2007 LSBC 24
Report issued: April 27, 2007
Citation issued: March 8, 2006

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

Raymond Barton

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: September 28, 2006 and February 12, 2007

Panel: G. Glen Ridgway, Q.C., Chair, Ralston S. Alexander, Q.C., Robert C. Brun, Q.C.

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: Donald P. Kennedy, Q.C.

Background

[1] On March 8, 2006, a citation was issued against the Respondent, a former member of the Law Society of British Columbia, which as amended, authorized this Panel to enquire into the following conduct:

> 1. While you were a non-practising member of the Law Society, you engaged in the unauthorized practice of law contrary to the *Legal Profession Act* when you performed legal services or offered to perform legal services for W.F. and M.F. in the expectation of a fee, gain or reward from W.F. and M.F.

[2] The Respondent admitted service of the citation and the Affidavit of Service was marked as an Exhibit to the proceedings.

[3] The Respondent admitted that at all times material to the citation, his status was that of non-practising lawyer.

Facts

[4] In about 1993, W.F. purchased a Placer claim (" the claim") from W.P. at a cost of approximately $5,000. W.F. registered his title to the claim by filing a bill of sale at the Mineral Titles Branch. At that time W.P. provided W.F. with a map purporting to show the size and location of the claim.

[5] In 2004 W.F. was shown a GPS map that demonstrated the claim was much smaller than he had believed.

[6] W.F. made enquiries with the Mineral Titles Branch but was not able to determine why the size of the claim was diminished.

[7] W.F. said that he was advised at that time by W.P. and one other individual to see the Respondent about the claim. W.F. said that these individuals told him that the Respondent was a lawyer.

[8] W.F. testified that he first went to see the Respondent because he understood that he was a lawyer.

[9] W.F. testified that he went to see the Respondent " . . .to see if he could look into it and see why they took a big chunk of our claim out. What were the grounds for taking it out?"

[10] W.F. testified that he first met the Respondent in late June or July of 2004. Only W.F. and the Respondent were present at the first meeting.

[11] Following the first meeting, there were a number of further meetings, some of which were also attended by M.F., the spouse of W.F. According to W.F., at their first meeting he had a discussion with the Respondent about payment for services. His evidence in chief was as follows:

> Q Did you have any discussions with him at that meeting about paying him for his services?
>
> A Well, I asked him how much to pay him and he says, " Well, I can't - - I'm not in a position to charge you," he said. He said in a week or so, he should be reinstated, and it would be different then. So I just offered to give him $100 for his work.
>
> Chair: Did you offer it to him or did you give it to him?
>
> A I gave it to him. Offered it to him, yeah.
>
> Q Did he give you a receipt for the $100?
>
> A No, that's what he said he couldn't, because he wasn't in a position at that time to give us one.

[12] Counsel for the Law Society also asked W.F. if the Respondent ever told him that he wasn't giving legal advice. To that question W.F. responded:

> A He wasn't giving me legal advice. The way I look at it, what he was doing was something I'd asked him to do.

[13] There was some dispute over exactly how much was paid to the Respondent. According to W.F., he gave the Respondent $100 at their first meeting. He testified that, by the end of the summer, he had given him $750. He did not get receipts for these payments. According to W.F., the Respondent later said that it might be possible to resolve matters by having a computer analysis done to establish the proper size and location of the claim. W.F. was told that he should send $1,200 to the Respondent to pay the cost of having the data put into the computer. A few days after the $1,200 amount was sent to the Respondent, the Respondent told W.F. that the computer specialist declined to run this information through the computer program.

[14] Following this development, W.F. decided that the dispute was becoming too involved, and he delivered a note to the Respondent asking him to " drop it" . In cross-examination W.F. said that he ultimately decided to drop the matter because, " It just seemed to me at the time we were heading up the wrong road."

[15] At a later date, W.F. asked the Respondent for an accounting as to the amount of money paid, but

he was never provided with one.

[16] When specifically questioned about the payments for services, W.F. said that the first $100 that he gave to the Respondent was in the nature of a payment for a favour. W.F. said that later, when he made further payments, he took it that the Respondent had been reinstated. W.F. felt that at some point he stopped paying for a favour and started paying for services. He agreed however that the Respondent never told him that he had been reinstated.

