2009 LSBC 04
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Barry Joseph Promislow

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: December 2, 2008

Panel: Richard N. Stewart, QC, Chair, Kathryn A. Berge, QC, Leon Getz, QC

Counsel for the Law Society: Eric Wredenhagen
Appearing on his own behalf: Barry J. Promislow

Background

[1] In a decision on Facts and Verdict issued March 10, 2008 (2008 LSBC 08), we found that the Respondent deliberately breached an undertaking that had been imposed on him. In reaching our conclusion we referred to the proposition set out by the Hearing Panel in *Law Society of BC v. Richardson,* 2007 LSBC 11, at paragraph [35]:

> When a lawyer receives property from another person, whether or not that person is a lawyer, on an undertaking or trust condition to use or not to use the property except on certain trust conditions, the lawyer has *only two options*. The lawyer may either accept the undertaking on those conditions, or the lawyer may reject the undertaking and return the property. [emphasis added]

We pointed out that the Respondent did neither of these things. Instead, he deliberately ignored the trust condition. In doing so, he failed to comply with Chapter 11, Rule 11 of the *Professional Conduct Handbook*. We concluded that the Respondent had committed professional misconduct.

Submissions on Sanction

[2] The Law Society seeks a fine of $7,500 and an award of costs in the amount of $3,500.

[3] The Respondent's position is that, in all of the circumstances, a reprimand is a sufficient sanction. He told us that he is in the process of winding down his practice and that, in the circumstances, the substantial fine proposed by the Law Society would amount to a significant part of his income and, as a result, would represent a significant hardship to him. He agreed with the Law Society's position on costs.

Discussion and Analysis

[4] The factors to be considered in assessing penalty are set out *Law Society of BC v. Ogilvie*, 1999 LSBC 17, the leading authority on the subject. They 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.

[5] We consider these factors, to the extent relevant in the circumstances, in turn.

The nature and gravity of the conduct proven

[6] In our decision on Facts and Verdict we referred to the observation of the Hearing Panel in *Law Society of BC v. Heringa*, [2003] LSBC 10, approved by the British Columbia Court of Appeal, [2004] B.C.J. No. 377, that compliance with undertakings is " fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers." It is difficult, therefore, to overestimate the seriousness of the Respondent's offence.

[7] The intrinsic seriousness of the Respondent's offence is exacerbated, in our view, by the fact that his disregard of the undertaking arose out of a dispute concerning a minor procedural matter - who should file a particular document with the Court. In the circumstances, this was a question of surpassing triviality.

The Respondent's experience

[8] The Respondent is no neophyte. He was called to the Bar in 1958. At the time of the conduct complained of he had been practising law in this Province, principally as a litigator in real estate matters, for 50 years. He is a senior member of the profession. Undertakings, and their importance, cannot sensibly be considered novelties in his experience.

Professional Conduct Record

[9] The Respondent's Professional Conduct Record is in evidence before us. Since 1985 he has been the subject of one citation, six Conduct Reviews and one referral by the Practice Standards Committee for a

review of the adequacy of his corporate records systems. The most recent of these matters occurred in 1999. The Respondent's conduct difficulties have centered around two particular themes: breaches of undertakings and discourteous conduct.

Breach of Undertaking

[10] Two of the prior discipline matters involved disregard of undertakings. In the first, a 1990 Conduct Review, the Conduct Review Subcommittee recommended that, although there had been breaches of undertaking, no further disciplinary action should be taken in view of the complexity of the transactions involved and certain explanations provided and acknowledgments made by the Respondent to the Subcommittee.

[11] The second matter involving a breach of undertaking was a citation that led to a decision of a Hearing Panel in June 1997. The Panel approved the Respondent's conditional admission of professional misconduct and his agreement that he be reprimanded and pay a fine of $3,500 and hearing costs of $1,500. The nub of the admitted misconduct was that the Respondent had again committed a breach of trust terms by unilaterally altering two draft Court Orders that had been sent to him for endorsement and filing them, as altered, in the Court Registry.

