2021 LSBC 54
Hearing File No.: HE20200042
Decision Issued: December 16, 2021
Citation Issued: June 8, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

JOHN AARON HOSSACK

RESPONDENT

DECISION OF THE HEARING PANEL

Written Submissions:	September 3, 2021
Panel:	Thomas L. Spraggs, Chair Monique Pongracic-Speier, QC, Lawyer Paul Ruffell, Public representative
Discipline Counsel:	Alison Kirby
Appearing on his own behalf:	John Aaron Hossack

INTRODUCTION:

[1] This matter arises in connection with the Respondent's conduct while administering the estate of JB, a long-time client. JB died in November 2014. JB's will appointed the Respondent as JB's executor and trustee. The Respondent, his

firm and JB had also entered into a fee and retainer agreement during JB's lifetime for the Respondent and the firm to provide legal services to the estate and, in particular, to apply for probate of JB's will. The issues in this case arise from how long the Respondent took to apply for probate of JB's will and from the Respondent's communications with DS, a beneficiary of the estate.

[2] The citation (the "Citation") alleges that, between June 2018 and May 2020, the Respondent committed professional misconduct or conduct unbecoming the profession by failing to administer the estate in a timely manner and by failing to respond to communications from DS in a timely manner. The Respondent's conduct is alleged to have infringed rules 3.1-1, 3.1-2 and 3.2-1 of the *Code of Professional Conduct for British Columbia* (the "*Code*").

[3] The Respondent and the Law Society have made a joint submission to the Panel, pursuant to Rule 4-30 of the Law Society Rules (the "Rules"), as amended in March 2021. The Respondent admits that he committed professional misconduct by failing to provide the quality of service expected of a competent lawyer, as alleged in the Citation. The Respondent and the Law Society jointly submit that the appropriate disciplinary action is for the Respondent to be suspended from the practice of law for one month. The parties also agree that the Respondent should pay costs to the Law Society in the amount of $3,792.79, by way of four monthly, equal instalments.

[4] In support of the joint submission, the parties filed an agreed statement of facts (the "ASF"), cross-referenced to a book of documents.

[5] At the request of the parties, the hearing proceeded in writing.

[6] For the reasons that follow, we accept the ASF and the Respondent's admission of professional misconduct as alleged in the Citation. We are satisfied that it would not be contrary to the public interest in the administration of justice, within the meaning of Rule 4-30(6)(b), for us to accept the disciplinary action proposed by the Respondent and the Law Society. We do not consider it necessary to consider a disciplinary action different from the disciplinary action to which the Respondent and the Law Society consent. We order that the Respondent be suspended from the practice of law for one month and that he pay costs to the Law Society in the amount of $3,792.79, by way of four equal, monthly instalments.

THE FACTS:

[7] The Respondent was called to the Bar in British Columbia in May 1974. He practises law through his firm in Parksville, British Columbia, primarily in the areas of wills and estates, residential real estate and corporate law.

[8] JB was the Respondent's long-time client. In June 2009, the Respondent drew wills for JB and her husband. JB named the Respondent as her alternate executor in her 2009 will. In addition, in 2009, JB, the Respondent and the Respondent's firm entered into a fee and retainer agreement setting out the remuneration that the Respondent would receive if he acted as executor and trustee, and retaining the Respondent and his firm to provide legal services to JB's estate, including to apply for probate.

[9] JB's husband died in 2013. In the summer of 2014, the Respondent drew a new will for JB (the "Will"). The Will appointed the Respondent as JB's executor and trustee and bound the Respondent and the estate to the terms of the 2009 fee and retainer agreement. The Will named three beneficiaries, one of whom was DS. The Will gave DS a 50 per cent share of the residue of JB's estate.

[10] JB died in mid-November 2014, leaving no children but leaving an estate valued at approximately $300,000. The Respondent did not apply to probate the Will until March 2017.

[11] DS knew that she was a beneficiary of JB's Will. DS telephoned the Respondent several times between November 2014 and June 2016 to inquire about the probate of the Will. DS asked when she could expect to receive a distribution from the estate as she urgently needed access to funds.

[12] On June 6, 2016, DS made a complaint to the Law Society alleging that the Respondent had delayed the probate of the Will, had failed to communicate with her, and had failed to release the funds held by the estate. The Law Society referred DS's complaint to the Practice Standards Committee and a review of the Respondent's practice was ordered. The review was carried out between February and May 2017. Fourteen of the Respondent's client files were reviewed, although the estate administration file for the Will was not among them.

