2008 LSBC 38
Report issued: December 9, 2008
Citation issued: August 24, 2007

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

Donald Andrew Lyons

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: October 2, 2008

Panel: Kathryn A. Berge, QC, Chair, Anna K. Fung, QC, Thelma O'Grady

Counsel for the Law Society: Maureen S. Boyd
Appearing on his own behalf: Donald A. Lyons

Background

[1] On August 24, 2007, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules. The citation directed that there be an inquiry into the conduct of the Respondent regarding the following:

> On or about April 10, 2006 and June 5, 2006, while acting for your client, SC, you received or accepted cash in an aggregate amount of $7,500 or more in one client matter or transaction, when you were engaged on your client's behalf in some or all of paying funds, purchasing securities or business assets, or transferring funds, contrary to Rule 3-51.1 of the Law Society Rules.

[2] This citation came before this Panel and was heard on January 17, 2008. The matter proceeded by way of a Statement of Agreed Facts, which included a conditional admission by the Respondent that his conduct constituted professional misconduct.

[3] On March 14, 2008, this Panel issued its decision on Facts and Verdict and subsequent Corrigenda on September 29, 2008 (together, the " September Decision") accepting the Respondent's admission of professional misconduct arising from his violation of Rule 3-51.1 (commonly referred to as the " No-Cash Rule") and making a determination under section 38(1) of the *Legal Profession Act* that the Respondent had committed professional misconduct. The No-Cash Rule prohibits lawyers from accepting cash in excess of $7,500 from a client, except if the cash is provided for retainer purposes.

[4] On October 2, 2008, this Panel conducted the Penalty Hearing to determine the appropriate penalty in this case. As at the earlier hearing on Facts and Verdict, the Respondent confirmed that he was aware of his right to counsel and confirmed that he had consulted counsel for advice prior to the hearing.

[5] In its September Decision, this Panel found that the Respondent was guilty of professional misconduct. The Panel noted that the conduct for which the Respondent was cited was serious: there were two separate instances of breaches of the No-Cash Rule, distinct from each other in time and circumstances, persisting over a period of nine months from the initial acceptance of cash in April, 2006 to the point of full disclosure to the Law Society on January 29, 2007, when the Respondent delivered a written response detailing the complete circumstances in which he had received the prohibited amounts of cash.

[6] As was noted in the September Decision, this is a matter of first instance, as it is the first time that the Law Society has issued a citation pursuant to Rule 3-51.1 and a lawyer has been found to have professionally misconducted himself by contravening the No-Cash Rule so as to trigger this hearing as to penalty.

Submissions

[7] Counsel for the Law Society prefaced her submissions by confirming that, as this is a case of first instance, there is no direct authority on point that binds the Panel in determining the appropriate penalty. She provided a useful summary of penalties in what were submitted to be similar types of cases involving breach of trust accounting rules, breach of undertaking cases, and other matters involving lawyers who had no prior discipline record.

[8] Law Society counsel submitted that, after taking into account all of the circumstances of this matter, an appropriate penalty would be a fine of $5,000 and costs in the amount of $4,500. Given that a reprimand is implicit in any order for a fine (see *Law Society of BC v. Hart*, 2007 LSBC 50), it was submitted that no separate reprimand is required. Further points made by the Law Society included the following:

> (a) the Respondent's repeated breach of Rule 3-51.1 constituted an aggravating factor that suggests that a heavier penalty may be appropriate; and
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> (b) the Respondent accepted the cash on both occasions, not on a mistaken understanding of the Rule, but on a mistaken understanding of the consequences of the violation of the Rule.

[9] The Respondent, while agreeing that a fine was appropriate, submitted that the fine sought by the Law Society was excessive. He thought a fine of $1,500 to $2,500 would be more appropriate due to:

> (a) the various personal factors set out in the September Decision, including the personal and professional crisis in which he found himself at the time that the breaches of the No-Cash Rule occurred, including the dissolution of his former law firm;
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> (b) the Law Society's role in the matter;
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> (c) his previous unblemished discipline history;
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> (d) the suffering he has already experienced as a result of the negative publicity surrounding this matter as it is a case of first instance that has attracted media attention, including coverage in the Vancouver Sun;
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> (e) the unanticipated pressure upon others associated with him as a result of the negative publicity surrounding the case; and
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> (f) the negative effects upon his income both as a result of the negative publicity and his inability to

work effectively as a result of his distress arising from the September Decision.

[10] In respect of costs, the Respondent submitted that, while costs were appropriate, the amount sought by the Law Society was excessive and a reduced amount would be more appropriate in the circumstances.

Discussion

[11] *Law Society of BC v. Ogilvie*, 1999 LSBC 17 is the leading authority on the consideration of the type of relevant factors in determining the appropriate penalty in Law Society disciplinary cases in general. The factors to be considered include:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[12] In terms of the nature and gravity of the conduct, this Panel concluded in its September Decision that the nature of the conduct proven was serious and amounted to professional misconduct, particularly due to the following:

1. The fact that the Respondent was not fully aware of the extent of the potential consequences of a breach of the No-Cash Rule is an insufficient excuse for its violation. Certain Law Society Rules have primarily an administrative intent, but the No-Cash Rule is not one of these. This Rule has at its heart the mandate of the Law Society to regulate the practice of law in the public interest. By its clear prohibition, it strives to protect lawyers from being drawn into acting as the willing or inadvertent dupes of the unscrupulous and the dishonest. The Respondent was knowledgeable about the Rule, its importance to the Law Society and the public, and yet chose to ignore it, despite his awareness of its importance to the regulation of the legal profession.

