OF PROOF

- [20] 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

[21] 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.

[22] The Citation engages rules 3.1-2 (Competence) and 3.2-1 (Quality of Service) of the *Code*.

[23] “Competent lawyer” is defined in rule 3.1-1 of the *Code*, and includes:

a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including:

- (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises; ...
- (d) communicating at all relevant stages of a matter in a timely and effective manner; ...
- (g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;
- (h) recognizing limitations in one’s ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;
- (i) managing one’s practice effectively; ...

[24] Rule 3.1-2 of the *Code* states “A lawyer must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer.”

[25] The commentaries to rule 3.1-2 further explain as follows:

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client’s behalf.

...

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

- (a) decline to act;
- (b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
- (c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

...

[12] The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[26] In addition, rule 3.2-1 of the *Code* states "A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil." Further commentary on this is provided in the *Code*.

[27] For over a period of five years, the Respondent failed to advance the Client's file and failed to provide timely service. This was compounded by the Respondent's failure to communicate with the Client, leaving the Client without any knowledge on the status of the file. The Respondent admitted that he had not previously acted on a civil sexual assault file prior to taking on the Client's file, which was one of the reasons why the file was not being worked on by the Respondent.

[28] The Respondent's conduct in respect of the allegation contained in the Citation amounts to a marked departure from the standard of conduct that the Law Society expects of lawyers and, as such, constitutes professional misconduct. The Respondent's conditional admission is accepted.

APPROPRIATENESS OF PROPOSED DISCIPLINARY ACTION

- [29] The role of this Panel is to accept or reject the proposed disciplinary action. The proposal is a fine of \$10,000 and costs of \$1,000.
- [30] As stated by the panel in *Law Society of BC v. Lim*, 2019 LSBC 19, in considering the appropriate penalty to be imposed, this Panel must consider whether the proposal is fair and reasonable in all the circumstances. In *Lim*, the panel found that some deference should be given to the recommendation of the Discipline Committee as being within the range of a “fair and reasonable disciplinary action in all of the circumstances.”
- [31] Section 38 of the *Legal Profession Act* states that, where a hearing panel finds, as this Panel has, that a lawyer’s actions constitute professional misconduct, the panel must do one or more of the following:
- (a) reprimand the respondent;
 - (b) fine the respondent;
 - (c) impose conditions or limitations on the respondent’s practice;
 - (d) suspend the respondent for a period of time or until any conditions or requirements imposed by the panel are met;
 - (e) disbar the respondent; or
 - (f) require the respondent to do one or more remedial actions or make submissions respecting their competence to practise law.
- [32] The purpose of disciplinary proceedings is the fulfillment of the Law Society’s mandate to uphold and protect the public interest in the administration of justice and to fulfil its regulatory role in ensuring the general integrity and competence of lawyers.
- [33] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the benchers confirmed that the “... objects and duties set out in section 3 of the *Act* are reflected in the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17.”
- [34] In *Law Society of BC v. Dent*, 2016 LSBC 05, at para. 16, the panel stated:
- It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final

outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.

[35] The Law Society submits that emphasis ought to be placed on the following factors:

- a. The nature and gravity of the conduct proven;
- b. character and professional conduct record of the Respondent;
- c. the need to ensure the public's confidence in the integrity of the profession; and
- d. the range of penalties imposed in similar cases.

[36] The Respondent agrees with the Law Society; however, he adds that consideration should also be given to his acknowledgement of the misconduct and remedial action that we discuss in the analysis below under "character and professional conduct record of the Respondent."

The nature and gravity of the conduct proven

[37] The Respondent describes the misconduct as one consisting of a lack of service and not one involving deceit. The Panel agrees that the nature of the misconduct did not involve any element of deceit.

[38] The Respondent failed to advance the Client's file in any way for a period of over five years. During this period, the Client attempted to get updates and assurances from the Respondent that the matter was progressing. After waiting over five years, the Client made a complaint to the Law Society as the Client was unable to get information from the Respondent on the status of the file. This amount of time, coupled with the lack of response, is inordinate and serious.

[39] The Client suffered undue stress, confusion and frustration. The Client was deprived of five years in which the legal matter did not progress.

[40] It is expected that lawyers will reasonably keep their clients apprised of the steps taken or not taken on their legal matters. The Respondent failed to do so. This is an aggravating factor.

Character and professional conduct record of the Respondent

- [41] At the time the Citation was issued, the Respondent was an experienced lawyer having been practising law in British Columbia for 23 years.
- [42] The Respondent submits that he has admitted to his conduct and has cooperated in the investigation. The Respondent further submits that he has had a thorough investigation into his office practices and procedures and that he has implemented the office management procedures.
- [43] The Respondent wrote to the Law Society on July 13, 2018 and stated as follows:
- I am apologetic in my reply to the Law Society and wholeheartedly embarrassed by my inaction on the file. KH did communicate with me and I agree that I failed to communicate back to her requests. I received the retainer and I failed to engage and act on her behalf. There are no other documents in the file other than those already provided to you by KH. No actions were commenced on her behalf. I procrastinated on this file and did not follow up with the client when I found myself incapable of handling the matter. In retrospect I ought to have returned the retainer then and suggested she approach new counsel to take on her matter. I can offer no excuses for my actions.
- [44] The Law Society submits, and this Panel accepts, that the Respondent's professional conduct record reveals similar issues around procrastination and quality of service, which suggests that progressive discipline ought to apply and a fine in the amount of \$10,000 is appropriate:
- i. *December 2013*: Citation for failing to communicate with his client and failing to advance his client's claim for 17 months. The Respondent also withdrew funds from trust in payment of fees in the amount of 25 per cent of both the amount recovered on his client's behalf and an amount awarded as costs, even though the contingent fee agreement did not entitle him to any percentage of the costs and, if it did, such an agreement would be contrary to s. 67(2) of the *Act*. The Respondent admitted that his conduct constituted professional misconduct and the panel ordered a fine of \$4,500 (*Law Society of BC v. Chiasson*, 2014 LSBC 32).
 - ii. *May 2006*: Practice Standards referral for two complaints from clients about failing to respond to their communications, failing to keep them informed about their cases, and delay in advancing their files resulting in a Practice Review. The Practice Standards Committee accepted the