[13] The practice reviewer made several recommendations aimed at promoting timeliness in the Respondent's practice habits and addressing an issue with avoidance. In July 2017, the Practice Standards Committee endorsed the recommendations and directed the Respondent to provide periodic compliance

reports to the Committee. The Respondent submitted the required reports. In May 2018, the Respondent's practice standards file was closed.

[14] Meanwhile, the administration of JB's estate remained incomplete. The Respondent applied for probate of the Will on March 8, 2017, but the application was rejected. The Probate Registry issued a memo to the Respondent on March 24, 2017 identifying the deficiencies in the application materials. One deficiency was that JB's intestate successors were listed in the application materials as "unknown". The court advised that detailed affidavit evidence would be required to explain this notation and the efforts that had been made to try to identify JB's intestate successors.

[15] Between March 24, 2017 and July 2018, the Respondent did not take any substantial steps to remedy the deficiencies in the rejected probate application.

[16] DS continued to inquire about the administration of the estate. She contacted the Respondent eight times between June 2017 and July 2018. She reiterated her need for her inheritance because she was in a "very poor financial state". The Respondent variously replied to DS that the application was "still in" the Probate Registry; that he had to file a supplementary affidavit; and that he was taking other steps to administer the estate, such as "preparing income tax filings," when he was not doing so. The Respondent never told DS that the Probate Registry had rejected the application for probate filed in March 2017.

[17] In mid-July 2018, the Respondent filed additional affidavit evidence in response to the Probate Registry's memo of March 24, 2017. The Respondent deposed as to what JB told him when the Will was made about what she knew of her kin.

[18] In or around September 2018, the Probate Registry apparently advised the Respondent that he would need to apply, in Chambers, for an order waiving the requirement for service of the probate application on JB's potential intestate successors. In the 14 months that followed, the Respondent did not take any substantive steps to prepare the required application.

[19] Meanwhile, DS continued to contact the Respondent periodically to ask about her inheritance. For example, in October 2018, DS inquired about the possibility of an interim distribution from the estate. The Respondent replied that he could not make an interim distribution because he could not get bank accounts released without a grant of probate.

[20] DS contacted the Respondent again on January 7, 2019. The Respondent did not reply.

[21] On February 25, 2019, DS emailed the Respondent to ask whether everything requested by the Probate Registry had been filed. On March 1, 2019, the Respondent advised DS that he was "still working on setting down a date for the Court Hearing" and that he expected to "arrange a date momentarily." In fact, the Respondent was not working to set the application for hearing.

[22] On July 31, 2019, DS again emailed the Respondent and requested an update. The Respondent did not reply.

[23] On August 1, 2019, DS made a second complaint to the Law Society. She said "there has been one delay after another and I have been told on several occasions that things would be completed soon and it has now been almost five years and still nothing."

[24] On November 14, 2019 – five years after JB's death – the Respondent retained another lawyer to assist him with the application for probate of JB's Will. Probate was granted on November 23, 2020. Interim distributions were made to the beneficiaries in April and July 2021.

[25] The Law Society issued the Citation on June 8, 2020. Service of the Citation, in accordance with Rule 4-19 of the Rules, is admitted.

[26] Finally, it is convenient to note here that, in addition to the referral to the Practice Standards Committee in 2016 discussed at paragraph 12 above, the Respondent has a professional conduct record. He was subject to conduct reviews in 2012 and 2019 for breaches of undertakings given in real estate transactions.

ISSUES:

[27] The issues for the Panel on this application under Rule 4-30 are as follows:

(a) Should the panel accept the ASF and the Respondent's admission of a discipline violation?

(b) If so, should the panel impose the disciplinary action proposed in the joint submission?

DISCUSSION:

A preliminary matter: The decision to proceed with the hearing in writing

[28] On August 20, 2021, the Law Society filed an application for the hearing of the Citation to proceed in writing. The Respondent consented to the application. The Panel was persuaded that there is no issue of fact or law that would require oral evidence or oral submissions to do justice between the parties. We therefore granted the order sought. We have decided this matter on the written materials filed by the parties, which include the ASF, a letter from the Respondent confirming his admissions and consent to the jointly proposed disciplinary action, and written submissions by counsel for the Law Society.

Issue 1: Should the panel accept the ASF and the Respondent's admission of a discipline violation?

