

[2003] LSBC 23

Report issued: November 4, 2003

Citations issued: December 19, 2002 and
February 12, 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: July 4, 2003

Panel: G. Ronald Toews, Q.C., Chair, Dr. Maelor Vallance,
Gerald J. Kambeitz, Q.C.

Counsel for the Law Society: Todd Follett

Counsel for the Respondent: Michael Ranspot

Background

[1] On May 30, 2003, this Panel found the Respondent guilty of professional misconduct on all but one count of two citations, issued December 19, 2002 and February 12, 2003, which citations had been consolidated for purposes of the May 30, 2002 hearing.

[2] The facts upon which the finding of professional misconduct was founded are set out in the Decision on Facts and Verdict issued by this Panel and will not be repeated in detail here.

[3] The facts can be summarized as disclosing a serious and consistent pattern of failure by the Respondent, attributable to procrastination, in observing his professional duties to a client and to the Law Society.

[4] He failed to serve a client in a proficient manner, he failed to respond to Law Society enquiries regarding a client complaint, he failed to respond to Law Society enquiries about his Form 47 and he failed to cooperate with the Law Society attempts to allow him to practice, while, at the same time, protecting the public through a Practice Supervision Agreement.

[5] One victim of the Respondent's procrastination was a divorce client; the complainant on the December 19, 2002 citation. As a result of the Respondent's procrastination, her divorce took about a year longer than it should have.

[6] Another victim of the Respondent's procrastination has been the Respondent himself. He has repeatedly landed himself before the Law Society for failing to answer correspondence. This has resulted in recurring trouble and cost to himself (though most of the professional costs of supervising the Respondent while

keeping him in practice has been borne by the rest of the profession) and a great deal of Law Society staff time.

[7] The Respondent was under suspension at the time of this hearing. He was placed under suspension on January 24, 2003 by a Panel of three Benchers pending hearing of the Citations before this Panel. Prior to that, the Respondent had been before a Benchers' Panel on October 29, 2002, which Panel declined to suspend the Respondent but allowed him to practice subject to a Practice Supervision Agreement.

[8] The Respondent did enter into such an agreement, but failed to abide by the terms of that agreement and his supervising lawyer resigned from his supervision in January of 2003. Thus the Respondent was suspended by the January 24, 2003 Panel.

[9] In 1990 the Respondent was found guilty of professional misconduct as a result of trust record keeping and accounting irregularities. He was reprimanded, ordered to pay a fine of \$1,000.00 and to pay costs of \$2,850.00. In addition, the Panel ordered that he not practice law except " as a partner or employee of another lawyer until relieved of that condition by the Law Society" .

[10] The Law Society has not relieved the Respondent of that condition except for brief periods in which the Respondent asked for time to find alternate practice arrangements.

[11] The Respondent practiced in a partnership with Mr. Lyons from 1989 until April of 1993. He practiced in a partnership with and under the supervision of Mr. Tarnow from January, 1994 until April of 2001, when Mr. Tarnow took up a job in Yellowknife. He continued to be an economic partner of Mr. Tarnow until his suspension.

[12] The Respondent has, in addition, been the subject of practice reviews held on January 17, 2003, August 1, 1997, July 25, 1996, November 8, 1994, February 18, 1993 and one in 1990.

[13] The Respondent is a married man in his fifties. He and his wife are raising a young, special needs daughter. They live on Saltspring Island and commute to Victoria for work. The Respondent's wife is a self employed registry agent who earns about \$1,000.00 a month.

[14] The Respondent's counsel advised this Panel that the Respondent's practice has not been a remunerative one for some time before his suspension - in part because of his habit of procrastination (which included putting off billing files until it was too late to collect on them) and in part because he was not careful to secure retainers and had trouble collecting accounts from clients. Since his suspension in January, 2002 he has earned a small income from odd jobs.

[15] The Respondent's family income does not meet its expenses and they are, clearly, in a very difficult financial situation.

[16] The Respondent's counsel advised the Panel that it was unrealistic to expect that the Respondent would be able to find a lawyer who would employ him or be his partner. He did, however, have lawyers in mind who might agree to be part of a Practice Supervision Agreement, although the cost of such supervision might be prohibitive for the Respondent.

[17] Counsel for the Respondent placed a number of letters before this Panel on the Respondent's behalf:

- (a) One, from R.T.F. MacIsaac, who had shared office space with the Respondent for a year and a half, spoke well of the Respondent's character and abilities. The letter spoke of his tendency to procrastinate and steps the writer had seen the Respondent take to deal with his problem with the assistance of the Lawyers' Assistance Program.

(b) Another letter, from James Dunn, of the Lawyers Assistance Program, spoke well of the Respondent's improved ability to confront and deal with his problems. It described his attendance at the Edgewood Insite program and his subsequent regular attendance at a lawyers' support group and AA meetings.

