2007 LSBC 27
Report issued: May 29, 2007
Citation issued: August 24, 2005

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

Pamela Suzanne Boles

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: November 29, 2006

Panel: Kathryn Berge, Q.C., Chair, Karl Warner, Q.C., Brian Wallace, Q.C.

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: Jerome Ziskrout

Background

[1] On August 24, 2005, 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 there be an inquiry into the conduct of the Respondent regarding the following:

1. In representing your client, W.L., you caused a form of an Order of the Court to be entered containing a term which had not been sought nor granted by the Court when the matter was heard in Chambers.

2. In representing your client, W.L., you misled opposing counsel, Mr. Framingham, in advising him that the Court had granted a term to an Order in Chambers when the Court had not in fact granted that term.

3. That you, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, failed to respond promptly as required to letters from the Law Society dated February 1, 2005, February 23, 2005, March 10, 2005 and March 29, 2005, nor to a telephone message from the Law Society left April 5, 2006.

[2] This citation came before this Hearing Panel and was heard on November 29, 2006.

[3] The Respondent admitted that the citation was properly issued and served pursuant to the requirements of Law Society Rule 4-15.

[4] The Respondent denied that she had professionally misconducted herself in relation to Counts 1 and 2 on the Schedule to citation and a hearing was conducted pursuant to the Law Society Rules, Chapter 5.

[5] The Respondent admitted that she had professionally misconducted herself in respect of Count 3.

Agreed Statement of Facts

[6] Counsel submitted an Agreed Statement of Facts, consisting of the following (references in the original to appendices have been omitted and the paragraphs have been somewhat consolidated and consequently amended):

1. The Respondent was called to the Bar in British Columbia on November 17, 1989. The Respondent was a practising lawyer at all material times.

2. The Respondent was counsel for the plaintiff in Supreme Court Action *W.L. v. S.* (the " BCSC Action"). The BCSC Action involved a claim for injuries sustained by the plaintiff in a motor vehicle accident.

3. When the plaintiff initially commenced the BCSC Action, only Mr. S., the owner of the vehicle that had collided with the plaintiff's vehicle, was named as a defendant. Mr. S. was represented by Dale Framingham in the BCSC Action.

4. Mr. A. was the driver of the vehicle that collided with the plaintiff's vehicle. In October 2002, the Respondent brought an application on behalf of the plaintiff for an order adding Mr. A. as a defendant. A copy of the Notice of Motion with supporting Affidavit was served on Mr. Framingham as counsel for Mr. S.

5. Mr. Framingham was not counsel for Mr. A. As such, he took no position on behalf of Mr. S. and did not attend the hearing of the application, which was heard on June 11, 2003 before Master Donaldson.

6. Despite inquiries regarding the outcome of the plaintiff's application, Mr. Framingham was not provided a copy of the entered order of Master Donaldson (the " Entered Order") until October 29, 2003.

7. The Entered Order contains a term dispensing with service of documents on Mr. A., which term was not sought by the plaintiff nor granted by the Court (the " Additional Term").

8. The Respondent did not discuss the Additional Term with Mr. Framingham prior to the hearing of the application.

9. On November 28, 2003, Mr. Framingham spoke to the Respondent to inquire how she had obtained the Additional Term. The Respondent advised him that she had not sought nor requested such an order and that the Court gave it anyway.

10. Mr. Framingham telephoned the Respondent's office on January 30, March 12 and March 16, 2004, requesting a return phone call regarding the *W.L. v. S.* file. Mr. Framingham did not receive a response prior to Mr. Dyer swearing his affidavit.

11. Mr. Dyer, a member of Mr. Framingham's firm, swore an affidavit on March 31, 2004, setting out

the facts surrounding the Entered Order from Mr. Framingham's point of view. Mr. Dyer's affidavit was admitted for the truth of its contents except for two particular paragraphs and two exhibits.

12. The Respondent and Mr. Framingham appeared before Madam Justice Koenigsberg for a pre-trial conference on April 6, 2004, at which time the circumstances surrounding the entry of the order and Mr. Dyer's Affidavit were brought to the attention of the Court. Madam Justice Koenigsberg questioned the Respondent regarding the order. The end result of the exchange was that the Respondent had no explanation for how it was that an order came to be entered containing the Additional Term.

13. Mr. Framingham sent to the Law Society of British Columbia (" Law Society") a letter of complaint dated January 13, 2005. The complaint was assigned to James Dent, then staff lawyer with the Law Society, Professional Conduct Department.

14. Mr. Dent sent a letter to the Respondent dated February 1, 2005, enclosing a copy of the letter received from Mr. Framingham and requesting a response.

