2009 LSBC 02
Report issued: January 29, 2009
Citation issued: February 1, 2008

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

Gregory John Lanning

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: November 25, 2008

Panel: William Jackson, Chair, Leon Getz, QC, David Mossop, QC

Counsel for the Law Society: Jean Whittow, QC
Appearing on his won behalf: Gregory Lanning

Background

[1] We were empanelled to consider certain alleged conduct of the Respondent, outlined in a citation against him issued on February 1, 2008. The citation summarized those matters as follows:

> In the course of your representation of your client LG in a family matter, you conducted yourself in an unprofessional manner towards the unrepresented opposing party, NG, and in particular in your correspondence to her during the period between August 2006 to December 2006.

[2] On September 29, 2008, following a hearing that spanned three days in June 2008, we issued our decision on Facts and Verdict. We found that the Respondent's conduct constituted professional misconduct in respect of the allegations in the citation.

[3] The primary focus of the *Legal Profession Act* is the protection of the public interest. The imposition of disciplinary sanctions is intended, therefore, to ensure that the public is protected from acts of professional misconduct. Section 38(5) of the *Act* sets out a range of sanctions, from a reprimand to disbarment.

Discussion

[4] In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the Hearing Panel set out what has since become generally accepted as a useful, albeit not exhaustive, list of considerations to be taken into account in assessing an appropriate penalty. Not all of them will be relevant in all cases; and in some cases other factors may require consideration. We deal below with the factors identified in *Ogilvie* that we think are relevant in this case.

The nature and gravity of the conduct proven

[5] We found that, in 12 letters over a five-month period, the Respondent failed to behave in a manner that is

consistent with the standards of civility expected of a lawyer. This Panel also considered the Respondent's position that NG was a difficult person and that his purpose was to " defeat" , " squelch" or " crush" her to advance his client's interests. We also considered his submission that his correspondence with NG was not published to other persons as were the three examples of public remarks provided by the Respondent.

[6] We also considered that, while incivility is not the most serious form of misconduct that a lawyer may commit, it does nonetheless reflect badly upon the profession, especially when addressed to a lay litigant.

The previous character of the respondent, including details of prior discipline

[7] We were provided with the Respondent's Professional Conduct Record. It covers two incidents. In the first, in 1994, the Respondent was the subject of a Conduct Review arising from circumstances bearing no resemblance to the present case. We have attached no significance to it.

[8] In 2000, the Respondent was subject of a second Conduct Review arising, once again, from circumstances quite different from the present. It was alleged that the Respondent had failed to honour an undertaking in a matrimonial matter. The Conduct Review resulted in a citation being issued against the Respondent.

[9] The Hearing Panel did not find that there had been a breach of undertaking as alleged in the citation but rather made a finding incompetence.

[10] This finding was appealed to the Benchers " en banc" pursuant to s. 47 of the *Act*. The Hearing Panel's decision was upheld.

[11] On the face of it, as the finding of " incompetence" is not similar to this Panel's finding of professional misconduct, this entry on the Professional Conduct Record should also have little weight. However, counsel for the Law Society submitted that two letters by the Respondent in response to the Conduct Review report, the hearing on the merits, the hearing on penalty and the section 47 Review revealed the sort of dogged confrontational behaviour that the Respondent displayed in his dealings with NG in this case.

[12] The Respondent contended that his interpretation of the Rule and law concerning undertakings (the subject of the citation) was legitimate and that it was simply ignored by the various reviewing bodies. He further submitted that the two members who conducted the Conduct Review were dismissive of his position and that their report was biased and intemperate. In those circumstances, he contended, it was incumbent on him to point these matters out and to state his position vigorously. This Panel accepts the submission of the Law Society in paragraph 11 above.

The impact upon the victim

[13] The " victim" in this case is NG. There is little doubt that she found the Respondent's correspondence patronizing, provocative and insulting. She testified that it " got her back up." Counsel for the Law Society properly conceded, however, that she continued undeterred and that " her vigour in her approach to the litigation was undiminished."