[29] Rule 4-30 provides as follows:

> **Admission and consent to disciplinary action**
>
> **4-30** (1) Discipline counsel and the respondent may jointly submit to the hearing panel an agreed statement of facts and the respondent's admission of a discipline violation and consent to a specified disciplinary action.
>
> (2) to (4) [rescinded]
>
> (5) If the panel accepts the agreed statement of facts and the respondent's admission of a discipline violation
>
> (a) the admission forms part of the respondent's professional conduct record,
>
> (b) the panel must find that the respondent has committed the discipline violation and impose disciplinary action, and
>
> (c) the Executive Director must notify the respondent and the complainant of the disposition.
>
> (6) The panel must not impose disciplinary action under subrule (5) (b) that is different from the specified disciplinary action consented to by the respondent unless
>
> (a) the respondent and discipline counsel have been given the opportunity to make submissions respecting the disciplinary action to be substituted, and
>
> (b) imposing the specified disciplinary action consented to by the respondent would be contrary to the public interest in the administration of justice.
>
> (7) An admission of conduct tendered in good faith by a lawyer during negotiation that does not result in a joint submission under subrule (1) is not admissible in a hearing of the citation.

[30] This Panel must first decide whether to accept the ASF and the Respondent's admission of a discipline violation: Rule 4-30(5). If the panel accepts these, the panel must find that the respondent has committed the discipline violation and proceed to impose disciplinary action: Rule 4-30(5)(b).

[31] We accept the ASF. The ASF and accompanying documents offer sufficient admissible evidence to allow us to make reliable findings of fact about the Respondent's conduct in connection with the matters alleged in the Citation.

[32] We turn to the question of whether to accept the Respondent's admission of a discipline violation. "Discipline violation" is defined in the Rules to mean, among other things, professional misconduct: see Rule 1, "discipline violation".

[33] In addressing the question of whether to accept the Respondent's admission of professional misconduct, we remain mindful that the usual rule in discipline proceedings is that the Law Society bears the burden of proving each allegation in a citation on the balance of probabilities: *Foo v. Law Society of British Columbia*, 2017 BCCA 151 at para. 63. Do the provisions of Rule 4-30(5) lift the Law Society's burden of proof?

[34] Generally, the function of an admission in legal proceedings is to remove the need for the moving party to prove what is admitted. Nonetheless, the language of Rule 4-30(5) calls upon a panel to determine whether to accept the respondent's admission of a discipline violation; the panel is not bound to do so.

[35] In our view, Rule 4-30(5) requires this Panel to thoughtfully assess the evidence in the ASF (and accompanying documents) and to consider whether, on the balance of probabilities, that evidence supports the Respondent's admission of a discipline violation. If the evidence supports the Respondent's admission, we should accept it. If the evidence does not support the admission, its appropriateness will be called into question.

[36] In undertaking the assessment required by Rule 4-30(5), we remain cognizant that "balance of probabilities" means "more likely than not," judged on clear, convincing and cogent evidence: *F.H. v. McDougall*, 2008 SCC 53 at paras. 39 and 44.

[37] To reiterate, the Citation alleges that, between June 2018 and May 2020, the Respondent failed to administer the estate in a timely manner and failed to respond to communications from the beneficiary DS in a timely manner. The Citation further alleges that this conduct amounted to a failure to provide the quality of service expected of a competent lawyer, contrary to one or more of rules 3.1-1, 3.1-

2 and 3.2-1 of the *Code*, and amounts to misconduct or conduct unbecoming the profession.

[38] We have no hesitation in concluding that, between June 2018 and May 2020, the Respondent failed to administer the estate in a timely manner. The ASF does not suggest that JB's estate involved special or unusual complexity. The Respondent admits that he did not take any substantive steps to advance the application for probate between April 2017 and July 2018 or between September 2018 and November 2019. The ASF offers no explanation for the Respondent's inaction during these periods of time.

[39] We also conclude that the Respondent failed to respond in a timely manner to DS's communications between June 2018 and May 2020. DS contacted the Respondent five times between June 2018 and May 2020. The Respondent admits that he did not respond to two of DS's communications (January 7 and July 31, 2019). A non-response is not a timely response.

[40] The Respondent admits that his failures to administer the estate and to respond to DS's communications in a timely manner are contrary to his obligations, pursuant to rules 3.1-1, 3.1-2 and 3.2-1 of the *Code*, to provide the quality of service expected of a competent lawyer. The admission is appropriate.

[41] Rule 3.1-1 of the *Code* defines "competent lawyer" in relevant part, as follows:

> In this section
>
> **"competent lawyer"** means 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;
> >
> > (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
> >
> > (c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:
> >
> > (i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(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; [and]

(i) managing one's practice effectively …

[42] Rule 3.1-2 provides, "A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer."

[43] Rule 3.2-1 provides, "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."

[44] The Respondent's long periods of inaction in the probate matter between June 2018 and May 2020 place him offside the service standards articulated in the *Code*.