15. The Respondent did not provide a response, and Mr. Dent sent her reminder letters on February 23, 2005, March 10, 2005 and March 29, 2005. The Respondent received the letters from the Law Society but failed to provide any response.

16. On April 5, 2005, Mr. Dent telephoned the Respondent and left her a voice mail message requesting that she contact Mr. Dent. The Respondent did not return Mr. Dent's phone call directly.

17. On May 30, 2005, Mr. Dent wrote to the Respondent advising her that the matter was now being referred to the Discipline Committee for review at its next meeting.

18. The Respondent sent a letter dated June 2, 2005, responding to Mr. Dent's May 30, 2005 letter. [The letter included a reference to a voice mail left at some earlier point.]

19. Mr. Dent did not receive the voice mail referenced in the Respondent's letter dated June 2, 2005.

20. On June 1, 2005, the Discipline Committee reviewed the matter of Mr. Framingham's complaint against the Respondent and recommended to the Chair that a citation be issued. The Chair so directed. Stuart Cameron, the Director of Professional Regulation, wrote to the Respondent on June 3, 2005 advising her of the direction. The citation was issued on August 24, 2005.

21. The Respondent admitted that:

(a) she caused a form of the Order of Master Donaldson to be entered containing the Additional Term which had not been sought nor granted by the Court when the matter was heard in Chambers (" Count 1");

(b) she misled Mr. Framingham in advising him the Court had granted the Additional Term when it had not (" Count 2"); and

(c) she failed to respond to communications from the Law Society, as alleged in the Schedule to

the citation (" Count 3").

Respondent's Evidence

[7] The Respondent gave evidence that she has a busy Chambers practice with multiple orders, which are being entered at any given time. In 2003, when these difficulties began, she was in the habit of relying upon her experienced staff to enter orders and support her generally and, as well, put a lot of faith in the careful approach of the Registry staff in their review of orders prior to entry.

[8] The Respondent was contrite and admitted that she should have undertaken a detailed review of the file at a much earlier time, and was apologetic about the inconvenience, time and expense caused to the Law Society and its members as a result of her delay in undertaking this task and making a full reply to the complaint.

Count 1

[9] The Respondent testified that she accepted full responsibility as counsel of record for the insertion of the Additional Term into the Order. She does not independently recall why there was a delay in entering the order or anything about its drafting, save for some details regarding costs. In preparation for this hearing, she reconstructed the events of the summer and fall of 2003. Her testimony was based upon an examination of the file, the Clerk's notes of the June 11, 2003 Chambers hearing and the electronic records from her assistant's computer. This file examination was hampered by the fact that she was not in the habit of ensuring that all rejected drafts of an order are retained on the file. Until this file review was completed she had been unable to understand how it had come about that the Entered Order had contained the Additional Term.

[10] The Respondent produced the Clerk's notes as an exhibit. They revealed that the Entered Order was submitted to the Supreme Court Registry and returned three times. The file review reflected that up to four versions appear to have been created prior to entry.

[11] The first version correctly reflected the actual order made in Chambers on June 11, 2003. It was not submitted for entry until August 7, 2003, after Mr. Framingham's office enquired about it. It was returned because it did not include the name of the Master who granted it.

[12] Further versions of the order were created by the Respondent's assistants, one of whom was temporary and the other permanent. Drafts of the order were submitted and returned by the Registry on two further occasions between August 13 and October 15, 2003. It appeared to the Respondent that the Additional Term was added at some stage by a temporary assistant working from a precedent. The Respondent, having already signed previous versions, signed further versions of the order again without putting her mind to the contents.

[13] On the third occasion that the order was submitted, it was returned by the Registry with a request that a provision for costs be included, despite the fact that no such order was made by the Master. On cross-examination the Respondent admitted that she did become involved in the process of entry of the order in respect of this question of costs. The Clerk's notes of the original hearing were reviewed, leading the Respondent's assistant to have a discussion with the Registry regarding the fact that the Clerk's notes incorrectly specified that the Master had made an order for costs. The draft order was then re-submitted on October 21, 2003 and entered on October 27, 2003, complete with the Additional Term and without an order for costs. The Respondent, the Registry and the assistant failed to note the incorrect inclusion of the Additional Term. The Entered Order was delivered to Mr. Framingham on October 29, 2003.

Count 2

[14] The Respondent testified as to why, on November 28, 2003, she told Mr. Framingham that she had neither sought nor requested the Additional Term included by the Court in the Entered Order, but that the Court " gave it anyway" . She recalled the discussion and that they discussed a number of points regarding the file. She did not specifically recall giving this particular answer to Mr. Framingham but accepts that if Mr. Framingham said that this is what she said, he must be correct and she does not dispute it.

