

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MICHAEL ANTHONY NEWCOMBE

RESPONDENT

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

Hearing date: May 26, 2021

Panel: Thomas L. Spraggs, Chair
Clarence Bolt, Public representative
David Layton, QC, Lawyer

Discipline Counsel: Barbara Lohmann

Counsel for the Respondent: Grant J. Gray

INTRODUCTION

- [1] The citation in this matter (“Citation”) contains two allegations, both of which relate to a monetary judgment that was obtained against the Respondent in April 2018 and remained unsatisfied until early June of the same year.
- [2] First, the Citation alleges that the Respondent committed professional misconduct by failing to notify the Executive Director of the Law Society (“Executive Director”) in writing of the circumstances of this judgment and his proposal for satisfying it, contrary to Rule 3-50 of the Law Society Rules (“Rules”).
- [3] Second, the Citation alleges that the Respondent committed professional misconduct by making a representation to the Law Society in his 2018 Practice

Declaration Form (“2018 Practice Declaration”) that, during the reporting period, no judgment was rendered against him, which he knew or ought to have known was untrue, contrary to rule 7.1-1 of the *Code of Professional Conduct for British Columbia* (“BC Code”).

- [4] The Law Society served a Notice to Admit on the Respondent on January 8, 2021. On January 29, 2021, the Respondent admitted to the authenticity of the documents attached to the Notice to Admit and to the truth of the facts set out in the Notice to Admit, with a minor exception that is immaterial to the issues before us. We have accepted the Respondent’s admissions. The Notice to Admit thus comprises the undisputed evidentiary record in this matter.
- [5] At the Hearing, the Respondent admitted that he committed professional misconduct, as alleged in the Citation, by failing to report the unsatisfied monetary judgment to the Executive Director as required by Rule 3-50, and by providing untrue information in his 2018 Practice Declaration as to whether any judgments had been entered against him.
- [6] For the reasons set out below, we agree that the Respondent committed professional misconduct in these two ways.
- [7] However, in coming to this conclusion, we have not found it necessary to determine the Respondent’s precise state of mind in committing the professional misconduct. This issue will likely be relevant at the Disciplinary Action stage of this matter. But for the time being, it is enough to conclude, as we have, that the Respondent committed professional misconduct because, at the very least, he ought to have known of his obligation to comply with Rule 3-50, and he ought to have known that the information he provided in the 2018 Practice Declaration as to whether any judgments had been entered against him was untrue.

RELEVANT FACTUAL FINDINGS FROM THE NOTICE TO ADMIT

- [8] The Respondent was called and admitted as a member of the Law Society on September 25, 1987. His law practice is in Kelowna and focuses primarily on family law, although he also practises some criminal and residential real estate law.

September 30, 2016 conduct review for failing to comply with Rule 3-50

- [9] On July 7, 2016, the Discipline Committee ordered that the Respondent appear at a conduct review (“Conduct Review”).

[10] The Conduct Review was required in part because the Respondent had breached Rule 3-50 by failing to notify the Executive Director of three unsatisfied monetary judgments and his proposal for satisfying them.

[11] The relevant portion of Rule 3-50 states:

- (1) A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately notify the Executive Director in writing of
 - (a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and
 - (b) the lawyer's proposal for satisfying the judgment.

[12] The Conduct Review took place on September 30, 2016, with the Respondent appearing before the Conduct Review Subcommittee.

[13] Regarding the Respondent's failure to comply with Rule 3-50 in relation to the three unsatisfied monetary judgments, the Conduct Review Subcommittee's report notes the following:

- (a) The Subcommittee reviewed Rule 3-50 with the Respondent and appraised him of the seriousness of not complying with it. In particular, the Subcommittee advised the Respondent that it is fundamental to the legal profession that a lawyer who has a judgment filed against them inform the Law Society about the judgment and how the lawyer will satisfy it so that, among other things, the Law Society will be aware of the lawyer's financial difficulties;
- (b) The Subcommittee advised the Respondent that, under the principle of progressive discipline, if he failed in the future to report a judgment against him as required by Rule 3-50, the Discipline Committee had a right to order a citation in respect of the failure;
- (c) The Respondent indicated that he understood the principle of progressive discipline and the potential consequences of any future failure to comply with Rule 3-50;
- (d) The Respondent acknowledged his breach of Rule 3-50 and stated that he would not transgress this rule again;

- (e) The Subcommittee concluded that the Respondent was now fully aware of Rule 3-50 and the consequences of violating it; and
- (f) Given the Respondent's acknowledgment of his misconduct and the steps that he indicated he would take in the future, the Subcommittee recommended that the Discipline Committee accept the Conduct Review as appropriate disciplinary action and take no further steps in this regard.