The advantage gained, or to be gained, by the Respondent

[14] This Panel found that the Respondent's actions were motivated by, first, his purpose to protect and advance his client's interests in the face of what he considered to be NG's truculence and manipulation of his client and, second, personal frustration. His personal investment in his correspondence was reiterated at

the penalty hearing in his final submissions. He stated as follows:

> I stood up for me at the points when she decided to attack me, otherwise there would have been no need for those references, but this is the fight that she - that she wanted to start up. And NG likes to return to the same issue, so I could imagine that once I will have to watch exactly which nouns I use simply in order to satisfy a woman who for no reason that she could ever give didn't like the reference to ‘ the girl' or ‘ the daughter'. That's the only person I've ever come across in any context, legal or non-legal, who's ever objected to such a simple, ordinary phraseology. What a wimp I would be if I had to give in to that, and especially when this is NG, who never provides anything to anybody, makes no concessions, never gives anybody but always - but always demands. That would offend my sense of dignity, my sense of worth. I'm just as important as NG.

[15] So the only advantage that the Respondent gained from his behaviour was the reinforcement of his sense of self-worth.

The number of times the offending conduct occurred

[16] As stated earlier, there were 12 letters over a period of five months, many of them offensive in multiple ways. They were not spontaneous outbursts but were carefully and calculatedly intemperate.

[17] The Respondent submitted that each of the offending letters was a response to a provocation by NG, and they were necessary to admonish and deter her. We do not agree with this submission.

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

[18] Counsel for the Law Society says that the Respondent has made no acknowledgement of wrongdoing. More than this, after being contacted by the Law Society about the complaint on February 1, 2007, he responded with a provocative and problematic letter taking an approach similar to that about which the complaint was made.

[19] The Respondent says that, at the time of that letter, he was not aware of the details of the complaint. The Respondent is mistaken. The Law Society's letter of February 1, 2007 enclosed the detailed complaint of NG and referred to an earlier telephone conversation between the staff lawyer of the Law Society and the Respondent on January 23, 2007.

[20] The Respondent continues to maintain that his conduct was a legitimate tactic in dealing with a difficult self-representing litigant. Accordingly, he does not agree that his actions were professional misconduct, and he cannot logically acknowledge any misconduct. This Panel does not agree and considers the Respondent's recalcitrance an important factor in determining penalty.

The Impact of the Proposed Penalty on the Respondent

[21] The Respondent indicated that he carries on his practice under a part-time licence. As well, his practice consists largely of legal aid referrals and pro bono. In light of this, we believe that a fine in the range suggested by the Law Society would have a disproportionately adverse impact on the Respondent. He also stated that, if a fine and costs were imposed in the quantum suggested by the Law Society, he would require time to pay.

The Need for Specific and General Deterrence

[22] Counsel for the Law Society submitted that the matter could have been resolved by an early apology and that the Respondent required to be specifically deterred from similar behaviour. In response to questions from the Panel, the Respondent indicated that, in similar circumstances, he would either litigate the issues at arm's length rather than attempt to deal directly with a hostile self-representing litigant or find his client new counsel.

[23] We agree with the Law Society's submission that general deterrence is an important factor to underscore the importance placed on civility by lawyers. This is particularly true as the number of lay litigants using the legal system increases.

The Need to Ensure the Public's Confidence in the Integrity of the Profession

[24] We adopt the position of the Panel in the *Ogilvie* decision. At paragraph 19 they wrote:

> The public must have confidence in the ability of the Law Society to regulate and supervise the conduct of its members. It is only by the maintenance of such confidence in the integrity of the profession that the self-regulatory role of the Law Society can be justified and maintained.

The range of penalties imposed in similar cases

[25] The precedents provided reveal a range of penalties from a reprimand to a suspension combined with conditions. As ever, the range depends on the extent of the misconduct.