[17] W.F. testified that the Respondent told him that he was going to retain the services of Mr. M. to conduct enquiries as to the proper boundaries of the claim. In cross-examination W.F. testified as follows:

> Q Here's what I'm going to suggest to you. The way this was, was that he didn't - - he said he couldn't take money for his legal work, right, until he was reinstated. Is that right?
>
> A Yeah.
>
> Q But he could take money for the work he was doing that wasn't legal work?
>
> A Well, I wouldn't know that.
>
> Q You knew he was paying Mr. M., didn't you?
>
> A Was that illegal?
>
> Q You knew that Mr. M. was going out to the site and looking it over, right, and checking it right?
>
> A Yeah.
>
> Q And you didn't think that was legal work?
>
> A Well, I just didn't think either way. He was handling it so, you know, you're doing it that way. Do it that way.

[18] M.F., the spouse of W.F., also gave evidence. She testified that she was present with W.F. on some occasions when he met with the Respondent. When asked in chief about W.F.' s dealings with the Respondent she stated:

> Q Can you tell me about the nature of the conversations that your husband and you had with the Respondent in the meetings where you were present?
>
> A Well, the reason my husband went to see him was to see if he could find out legally why the Wayside took the corner out of his claim, or the fellow that did the GPS took it out, and why it was recorded in the Mining Office that way. And then, if he could, to find out how we could go about getting it reinstated.

[19] M.F. testified that her husband went to the Respondent because, " We felt we needed a lawyer and Mr. Barton was recommended to us" .

[20] The Respondent called Mr. M. to give evidence. Mr. M. testified that he prepared a preliminary report wherein he concluded that, as a result of an error that occurred in 1993, the size of the claim had

been diminished. In that year W.P. had incorrectly re-staked the claim, at which time he over-staked other peoples property and also did not include all of the existing property in the claim. Consequently, when W.P. sold the claim to W.F. the map that purported to describe the size of the claim was incorrect.

[21] Mr. M. concluded that, given the nature of the problem, it was too late for W.F. to do anything about it with the Mineral Titles Branch.

[22] Mr. M. testified that he had been present at some of the meetings between the Respondent and W.F. Mr. M. testified:

> Q And what can you say about the Respondent discussing his predicament with the Law Society to W.F.?
>
> A Well, I told him that he can't - - that Ray Barton cannot practise law because - - I use the term sheepskin, which is a university degree or whatever you call it. He's got no sheepskin, so he can't practise law.
>
> Q Did the Respondent say that?
>
> A Yeah. He told Mrs. and Mr. F. and myself that he - - you know, I said I heard rumours of it and he said, " Yes, I do not have my ticket," or whatever.

[23] Mr. M. also testified that he heard the Respondent tell W.F. and M.F. that " I'm not a lawyer."

[24] Mr. M. was questioned on the draft report that he prepared at the request of the Respondent. Mr. M. testified that he prepared the report and the Respondent had nothing to do with it. Curiously, however, the report indicated that it was " Submitted by Raymond Barton." Mr. M. said he put that in the report because at the time he was living at the Billy Barker Hotel and that he did not have a permanent address. On page 3 of the report, Mr. M. stated that he had written " Submitted by Raymond Barton, B.A. LLB" , because he had taken that off one of the Respondent's business cards. Mr. M. said that the reference " Attention: Raymond Barton, Lawyer" on page 7 of the report was also his error. He said at the time he prepared the report he knew that the Respondent was not a lawyer and that he had simply " screwed up there."

[25] The Panel heard evidence from T.M., who is the common-law spouse of the Respondent. She testified that on one occasion she had been at the Respondent's residence when she overheard a conversation between W.F. and the Respondent. She said she only heard portions of the conversation. She specifically recalled hearing the Respondent explain to W.F. that he would have Mr. M. carry out some research and prepare a report. She said the Respondent told W.F. that he was a non-practising lawyer. She also heard the Respondent say to W.F. that they should take " one step at a time" . She did not hear any discussion about fees. She believed this conversation took place approximately two summers ago.

[26] The Respondent also gave evidence. He testified he had been called to the Bar in Manitoba in 1977 and to the British Columbia Bar in 1983. He became a non-practising member on December 31, 2003.

[27] The Respondent said that Mr. and Mrs. F. came to see him at his residence. They had been referred by a former client, W.P. The Respondent said that W.F. indicated that he thought he needed a lawyer. The Respondent said he told W.F. that he was getting ahead of himself. He suggested first they needed someone like Mr. M. to investigate the matter. At that point, the Respondent said he told W.F. that he was a non-practising lawyer. He said that he told W.F. that, by the time Mr. M. got through his enquiries,

he would likely have been reinstated. He told W.F. that, while he could do the work on a pro bono basis, this was not a pro bono case.

