2004 LSBC 19
Report issued: June 16, 2004
Oral reasons: May 20, 2004
Citation issued: February 11, 2004

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

ROBERT GORDON MILNE

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: May 20, 2004

Panel: Margaret Ostrowski, Q.C., Chair, Carol Hickman, Art Vertlieb, Q.C.

Counsel for the Law Society: Todd R. Follett
Counsel for the Respondent: Jerome Ziskrout

[1] A citation dated February 11, 2004 was heard by this Panel.

[2] This Panel found that the Respondent, by altering a document executed on behalf of Her Majesty the Queen in the Right of the Province of British Columbia when he did not have the authority to do so, and causing the altered document to be filed in the Land Title Office, was guilty of professional misconduct.

PUBLICATION

[3] Mr. Ziskrout raised the issue of publication in the course of the hearing. He described the anxiety of his client in regard to publication and argued that the circumstances here weighed against the interest of the public and the society, and that the balance should be in favour of his client. The Panel accepted this as an application on behalf of the Respondent for anonymous publication in Rule 4-38.1(4).

[4] Rule 4-38.1 of the Law Society Rules reads as follow:

> (1) Except as allowed under this Rule, a publication under Rule 4-38 must identify the respondent.
>
> (2) If all counts of the citation are dismissed by a panel, the publication must not identify the respondent unless the respondent consents in writing.
>
> (3) The panel may order that publication not identify the respondent if
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> > (a) the panel has imposed a penalty that does not include a suspension or disbarment, and
> >
> > (b) publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication.
>
> (4) A respondent may apply to the panel for an order under subrule (3)

(a) in writing or on the record in the course of a hearing, and

(b) no later than 7 days after the written report on findings of fact and verdict is issued or oral reasons delivered.

(5) The Executive Director must not publish under Rule 4-38 until

(a) 7 days after a report is issued unless

(i) a penalty of suspension or disbarment is imposed, or

(ii) the respondent waives the right to apply under subrule (4), or

(b) an application under subrule (4) is resolved or withdrawn.

(6) If a panel orders that a respondent's identity not be disclosed under subrule (3), the panel must state in writing the specific reasons for that decision.

(7) If, on a review of a panel decision dismissing all counts of a citation, the Benchers make a finding that upholds one or more counts, the respondent may apply to the Benchers under subrule (4), and subrule (3) to (6) apply as if the Benchers were a panel.

[5] Mr. Follett argued that there is an evidentiary basis required for proceeding under 4-38.1. In regards to the first part of the test, he conceded that the penalty in this case would not likely attract a suspension or disbarment and the Law Society was not asking for such.

[6] However, he argued that the second part of the test required that there should be medical evidence of possible grievous harm to the Respondent - evidence such as a predisposition to suicide or emotional distress. Embarrassment, in his submission, would not qualify. He further argued that the grievous harm must outweigh the interests of the public and its right to know who did what. He agreed the facts are sympathetic but the question is one of harm versus public interest.

[7] The Panel considered the evidence that had been given by the Respondent in testimony regarding his personal circumstances, including his unblemished professional record of 29 years of practice, his standing in the community and his volunteer commitments. Also introduced in evidence during the hearing were four letters of reference. In each of those letters from experienced counsel in the province, there was expression that this incident does not represent the true character of the Respondent and that in spite of this incident, they would continue to rely on his undertakings and deal with him as they have in the past.

[8] The Panel took note that Rule 4-38.1(3)(b) required that the harm to the Respondent had to be (1) grievous and (2) outweigh the interest of the public and society in order to qualify for anonymous publication. The panel is of the opinion that medical evidence is not always required to establish grievous harm and that each case is to be decided on its own facts and circumstances.

[9] In the absence of cases on point, the Panel considered the *Interpretation Act,* section 8 which reads as follows:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[10] The Gage Canadian Dictionary defines " remedial" as " intended as a remedy or cure; curing; helping."

[11] Section 3 of the *Legal Profession Act* reads as follows:

" It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by

(i) preserving and protecting the rights and freedoms of all persons,

(ii) ensuring the independence, integrity and honour of its members, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a)

(i) to regulate the practice of law,

(ii) to uphold and protect the interests of its members.

[12] The Panel concludes that the test that should be applied in regard to Rule 4-38.1 is to balance the grievous harm to the individual taking into account the individual's self worth, emotional health, and reputation against the interest of the public and the Law Society in publication.

[13] The Respondent gave evidence and related in detail his activities in the profession and in the community; his counsel argued that publication would be harmful to the Respondent's reputation and standing the community. It was clear to the Panel that the Respondent enjoys prominence in this regard. Of great importance to the Panel however, is the demeanour of the Respondent throughout the hearing and during his testimony. It was apparent to the Panel that this misconduct has caused him great emotional anguish. At times, the Respondent appeared overwhelmed by his wrongdoing and gravely affected by it. While medical evidence may in some cases be helpful, it is not necessary here given our observations of the Respondent's demeanour. It is clear that in this case, the affect is much more than simply loss of reputation and embarrassment.

[14] The Panel felt that the circumstances in the present case were exceptional in that the member had 29 years of discipline free practice, he had been contrite and admitted his wrong, his misconduct had caused no harm or risk of prejudice in the transaction and he was not motivated by self-gain. His risk to the public was minimal. The public interest would be served by his continued volunteerism which might be jeopardized by publication.

[15] Using a remedial and a large and liberal interpretation of Rule 4-38.1, the Panel concluded that the harm to the Respondent would be grievous in terms of the effect on his reputation and standing in the community and to his self-worth and emotional health, and that this harm would outweigh the interest of the public in knowing his personal identity. Importantly, the Panel was of the opinion that there would be little likelihood of a repetition of the misconduct and that this member posed little or nor risk to the profession. The Panel did not agree with Mr. Follett's argument that the public have a right to know " who did what" - that discipline of a lawyer must be meted out in the context of upholding and protecting the public interest in the administration of justice. The Panel concluded that Rule 4-38.1 must be viewed as remedial and the punishment should fit the " crime."

[16] Accordingly, the Panel grants the Respondent relief under Section 4-38.1 for anonymous publication.

FINE AND COSTS

[17] On the issue of fine and costs, Mr. Follett referred the Panel to the cases of Morris (1998) and

Promislow as being similar in facts but were different to the extent that they were admissions of professional misconduct. Mr. Follett conceded that the facts admitted here are quite close to admitting professional misconduct so the Law Society was not required to prove all matters. In the Promislow case, a $3,500.00 fine and $1,500.00 costs was ordered. The penalty in Morris was a $10,000.00 fine and $2,500 in costs. Mr. Follett suggested that the disparity between the two might have been the fairly extensive professional conduct record of Mr. Morris. Mr. Follett suggested that a fine of $5,000.00 and costs would be appropriate here.

[18] The Panel considered Mr. Ziskrout's submission that professional misconduct of the Respondent should be considered to be on the mild side and that a reprimand would be appropriate in light of the circumstances that there was no harm done and no motivation for self-gain.

[19] Upon consideration of the submissions, the Panel ordered that the Respondent pay a fine of $3,500.00 within one month and costs. If costs are not able to be agreed upon, the Panel would be recalled.

[20] The Executive Director is instructed to record the finding of Professional Misconduct on the Respondent's professional conduct record.