

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

Eric Kai Chesterley

Respondent

Decision of the Hearing Panel

Hearing date: September 30, 2009

Panel: James Vilvang, QC, Chair, Haydn Acheson, David Mossop, QC

Counsel for the Law Society: Eric Wredenhagen

Counsel for the Respondent: Gerald Cuttler

Background

[1] On January 28, 2009 a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society pursuant to the direction of the Chair of the Discipline Committee. The citation directed that this Panel inquire into the Respondent's conduct as follows:

1. In or about March 2003, you commenced a civil action in the name of an individual, ER, when you did not have a solicitor-client relationship with her at that time. In the alternative, you commenced such action without proper instructions.
2. [withdrawn]
3. In acting jointly for ER and another individual, RL, you acted contrary to Chapter 6 of the *Professional Conduct Handbook*.

[2] Law Society counsel advised the Panel that allegation 2 on the Schedule to citation had been withdrawn. Allegation 3 was amended at the hearing pursuant to Rule 4-31(2)(b).

[3] The Respondent admits service of the citation in accordance with Rule 4-15 of the Law Society Rules.

[4] This citation came before this Panel as a conditional admission of a disciplinary violation and consent to a specific disciplinary action pursuant to Rule 4-22 of the Law Society Rules. The Respondent admitted that he had professionally misconducted himself by committing the disciplinary violations set out in allegations 1 and 3 on the Schedule to the citation and consented to the following disciplinary action:

- (a) a fine of \$3,000; and
- (b) costs of \$1,500, both fine and costs payable in equal monthly installments of \$500 over a nine-month period commencing December 1, 2009.

Agreed Statement of Facts

[5] An Agreed Statement of Facts was filed in these proceedings. It provided as follows:

1. The Respondent was admitted to the bar of the Province of British Columbia on June 30, 1976.
2. The Respondent practises primarily in the areas of criminal law and wills and estates, but also practises civil litigation and real estate law.
3. In early December 2002, RL retained the Respondent to act for him in an action (the " Action") involving RL's claim to an interest in land registered in the name of his father, BH, located in [Town], British Columbia (the " Property").
4. After considering the matter, the Respondent advised RL that his mother, ER (BH's ex-wife) would be the proper party to make the claim in respect of the Action.
5. On December 5, 2002, RL emailed ER. He told her that he had been talking to the Respondent about starting an action against BH, and he asked her to sign on as a party to the action.
6. On December 5, 2002, ER replied to RL and stated, in part, " Yes, of course I'll do that. Just let me know when and how."
7. Following this email exchange, RL told the Respondent that ER agreed to be a party in the Action and provided ER's address and telephone number to the Respondent. RL told the Respondent that he would pay the Respondent's fees.
8. The Respondent believed that ER had agreed to be a party in the Action. However, he did not contact ER to confirm this.
9. On or about February 22, 2003, the Respondent telephoned ER to obtain information from her with respect to the potential action against BH. They had not spoken previously. The Respondent asked ER questions that pertained to the Action but did not inform ER that she would be named as a plaintiff in the Action.
10. On March 10, 2003, the Respondent filed a Writ of Summons and Statement of Claim naming ER as the plaintiff in the Action. The Respondent filed the Action with an honestly held belief that ER had agreed to be named as a plaintiff, but the Respondent admits that, as of March 10, 2003, ER had not authorized him to do so.
11. On March 14, 2003, the Respondent wrote a reporting letter in which he enclosed a copy of the filed Action Writ of Summons and Statement of Claim, and advised that a Certificate of Pending Litigation had been registered against the Property. The letter was addressed to ER's address but it was inadvertently addressed to RL. The Respondent intended to send his March 14, 2003 letter to both ER and RL.
12. On or about April 14, 2003, after ER had learned that she had been named as plaintiff in the Action, ER spoke with the Respondent by telephone. During this conversation ER agreed to let the Action Writ and Statement of Claim in her name stand. Following her discussion with the Respondent, ER sent RL an email summarizing her understanding of the litigation and her role in it.
13. The Respondent did not advise ER in the course of their April 14, 2003 conversation that there was a risk that she might be required to pay the defendant's costs.