[28] While W.F. had testified that he had paid $1,950 to the Respondent, the Respondent thought that he had actually received only $1,700, including the $1,200 for the computer determination. The Respondent said that he did not believe he was providing legal advice, but rather, was providing mining advice. The Respondent said that, although W.F. had requested an accounting, he did not mail it to him since he had thought that W.F. would drop by his residence to pick it up. The Respondent said in cross-examination that he had considered at the time whether what he was doing was the practice of law, but he determined in his own mind that it was not. The Respondent agreed that the first step in the process was to discover the facts so that he could then tell W.F. his options. It was for this reason, he said, he asked Mr. M. to try to determine the exact location of the claim. The Respondent said that W.F. threw in the towel before he was advised of his options.

[29] The Respondent agreed that he suggested to W.F. that a meeting might take place between W.F. and W.P. to try to work things out.

[30] When asked about the fees paid to Mr. M., the Respondent said he thought he had given him $500 for the report, while Mr. M. said he had only received $150.

[31] While there is some uncertainty as to exactly how much money W.F. paid to the Respondent and how much the Respondent paid to Mr. M., the Respondent agreed that he kept all of the funds received except for the $150 to $500 that he paid to Mr. M. When asked what he had done to earn the money that he kept, the Respondent said he had the expertise to hire Mr. M., and he knew how to motivate him to do a proper assessment. The Respondent suggested that Mr. M. was a " highway staker" , which he explained means that he is someone who cheats.

[32] The Respondent testified that he told W.F. that he was not doing legal work. The Respondent also testified that he believed that, by the time legal work would be required, he would have been reinstated. The Respondent was cross-examined on the conditions set by the Law Society prior to these events that he had to meet before he could be reinstated. The Respondent said that he believed that he had satisfied those requirements by June or July of 2004, and that he would be reinstated shortly after that.

[33] The Respondent testified that he had wanted to provide an accounting to W.F. on the fees, but he believed that W.F. would simply come and pick this up. Later, he asked the Law Society for W.F.' s address so he could send the accounting, but he said he was told that they would not provide this information to him. In the result, he never supplied an accounting to W.F.

[34] The Respondent said that it was agreed at his last meeting with W.F. that the $1,200 that had received from W.F. for the computer assessment could instead be applied to his bill. He maintained that none of the work that he had done was " legal work" . When asked why he kept all the funds he said he was short of cash and needed the money.

Law

The Scope of the Hearing

[35] The *Legal Profession Act*, SBC 1998, c. 9, s. 38(4) provides:

Discipline hearings

38 (1) This section applies to the hearing of a citation.

. . .

(4) After a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed one or more of the following:

(i) professional misconduct;

(ii) conduct unbecoming a lawyer;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules;

(c) make any other disposition of the citation that it considers proper. (underlining added)

[36] The circumstances alleged in this citation require the Panel to consider s. 38(4)(a) and (b)(i), (iii) and (v).

The Practice of Law

[37] Section 1 of the *Legal Profession Act* defines the practice of law in this way:

Definitions

" practice of law" includes

(a) appearing as counsel or advocate,

(b) drawing, revising or settling

(i) a petition, memorandum, notice of articles or articles under the *Business*

Corporations Act, or an application, statement, affidavit, minute, resolution, bylaw or other document relating to the incorporation, registration, organization, reorganization, dissolution or winding up of a corporate body,

(ii) a document for use in a proceeding, judicial or extrajudicial,

(iii) a will, deed of settlement, trust deed, power of attorney or a document relating to a probate or letters of administration or the estate of a deceased person,

(iv) a document relating in any way to a proceeding under a statute of Canada or British Columbia, or

(v) an instrument relating to real or personal estate that is intended, permitted or required to be registered, recorded or filed in a registry or other public office,

(c) doing an act or negotiating in any way for the settlement of, or settling, a claim or demand for damages,

(d) agreeing to place at the disposal of another person the services of a lawyer,

(e) giving legal advice,

(f) making an offer to do anything referred to in paragraphs (a) to (e), and

(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),

but does not include

(h) any of those acts if not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed,

(i) the drawing, revising or settling of an instrument by a public officer in the course of the officer's duty,

(j) the lawful practice of a notary public,

(k) the usual business carried on by an insurance adjuster who is licensed under Division 2 of Part 6 of the *Financial Institutions Act,* or

(l) agreeing to do something referred to in paragraph (d), if the agreement is made under a prepaid legal services plan or other liability insurance program.

