2007 LSBC 44
Report issued: October 04, 2007
Citation issued: April 5, 2006

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 Penalty

Hearing date: August 28, 2007

Panel: Gavin Hume, Q.C., Chair, David Renwick, Q.C., 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 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;

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

[2] The Panel concluded, as a result of the hearing on facts and verdict, that the Respondent had engaged in professional misconduct with respect to the services he had provided to various clients. [*Law Society of BC v. O'Sullivan*, 2007 LSBC 08]

[3] The issue before the Panel in this hearing was the penalty to be imposed as a result of our earlier finding and what costs, if any, should be awarded. At the conclusion of the hearing we informed counsel that we would impose the penalty described below and decline to make an order as to costs. These are our reasons for those decisions.

[4] We turn first to penalty. As both counsel advised us, the Respondent, under normal circumstances, would be facing a suspension, potential practice restrictions, a psychiatric examination with respect to his ability to practise and costs. [See *Law Society of BC v. Williamson*, 2005 LSBC 19 and *Law Society of BC v. Smiley*, 2006 LSBC 31] However, the factual circumstances surrounding the Respondent differ from the circumstances in *Williamson* and *Smiley*, *(supra)*. In particular, the Respondent has suffered difficult medical problems, including chronic heart disease and psychiatric issues. As a result, he retired from the practice of law on December 31, 2006, and advised us that he did not intend to return to the practice of law. We were also advised that a custodian was appointed for his practice on December 7, 2006, and the various aspects of his practice, including those that were the subject matter of the issues before the Panel in the penalty phase of this hearing, were in the process of being successfully wound-up.

[5] As a result, we agreed with the joint submission of counsel that the appropriate penalty would

be:

(a) an order that the Respondent not reapply for membership until six months following the penalty decision;

(b) an order that the Respondent not apply for membership in any other Law Society without first advising the Law Society of British Columbia, in writing;

(c) an order that the Respondent not permit his name to appear on the letterhead of any lawyer of law firm without the Law Society's written consent;

(d) an order that the Respondent not work for any lawyer or law firm in British Columbia without the Law Society's written consent;

(e) with the exception noted in paragraph 6(g), below, an order that the Respondent will immediately resign from acting in any of the following roles:

i. as a personal representative of a deceased person;

ii. as a trustee of the estate of a deceased person;

iii. as a decision maker or guardian under the *Adult Guardianship Act*; or

iv. as a representative under the *Representation Agreement Act*.

(f) with the exception noted in paragraph 6(g), below, an order that the Respondent refrain from acting in any of the foregoing roles until such time as he may again become a member in good standing of the Law Society of British Columbia, or until the Supreme Court of British Columbia orders otherwise; and

(g) an order that the Respondent be allowed to act as executor under a Will executed by his stepfather, A.M., of [address], Calgary, Alberta.

[6] During the course of discussion with respect to this order, it was clarified that paragraph (d) made reference to the Respondent working in any capacity for any lawyer or law firm in British Columbia. In addition, we learned that the Respondent is named as a co-executor in the Will of his stepfather, who is still alive.

[7] We therefore made the order as set out above.

Costs

[8] The next issue that we were required to deal with was the question of what costs, if any, should be awarded against the Respondent.

[9] Counsel for the Law Society provided us with an outline of the costs that the Law Society was seeking. In our view, the costs sought are reasonable, given the nature of the hearing and the work done by counsel. However, under Rule 5-9 we have a discretion as to whether or not we would make an order for some, or all of the costs, despite their reasonableness.

[10] In *Law Society of BC v. Racette*, 2006 LSBC 29, the Panel stated in paragraphs 13 and 14:

[13] This Panel has previously held that any order for costs should be based on a careful consideration of all relevant factors including:

(a) the seriousness of the offence;

(b) the financial circumstances of the Respondent;

(c) the total effect of the Penalty, including possible fines and/or suspensions;

(d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[14] Full indemnity for costs should never become " automatic" . In every case the total penalty, including costs, should " fit the crime" .

[11] We considered the four factors identified in *Racette (supra)*. The offences committed by the Respondent were serious and resulted in added expense to his client. However, while not an excuse, it is explained by the medical conditions from which he suffered. Financially, the Respondent faces considerable difficulty. He has not had any income since December, 2006. His income prior to that date was declining. He has little in the way of savings. He has no retirement funding and lives in a rental home. As a result, he has made an assignment into bankruptcy and his assets, as set out in the Statement of Affairs, are listed at less than $2,000 and his liabilities are in excess of $50,000.

[12] In considering the effect of the penalty, we bore in mind that the Respondent came from a family of lawyers and took great pride in being a member of the profession. He was embarrassed by his failure to live up to his professional responsibilities and the fact that he will not return to the practice of law. When we considered the extent to which the conduct of the Respondent resulted in costs accumulating or being saved, we bore in mind that he admitted his professional misconduct and co-operated in the preparation and delivery of a joint submission to the Panel on both his professional misconduct and the penalty, thereby saving expense of what would otherwise be a potentially lengthy hearing. In addition, the Respondent consented to the appointment of a custodian in order to wrap-up his practice.

[13] In addition to the consideration of the above factors, we considered the other personal circumstances of the Respondent. He is 58 years of age with significant health challenges. He advised us that he will never practise again, as previously stated. He filed an assignment under the *Bankruptcy and Insolvency Act*, which application indicates he has essentially no assets and appears to be surviving with the support of his family. His medical condition is such that it appears unlikely that he will obtain employment in the foreseeable future.

[14] In view of the circumstances described, we reach the conclusion that no order for costs will be made.