reviewers' recommendations aimed at improving the Respondent's office and file management systems, including client communications and managing client expectations. The Practice Standards file was closed in May 2007 upon "satisfactory completion."

- iii. 1998: Conduct Review to discuss the Respondent's failure to advise opposing counsel that he was no longer retained to act, when he was served with a short leave application.

[45] The Respondent's prior citation in 2013 and prior practice standards referrals, all of which relate to a failure to advance files, engage the application of progressive discipline and a greater sanction in this case.

[46] The Panel accepts as a mitigating factor the Respondent's acknowledgement early on of misconduct and the apology sent to the Client.

Public confidence in the profession and the disciplinary process

[47] The panel in *Law Society of BC v. Kim*, 2019 LSBC 43, at para. 78, discussed what is required to maintain the public's confidence in the legal profession:

To maintain public confidence in the trustworthiness of lawyers, the Law Society must respond firmly – and be perceived to respond firmly – to instances where lawyers fail to fulfill their duties to clients for reasons of expediency and convenience. The public will have greater confidence in Law Society disciplinary processes when the sanctions are proportionate, fair and reasonable in all of the circumstances, including the range of sanctions levied in prior similar cases.

[48] The public must have confidence that a lawyer who agrees to act on their behalf has both the time and skill to progress the issue. That was not the case here. Further aggravating the situation was the Respondents failure to tell the Client that he had neither the skill nor the time to act on her behalf and letting the file sit unattended for over five years.

Range of penalties imposed in similar cases

[49] We have reviewed the prior similar cases referenced by the Law Society and the Respondent. The penalties imposed consist of fines ranging between \$3,000 and \$15,000. We note that the cases cited by the Law Society and the Respondent contain conduct similar to that in this case; however, such conduct was often coupled with other professional misconduct or had other factors that are not present

here. This case, with the length of delay, little to no communication and no action being taken on the file, appears to be unusual and is worthy of serious penalty.

- [50] Considering the *Ogilvie* factors discussed above and applying the principle of progressive discipline, the proposed fine of \$10,000 fits within the range of acceptable penalties.

NON-DISCLOSURE ORDER

- [51] The Law Society requested an order under Rule 5-8(2) that exhibits containing confidential client information or privileged information not be disclosed to members of the public. The Respondent consents to the order.
- [52] In order to prevent the disclosure of confidential or privileged information to the public, we order under Rule 5-8(2) that, if a member of the public makes a request for copies of the exhibits in these proceedings, those exhibits must be redacted for confidential or privileged information before being provided.

COSTS

- [53] The Law Society seeks, and the Respondent consents, to costs of \$1,000.
- [54] The range presented in the tariff applicable to hearings under Rule 4-30 is \$1,000 to \$3,000.
- [55] While at the low end of the tariff, it is within the range of acceptable awards and the Panel accepts the proposed costs award of \$1,000.

SUMMARY OF ORDERS MADE

- [56] The Law Society has proven the Respondent committed professional misconduct with respect to the Citation. The Panel has concluded that the proposed disciplinary action is fair and reasonable in all of the circumstances and the proposed penalty is accepted.
- [57] The Law Society submits that the fine should be paid in monthly instalments. The Respondent seeks to pay the fine over a 12-month period. With respect to the time given to the Respondent to pay the fine, the Panel has taken notice of the current pandemic situation in British Columbia and afforded additional time for the Respondent to make payment. This is an unusual time and uncharted territory, and

the order for payment has reflected this. For clarity, in the usual circumstances, this Panel would not have afforded this much time to pay the fine.

[58] The Panel makes the following orders:

- (a) The Respondent has committed conduct that constitutes professional misconduct in relation to the allegations in the Citation, pursuant to section 38(4) of the *Act*;
- (b) The Executive Director is instructed to record the Respondent's admissions on his professional conduct record;
- (c) The Respondent must pay a fine in the amount of \$10,000 on or before May 1, 2021;
- (d) The Respondent pay costs to the Law Society in the amount of \$1,000 on or before November 1, 2020; and
- (e) If a member of the public makes a request for copies of the exhibits in these proceedings, those exhibits must be redacted for confidential or privileged information before being provided.

[59] While not an order of this Panel, the Panel recommends that the Respondent take advantage of the available file management courses to address the pattern of reoccurring quality of service issues apparent in the Respondent's professional conduct record. We also strongly recommend that he seek out a mentor in the profession who can assist him in practice management.