Intemperate and Discourteous Conduct

[12] In our decision on Facts and Verdict we referred (at paragraph [4], subparagraph 12) to a " somewhat dyspeptic exchange of correspondence" between the Respondent and the lawyer who had imposed the undertaking on him.

[13] The Respondent's ill temper was not the ground of our finding of professional misconduct. It does, however, have a bearing on the question of the appropriate sanction because it suggests that he has a disposition to be gratuitously truculent, quarrelsome and uncivil towards professional colleagues and others.

[14] This suggestion derives force from the fact that, at a minimum, three of the earlier matters disclosed in the Respondent's Professional Conduct Record reflect a similar disposition - the first in 1985, the second in 1992 and a third, referred to above in paragraph [11], in 1997.

[15] In the course of his submissions to us on the subject of the appropriate sanction, the Respondent essentially conceded that he had been uncivil in this case, and the manner of his concession led us to believe that he acknowledged, as well, that this was nothing new. " I must try," he said, " to be more civil. It has been difficult, but I am getting there. My " adversarial presence" came to the fore, and it should not have done." He also told us that, while he is still actively practising, he is cutting back his practice, that he acknowledges the error of his ways and that he will, in his phrase, " sin no more." The Respondent observed that he has turned the page on his history of intemperate conduct and is finding a new pleasure in practice. He has made similar representations in earlier discipline proceedings. They do not seem to have had long-lasting effect.

Deterrence

[16] We do not need to elaborate on the nature and the importance of a meticulous observance of the specific requirements set out in undertakings. They are important, indeed essential, to the practice of law and the efficient and seamless conduct of clients' business and, therefore, to public regard for the profession and the way in which it behaves. It ought not to be necessary to remind members of the profession in general of this.

[17] In the case of the Respondent, it seems that notwithstanding his experience in prior discipline proceedings, the lessons have yet to be fully absorbed into his professional bloodstream. We found that his breach was deliberate and that it was compounded, perhaps even caused by, his apparent and now, once again, acknowledged inclination to cantankerousness.

[18] In our view the case is amply made out for sanctions that serve the ends of both general and specific deterrence and reflect the other concerns to which we have referred.

Sanctions imposed in other similar cases

[19] Counsel for the Law Society provided us with an array of sanctioning decisions made by Hearing Panels between 2001 and 2008 in matters involving breaches of undertakings. Sanctions have ranged from reprimands to suspensions.

Suspension

[20] In three of the cases - *Law Society of BC v. Hordal*, 2004 LSBC 36 (decision of Review Panel under section 47 of the *Legal Profession Act*), *Law Society of BC v. Goddard,* 2006 LSBC 12 and *Law Society of BC v. Heringa,* (*supra*) - the lawyer was suspended; in the case of *Hordal* (*supra*) for six months, in *Goddard* (*supra*) for two months and in *Heringa* for one month. What seems to have led to the decision to impose a suspension was, in each case, the existence of further aggravating factors ? something more than a " mere" breach of undertaking. In *Hordal,* for example, the additional considerations were that the lawyer had made false representations designed to mislead opposing counsel to believe that the undertaking would be honoured and that his Professional Conduct Record indicated that he had previously been the subject of a Conduct Review in circumstances that displayed a " disturbing similarity" to those involved in the instant case. In *Goddard* the lawyer admitted to five instances of professional misconduct involving a breach of undertaking; and, in *Heringa,* the undertaking had remained outstanding and unfulfilled for some six years.

[21] In *Law Society of BC v. Kruse*, [2001] LSBC 32 a fine of $12,000 was levied on a former member who, in addition to failing to comply with an undertaking, ignored all communications from the lawyer who had imposed it and from the Law Society. The Panel made it clear, however, that had the former member still been in practice, it would have suspended him.