2. In considering the criteria that distinguish a " Rules breach" from professional misconduct, this Panel takes into account the fact that the conduct for which the Respondent has been cited is serious: there were two separate instances of breaches of the No-Cash Rule, distinct from each other in time and circumstances, persisting over a period of nine months from the initial acceptances of cash to the point of full disclosure to the Law Society.

3. Although the Respondent may not have been fully briefed by the Law Society as to all of the steps that he must take under the circumstances and the possible consequences of a breach of the No-Cash Rule, ultimately, it was the Respondent's responsibility to inform himself regarding the Rules.

4. By the time of the violations of the No-Cash Rule by the Respondent, the Law Society had made it clear in its many publications on the Rule that there would be serious consequences for any lawyer who does not comply with the Rule.

[13] As to the age and experience of the Respondent, he was called to the Bar of British Columbia on July 10, 1979, and has practised law steadily since then. At the time of the impugned conduct, he had practised law for approximately 27 years such that he would have been regarded as a seasoned, senior practitioner in his field.

[14] As concerns the previous character of the Respondent, as is set out above, he has no previous professional conduct record, and has apparently practised without incident until the conduct in question. This speaks in favour of leniency from the Panel in considering the range of possible penalties.

[15] There is no evidence that the Respondent obtained any monetary advantage from receipt of the cash, save that he ultimately was able to obtain a retainer from which he was able to pay his modest account. Nevertheless, by not insisting that the client provide the Respondent with a cheque, he put the goal of accommodating his client above his paramount obligation to practise law in accordance with the strictures of the profession. Such strictures are imposed with the direct purpose of protection of the public. Implicit or explicit pressure from clients to " bend the rules" may occasionally be encountered by lawyers from time to time. The good judgment and steadfast resolve to resist such pressures is part of discipline that every lawyer has the duty to develop in himself or herself. This duty has a direct relationship to the profession's privilege of self-regulation. It follows that a response to such pressure or the simple desire to accommodate a client cannot serve as an excuse for non-compliance with a Law Society Rule. The fact that the Respondent in this instance knowingly violated the No-Cash Rule in an effort to please his client not once but twice, is a factor militating against the Respondent in this instance.

[16] As already noted, the offending conduct occurred not once but twice within the space of approximately two months involving the same client, despite the fact that the Respondent was fully aware of the No-Cash Rule on both occasions. This is an aggravating factor to be reflected in any penalty to be imposed upon the Respondent.

[17] In his submissions to the Panel, the Respondent acknowledged without reservation that he had made a mistake and he was extremely ashamed of his conduct. He also apologized to the Law Society for his conduct, providing assurances that " this is the first time that I have been disciplined, and I promise that it will be the last." The Panel accepts that the Respondent is genuine in his remorse and regrets what appear to be uncharacteristic and unfortunate lapses in judgment. There is no need for any remediation or rehabilitation of the Respondent in this case in light of his clear acknowledgment of responsibility for his conduct.

[18] In terms of other mitigating factors, the Panel notes that the Respondent self-reported the breaches

(albeit not as promptly and completely as he ought to have done), the unique factors of the Respondent's internal firm crisis at the time of the offences, and the involvement of the Law Society in the matter.

[19] In terms of the impact of a penalty upon the Respondent, there is no indication that there will be any other sanctions or penalties that will flow from these offences.

[20] With respect to specific deterrence, the Panel is satisfied that, in light of the Respondent's unreserved acceptance of responsibility for his conduct, no further specific deterrence is necessary. With respect to general deterrence, however, this Panel agrees with the submissions of counsel for the Law Society that in order to ensure the efficacy and purpose of the No-Cash Rule, the penalty in this case must signal clearly both to the Respondent and to the profession that the No-Cash Rule must be complied with, regardless of the inconvenience to the lawyer or to the client. The penalty should, as a general rule, be a fine with sufficient deterrent effect that it prevents other lawyers from treating it as an acceptable cost of doing business or a convenient price to pay for keeping the client happy. In light of the Respondent's knowing breaches of the Rule on two separate occasions, in this instance, the fine should not be at the absolute bottom end of the scale.

[21] It might be argued that a breach of the No-Cash Rule is essentially a victimless offence beyond the damage done to the public's faith in the integrity of lawyers and their adherence to standards of professional conduct. This Panel asserts that the particular circumstances of a breach will determine whether or not this is true. However, irrespective of that, this Panel feels that the lack of identifiable victims does not minimize the importance of the Rule. Breaches of the Rule may potentially erode the confidence of the public in the integrity of the profession and, as such, ought not to be condoned lightly if at all.

