2009 LSBC 27
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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

Re: Lawyer 10

Respondent

Decision of the Hearing Panel on Penalty and Application for Anonymous Publication

Hearing date: May 15, 2009

Panel: G. Glen Ridgway, QC, Chair, William F.M. Jackson, Richard N. Stewart, QC

Counsel for the Law Society: Eric Wredenhagen
Counsel for the Respondent: Craig P. Dennis

Introduction

[1] This Panel has previously found that the Respondent's conduct in swearing paragraph 5 of an Affidavit constituted professional misconduct (see *Law Society of BC v. Lawyer 10*, 2009 LSBC 06).

[2] Paragraph 5, when read together with paragraph 1 of the same Affidavit states that:

> ... I have personal knowledge of the fact (paragraph 1) that ... *The funds were not paid to the Petitioners* (paragraph 5).
> [emphasis added]

[3] The actual fact, unknown to the Respondent, was that the funds had actually been paid to the Petitioners.

[4] The Respondent's Affidavit was relied upon by the Court in making an Order that resulted in additional funds ($551,858.60) being paid to the Petitioners to which they were not entitled.

[5] The Respondent's error was in making this statement asserted to be based on his personal knowledge, when in fact he had relied on information provided to him by others.

Purpose of this Hearing

[6] The hearing was convened on May 15, 2009 to consider:

1. The appropriate penalty to impose on the Respondent as a result of our finding of professional misconduct.

2. The Respondent's application pursuant to Rule 4-38.1(3) that publication of our decision on Facts and Verdict and Penalty not identify the Respondent.

The Penalty

[7] The primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate set out in section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice. This purpose is recognized in the following oft-cited passage from MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline* at p. 26-1:

> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.
>
> In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

[8] Section 38(5) of the *Act* sets out the range of penalties that a hearing panel may impose. This range includes:

> (a) a reprimand;
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> (b) a fine in an amount not exceeding $20,000;
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> (c) the imposition of conditions on the Respondent's practice;
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> (d) a suspension, either from the practice of law or from practice in one or more fields of law for a specified period of time or until compliance with a requirement under (f);
>
> (e) disbarment; or
>
> (f) one or more other requirements, including completion of a remedial program, examination to establish competency or fitness, or practising only as a partner, employee or associate of one or more other lawyers.

[9] The Law Society submits that this Panel should order that the Respondent pay a fine of $2,500.

[10] The Respondent submits that the penalty should be a reprimand.

[11] The decision in *Law Society of BC v. Ogilvie,* [1999] LSBC 17, sets out a non-exhaustive list of factors which may be considered by a hearing panel in determining the appropriate penalty:

> (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 upon 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.

Nature and Gravity of the Conduct Proven

[12] The Respondent, however innocently, swore an affidavit that was presented to the Court that was not true.

[13] The Panel repeats paragraphs 49 and 50 of its decision on Facts and Verdict.

> [49] The Panel repeats the words of the Hearing Panel in the *Law Society of BC* v. *Hart*, 2007 LSBC 50:
>
> [9] It must be understood by all members of the profession that great care must be taken in preparing affidavit and making representations to the Court to ensure accuracy. ... The Courts and the public must have confidence that lawyers are scrupulously fulfilling their duties in this regard. ...
>
> [50] This Panel adds that a lawyer is an officer of the Court and when that lawyer is the deponent to an Affidavit (a sworn statement) that will be relied on in Court, the lawyer must conform to the highest standard of care, accuracy and thoroughness in ensuring the accuracy of the sworn statements that the lawyer makes.

[14] The Panel does not agree with the Respondent's submission that the incident must be judged based on the " very low end of severity" .

The age and experience of the respondent

[15] The Respondent was called to the Bar of British Columbia in 1988 and has practised as a solicitor steadily since then; he has never practised as a litigator. At the time of the impugned conduct, he had practised law for approximately eight years such that he would have been regarded as an intermediate practitioner in his field. His relative experience at the time, coupled with his unblemished record over 21 years of practice, speak to the appropriateness of a penalty at the low end of the scale.

The Previous Conduct of the Respondent

[16] The Respondent has no previous Professional Conduct Record, and had practised without incident until the time of the event in question and since. These facts also speak to the appropriateness of a penalty at the low end of the scale.