(c) Another letter, from Jerry Blackburn, of Edgewood in Nanaimo, to the Respondent, described the six day program the Respondent had attended.

[18] Counsel for the Respondent placed three letters from medical practitioners before the Panel. Two, dated November 28, 2002 and April 30, 2003 are from a psychiatrist, Dr. A.M. O'Breasail:

a. Dr. O'Breasail described the Respondent's history, diagnosed him as suffering from low grade depression, dysthymia (a mild disruption in mood) and having obsessive-compulsive personality traits. He noted that " This man has a long history of personality patterns that are self defeating and have given rise to problems professionally..." . He noted " impulsive type behaviors, in particular picking at the skin of his fingers" . The Panel particularly notes that comment by Dr. O'Breasail as that behaviour was apparent during this hearing. Dr. O'Breasail prescribed medications, noted the programs in which the Respondent had been taking part and " emphasized the importance of his creating structure in his life in order to help him overcome his procrastination" .

b. The third letter, dated May 28, 2003, is from the Respondent's personal physician. He summarized Dr. O'Breasail's letters and added that the Respondent had admitted to being an alcoholic. He has, recently recognized his alcoholism which continues past his last drink in December of 1998.

c. Dr. Saunders described the Respondent's attendance at the Edgewood Clinic and his subsequent attendance at AA and LAP sessions. The doctor noted " I feel this patient is quite motivated to continue working hard to address the concerns that his personality pattern have caused with respect to his professional and personal life."

[19] The Law Society position on penalty is that the Respondent be allowed to practice, but only in a structured environment.

[20] Law Society counsel notes that the Law Society has not relieved the Respondent of his 1990 obligation to practice only as a partner or as an employee of another lawyer.

[21] The Law Society urges that if he is allowed to return to practice it should be under the supervision of the Practice Standards Committee.

[22] Law Society counsel recognizes the effect of the Respondent's suspension from practice thus far and does not suggest a fine or further suspension, but, rather, a reprimand.

[23] The Respondent's counsel asked this Panel to consider the effect of the suspension to date and urged this Panel to allow the Respondent back into practice subject to close supervision as set out in a Practice Supervision Agreement, the terms of which should be left to the Practice Standards Committee.

[24] Respondent's counsel further urged this Panel to allow the Respondent to practice prior to reaching an agreed Practice Supervision Agreement, provided that he limit his practice to witnessing real property documents.

[25] It is clear that the Respondent has had a problem with procrastination to a sick degree for much of his professional life. He appears to have responded to external controls. This Panel notes his recent efforts and his increased motivation, but given the length of his history it is too soon to be sure that any change will be maintained.

[26] There has been nothing in the Respondent's behaviour since 1990 that persuades this Panel that the 1990 Panel was not correct when it required that he practice " only in a partnership or as an employee of another member" .

[27] The Respondent has demonstrated that the only thing wrong with that Panel's decision was that it was not clear enough and allowed him to avoid it's intent by having a " partner" in Yellowknife, Northwest Territory.

[28] This Panel notes the period of time during which the Respondent has been under suspension. That suspension was not a penalty but was imposed because the Respondent would not abide by a Practice Supervision Agreement.

[29] This Panel notes the submissions of Counsel on penalty and the Respondent's financial situation.

Penalty

[30] This Panel orders that:

- (a) the Respondent be reprimanded;
- (b) the Respondent practice only as a partner or employee of a lawyer who is a member in good standing of the Law Society of British Columbia and who is in full time practice in the Province of British Columbia and who is acceptable to the Law Society; and
- (c) prior to returning to practice the Respondent must enter into a Practice Supervision Agreement with a lawyer acceptable to the Law Society, the terms of which are acceptable to the Law Society.

Costs

[31] Law Society counsel has urged this Panel to order the Respondent to pay the costs of this hearing as well as the interim suspension hearings which arose from these citations. Law Society counsel has presented this Panel with a bill of costs in the amount of \$11,240.94.

[32] Counsel for the Respondent has conceded that the Respondent should pay some costs, but urges this Panel not to order payment of Law Society counsel fees since, as he put it, Law Society counsel is a salaried employee of the Law Society and the profession would have had to pay his salary anyway.

[33] This Panel entirely rejects the approach to Law Society counsel fees suggested by the Respondent's counsel. It is not for this Panel to speculate what Law Society employees would be doing if they were not dealing with the Respondent.

[34] Whatever superficial impression of unfairness there may be in ordering an impecunious lawyer like the Respondent to pay the costs he has occasioned by his misconduct, there is a very real unfairness in asking the members of the profession to subsidize the Respondent's inability to practice according to the standards the public is entitled to expect members of the profession to follow.

[35] This Panel orders that the Respondent pay the costs of this hearing in the amount of \$11,240.94. The Respondent may pay the costs in instalments of \$350.00 per month commencing March 1, 2004.