[38] Section 15(1) provides:

Authority to practise law

15(1) No person, other than a practising lawyer, is permitted to engage in the practice of law, except

(a) a person who is an individual party to a proceeding acting without counsel solely on his or her own behalf,

(b) as permitted by the *Court Agent Act,*

(c) an articled student, to the extent permitted by the benchers,

(d) an individual or articled student referred to in section 12 of the *Legal Services Society Act,* to the extent permitted under that Act,

(e) a lawyer of another jurisdiction permitted to practise law in British Columbia under section 16 (2) (a), to the extent permitted under that section, and

(f) a practitioner of foreign law holding a permit under section 17 (1) (a), to the extent permitted under that section.

[39] Section 85 provides in part:

Enforcement

85(1) A person commits an offence if the person

(a) contravenes section 15, ...

[40] In argument counsel for the Law Society referred the Panel to the definition of the " Practice of law" contained in *Black's Law Dictionary* (6th Edition). That definition provides as follows:

> The rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent. *R.J. Edwards, Inc. v. R.L. Hert*, Okl., 504 P.2d 407, 416. It is not limited to appearing in court, or advising and performing of services in the conduct of the various shapes of litigation, but embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and in larger sense includes legal advice and counsel and preparation of legal instruments by which legal rights and obligations are established. *Washington State Bar Ass'n v. Great Western Union Federal Sav. and Loan Ass'n*, 91 Wash.2d 48, 586 P.2d 870. A person engages in the " practice of law" by maintaining an office where he is held out to be an attorney, using a letterhead describing himself as an attorney, counseling clients in legal matters, negotiating with opposing counsel and pending litigation, and fixing and collecting fees for services rendered by his associate. *State v. Schumacher*, 214 Kan. 1, 519 P.2d 1116, 1127. (underlining added)

[41] We were directed by counsel for the Law Society to the " Definition of the Practice of Law" approved by the Washington State Supreme Court on September 1, 2001. The " Definition of the Practice of Law" therein:

(a) General Definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

(1) Giving advice or counsel to others as to their legal rights or the rights or responsibilities of others for fees or other consideration.

(2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).

(3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).

[42] In the *Code of Professional Conduct* prepared by the Canadian Bar Association in 2004, chapter XVII, the following commentary is provided:

Commentary

Guiding Principles

1. Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, regulation and, in the case of misconduct, from discipline by any governing body. Their competence and integrity have not been vouched for by an independent body representative of the legal profession. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the solicitor-client privilege, the lawyer's duty of secrecy, the professional standards of care that the law requires of lawyers, as well as the authority that courts exercise over them. Other safeguards include group professional liability insurance, rights with respect to the taxation of bills, rules respecting trust monies, and requirements for the maintenance of compensation funds.

Suspended or Disbarred Persons

2. The lawyer should not, without the approval of the governing body, employ in any capacity having to do with the practice of law (a) a lawyer who is under suspension as a result of disciplinary proceedings, or (b) a person who has been disbarred as a lawyer or has been permitted to resign while facing disciplinary proceedings and has not be reinstated.

[43] The combined effect of sections 1, 15 and 85 of the *Legal Profession Act*, cited above, is that the Law Society of British Columbia has the responsibility under the *Act* to take action against non-lawyers who illegally offer legal services or misrepresent themselves as lawyers. This responsibility exists for the protection of the public. In the case of non-practising lawyers, the need for protection of the public remains since those persons will not be subject to the ethical and practice standards or other regulatory requirements of the Law Society of British Columbia, nor will they be required to carry Errors and Omissions insurance or trust protection coverage.

The Burden of Proof

[44] In *Law Society of BC v. Martin*, 2005 LSBC 16, paragraph [137] it is observed:

(a) The onus of proof throughout these proceedings rests on the Law Society to prove the facts necessary to support a finding of professional misconduct.

(b) The standard of proof is higher than the balance of probabilities but less than reasonable doubt. The standard is a civil standard but rises in direct proportion to the gravity of the allegation and the seriousness of the consequences.

