

2004 LSBC 12

Report issued: May 4, 2004

Citation issued: September 23, 2003

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

DAVID MICHAEL ASHTON

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: March 16, 2004

Panel: Ralston S. Alexander, Q.C., Single Bencher Panel

Counsel for the Law Society: Luisa Hlus

Counsel for the Respondent: Michael Ranspot

Introduction

[1] On March 16, 2004, I found the Respondent guilty of professional misconduct on the basis of certain facts as described in that decision. That finding requires this panel to establish a penalty for the professional misconduct.

[2] The Law Society argued that a suspension was appropriate in the circumstances with the "fall back" position of the Law Society being that if no suspension was found to be warranted, then a reprimand with a fine would be required.

[3] Counsel for the Respondent argued for a reprimand and suggested that on the basis of the submissions, any other outcome would be inappropriate to the Respondent.

Submissions on Penalty

[4] In the course of the submissions on penalty, the Respondent spoke on his own behalf to supplement the observations of his Counsel. In the course of those submissions, the Respondent provided certain information with respect to his health, financial circumstances, and general demeanor, which submissions the Law Society quite properly noted, were not evidence before the panel as they were not provided on oath, and were not tested by the Law Society having an opportunity to cross examine and test the veracity of the submissions.

[5] In the course of those submissions, the Respondent provided the assurances that the panel could treat the substance of the submissions as if they had been provided under oath. I was not inclined to accept that position but noted that the vast majority of the material provided in the Respondent's personal submissions was information which is generally available through other sources and from a review of the Respondent's long history with the Law Society in a variety of matters which are fully described in the Respondent's

Professional Conduct Record which was before the panel.

Circumstances of the Respondent

[6] It is clear from the Respondent's Professional Conduct Record and from submissions of his counsel, that the Respondent suffers from a chronic procrastination-avoidance ailment. In addition, the Respondent has suffered periodically from depression, which has been successfully treated with medication to the extent that it has been suggested that no further pharmacological treatment of that problem is required.

[7] The Respondent is presently not engaged in the practice of law. A hearing panel ordered that the Respondent could return to the practice of law following a suspension, provided that he met certain conditions, including a condition that he practice in association with another member approved by the Law Society, and that he must enter into a practice supervision agreement with a lawyer acceptable to the Law Society, on terms and conditions that are acceptable to the Law Society. That hearing panel's decision was delivered on November 4, 2003, and the Respondent has not found a practice situation which meets the requirements of that hearing panel's decision. He is presently driving taxi for a living.

Discussion

[8] Counsel for the Respondent suggests that I have a broad discretion in terms of establishing the appropriate penalty in these circumstances. He argues that the financial and practice circumstances of the Respondent suggest that a reprimand is the appropriate penalty.

[9] Subsection 5 of Section 38 of the *Legal Profession Act* sets out the options available for a panel upon a finding of professional misconduct and the options range from a reprimand to a disbarment, and in addition, permit a panel to impose conditions upon the practice of the Respondent.

[10] Before addressing the appropriate penalty, it is necessary to observe that both Mr. Cleveland, and his client, exhibited remarkable patience and restraint throughout the seven month period from June of 2002, through January of 2003. The diligence with which Mr. Cleveland pursued a response from the Respondent is admirable. It exemplifies all of the best characteristics of the appropriate manner in which the practice of law should be conducted.

[11] With that exemplary conduct must be contrasted the utterly unacceptable behaviour of the Respondent in these circumstances. It is difficult to imagine the depth of frustration that was suffered by Mr. Cleveland and his client at the repeated, steadfast and utterly consistent refusal of the Respondent to deal with the matters engaged by the lawsuit which had been commenced by the Respondent against Mr. Cleveland's client. It is quite clearly conduct which must be censured in the strongest possible terms.

[12] During the course of the hearing, I observed that it appeared to me that the Respondent had rendered himself immune to penalties from the Law Society. He was in destitute financial circumstances, he was not in practice, was apparently incapable of concluding a satisfactory practice arrangement, and he appeared to me to be insensitive to criticism from the Law Society as evidenced in part by his ability to ignore, over long periods of time, requests for information from the Law Society with respect to complaint matters of interest to that organization.

[13] While the circumstances of the Respondent must be taken into account in establishing an appropriate penalty, it is also important that an appropriate message of condemnation is provided so as to ensure that the membership of the Law Society is aware of the seriousness with which these matters are viewed.

[14] The financial circumstances of the Respondent must be taken into account when determining both the

propriety and amount of any fine that might be levied. These circumstances will also have a bearing on costs, although it is the view of the Benchers that the impecuniosity of a member should not visit the cost consequences of professional misconduct upon the profession as a whole.

Conclusion

[15] In the result of all of the foregoing, I order that the Respondent's ability to practice law be suspended for a three month period of time from the date of the issuance of these reasons.

[16] I further direct that the Respondent be responsible for payment of the costs of the Law Society in the amount of \$2,633.50.

[17] The costs of the Law Society should be paid by the Respondent, without interest, in monthly instalments of \$250.00 per month, with the first of such payments to commence in the month following the month in which the Respondent satisfies his outstanding financial obligations to the Law Society with respect to existing orders as to fines and costs.

[18] I direct the publication of this decision should follow in the normal course.