

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

Marcus O'Sullivan

Respondent

**Decision of the Hearing Panel
on Facts and Verdict**

Hearing date: December 13, 2006

Panel: Gavin Hume, Q.C., Chair, David Renwick, Dirk Sigalet, Q.C.

Counsel for the Law Society: James Doyle

Counsel for the Respondent: Dean Lawton

Background

[1] On April 5, 2006, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation directed that this Panel inquire into the Respondent's conduct as follows:

1. On a wills and estate file, you failed to provide your clients O.W. and N.K-W. with a quality of service at least equal to that which would have been expected of a competent lawyer in a similar situation including, but not limited to:
 - (a) you failed to keep your client reasonably informed;
 - (b) you failed to answer reasonable requests from your client for information;
 - (c) you failed to answer within a reasonable time, a communication that required a reply; and
 - (d) you failed to do the work in hand in a prompt manner so that its value to the client was not diminished or lost;

contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*

2. On a motor vehicle file, you failed to provide your client F.S. with a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, including but not limited to:

- (a) you failed to keep your client reasonably informed;
- (b) you failed to answer reasonable requests from your client for information;
- (c) you failed to answer within a reasonable time a communication that required a reply;
- (d) you failed to do the work in hand in a prompt manner so that its value to the client was not diminished or lost; and
- (e) you failed to disclose all relevant information to the client, and candidly advise the client about the position of a matter, whether such disclosure or advice might reveal neglect or error by you;

contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*

3. On a wills and estate file, you failed to provide your client R.H. with a quality of service at least equal to that which would have been expected of a competent lawyer in a similar situation including, but not limited to:

- (a) you failed to keep your client reasonably informed;
- (b) you failed to answer reasonable requests from your client for information;
- (c) you failed to answer within a reasonable time a communication that required a reply;
- (d) you failed to do the work in hand in a prompt manner so that its value to the client was not diminished or lost;

contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*.

[2] The requirements for service of this citation upon the Respondent, pursuant to Rule 4-15, were admitted by the Respondent.

Agreed Statement of Facts

[3] Counsel provided the Panel with an extensive Agreed Statement of Facts. In summary, the facts were as follows:

Count 1

1. O.W. and her sister N.K-W. were executrices named in the will of their father. The Respondent was retained by the sisters in December 2002 and was granted Power of Attorney as the sisters lived out of the jurisdiction. Some steps were taken by the Respondent between January and April 2003. In June 2003 O.W. requested in writing an update from the Respondent. No response was received. Further updates were requested in August, 2003. No significant steps were taken from this date until

March 2004, when the Respondent applied for, and obtained, an Order granting him Letters of Administration with Will Annexed. No steps were taken for the balance of 2004.

2. On December 31, 2004, the Respondent was suspended for failing to file his trust report, and in January 2005 O.W. filed a complaint with the Law Society.

3. The Law Society commenced inquiries of the Respondent with respect to his conduct in January 2005. Further inquiries were made in February and March 2005. While the Respondent was suspended, another member of the Law Society took some steps in the estate.

4. In March 2005, the Respondent replied to the Law Society, in effect admitting that he had not responded to inquiries from his client O.W.

5. It appeared no further steps were taken in the estate, and O.W. again wrote to the Law Society concerning the Respondent's response.

6. In July 2005, the Law Society wrote to the Respondent requesting further follow-up. Subsequent requests were made in August, and a response was received in September. In October 2005, the Law Society again wrote to the Respondent. In the interim, the Respondent advised that he suffered a health problem but in November indicated he would provide a response. The Law Society subsequently arranged for the pick-up of the Respondent's file.

Count 2

7. F.S. retained the Respondent in July 2002 to conduct on her behalf an action arising as a result of a motor vehicle accident. At the time F.S. was living out of the jurisdiction. At the time of the retainer, a trial was scheduled for September 2002. By consent, the trial was adjourned to July 2003, with documents to be delivered within a stated period.

8. In October 2002, the Defendant applied for an Order striking out the pleadings for failure to produce the documents and to respond to certain Interrogatories. An Order was made by the presiding Master requiring a response to the Interrogatories, amongst other things, failing which, the Plaintiff's case was to be dismissed.

9. In November 2002, the Respondent provided some material, which defence counsel viewed as not complying with the Order. As a result, defence counsel advised the Respondent that he would be seeking to have the matter struck. In December 2002, defence counsel obtained a dismissal and sought to recover costs. Subsequently, in December 2002, the Respondent advised defence counsel he would seek to set aside the dismissal, though it appears no steps were taken. In March 2003, F.S., unaware that the claim had been dismissed, provided certain documents to the Respondent. The Respondent communicated with F.S. in May 2003, but without revealing the status of the litigation.

10. There was further communication between the Respondent and defence counsel in December 2003, but in April 2004, defence counsel advised the Respondent that he had not received a response to the December communication and, as a result, he was scheduling a taxation.

