

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

Hugh Braker, Q.C.

Respondent

**Decision of the Hearing Panel
on Penalty**

Hearing date: July 6, 2007

Panel: William Jackson, Chair, Bruce A. LeRose, Q.C., David M. Renwick, Q.C.

Counsel for the Law Society: Maureen Boyd

Counsel for the Respondent: M. Louise Mandell, Q.C.

Background

[1] At a hearing held on December 6, 2006, this Panel determined that the Respondent's failure to substantively respond to repeated requests from Law Society staff and to communications from another lawyer amounted to professional misconduct.

[2] A complaint had been made to the Law Society that the Respondent had not responded to communications from a lawyer concerning the status of a client's file and subsequently failed to transfer that file. This correspondence started in November of 2005, and, as of the date of this hearing, the file still had not been transferred to the client's new counsel.

[3] Upon receipt of the complaint in February of 2006, Law Society staff wrote to the Respondent seven times throughout a period ending in July, 2006. There were also several telephone calls made during that period. The only responses were an initial denial of the receipt of any letter from the new counsel indicating a change in counsel, and later a request for further time to respond due to medical difficulties.

[4] Counsel for the Law Society proposed a penalty of a two-month suspension, an order that the Respondent provide a substantive response to the Law Society, a practice condition that the Respondent provide an undertaking to the Discipline Committee to respond within 14 days to communications received from the Professional Regulation Department of the Law Society, and costs in the amount of \$5,550.00.

[5] Through counsel, the Respondent agreed to the above order and indicated that the letter and transfer of the file were in process, that the undertaking, while inflexible, was acceptable and consented to costs in the amount of \$5,550.00.

[6] Through counsel, the Respondent proposed that a high fine and a period of supervision would have been sufficient.

[7] The Respondent provided two background letters from his physicians concerning his medical

condition, his curriculum vitae and eight letters of reference.

[8] Through counsel, the Respondent submitted that:

- (a) he has a long history of contributing to the public and to the Law Society;
- (b) he has carried on his very active practice and other public service throughout the time since he was first contacted by the Law Society concerning this matter in February 2006;
- (c) the admitted misconduct is out of character and suggested that it was symptomatic of depression; and
- (d) his situation is improving with regard to finances, health, finding someone to take over a portion of his large caseload and healing the trauma caused by deaths in his family.

Analysis

[9] It is trite that the purpose of the penalty in professional discipline is not to punish offenders, but rather to protect the public, maintain high professional standards and preserve public confidence in the legal profession. (McKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, loose-leaf ed. (Toronto: Thomson Canada Ltd., 2005) at p. 26-1).

[10] The decision *Law Society of BC v. Ogilvie*, [1999] LSBC 17 sets out a number of non-exhaustive factors to be considered in determining an appropriate penalty.

[11] Concerning the nature and gravity of the offence, a failure to respond to the Law Society is serious. In a Review of the decision in *Law Society of BC v. Dobbin*, [1999] LSBC 27 the majority held:

... The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law, and it is essential to the Law Society's mandate to uphold and protect the interests of its members.

[12] Concerning the age and experience of the Respondent, he was called to the Bar in British Columbia in 1984, and was in active practice for approximately 22 years at the time of this misconduct.

[13] Concerning the previous Professional Conduct Record, the Respondent was subject to a Conduct Review in 2002, concerning a failure to respond to another lawyer. In December, 2005 he was subject to a discipline hearing for failing to respond to the Law Society and was fined. In August 2005, and February 2006, the Respondent was subject to a Conduct Review about a failure to respond to matters regarding litigation in which he was counsel.

[14] The failure to respond that is the basis for one of the counts on this citation occurs within days of the February 2006 Conduct Review. At that time he expressed regret for his conduct and indicated:

He understands that he has caused upset and agrees that his conduct was inappropriate. He understands that this conduct cannot continue in the future and has confirmed to the Subcommittee that this conduct will not reoccur.

[15] Concerning the impact upon the victim, there is no evidence other than the original complaint.

[16] Concerning the number of times the conduct occurred, the two counts on the citation are caused by omission rather than commission and cover a period running from November, 2005 to present.

[17] Concerning the acknowledgement of misconduct, the Respondent admitted in a Statement of Agreed Facts at the hearing as to Facts and Verdict that his actions constituted professional misconduct.

[18] Concerning remediation of the Respondent, both previous Conduct Reviews and the previous discipline hearing incorporated remedial aspects, without apparent effect.

[19] Concerning the impact of possible penalties on the Respondent, it is clear that a suspension would have both a strong financial impact and a detrimental effect on his reputation. In *Law Society of BC v. Hordal*, 2004 LSBC 36 the Benchers on Review noted:

... there is significant difference in impact between a fine and a period of suspension. There is no useful purpose served in equating income foregone during a period of suspension with a similar amount in fine quantum.

[20] Concerning specific and general deterrence, in light of the lack of success in earlier interventions, specific deterrence must be considered. Similarly, in light of the Law Society's fundamental need to be able to investigate in order to regulate the profession, general deterrence is an applicable factor.

[21] Concerning the need to ensure the public's confidence in the integrity of the profession, the issues are similar to those of general deterrence.

[22] The range of penalties for failing to respond to the Law Society and failing to respond to a fellow lawyer are broad. It stretches from a reprimand to lengthy suspensions. As with all penalties, the range varies with the facts of each decision.

[23] In *Law Society of BC v. Ashton*, 2004 LSBC 12, the Respondent failed to respond over a six-month period. He was portrayed as suffering from depression throughout the period and had what was described as a "serious and consistent pattern of failure ... in observing his professional duties." He was suspended for three months for a second failure to respond.

[24] In *Law Society of BC v. Banks*, [1991] LSDD #12, the Respondent failed to respond over a four-month period. He had three prior discipline matters of a similar nature and the Benchers on a review of the decision overturned a suspension and ordered costs and various conditions of practice.

[25] In *Law Society of BC v. Hall*, 2004 LSBC 01, the Respondent failed to respond. It was the second citation for such a failure and the penalty was a one-month suspension, an order for a substantive response and an undertaking to respond within 14 days in the future.

Decision

[26] Applying the facts of this matter to the above factors, this Panel orders that:

1. The Respondent be suspended for one month, commencing November 1, 2007.
2. The Respondent provide a substantive response to Ms. Gill's letter dated February 14, 2006, on or before October 1, 2007.
3. The Respondent provide, within 14 days of the issuance of this determination, a written undertaking to the Discipline Committee of the Law Society, that he will respond in writing, within 14 days, to communications received from the Professional Regulation Department of the Law Society, if such communication requires a response.

4. The Respondent shall pay costs to the Law Society in the amount of \$5,550.00.