[15] Given that she accepts that she had made this statement to Mr. Framingham, the Respondent testified that her misstatement to him occurred because she did not believe that it was a matter of much importance, did not have the file in front of her at the time and was relying upon the normally careful work of her staff and the Registry to ensure that a correct order was entered. She said that what she was thinking, and continued to think to herself over the following months and years until undertaking the full file review two weeks prior to the hearing, was " if the Registry has entered this order, it must be correct."

[16] By reviewing the transcript of the original Chambers hearing, Mr. Framingham subsequently learned that the Respondent's explanation of the Additional Term was untrue. She did not return Mr. Framingham's calls and, on March 16, 2004, he set the matter down for the Pre-Trial Conference and made the Respondent aware that the issue of the Additional Term would be raised. The transcript of the Chambers hearing was attached as an exhibit to Mr. Dyer's affidavit.

[17] Despite the fact that, by then, the Respondent had seen the transcript of the hearing, she ordered the Master's Reasons in order to reconfirm whether or not the Additional Term had been ordered. She was still confused why this term appeared in the Entered Order if, in fact, it was not granted by the Court. She felt that there must be " something more" to the circumstances that led to the error. Despite taking this step, her view persisted that this was not a matter of great importance because she never intended to rely upon this Additional Term, as she always intended to serve Mr. A. with the Writ of Summons. By the time of the April Pre-Trial, the Respondent still had no explanation of the events that had occurred.

[18] The matter was settled prior to the May, 2004 trial date and, in the Respondent's view, the issue became moot. Equally, she felt that it was not necessary for her to take any steps under the Rules to amend the Entered Order as it was a matter of " no consequence" and she should not take the time of the Court to correct it.

Count 3

[19] In the fall of 2004, the Respondent's experienced assistant took parental leave. Into a busy practice new staff were inserted and attempted to fill the gap with limited success, causing the Respondent stress and overwork.

[20] By February 1, 2005, when Mr. Dent forwarded Mr. Framingham's complaint, the Respondent felt overwhelmed by work. She did not reply to Mr. Dent's letters except to the extent that, in the first week of April, 2005, she called the Law Society and left a voicemail for Mr. Dent on some portion of the Law Society phone system (possibly the general voice mailbox) but not in Mr. Dent's personal voice mail. She continued to consider the error in the entry of the Entered Order to be a matter of no real significance, felt confused about how it had occurred and did not take the time to properly respond to the Law Society.

[21] By the time of the hearing, the Respondent accepted that she was wrong not to have made a full and substantive answer to Mr. Framingham, to the Court at the Pre-Trial Conference and to the Law

Society.

Discussion

[22] In the Agreed Statement of Facts, the Respondent admits the occurrence of the events set out in Counts 1 and 2. The Law Society asserts that these facts are sufficient to establish professional misconduct or incompetence within the meaning of those words in the *Legal Profession Act,* section 38(4)(b)(i) and (iv). The Respondent disagrees.

[23] The Law Society must satisfy the burden of proof of establishing that the Respondent's conduct amounted to either professional misconduct or the incompetent performance of duties undertaken in her capacity as a lawyer.

[24] This burden requires that citations be proven on a balance of probabilities, which falls short of a criminal standard. Clear and cogent evidence must be established, with a weight proportional to the serious consequences for the professional person's career and status in the community that a finding of professional misconduct or incompetence carries (*Law Society of BC v. Martin*, 2005 LSBC 16*,* at pp. 22-23).

Professional Misconduct

[25] Professional misconduct under s. 38(4)(b)(i) is not defined in the *Act*, the Law Society Rules or the *Professional Conduct Handbook*, but it has been considered by the Benchers in numerous cases. The cases, including *Martin* (supra), describe three categories of professional misconduct:

(a) dishonourable or disgraceful conduct*,* including the telling of deliberate falsehoods or lies;

(b) recklessness to the extent that the lawyer pays no regard to the probable or possible injurious consequences of his or her conduct. Recklessness can arise from an isolated event, but it must amount to conduct stronger than ordinary negligence. The conduct must demonstrate a proven disregard of or indifference to the consequences of one's actions under circumstances involving danger to the life or safety of others as to be equivalent to a wilful and intentional wrong, although no harm need be intended. This concept of danger can also be extended to include disregard as to serious, injurious consequences to others to whom one owes a duty; and

(c) gross negligence, which amounts to either a series of acts evidencing gross culpable neglect of one's duties as a lawyer, as distinct from ordinary negligence, or a conscious and voluntary act or omission that is likely to result in grave injury. The neglect must be of an aggravated character that is or ought to be known to have a tendency to injure. As with recklessness, the concept of danger can also be extended to include disregard of serious, damaging consequences to others to whom one owes a duty.