14. In or about October 2003, ER retained the Respondent to defend her in an action started by her daughter against BH in which ER had been named as a third party defendant.
15. In or about November 2003, RL was added as a plaintiff in the Action. At some point prior to November 2005, BH also sued RL.
16. At no time between April 2003 and November 2003, or subsequently, did the Respondent fulfill the requirements of Chapter 6, Rule 4 of the *Professional Conduct Handbook*. Specifically, he did not explain to ER the principle of undivided loyalty; advise ER that no information received from her could be treated as confidential as between ER and RL; or secure the informed consent of ER as to the course of action to be followed if a conflict arose between ER and RL.
17. On December 15, 2005, on instructions from ER and RL, the Respondent filed a Notice of Discontinuance of the Action.
18. Opposing counsel subsequently brought an application for costs. On March 9 and 10, 2006, a hearing was held before Master Patterson. On March 14, 2006, the Respondent wrote to ER to report on the hearing.
19. In Reasons for Judgment released on April 12, 2006, Master Patterson held that the defendants were entitled to special costs payable by the plaintiffs.
20. On June 28, 2006, counsel for the parties again appeared before Master Patterson. Master Patterson allowed costs against RL and ER at \$25,783.05.
21. On June 29, 2006, the Respondent met with ER. The Respondent also prepared a reporting letter to RL and ER by the Respondent which was subsequently sent.
22. On or about August 14, 2006, ER wrote to the Respondent regarding her questions over the payment of costs.
23. On August 15, 2006, a Subpoena to Debtor was filed requiring ER to appear in Court on August 28, 2006.
24. ER subsequently settled her costs at \$13,475.21, which she paid by bank draft on August 18, 2006.
25. ER filed a complaint with the Law Society against the Respondent on August 29, 2006.
26. The Respondent cooperated fully with respect to the Law Society's investigation of ER's complaint.
27. On November 3, 2008, the Respondent, through his counsel, made the following statement:

At the outset, it should be made clear that Mr. Chesterley acknowledges that he did not obtain instructions from ER to name her as Plaintiff before he commenced the Action. Mr. Chesterley honestly but mistakenly relied on the advice of ER's son, RL, that ER agreed to be named as the plaintiff in the Action. Mr. Chesterley acknowledges that he did not explain to ER the risk that she might be liable to pay costs to the defendant before the action was commenced.

Mr. Chesterley acknowledges that he did not explicitly state to ER that he intended to name her as the Plaintiff during this conversation [on February 22, 2003] and that he should have obtained clear instructions in this regard before commencing the action.

Mr. Chesterley advised that she [ER] would not be billed for any expenses and she agreed to act

as Plaintiff. Mr. Chesterley acknowledges that he did not discuss the risk that she might be required to pay the Defendant's costs with her before she agreed to continue on as the named Plaintiff. He did not intend to mislead her but simply overlooked the need to discuss the issue.

In summary, Mr. Chesterley clearly acknowledges and sincerely regrets that he did not obtain explicit instructions from ER before commencing the litigation, that he did not discuss the costs risk with her at the outset, and that he failed to comply with Chapter 6, Rules 4 to 6, of the *Professional Conduct Handbook*.

28. The Respondent admits that he commenced a civil action in the name of ER before she actually retained him and that he commenced such action without proper instructions.

29. The Respondent admits that in acting jointly for ER and another individual, RL, he failed to comply with Chapter 6, Rulings 4, 5 and 6 of the *Professional Conduct Handbook*.

30. The Respondent admits that his conduct as admitted herein constitutes professional misconduct.

[6] The Panel accepts the conditional admission made by the Respondent. We find that he has professionally misconducted himself as specified in allegations 1 and 3 of the Schedule to the citation, as amended.

[7] The Panel imposes the following penalty:

1. The Respondent will pay a fine of \$3,000.
2. The Respondent will pay costs in the amount of \$1,500, both fine and costs payable in equal monthly installments over nine months, commencing December 1, 2009.

[8] The Panel takes this opportunity to thank counsel for their presentation of the Agreed Statement of Facts, their thoughtful submissions and for their candour.