[45] Additionally, the Respondent's communications with DS during the time period at issue in the Citation did not meet the standards expected of lawyers with respect to

timeliness, diligence or efficiency in practice. As noted above, the Respondent twice failed to reply to DS's inquiries.

[46] The next question is whether to accept the Respondent's admission that his failure to provide the quality of service expected of a competent lawyer amounts to professional misconduct. Not every breach of the Rules or the *Code* will amount to professional misconduct. "Professional misconduct" means a *marked departure* from the conduct that the Law Society expects of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171. Factors to consider in determining whether the "marked departure" test is met may include the gravity of the misconduct, its duration, the number of breaches, the presence or absence of bad faith and the harm caused by the misconduct: see *Law Society of BC v. Bronstein*, 2021 LSBC 19 at para. 172 and the cases cited therein.

[47] In our view, the Respondent is correct to concede that he engaged in professional misconduct.

[48] The Respondent accepted JB's appointment of him as her executor and trustee. He and his firm also contracted with JB to provide the legal services necessary to discharge these functions. In these circumstances, the Respondent had a duty to diligently probate JB's Will and efficiently and conscientiously distribute the proceeds of the estate to those JB intended to benefit. He did not do so between June 2018 and May 2020 although, by June 2018, it had already been three and a half years since JB's death. The ASF offers no rationale for the Respondent's persistent inaction.

[49] Two additional features of the Respondent's conduct lend it the character of a "marked departure" from the expected standards. First, the Respondent failed to advance the probate application despite knowing that DS, the beneficiary of the largest share of the estate, was in a bad way financially and needed access to her inheritance. Second, the Respondent tried to hide his inaction from DS. He even went so far as to lie to her in his email of March 1, 2019. These aspects of the Respondent's behaviour are wholly unacceptable.

[50] Turning to the second allegation in the Citation, it is highly concerning that the Respondent neglected to answer not one, but two, reasonable inquiries from DS between June 2018 and May 2020. That behaviour was not only discourteous but inconsistent with the Respondent's duty, as executor, to keep the beneficiaries of JB's estate informed about matters concerning the estate. We are satisfied that the Respondent's failure to respond was professional misconduct, within the meaning of s. 38(4) of the *Legal Profession Act*, SBC 1998, c. 9.

[51] As we have accepted the ASF and the Respondent's admission of a discipline violation, we are bound to find that the Respondent committed the professional misconduct alleged in the Citation and to impose disciplinary action: Rule 4-30(5)(b).

Issue 2: Should the panel impose the disciplinary action proposed in the joint submission?

[52] The effect of Rule 4-30(6)(b) is to require the panel to impose the disciplinary action consented to by the respondent unless that disciplinary action "would be contrary to the public interest in the administration of justice."

[53] The Law Society argues in its submissions that the "public interest test" is stringent. The Law Society highlights that, in the criminal sentencing context, the Supreme Court of Canada has found that a joint sentencing recommendation may be considered as contrary to the public interest if it is "*so markedly out of line* with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system": *R. v. Anthony-Cook*, 2016 SCC 43 at para. 33 [emphasis added]. Rejection of a joint sentencing recommendation in the context of criminal law therefore "… denotes a submission *so unhinged* from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all of the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down …": *Anthony-Cook* at para. 34 [emphasis added].

[54] The *Anthony-Cook* standard for evaluating joint sentencing recommendations has been adopted by most law societies in Canada to evaluate joint proposals for professional disciplinary action: see *Law Society of BC v. Clarke*, 2021 LSBC 39 at para. 86 and the cases cited therein. This Tribunal has accepted the applicability of the *Anthony-Cook* test in connection with joint proposals for disciplinary action pursuant to the past and current versions of Rule 4-30: see *Law Society of BC v. Becker*, 2021 LSBC 11 at para. 4 and *Clarke* at paras. 83 to 87, respectively.

[55] It is unnecessary for us to add to the commentary on the applicability of the *Anthony-Cook* test in evaluating joint proposals for disciplinary action under Rule 4-30. Even if a less stringent test were to apply, we would not find that the proposed sanction is contrary to the public interest in the administration of justice.

[56] *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 55, sets out a non-exhaustive list of factors to consider in the assessment of a disciplinary penalty:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[57] We have considered the *Lessing* factors in assessing whether it would be contrary to the public interest in the administration of justice to accept the jointly proposed disciplinary action, although we will not discuss each separately.