[22] As already noted, this is a matter of first instance and no previous Panel has considered the appropriate range of penalties for breaches of the No-Cash Rule. While the Panel appreciates the attempt at guidance offered by counsel for the Law Society, the Panel is not persuaded that any of those cases ought to guide this matter as one of first instance. This Panel is not inclined to view breaches of the No-Cash Rule as analogous in nature to breach of trust accounting rules, which, when they relate to the form of trust accounting rather than to substantive trust account shortages, may be viewed by some as simply " administrative" in nature. The purpose of the No-Cash Rule is substantive and does not relate to form only. As noted in the Law Society publications to the profession , the No-Cash Rule is a proactive rule that seeks to prevent the involvement, knowing or otherwise, of lawyers in money laundering activities. In that respect, enforcement of the prohibition should be strict and rigorous.

[23] That being said, this Panel does not view breaches of the No-Cash Rule as analogous either to breach of undertaking cases in terms of the severity of consequences and its impact on the legal process. The sanctity of undertakings is well known to the legal profession and is a fundamental tenet of the integrity of the profession. The No-Cash Rule, being a relatively recent innovation of law societies across Canada is, as demonstrated by this case, not as well known or understood by the profession, despite continued efforts by the Law Society to educate its members about its importance.

[24] In respect of the Respondent himself, while the Panel genuinely sympathizes with the Respondent's plight and is troubled by the impacts that its decision has already had on the Respondent and his family, it notes that the responsibility for such consequences must rest first and foremost with him. His own conduct brought about the citation, and he admitted that he professionally misconducted himself, not once but twice in the space of months. The Panel has a responsibility to strike an appropriate balance between protecting the public interest in responding to professional misconduct and the interest of a lawyer when his professional life is at stake. Overall, in striking such balance in the unique circumstances of this case, however, the Panel is persuaded that the scale should tip in favour of the Respondent.

[25] In terms of the precedent set in other somewhat analogous matters, this Panel takes note of:

> (a) *Law Society of BC* v. *Cunningham*, 2007 LSBC 47, where, as in this instance, the misconduct was a first and isolated event, and the respondent professionally misconducted himself by failing to respond to communications from the Legal Services Society and the Law Society. The respondent in that matter received a fine of $2,000;
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> (b) *Law Society of BC* v. *MacDonald*, 2006 LSBC 01, which is the only other preceding decision involving receipt of cash. The respondent in that instance did not record the receipt of cash. He was not charged with a breach of the then existing No-Cash Rule and, instead was charged with failure to record a trust deposit. In that instance, the respondent consented to a fine of $1,500 and a practice condition requiring the hiring of a professional accountant to review his books and records and provide quarterly reports regarding compliance to the Law Society for two years. This decision can be distinguished from the present matter due to the fact that there was no finding of professional misconduct nor contravention of the No-Cash Rule itself; and
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> (c) *Law Society of BC* v. *Martin*, 2007 LSBC 20, where the respondent was found to have professionally misconducted himself by approving for payment fraudulent or inflated accounts of the client's children over an extended period of time. As here, the respondent had no previous record of professional misconduct and no evidence of dishonesty. Nonetheless, the respondent in that case received a reprimand, a fine of $20,000 and was ordered to pay substantial costs.

What is clear from the above is that the range of appropriate penalties is broad and that the *Ogilvie* factors must be weighed carefully in each case and adjusted within the range in order to appropriately sanction the improper conduct of lawyers in each instance.

[26] As for costs, counsel for the Law Society has submitted a total bill of costs showing that full indemnity for costs would amount to $10,460. Of that, $1,487.50 is attributable to time spent by counsel in reviewing the Respondent's New Evidence Application following the Panel's original decision on Facts and Verdict and attending to certain post-decision communications from the Respondent.

[27] Counsel for the Law Society urged the Panel to make an order for costs in the amount of $4,500 against the Respondent, which approximates 43% of the total indemnity costs, while at the same time acknowledging that the time she had spent on this case was somewhat higher than might have been expected due to this being a case of first instance and the number of communications from the Respondent.

[28] The Panel finds that it would be inappropriate for the counsel costs related to the New Evidence Application to be included in the final costs order in light of the fact that the Panel issued the September 29, 2008 Corrigenda as a result of the Respondent's application. The Panel also finds that it would be inappropriate for the Respondent to have to bear the burden of paying for increased counsel fees entailed in dealing with this matter as being one of first instance.

Conclusion

[29] As this is a matter of first instance, the Panel finds that its discretion in terms of range of penalties to be unfettered by previous precedent. That being said, in light of the factors discussed above and having particular regard to the previously unblemished history of the Respondent and the steps he took to consult the Law Society with respect to the effect and interpretation of the No-Cash Rule prior to his first receipt of the impugned cash, the Panel agrees with the Respondent's submission that a fine in the lower range of the

spectrum is warranted. Thus, the Panel finds that a fine of $1,500 is appropriate and so orders.

[30] In addition, the Panel orders costs of $2,700, being approximately 30% of the total indemnity costs, less the costs associated with the New Evidence Application and related communications with the Respondent.

[31] As agreed by the Respondent and counsel for the Law Society, the Respondent will have until June 15, 2010 to make such payment in full.