[45] The term " professional misconduct" includes conduct that can be described as " dishonourable" or " disgraceful" . In addition, " professional misconduct" is generally defined as " conduct that is contrary to the best interest of the public or the legal profession or harms the standard of the legal profession."

Analysis of the Facts

[46] The evidence clearly establishes that W.F. and M.F. went to the Respondent because they believed he was a lawyer, and they believed they needed the services of a lawyer to assist them. The evidence is also clear that the Respondent told W.F., at their first meeting, that he was not in good standing as a lawyer at that time. W.F. says that the Respondent told him that he expected to be reinstated as a lawyer within one or two weeks of their first meeting. The Respondent confirmed in his evidence that, in the summer of 2004, he had expected that he would be reinstated in short order.

[47] W.F. says that, at their first meeting, the Respondent indicated that he could not be paid for his services until he could be reinstated. As a consequence, W.F. gave the Respondent $100 at that time as a form of " thank you" and not as payment for legal services. W.F. indicated, however, that, after the first meeting, when he made payments as requested by the Respondent, he understood that, by then, the Respondent had been reinstated. It is clear from the evidence of W.F. that, while the Respondent never actually told him that he had been reinstated, W.F. nonetheless made that assumption.

[48] While Mr. M. confirmed that he heard the Respondent tell W.F. that he was not able to practise law, Mr. M. at the same time prepared his draft report referring to the Respondent as a " lawyer" and to W.F. as the " client" .

Did the Respondent Engage in the Unauthorized Practice of Law?

[49] When the course of dealings between W.F. and the Respondent are viewed as a whole, it is evident that the Respondent was conducting the unauthorized practice of law. W.F. came to the Respondent because he believed him to be a lawyer. While the Respondent properly told him that he was not at that time entitled to practise law, he stated that he expected to be reinstated in the near future. As their relationship continued, W.F. concluded that the Respondent had indeed been reinstated. For this reason he made payment for services.

[50] For his part, the Respondent did what a practising lawyer would do in these circumstances. He told W.F. that it would first be necessary to establish the facts. To do this the Respondent retained Mr. M. to enquire into the status of the claim. Having received the report from Mr. M., the Respondent then discussed with W.F. what he might do to resolve the dispute. At about this time the possibility of a meeting between W.P. and W.F. was discussed. Ultimately, W.F. decided that the case was going down the wrong road, and he decided not to take any further action. It was then agreed that the Respondent would be entitled to retain the net funds remaining for his services. The evidence as to the exact amount retained is unclear since there was no formal accounting. This demonstrates the sort of problem that could be anticipated where one engages in the unregulated practice of law. Funds were received and paid out without proper records being maintained, and there is uncertainty therefore as to exactly what W.F. paid to the Respondent, what the Respondent paid to Mr. M. and what the Respondent retained as fees. This is just one illustration of the risk to the public in these circumstances. Another example of risk is that solicitor-client privilege would not have applied to W.F.' s discussions with the Respondent.

[51] On the evidence, therefore, this Panel finds on the requisite standard set out in *Martin* (supra) that

the Respondent, while a non-practising member of the Law Society, engaged in the unauthorized practice of law, contrary to s. 15(1) of the *Legal Profession Act*, when he performed legal services or offered to perform legal services for W.F. and M.F. in the expectation of a fee, gain or reward. We need not consider the effect of the Respondent's status as a non-practising member since either s. 38(4)(b)(iii) or (v) is applicable.

Is the Respondent Guilty of Professional Misconduct?

[52] While this Panel has concluded that the Respondent entered into the unauthorized practice of law in his dealings with W.F. and M.F., we find that his conduct falls short of that required to support a finding of " professional misconduct" . The Respondent's conduct, in all of circumstances, was not " dishonourable or disgraceful" . The Panel is mindful of the fact that the Respondent clearly told W.F. that he was not a practising lawyer when he first took on the conduct of the matter. The Panel was also impressed by the fact that the Respondent clearly believed that he was about to be reinstated shortly after the retainer commenced. As the Respondent testified, he believed that by the time Mr. M. had completed his report he would be reinstated. As events transpired, that was not the case, and shortly after Mr. M. released his report, W.F. and M.F. decided not to pursue the matter any further, thereby bringing the relationship to a close.

Verdict

[53] This Panel finds that the Respondent's conduct is not professional misconduct; however, he did engage in the unauthorized practice of law, contrary to s. 15(1) of the *Legal Profession Act*.