[14] As explained below, this Conduct Review is relevant to the allegations in the Citation because it establishes that the Respondent had previously been told about the importance of providing the Law Society with accurate information regarding monetary judgments rendered against him.

Failure to comply with Rule 3-50 regarding judgment entered on April 25, 2018

[15] On April 23, 2018, approximately 18 months after the Conduct Review took place, the Royal Bank of Canada ("RBC") obtained a monetary judgment for \$12,841.63 against the Respondent ("Judgment").

[16] The Judgment was entered on April 25, 2018.

[17] On May 23, 2018, the Judgment was registered as a charge against a property that the Respondent owned in Osoyoos.

[18] The Respondent did not satisfy the Judgment within seven days after the date of entry. Nor did he report the unsatisfied Judgment to the Executive Director as required by Rule 3-50.

[19] The Respondent paid the Judgment in full in early June 2018. It was discharged from his Osoyoos property on July 6, 2018.

Untrue information about judgment in 2018 Practice Declaration

[20] On November 26, 2018, the Respondent submitted his 2018 Practice Declaration to the Law Society.

[21] He answered "no" to the following question on the 2018 Practice Declaration:

During the reporting period, I became insolvent or bankrupt or had a judgment rendered against me.

[22] This answer was untrue because the Judgment had been rendered against the Respondent about seven months before, in April 2018.

Information provided by the Respondent during the Law Society's investigation

[23] In response to inquiries by the Law Society, the Respondent provided the following information regarding the Judgment in a letter dated August 17, 2020:

At the time that it [Judgment] was obtained I was well aware of it because I tried to negotiate with the bank to reduce the amount of interest it was charging on the credit card bill. I was concerned that if they got a judgement, it would impair my ability to secure a mortgage.

As you can see from the Title documents, the Judgement was obtained on April 23rd, 2018 and registered on title on May 23rd, 2018. The mortgage was registered on June 1st, 2018 and the funds were used in part to discharge the Judgment which occurred on July 7th, 2018.

Clearly I ought to have reported the Judgement to The Law Society and I must just have not thought to do so. I have no good explanation especially since I well knew that I was required to do, [sic] but it certainly was not intentional.

[24] On September 15, 2020, the Law Society emailed the Respondent asking for further information in light of his August 17, 2020 letter. Paragraph 2 of the Law Society's email asked the Respondent to provide detailed explanations to the following questions:

2(a) Would you have been in a position to satisfy the Judgment within seven days of its issuance? If so, why was the Judgment not satisfied within seven days?

2(b) We noted that you answered "no" to the question "*During the reporting period, you became insolvent or bankrupt or had a judgment rendered against you?*" on your 2018 Annual Practice Declaration. It appears that your response was not accurate. Please provide an explanation.

2(c) Please review Rule 3-49(a) and Rule 3-50(1). Given the results of the compliance audit, what arrangements, processes or procedures do you have in place, if any, to address the risk of an unsatisfied judgment and/or failure to report occurring in the future? Are any of these different than the ones put into place as a result of the compliance audit conducted in 2015 and your Conduct Review September 30, 2016?

[25] The Respondent replied to the Law Society's email by letter dated September 28, 2020. In this letter, he answered the Law Society's three questions as follows:

I response [sic] to point 2(a): That is a difficult question to answer. No, I did not have the funds at hand to pay off the debt in seven days. But, no doubt if, for instance, they were holding my child hostage, I am sure I could have come up with the money.

2(b): I had completely forgotten about it [the Judgment] by then. It had been paid off and I just didn't remember it. I had no reason to, and definitely did not, withhold the information from the Law Society intentionally.

2(c): I have reviewed the two Rules you mention in your letter and yes, I am familiar with them. As to procedures to ensure that this does not happen again, I can only say that I am well aware of the Rules and will diarize immediately if I do have a judgement registered against me in the future.