[26] The distinguishing lines between recklessness and gross negligence are often blurred in the authorities. This Panel accepts the *Martin* decision where the Panel reviewed the law and held that the test for professional misconduct is " whether the facts, as made out, disclose a marked departure from that conduct the Law Society expects of its members." *Martin,* at p. 29, para. [171]. Whether conduct deserves discipline is a factual matter to be decided by the lawyer's professional peers. " What may, in each particular circumstance, constitute professional misconduct ought not to be unduly restricted." *Stevens v. Law Society (Upper Canada)* (1979), 55.O.R. (2d) 405 at 410.

[27] In respect to the first category of professional misconduct, dishonorable or disgraceful conduct

including the telling of deliberate falsehoods or lies, counsel for the Law Society accepted, and the Panel has concluded, that the evidence did not establish on a balance of probabilities that the Respondent entered the wrongly-worded order or misled opposing counsel intentionally. Therefore, in respect of professional misconduct, the issue with respect to Counts 1 and 2 is limited to whether the Respondent's conduct was reckless or grossly negligent.

Count 1

[28] The Respondent's explanation of how the Additional Term found its way into the Order establishes that, in signing the order without satisfying herself that it conformed to what had been sought and granted, she acted negligently. Given that both counsel expected that Mr. Framingham would receive instructions to act for Mr. A. if he were added as a defendant, and that Mr. Framingham was monitoring the progress of entry of the Order, there was never a risk that any serious consequences would arise as a result of the Additional Term.

[29] The Respondent's evidence that she had no intention of trying to avoid serving the Additional Defendant was unchallenged by the Law Society. Under all of the circumstances, we have been unable to conceive of how her actions in relation to Count 1 could have created any risk to anyone.

[30] This Panel concludes that the Respondent's negligence in entering the Entered Order containing a term that was neither sought nor granted was neither recklessness nor grossly negligent and, as a result, does not amount to professional misconduct.

Count 2

[31] The Respondent admitted that she misled Mr. Framingham by her incorrect statement that the Additional Term was granted by the Court. As an explanation she states that this reflected the conclusion that she came to that this must have been what happened, given that the term was in the Entered Order.

[32] This Panel finds the Respondent's cavalier response troubling. There is a significant difference between knowing that something did occur and drawing the inference that it must have occurred. In the circumstances, stating an inference as though it were a fact was unacceptable. At the least, the Respondent should have said that she was drawing the inference that the Court must have ordered the Additional Term. The right response would have been to admit that she did not recall and to look into it.

[33] Further, at a minimum, it was negligent for the Respondent to have made this bald assertion when she did not know whether it was true, but it cannot be said that she intentionally misled Mr. Framingham. However, the negligence in Count 2 shows a lack of concern about whether what she said was true. This is conduct of greater gravity than that demonstrated in Count 1.

[34] As with the entry of the Order, there were no grave consequences that could have flowed from the misstatement. This was known to both Mr. Framingham and the Respondent throughout. Despite the fact that this Panel wishes to express its disapproval of the Respondent's conduct, it is not possible to find that the whole of the evidence makes out conduct that was reckless or grossly negligent as it does not meets the standard of gross culpable neglect of the Respondent's duties as a lawyer. Again, applying the test set out in *Martin*, we have concluded that the Respondent's conduct set out in the Count 2 of the citation does not amount to professional misconduct.

Incompetence

[35] If the Respondent did not professionally misconduct herself in respect of Counts 1 and 2, then the

[35] If the Respondent did not professionally misconduct herself in respect of Counts 1 and 2, then the Law Society argues that the Respondent was incompetent within the meaning of the *Legal Profession Act,* s. 38(4)(b)(iv).

[36] This Hearing Panel considered several cases cited by the Law Society in support of its submission that the Respondent's conduct in respect of both Counts 1 and 2 amounted to incompetence. Incompetence may be found in a case where, although there is no professional misconduct going to the heart of the respondent's duties as a lawyer, the respondent's conduct poses a real risk to others. This was true in *Law Society of BC v. Ash*, [1998] LSDD No. 133, in which a lawyer was found to have been incompetent when he breached a duty akin to that of a fiduciary when, after agreeing to act as a trustee shareholder for a real estate transaction, he gave the other counsel to believe that he had paid a real estate deposit when he had in fact not done so.