Fine

[22] In *Law Society of BC v. Clendening,* 2007 LSBC 10, a fine of $7,500 was levied. The lawyer had previously been the subject of a Conduct Review arising out of a breach of undertaking, and his misconduct in the instant complaint was compounded by a failure to respond to correspondence concerning the fulfilment of the undertaking imposed on him. The Panel considered these aggravating factors.

[23] In general, the precedents suggest that, in cases of simple breaches of undertaking without further aggravating factors, the fines imposed range between $2,000 and $5,000. See, for example, *Law Society of BC v. Epp,* 2006 LSBC 21 (lawyer with an " impeccable career" free of prior discipline, found to have committed a " one-time" error in judgment, fined $5,000); *Law Society of BC v. Shojania,* 2004 LSBC 25 (lawyer who had relied on erroneous information from legal assistant fined $2,000); *Law Society of BC v. Jeletsky,* 2005 LSBC 02 (lawyer who had imprudently relied on statements of client fined $2,500).

[24] In this case, the Respondent's discipline record is itself an aggravating factor of some significance. His repeated willingness to violate trust conditions and to do so in a manner that is deliberately contentious and uncivil suggests an unwillingness or inability to change.

[25] We have considered the precedents and the submissions, both of counsel for the Law Society and of the Respondent. We gave very serious consideration to imposing a period of suspension. In light, however, of the Respondent's age, the fact that he is winding down his practice, his acknowledgment of his discourtesy in this case and the possibility that his recognition of his weaknesses may be genuine and the beginning of wisdom, we have decided not to do this.

[26] At the same time, we wish to reaffirm the historic position of the Law Society on the centrality of the meticulous observance of undertakings and of civility in the conduct of a lawyer's professional business. Taking all of this into account, we have come to the conclusion that the appropriate sanction in the circumstances is the imposition of a fine of $10,000. This is consistent with the precedents that we have examined.

Costs

[27] The Law Society seeks an order that the Respondent make a contribution of $3,500 to its costs in connection with this matter. We have been provided with a draft Bill of Costs showing that the Law Society's actual and estimated costs are approximately $8,300. The order that it seeks represents, therefore, indemnification of approximately 40% of that amount.

[28] We have considered the factors to be taken into account in assessing costs that were identified in *Law Society of BC v. Racette,* 2006 LSBC 29 at paragraph [13] and have concluded that the amount of $3,500 sought by the Law Society is reasonable.

Other

[29] The *Legal Profession Act,* section 38(5)(f)(i), permits a hearing panel to include in a discipline penalty a requirement that a respondent " complete a remedial program to the satisfaction of the Practice Standards Committee," and section 38(5)(d)(iii) permits a hearing panel to ensure that the requirement is fulfilled by ordering the suspension of a respondent if it is not fulfilled by a specific date.

[30] The Respondent continues to practise although he has indicated that he is winding down his practice. It is likely that he will face challenging, frustrating, possibly infuriating, moments. These are virtually unavoidable. To give him the best possible chance of improving his ability to deal with such challenges and frustrations and hence his relations with other members of the profession, we think the Respondent should be required to complete the online " Communications Toolkit" course developed by the Law Society as an appropriate remedial program, and we so order. We further order that he must complete the program to the satisfaction of the Practice Standards Committee by May 7, 2009, or be suspended from that date until he does so.

[31] In summary, we order that the Respondent:

1. pay a fine of $10,000;

2. make a contribution of $3,500 towards the Law Society's costs;

3. complete, to the satisfaction of the Practice Standards Committee, the online " Communications Toolkit" course developed by the Law Society; and

4. if the course is not completed as required in paragraph 3 by May 7, 2009, be suspended from that date until the course is so completed.

[32] The Respondent must pay the fine and costs ordered before a date or dates to be agreed between him

and counsel for the Law Society. Failing such an agreement, the parties are at liberty to apply.