I can assure you and the Law Society that I will not ever forget this again.

ANALYSIS

[26] We have concluded that the Respondent has committed professional misconduct in both of the ways alleged in the Citation. In the discussion below, we will explain our reasoning with respect to each allegation. Before doing so, however, we will review the test for establishing professional misconduct.

Test for professional misconduct

[27] A lawyer has committed professional misconduct where the facts as made out disclose a marked departure from the conduct the Law Society expects of lawyers. This objective test is met where the respondent's conduct displays gross culpable neglect of their duties as a lawyer (*Law Society of BC v. Martin*, 2005 LSBC 16, at paras. 154, 171 and 172; *Re: Lawyer 12*, 2011 LSBC 35, at paras. 7, 8 and 42).

[28] Intentional misconduct is not a precondition of professional misconduct. Provided that gross culpable neglect is established, it matters not that the respondent may have acted in good faith or that the respondent's misstep was the result of a mistake or inadvertence (*Law Society of BC v. Guo*, 2021 LSBC 20, at para. 52; *Law Society of BC v. Gellert*, 2013 LSBC 22, at para. 67; *Law Society of BC v. Harding*,

2014 LSBC 52, at para. 79; *Law Society of BC v. Sangha*, 2020 LSBC 03, at para. 67).

- [29] The Law Society has the onus of establishing professional misconduct on a balance of probabilities, based on evidence that is “sufficiently clear, convincing and cogent” (*F.H. v. McDougall*, 2008 SCC 53; *Law Society of BC v. Schauble*, 2009 LSBC 11, at para. 43).

Allegation 1: failure to comply with Rule 3-50

- [30] Allegation 1 in the Citation asserts that the Respondent committed professional misconduct by failing to notify the Executive Director in writing of the circumstances of the Judgment and his proposal for satisfying it, contrary to Rule 3-50.
- [31] As already noted, Rule 3-50 requires a lawyer against whom a monetary judgment is entered, and who does not satisfy the judgment within seven days after it has been entered, to immediately notify the Executive Director in writing of: (a) the circumstances of the judgment, including whether the judgment creditor is a client or former client; and (b) the lawyer’s proposal for satisfying the judgment.
- [32] The Respondent admits that his conduct in failing to provide written notice to the Executive Director as required by Rule 3-50 constitutes professional misconduct. But he argues that, at this stage at least, we need not determine whether he intentionally breached Rule 3-50. In advancing this argument, the Respondent indicates that he plans to call evidence bearing on his state of mind at the Disciplinary Action stage of the proceeding, which he suggests will support a finding that the breach of Rule 3-50 was not intentional.
- [33] We concur that, at this stage in the process, it is unnecessary to decide whether the breach was intentional. Based on the evidence and the Respondent’s admission of culpability, we conclude that, regardless, the failure to comply with Rule 3-50 amounts to gross culpable neglect of his duties as a lawyer. Accordingly, the Respondent’s breach of Rule 3-50 amounts to professional misconduct.
- [34] We come to this conclusion for several reasons.
- [35] To begin with, an unsatisfied monetary judgment may be a sign of underlying problems that render a lawyer unable to properly perform their duties, or otherwise create a risk of danger to the public. This is why Rule 3-50 requires a lawyer to immediately notify the Law Society regarding any monetary judgment that has not been satisfied within seven days of being entered. Rule 3-50 thus enables the Law

Society to fulfill its function of protecting the public. It follows that a failure to comply with Rule 3-50 cannot be viewed as a mere administrative slip of no real consequence. See *Law Society of BC v. Lessing*, 2012 LSBC 19, at para. 60; *Law Society of BC v. Tungohan*, 2015 LSBC 02, at para. 168, review dismissed, 2016 LSBC 45, appeal dismissed, 2017 BCCA 423; *Law Society of BC v. Spears*, 2017 LSBC 29, at paras. 69 and 70; *Law Society of BC v. Boles*, 2016 LSBC 48, at paras. 69 and 70; *Law Society of BC v. Hart*, 2020 LSBC 51, at para. 155; and *Law Society of BC v. Lee*, 2021 LSBC 31, at paras. 94 and 101.

