

2009 LSBC 01

Report issued: January 23, 2009

Citation issued: September 24, 2007

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

Jack Alexander Adelaar

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: December 10, 2008

Panel: David Renwick, QC, Chair, Carol Hickman, David Mossop, QC

Counsel for the Law Society: Maureen Boyd

Counsel for the Respondent: Terrence Robertson, QC

Introduction

[1] The facts and verdict are set out in our decision issued July 2, 2008.

[2] What we must now determine is the appropriate penalty that the Respondent should receive pursuant to Rule 4-35. The range of penalties available are set out in section 38(5) of the *Legal Profession Act*, S.B.C., 1989, C.9 (the " Act").

Issues

[3] Counsel for the Law Society submitted that the appropriate penalty should be a fine of \$1,500 and an order that the Respondent pay costs in the amount of \$500.

[4] Counsel for the Respondent submitted that the appropriate penalty should be a fine of \$500 and that the Respondent is entitled to costs for defending the professional misconduct allegation, which was unfounded.

Background

[5] The background is set out in our reasons on Facts and Verdict issued July 2, 2008. It is not necessary to repeat the facts in this decision.

[6] The Respondent is 63 years of age and has been a member of the Law Society since 1972, with a practice divided between litigation and solicitors work.

[7] The Respondent does have a Professional Conduct Record, which was marked as Exhibit 4 in these proceedings. This can be summarized as follows:

1. Conduct Review Subcommittee report dated April 25, 1983.
2. Conditional Admission pursuant to Rule 468, Conditional Admission letter dated April 19, 1991 (Discipline Digest, 1992: No. 1 January).
3. Minutes of the Competency Committee dated June 15, 1992.
4. Conduct Review Subcommittee report dated July 14, 1994.
5. November 22, 1995 Minutes of the Competency Committee approving recommendations from the Follow-Up Practice Review report dated October 26, 1995.
6. April 10, 1997 Minutes of Competency Committee approving recommendations from the Practice Review report dated February 17, 1997.
7. *Law Society of BC v. Adelaar*, Findings of Fact, Verdict and Penalty, issued September 22, 1997.
8. *Law Society of BC v. Adelaar*, (Findings of Fact) dated October 6, 1997; *Law Society of BC v. Adelaar*, (Verdict) dated November 17, 1997; *Law Society of BC v. Adelaar*, (Penalty) dated February 11, 1998.
9. Conduct Review Subcommittee reported dated April 2, 1998.
10. Conduct Review Subcommittee report dated September 10, 1998.
11. Conduct Review Subcommittee report dated April 18, 2005.
12. Conduct Review Subcommittee report dated November 10, 2006.
13. *Law Society of BC v. Adelaar*, 2008 LSBC 18, issued July 2, 2008.

Discussion

[8] Counsel for the Law Society referred us to the decision of the hearing panel on penalty in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, which sets out a number of factors a Panel should consider when determining the appropriate penalty.

[9] We have taken these factors into consideration, as well as the significance of Rule 3-51.1, as set out in paragraph [19] of our decision issued July 2, 2008.

[10] Both counsel have submitted that a fine is an appropriate penalty in these circumstances. Counsel for the Law Society referred us to the decisions in *Law Society of BC v. Norton*, 2008 LSBC 36 and *Law Society of BC v. Lyons*, 2008 LSBC 38 where a fine was found to be appropriate in similar circumstances, specifically a breach of Rule 3-51.1.

[11] We have considered the circumstances in each of these cases. In *Norton (supra)*, the facts were similar and the Panel imposed a fine of \$500. However, in the *Norton* decision, the lawyer did not have a Professional Conduct Record. In *Lyons (supra)*, the circumstances were more egregious and the Panel found professional misconduct. However, in the *Lyons* decision, the lawyer did not have a Professional Conduct Record. As a result, the Panel imposed a fine of \$1,500.

[12] Taking all of this into consideration, we order a fine in the amount of \$1,000.

Costs

[13] Counsel for the Respondent submitted that the Law Society "casts its net very broad" by including all four possible adverse determinations in the citation. This, he submits, is not fair to the Respondent because it does not provide sufficient notice as to what allegations the Respondent is facing.

[14] In response, counsel for the Law Society submitted that the first page of the citation is a "standard form" which has not been changed for many years. She also submitted that sometimes it is not clear as to which adverse determination the Law Society is proceeding with until all of the evidence is established.

[15] This is a practice that the Law Society may want to reconsider. While it may take some time to review all of the evidence and ascertain which adverse determination the Law Society is proceeding with, surely, a lawyer is entitled to know prior to the hearing commencing, what allegations he/she is facing.

[16] Counsel for the Respondent further submitted that the Respondent made an admission with regard to a breach of the Rules and the only issue at hearing was whether this constituted professional misconduct. As a result, he submitted that this could have proceeded by way of a Rule 4-22 conditional admission rather than the costs of a full hearing.

[17] We note that this matter did proceed by way of an Agreed Statement of Facts, wherein the Respondent did admit to a breach of Rule 3-51.1. Accordingly, the hearing proceeded on a determination of whether this amounted to professional misconduct.

[18] Counsel for the Law Society admitted that this was one of the first cases in this area and as such, needed to be determined by a Panel of Benchers. Accordingly, she submitted that it would be unfair to require the Respondent to pay the costs associated with that process. She also acknowledged that the Law Society was unsuccessful in obtaining a finding of professional misconduct, so the costs payable by the Respondent should be reduced for that reason as well. The draft Bill of Costs submitted by the Law Society was for approximately \$8,800. However, because of the mitigating circumstances, the Law Society was only seeking an award of \$500.

[19] She further submitted that there would have been costs associated with dealing with this matter in any event, including a Rule 4-22 conditional admission. She also submitted that it would be unusual to order no costs, even in a Rule 4-22 admission.

[20] Counsel for the Respondent suggested that the usual rules of civil procedure should apply; specifically, that costs should follow the event. He submitted that because the Respondent was successful in defending the allegations of professional misconduct, he should have his costs.

[21] In response, counsel for the Law Society pointed out that the jurisdiction for a Respondent being awarded costs can be found in Rule 5-9 (3) which states as follows:

5-9(3) In the following circumstances, the panel or the Benchers have the discretion to direct that the applicant or respondent be awarded costs in a fixed amount or in accordance with subrule (1):

- (a) No adverse finding is made against the applicant;
- (b) The citation is dismissed;
- (c) The citation is rescinded after the hearing has commenced.

[22] Counsel for the Respondent provided several useful examples of situations where this Rule could be very unfair to a lawyer and submitted that this cannot be what the Benchers intended when this provision was enacted.

[23] While we agree with counsel for the Respondent that there may be situations that are unfair to the lawyer, given the current wording in Rule 5-9(3), the Panel has no jurisdiction to award costs to the Respondent unless the citation is dismissed or rescinded. This may be something that the Benchers wish to reconsider for the reasons set out above. However, this cannot be changed without a formal Rule amendment.

[24] However, we do believe, as counsel for the Law Society has submitted, that these are mitigating circumstance that can be taken into consideration when assessing the appropriate amount of costs.

[25] Accordingly, taking into consideration all of these factors, as well as the factors set out in the *Law Society of BC v. Racette*, 2006 LSBC 29, we award costs in favour of the Law Society in the sum of \$500.

Conclusion

[26] The Respondent will pay a fine of \$1,000 and costs to the Law Society of \$500, both fine and costs payable within four months.

[27] There will be a publication of this decision in accordance with Rule 4-38.