

2008 : No. 1 March

Re: Lawyer 7

Discipline hearing : November 21, 2007

Panel : Leon Getz, QC, Chair, Russell Tretiak, QC and Dr. Maelor Vallance

Report issued : February 11, 2008 (2008 LSBC 06)

Counsel : Maureen Boyd for the Law Society and Terrance Robertson, QC for the respondent

Facts

The respondent, who acted for the defendant in a personal injury action, requested the plaintiff to attend an independent medical examination. The plaintiff's counsel agreed, provided the respondent undertake to provide her with a copy of the doctor's report as soon as it was available. The respondent accepted the undertaking.

Shortly after the plaintiff's examination, the respondent received the doctor's interim report. Two weeks later, he wrote to plaintiff's counsel saying he would not receive the doctor's report until the plaintiff provided updated medical records. When the respondent wrote this letter, he believed the doctor's interim report had been sent to plaintiff's counsel. The respondent received the doctor's final report four months later and forwarded a copy to plaintiff's counsel.

More than a year later, in preparation for trial, the respondent served the interim report on plaintiff's counsel, pursuant to the Rules of Court. Until this time, the respondent believed the interim report had been previously sent to the other lawyer.

The respondent told the Law Society that his failure to send the interim report to plaintiff's counsel was an oversight, and that his letter to plaintiff's counsel was referring to the examining doctor's final report as he thought the interim report had already been sent to the other lawyer.

Admission and Penalty

The respondent admitted that he had breached an undertaking contrary to Chapter 11, Rule 7 of the *Professional Conduct Handbook* and that his actions constituted professional misconduct.

Pursuant to Law Society Rule 4-22, the hearing panel accepted the respondent's admission and his proposed penalty of a \$3,000 fine and costs of \$3,750.

Application for Anonymous Publication

The respondent applied for an order that the summary of the hearing panel's decision that is circulated to the profession not identify him. Law Society rules require that summaries of discipline decisions be circulated to the profession and that those summaries " must identify the respondent."

Rule 4-38.1(3), however, permits an order for anonymous publication of a decision only if there is no suspension or disbarment (as here) and if publication will cause grievous harm to the lawyer or another individual that outweighs the interest of the public and the Law Society as a disciplinary body in full disclosure.

In *Law Society of BC v. Doyle*, 2005 LSBC 24, the Benchers concluded that grievous harm must be

exceptional, unusual, onerous and injurious to the lawyer or cause catastrophic loss personally and professionally. The harm must involve significantly more than the damage to a lawyer's reputation or embarrassment that normally flows from a finding of professional misconduct.

The respondent argued publishing his name would have a detrimental effect on his relationship with the insurance company that was his largest client. He said the insurance company had a "zero tolerance policy" regarding professional and personal misconduct on the part of its outside counsel. He also said publication would have a detrimental effect on his ability to attract new clients.

The respondent submitted that his situation was analogous to that described in *Re: Lawyer 5*, 2005 LSBC 50, where the Benchers allowed anonymous publication. The lawyer in that case admitted to a technical breach of the Law Society's accounting rules and presented evidence that publication of his name would result in "public scorn" such that his single largest client, which was aware of the circumstances, would be compelled to end their long-standing relationship.

Decision of Leon Getz, QC (minority)

Leon Getz, QC concluded that there was no evidence that publication of the respondent's name "would give rise to a wave of public sentiment exposing the client to such scorn that it would almost certainly feel impelled to terminate its relationship with [the respondent]."

He also said the request for anonymity invited the Law Society "to acquiesce in concealing from the client something which, on the respondent's own account of the client's policy, is of significant interest to it."

Decision of Russell Tretiak, QC (majority)

Russell Tretiak, QC concluded there was no evidence to contradict the respondent's testimony that his major client had a zero tolerance policy regarding professional misconduct and that publication of his name could result in loss of the client.

He said the breach of undertaking was inadvertent and that harm to the respondent by publication outweighed the public interest.

Decision of Dr. Maelor Vallance (concurring)

Dr. Maelor Vallance agreed with Tretiak. He added that "the mischief that results from this respondent being cited and publication made exceeds disproportionately the error made by him."

The Discipline Committee has referred the decision on anonymous publication for review by the Benchers.