- [36] Furthermore, the Respondent had been told about the importance of Rule 3-50, and the need for lawyers to comply with its requirements, at the Conduct Review held on September 30, 2017. He assured the Conduct Review Subcommittee that he would not again transgress Rule 3-50. Even assuming that the Respondent did not intentionally breach Rule 3-50, his failure to comply with Rule 3-50, after having previously been alerted to and acknowledging the importance of compliance, displays gross culpable neglect of his duties as a lawyer. Indeed, at the Hearing before us, the Respondent agreed that the Conduct Review was a key factor that supported the conclusion that his breach of Rule 3-50 constituted professional misconduct. As the Respondent stated in his August 17, 2020 letter to the Law Society, in these circumstances he had “no good explanation” for non-compliance with Rule 3-50.
- [37] This is therefore not a case like *Law Society of BC v. Hart*, 2020 LSBC 51, at paras. 4 and 153 to 157, where the Law Society sought to discipline the respondent only for a breach of the Rules, and not for professional misconduct, arising from his failure to comply with Rule 3-50, because the failure arose out of the respondent’s ignorance of this particular requirement. The panel in *Hart* agreed, finding that the Law Society had established a breach of the Rules, but that the respondent did not commit professional misconduct in this regard. To similar effect, see also *Lee*, at paras. 8, 9, 95 and 100 to 103.
- [38] Rather, the Respondent’s case is similar to *Lessing*. There, the respondent failed to report six monetary judgments. The Law Society became aware of this failure through a complaint made by a judgment creditor. The respondent told the Law Society that he had been unaware of Rule 3-50, but now that he knew about the rule he would comply with it in the future. The respondent had two more monetary judgments entered against him, six and 14 weeks later, but failed to report these to the Executive Director, in breach of Rule 3-50. The panel in *Lessing* found that the respondent committed professional misconduct by not notifying the Executive Director about these latter two judgments because, by that point, he had been made aware of the existence of Rule 3-50.

[39] Finally, it is true that the amount of the Judgment was modest, the Respondent satisfied the Judgment five or six weeks after it was entered, and his breach of Rule 3-50 appears to have caused no actual harm to any clients, the judgment creditor, or the public. But the important protective purpose served by Rule 3-50 will be foiled unless lawyers provide written notice to the Executive Director as required. Actual resulting harm is not a precondition for establishing professional misconduct by reason of failing to comply with Rule 3-50. The concern here is that the Respondent's breach of Rule 3-50 deprived the Law Society of the opportunity to determine if he was facing financial problems that might put the public interest at risk. See *Lessing*, at para. 62.

[40] Accordingly, we hold that the Respondent committed professional misconduct by failing to report the Judgment to the Executive Director as required by Rule 3-50.

[41] To be clear, in coming to this conclusion we do not find it necessary to determine whether the Respondent's breach of Rule 3-50 was intentional. Granted, such a finding would strengthen the case for concluding that he had committed professional conduct (*Tungohan*, at paras. 168 to 171). But we are able to reach the same conclusion regardless. That said, the Respondent's state of mind at the time of the breach may well be relevant in determining the appropriate penalty at the Disciplinary Action stage of this matter.

Allegation 2: untrue information in 2018 Practice Declaration

[42] Allegation 2 in the Citation states that the Respondent committed professional misconduct by representing to the Law Society in his 2018 Practice Declaration that, during the reporting period, no judgment had been rendered against him when he knew or ought to have known this was untrue, contrary to rule 7.1-1 of the *BC Code*.

[43] Rule 7.1-1 of the *BC Code* states that:

A lawyer must

(a) reply promptly and completely to any communication from the Society;

(b) provide documents as required to the Law Society;

(c) not improperly obstruct or delay Law Society investigations, audits and inquiries;

(d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;

(e) comply with orders made under the *Legal Profession Act* or Law Society Rules; and

(f) otherwise comply with the Law Society's regulation of the lawyer's practice.

[44] As noted, the Respondent admits that he provided an untrue answer on his 2018 Practice Declaration when he stated that no judgment had been rendered against him during the reporting period. He also admits that giving this answer constituted professional misconduct. However, as with the Respondent's submissions regarding the breach of Rule 3-50, he argues that we can and should make a finding of professional misconduct without determining whether he knowingly provided an untrue answer.