[37] In *Law Society of BC v. Wynne*, [1995] LSDD No. 269, the respondent was found to be incompetent when he failed to make significant progress on an urgent committeeship file and was not honest with the client about the file's progress. Again, it was held that the behaviour did not amount to professional misconduct, but that it constituted incompetence.

[38] A single act of negligence does not constitute incompetence. In *Re: A Lawyer*, [1999] LSBC 45, *Discipline Case Digest* 00/1, the lawyer was alleged to have failed to attend in Court on an occasion when a hearing was set without taking appropriate steps to safeguard his client's interests by confirming an adjournment was granted. The result was that the client was arrested and held overnight on a bench warrant. In considering the appropriate verdict, the Panel held that the lawyer's error lay in his assumption that an adjournment would be granted. In not ascertaining whether the adjournment had actually been granted, the Panel found that the lawyer was negligent in the performance of his duties but that a single act of negligence did not, by itself, render him incompetent as this finding requires evidence of a pattern of carelessness or inattentiveness. This case bears the greatest similarity to the case before this Panel. As in *Re: A Lawyer,* (supra), the evidence before this Panel does not establish that the Respondent's conduct was part of a persistent course of conduct in the Respondent's practice, sufficient to establish incompetence.

[39] The Law Society submits, in the alternative, that the actions of the Respondent taken as a whole, demonstrate a degree of carelessness amounting to incompetence. In the view of this Panel, the facts do not establish the required pattern of carelessness. It is true that there were two incidents, each of which amounts to negligence. The entry of the wrongly-worded order demonstrated inattentiveness and lack of proper supervision of staff on the part of the Respondent; misleading Mr. Framingham showed a lack of care about what she said to another counsel. However, these two events together do not establish a pattern, particularly in light of the fact that the first draft of the order was correctly prepared.

[40] During the hearing on this matter, counsel for the Law Society put forward the Review Panel decision in *Law Society of BC v. Sheddy*, 2005 LSBC 35, as authority for the standard of conduct that must be established in order to prove incompetence. After this hearing was concluded, but before we rendered our decision, this decision was overturned by the Court of Appeal (2007 BCCA 96). As a result, this Panel invited counsel to make submissions regarding whether or not the *Sheddy* Court of Appeal decision was applicable to this case. Both the Respondent's counsel and the Law Society provided us with comprehensive written submissions. After reviewing these submissions, this Panel is of the view that the *Sheddy* decision of the Court of Appeal does not apply to this matter.

[41] In coming to these conclusions regarding both Counts, this Panel considered the Law Society submission that, if the Hearing Panel should find the Respondent's demeanour to be credible, this should not be the basis for a dismissal of a finding of misconduct. The case of *Faryna* v. *Chorny,* [1952] 2 D.L.R.

354 (B.C.C.A.), was put forward. In that case Mr. Justice O'Halloran held that:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with a preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[42] In putting forward this principle, the Law Society asserted that the Respondent's testimony regarding Counts 1 and 2 was inconsistent with the probabilities that surround the admitted facts and that a credible demeanour should not overshadow this inconsistency.

[43] This Panel found the Respondent's testimony to be credible in some respects and also congruent with the documents produced from her file, which supported her version of events in relation to events leading to issuance of the Entered Order. We cannot agree that the Respondent's evidence taken as a whole falls so short of being possible as to render her testimony inconsistent with the probabilities, nor do we have cause to reject it in its entirety. When the evidence before the Panel is doubtful, the doubt must be resolved in favour of the Respondent. That is so in this case.

[44] That being said, whether or not the Respondent's evidence was sufficiently corroborated by external facts is not key to the ruling of this Panel. The primary factor in the dismissal of Counts 1 and 2 is that, with or without the Respondent's testimony, the proven conduct does not meet the overall tests for professional misconduct or incompetent performance of duties undertaken in her capacity as a lawyer.

Conclusion

[45] In respect of Counts 1 and 2, this Panel finds that the Law Society has not met its burden of proof in establishing that the conduct set out in the citation amounts to either professional misconduct or incompetence. Therefore, these two Counts of the citation are dismissed.

[46] In relation to Count 3, on the basis of the Agreed Statement of Facts, the oral evidence and the submissions of counsel for the Law Society and of the Respondent, the Panel finds that the Respondent failed to respond to communications from the Law Society in the manner set out in the citation. This conduct was contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook* and amounts to professional misconduct as it is a marked departure from the conduct that the Law Society expects of its members.