11. In June 2004, defence counsel confirmed that he had received a call from the Respondent wherein the Respondent indicated he had instructions to apply to set aside the dismissal and that the

matter would be scheduled in August.

12. As no materials were received by defence counsel, he served a notice of motion seeking an Order confirming that the claim had been dismissed.

13. Defence counsel wrote further in July and August but did not receive a response, as a result of which, the motion was scheduled for August 2004, though it was adjourned to September and then generally, due to the Respondent's health problems.

14. In January 2005, defence counsel rescheduled the matter, as he had not heard from the Respondent, though the matter was again adjourned, it appears at the request of the Respondent, to March.

15. In March 2005, a notice of motion was filed seeking a declaration that there had been compliance with the Master's Order. Affidavits were filed in support of that, including the Respondent's Affidavit, which, in part, contained an admission that the Respondent was largely responsible for the delay. This motion was dismissed. A complaint was filed with the Law Society. A response was sought and obtained by the Law Society, which contained an admission that the Respondent was responsible for the delays. Further inquiries were made by the Law Society with some response that was viewed by the Law Society as inadequate.

Count 3

16. M.H. died in December 2003, and the Respondent was appointed as executor under the will. In January, some accounts were paid, though other accounts remained unpaid. Further payments were made later in the year and, in July 2004, the Respondent sent a notice to the beneficiaries of his intention to apply for probate. No further steps were taken until May 2005, when one of the beneficiaries wrote to the Respondent making inquiries.

17. In June 2005, 18 months after the death, the Respondent applied for a wills search. Probate was applied for but was rejected by the Registry. A complaint was filed with the Law Society in June 2005, and the Law Society made inquiries of the Respondent. In response, the Respondent admitted that he had not responded to the beneficiaries, despite their requests. The Law Society sought further details, though no response was received except a voicemail message that the Respondent was suffering from health problems. In November 2005, the Respondent advised he was back in the office, and the Law Society requested his file for review. A further response was requested but not received.

[4] By way of the Agreed Statement of Facts, the Panel was provided with some further background information with respect to the Respondent, who had suffered from difficult medical problems for some time, including depression and chronic heart disease. The Respondent, as a result, has decided that he would retire from practice on December 31, 2006.

[5] A custodian was appointed on December 7, 2006. Other counsel has assumed conduct of the litigation, and the estates are in the process of being wound up, apparently to the satisfaction of the clients.

[6] Chapter 3, Rule 3 of the *Professional Conduct Handbook* requires that lawyers meet a quality of service equivalent to a competent lawyer in a similar situation. It goes on to particularize ways that that service can be measured by examining, amongst other things, the level of communication with the lawyer's

client including responding to the client's requests for information, responding to communications, and performing services in a prompt manner.

[7] The Respondent admitted that, contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*, he:

(a) failed to provide his clients O.W. and N.K-W. with a quality of service at least equal to that which would have been expected of a competent lawyer in a similar situation including, but not limited to:

- i. failing to keep his client reasonably informed;
- ii. failing to answer reasonable requests from his client for information;
- iii. failing to answer within a reasonable time, a communication that required a reply; and
- iv. failing to do the work in hand in a prompt manner so that its value to the client was not diminished or lost.

(b) failed to provide his client F.S. with a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, including but not limited to:

- i. failing to keep his client reasonably informed;
- ii. failing to answer reasonable request from his client for information;
- iii. failing to answer within a reasonable time a communication that required a reply;
- iv. failing to do the work in hand in a prompt manner so that its value to the client was not diminished or lost; and
- v. failing to disclose all relevant information to the client, and candidly advise the client about the position of the matter, whether such disclosure or advice might reveal neglect or error by him.

(c) failed to provide his client R.H. with a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation including, but not limited to:

- i. failing to keep his client reasonably informed;
- ii. failing to answer reasonable request from his client for

information;

iii. failing to answer within a reasonable time a communication that required a reply; and

iv. failing to do the work in hand in a prompt manner so that its value to the client was not diminished or lost.

[8] The Panel considered the decision in *Law Society of BC v. Williamson*, 2005 LSBC 04. In *Williamson* the panel determined a failure on the part of the lawyer to advance the client's case in a prompt and diligent matter, combined with the failure to communicate properly with the client concerning the progress of the matter, constituted professional misconduct.

[9] After reviewing the Agreed Statement of Facts and the various exhibits and considering the admission, the Panel concludes that the Respondent has engaged in professional misconduct.

[10] At the request of the Respondent's counsel and with the consent of the Law Society, the Panel adjourned the penalty hearing. The Panel decided to do this as the Respondent is retiring and a custodian has been appointed to look after his practice. The adjournment will provide an opportunity for the affairs of the Respondent to be clarified and for the penalty to be more appropriate to the then current circumstances.