[45] We agree that the Respondent's untrue answer constitutes professional misconduct, and that, in so concluding, we need not determine whether he knew the answer was untrue when he gave it.

[46] Our conclusion in this regard is based on the following considerations.

[47] First, for the reasons given at paragraph 35 above, it is important that lawyers provide correct information to the Law Society regarding any judgments rendered against them.

[48] Second, rule 7.1-1(f) of the *BC Code* requires lawyers to comply with the Law Society's regulation of their practices. This duty mandates that lawyers make best efforts to provide the Law Society with information that is accurate.

[49] Third, breaching this duty by providing incorrect information can constitute professional misconduct even where the lawyer did not intend to deceive. See, for example, *Law Society of BC v. Liggett*, 2011 LSBC 22, at paras. 23 to 33, in which the respondent's misrepresentation to the Law Society was held to constitute professional misconduct, despite the absence of an intent to deceive, because he was reckless about the potential consequences of this misinformation.

[50] It is worth adding that recklessness is a subjective state of mind that is established where an individual persists in a course of conduct, despite knowing that doing so will risk a prohibited result. Recklessness is sufficient to establish the *mens rea* for general intent criminal offences (*R. v. Tatton*, 2015 SCC 33, at para. 49; *R. v. Russ*, 2019 BCCA 455, at para. 24).

[51] At this stage in the process, we need not go so far as to find the Respondent reckless in providing the untrue answer on the 2018 Practice Declaration. In the 2016 Conduct Review, he had been alerted to the importance the Law Society ascribes to providing it with information about judgments rendered against lawyers. Also, the Judgment had been rendered only seven months before the Respondent gave the untrue answer. It caused him concern because of its registration on his Osoyoos property, which led him to take steps to ensure its discharge about two-and-a-half months later. The events should have been fresh in his mind. Plus, the question to which he provided an untrue answer was straightforward and required only a simple “yes” or “no” response. Assuming for the time being that the Respondent had “completely forgotten” about the Judgment, as he says in his September 28, 2020 letter to the Law Society, and that he had believed the impugned answer was true, this belief was patently unreasonable in the circumstances. The Respondent’s untrue answer thus amounts to gross culpable neglect of his duty to provide the Law Society with accurate information on the 2018 Practice Declaration.

[52] In this respect, the Respondent’s case is somewhat similar to *Law Society of BC v. Lo*, 2020 LSBC 09. There, the respondent misreported to the Law Society in his annual trust reports that his firm’s payroll source deductions had been remitted. The parties agreed that the misrepresentation was not made with an intent to deceive, but occurred because the respondent’s business partner, who was not a lawyer, had advised that the deductions had been remitted. The panel accepted that an untrue answer honestly and reasonably made “will generally weigh against a finding of professional conduct” (*Lo*, at para. 51). However, while the respondent had acted honestly, he failed to exercise due diligence in ensuring that the information from his business partner was accurate, in particular because the incorrect information was submitted for three years running and he was aware of red flags that the firm was falling behind in meeting some of its financial obligations. The panel held that, in these circumstances, the respondent’s failure to ensure that the information he provided to the Law Society was correct constituted a marked departure from the standard expected of lawyers and therefore warranted a decision of professional misconduct.

[53] The same conclusion is justified in the case before us. Given the circumstances described at paragraph 51 above, the Respondent’s untrue answer on the 2018 Practice Declaration displays a marked lack of due diligence and gross neglect of his duty to make best efforts to provide the Law Society with accurate information regarding a matter of importance to lawyer regulation. We therefore find that the Respondent committed professional misconduct by giving this untrue answer.

[54] We have reached this conclusion without deciding whether the Respondent knowingly answered this question untruthfully and so intended to deceive. An intentional falsehood would further support the conclusion that the Respondent committed professional conduct. But we are able to reach that same conclusion in any event. We nonetheless recognize that the Respondent's state of mind when he submitted his untrue answer may well impact our determination as to the appropriate penalty at the Disciplinary Action stage of this matter.

CONCLUSION

[55] The Law Society has established that the Respondent's conduct regarding each allegation in the Citation constitutes a marked departure from the standard that the Law Society expects of lawyers. Accordingly, we find that the Respondent has committed professional misconduct with respect to each allegation.