[58] The circumstances of this case are that, starting three and a half years after a client's death and for the better part of two years thereafter, the Respondent, a senior lawyer, failed to take sufficient meaningful action to administer his client's estate. The Respondent's inaction persisted although the Probate Registry had twice informed the Respondent what he needed to do to proceed with the application for probate. The Respondent also failed to communicate in a timely fashion with a needy beneficiary of the estate. The Respondent's failure of diligence and his failure to adequately communicate with DS could not but shake public confidence in the integrity of the profession.

[59] The Law Society has drawn the Panel's attention to a number of discipline cases involving misconduct said to be of a similar quality to the Respondent's misconduct in this case.

[60] In *Law Society of BC v. Smiley*, 2006 LSBC 31, the lawyer failed to follow the client's instructions to file certain tax forms, but told the client that he had done so. The lawyer also failed to respond to the Law Society's communications while the lawyer's conduct was being investigated. The lawyer was suspended for one month.

[61] In *Law Society of BC v. McLellan*, 2011 LSBC 23, the lawyer failed to take substantive steps to move a client matter forward for six years. He also failed to respond to communications from the client. The lawyer had a professional conduct record of two conduct reviews and a citation for unrelated misconduct. He apparently was not cautioned for the conduct at issue in the reported decision. The client was not misled. There was evidence that the lawyer was experiencing difficult personal circumstances, was engaged in counselling and had restricted his practice to areas within his experience. He was fined $5,000, which we are told is the equivalent of a $10,000 fine today.

[62] In *Law Society of BC v. Simons*, 2012 LSBC 23, the lawyer failed to take substantive steps in the client's medical malpractice action for three and a half years. He failed to respond substantively to communications from the client. He also failed to inform the client (the plaintiff in the action) of an application to dismiss for want of prosecution until after the application had been granted, with costs in favour of the defendants. The lawyer was found to have misled the client and to have failed to provide her with the expected quality of service. The lawyer was suspended for one month.

[63] In *Law Society of BC v. Menkes*, 2016 LSBC 24, an experienced lawyer failed to take steps to advance his client's case for four years. He also failed to respond to communications from his client and to confirm that he had taken the steps he believed, and had told the client, he had taken. The lawyer candidly admitted his misconduct when he missed a limitation period and advised the client to retain other counsel. The lawyer had a professional conduct record consisting of three unrelated conduct reviews and a referral to the Practice Standards Committee aimed at the lawyer's struggles with procrastination. The lawyer was fined $7,500 (said to be equivalent to $12,500 today).

[64] The cases cited by the Law Society are in some respects similar to, and in some respects different from, the Respondent's case. Taken together, however, the cases

do not suggest that the parties' joint discipline proposal would offend the public confidence in the administration of justice.

[65] There are also other factors at play in the case that persuade us that the jointly proposed one-month suspension does not depart from the standard set out in Rule 4-30(6)(b).

[66] The first is that the professional misconduct at issue occurred *after* the Respondent had already undergone a practice review arising from DS's 2016 complaint to the Law Society. In our view, the persistence of problematic conduct after the practice review is an aggravating factor that leads to the expectation of progressive discipline and, more specifically, a suspension rather than a fine.

[67] Second, the Respondent failed to advance the administration of the estate between June 2018 and May 2020, despite repeated advice from DS that she needed access to her inheritance because of her poor financial situation. We infer from the ASF that the Respondent's inaction caused some degree of harm to DS from stress and from the likely deferral of a needed inheritance. This is also an aggravating factor in the Respondent's case.

[68] A third aggravating factor is that the Respondent was dishonest in his dealings with DS. Put simply, when asked by DS to explain whether the administration of the estate was progressing, the Respondent was not candid with DS but dissimulated and even lied to her. This aspect of the Respondent's behaviour is highly concerning.

[69] There are two notable mitigating factors in this case. The first is that there is no evidence that the Respondent benefitted (or sought to benefit) from his misconduct. The second is that the Respondent's admission of professional misconduct and the negotiated disciplinary action have preserved public resources and minimized inconvenience. Most importantly, the admission has avoided inconvenience to potential witnesses whose evidence may have been required in a contested hearing.

[70] In summary, in all the circumstances, we cannot say that the jointly proposed sanction of a one-month suspension from the practice of law would be contrary to public confidence in the administration of justice. We therefore impose the disciplinary action to which the parties consent.

ORDER

[71] The Respondent is suspended from the practice of law for one month starting on January 1, 2022 or another date agreed to by the parties.

[72] The Respondent must pay costs to the Law Society in the amount of $3,792.79, by way of four equal, monthly instalments, starting on January 1, 2022 or another date agreed to by the parties.