[26] In *Law Society of Alberta v. Pozniuk*, [2002] L.S.D.D. 55, the lawyer wrote to a fellow lawyer and called him " clueless" . That Panel imposed a reprimand as the case involved a single incident without the use of profanity.

[27] In *Law Society of BC v. Barker,* [1993] L.S.D.D. 189, the lawyer lost his temper in the course of a telephone conversation with an adjuster and used abusive language. Prior to the hearing, the lawyer had apologized. The matter proceeded by admission under a predecessor to Rule 4-22. The Panel imposed a reprimand, a fine of $400 and costs of $500.

[28] In *Law Society of BC v. MacAdam,* [1997] L.S.D.D. 55, the Panel dealt with several complaints. Two of them pertained to offensive remarks made to the client and to a probation officer. Again, in a citation dealt with under a predecessor to Rule 4-22, the Panel imposed a reprimand, an order to write letters of apology, a fine of $500 and costs of $500.

[29] In *Law Society of Upper Canada v. Kay,* 2006 ONLSHP 31 (Hearing) (CanLII), a lawyer had engaged in misconduct through improper communications in three different matters. In one he returned opposing counsel's letter with handwritten annotations. In the second, he accused the opposing counsel of " fraud" for referring to settlement discussions. In the third, he accused a former client of attempting to cheat him out of fees and threatened to initiate criminal proceedings. He was also found to have unreasonably withheld documents from this former client. Following limited joint submissions, the Panel ordered counselling, a practice review, a 30-day suspension and costs of $10,000. The Panel took notice of the lawyer's efforts prior to the penalty hearing to make amends for his misconduct.

[30] In *Law Society of Upper Canada v. Carter,* 2005 ONLSHP 0024 (CanLII), the lawyer took over carriage of a Legal Aid file. He formed the opinion that the prior counsel had not adequately represented the client.

The lawyer then wrote offensive letters to the previous lawyer, to three different Legal Aid staff and to the Law Society of Upper Canada. After the Panel's finding of misconduct, the lawyer began a further letter-writing campaign. The Panel found the further letters indicated that the lawyer had no remorse. The Panel imposed a suspension of three months and conditions of written apologies, medical evidence that he was fit to resume practice and costs of $1,500.

What is the Appropriate Sanction

[31] The Law Society suggests a fine of $7,500. We agree that a fine and reprimand are appropriate. Unlike the *Pozniuk, Barker* and *MacAdam* cases, this matter is not limited to a single incident. Unlike the *Kay* and *Carter* cases, the offensive communications are only between the Respondent and one complainant. As in the *Carter* decision, there are no efforts to apologize or make amends in the case at hand. Accordingly, considering all of the factors mentioned above, including the financial impact of the penalty upon the Respondent, we find that a fine of $2,500 is appropriate.

Costs

[32] The Law Society seeks costs in the amount of $8,800. The draft Bill of Costs totals $21,990.51. The amount sought is approximately 40% of full indemnity. The Respondent suggested that costs should be no more than 30% of full indemnity.

[33] The Benchers' authority to order costs is derived from s. 46 of the *Legal Profession Act* and Rule 5-9 of the Law Society Rules. Law Society decisions, such as *Law Society of BC v. Edwards*, 2007 LSBC 04, support costs on a full indemnity if reasonable in the circumstances. However, the Law Society submits that, in all of the circumstances of this case, costs payable on a percentage is appropriate.

[34] *Law Society of BC v. Racette*, 2006 LSBC 29, is authority that the following factors may be considered in determining what costs are reasonable:

(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.

[35] After considering the above factors and the submissions of both counsel, we are satisfied that costs should be fixed at approximately 30%, which would be $6,600.

[36] In summary, we make the following order:

(a) that the Respondent be reprimanded;

(b) that the Respondent be fined in the amount of $2,500;

(c) that the Respondent pay costs to the Law Society of British Columbia in the amount of $6,600; and

(d) that the Respondent pay the fine and costs by June 30, 2009.