The Advantage Gained by the Respondent

[17] There is no evidence that the Respondent obtained any advantage, monetary or otherwise, from the

conduct. The fee he collected from the client was forfeited to the Lawyers Insurance Fund. This fact also speaks to the appropriateness of a penalty at the low end of the scale.

The number of times the offending conduct occurred

[18] As noted, this was an isolated incident, and therefore the offending conduct occurred only once. Additionally, this is an isolated mark on his otherwise clean record of practice. This fact also speaks to the appropriateness of a penalty at the low end of the scale.

Acknowledgement of the Conduct by the Respondent

[19] In his submissions to the Panel, the Respondent acknowledged without reservation that he had made a mistake and expressed genuine remorse for this mistake. The Panel found that his evidence was not self-serving and was given in an honest and forthright manner. In the decision on Facts and Verdict, the Panel was " impressed by the Respondent," and found his evidence was " not self-serving" and " in every respect, given in a candid, straightforward and honest manner." This fact also speaks to the appropriateness of a penalty at the low end of the scale.

The Possibility of Remediation or Rehabilitation of the Respondent

[20] The Respondent submits, and this Panel agrees, that there is no need for any remediation or rehabilitation in light of his acknowledgment of responsibility for his conduct and his clean record over the 13 years since the swearing of the affidavit. This fact also speaks to the appropriateness of a penalty at the low end of the scale.

The Impact of the Proposed Penalty

[21] The Panel is satisfied that the positive statements made by it in these reasons will significantly reduce the impact on the Respondent of our findings. We assume that the fine we order be imposed can be paid by the Respondent without difficulty.

The Need for Specific and General Deterrence

[22] It is acknowledged by the Law Society that there is no need for specific deterrence in this case. The Respondent has no prior or subsequent discipline history, and has been remorseful, forthcoming, and co-operative throughout this proceeding. The Panel found him " impress[ive]" and " candid, straightforward and honest" (Decision paras. 35-36). The risk of the Respondent's reoffending is very small, and it is not suggested that he poses any danger to the public whatsoever. This fact also speaks to the appropriateness of a penalty at the low end of the scale.

[23] Nonetheless, it is submitted by the Law Society, and this Panel agrees, that there is a need for general deterrence in this case, particularly as, on its face, the Respondent's professional misconduct might seem less egregious than some, and caused not only by a failure to perform due diligence but also by what might appear to be a somewhat understandable reliance on the information provided by a professional colleague. It is precisely the " understandable" quality to the Respondent's conduct that highlights the need for general deterrence. It is well understood that Courts place a high degree of reliance on oral representations made by counsel in the course of submissions. This reliance is even greater when a lawyer's statements to the

Court are made in the form of sworn evidence. Lawyers must understand clearly that, if they give evidence in affidavit form, they are personally responsible for the content of that evidence.

The Range of Penalties in Similar Situations

[24] The Law Society acknowledges that this is the first case in which the Respondent's conduct resulted in a finding of professional misconduct arising from the filing of a misleading affidavit.

[25] The Law Society referred us to a number of decisions where the conduct of the Respondent was based on misleading oral statements made to the Court. In our view there is no material difference between a misleading oral statement made by a lawyer to the Court (which is not under oath) and a misleading sworn statement filed with the Court. The Court must be able to have absolute confidence in the oral statements made to it by the officers of the court. It is reasonable to assume therefore that the Court accepting a statement to it by an officer of the court to be of the same effect as if it was sworn.

[26] We were referred to several cases, including:

> i) In *Law Society of BC v. Hart*, 2007 LSBC 50, the Respondent allowed a client to swear a false affidavit and subsequently relied upon it in Court. The Respondent had three prior Conduct Reviews and two citations against him, but had no transgressions since 1999. The Panel required the Respondent to pay a fine of $2,000 and the costs of the proceedings in the amount of $1,500.
>
> ii) The Respondent in *Law Society of BC v. Cranston,* 2006 LSBC 36, signed a Bill of Sale when the document had been completed and signed outside of his presence. The Respondent received a penalty of a fine of $5,000 and was responsible for the costs in the action amounting to $3,500.
>
> iii) In the decision of *Law Society of BC v. Bhatti,* [2000] L.S.D.D. No. 31, where the lawyer affixed his signature as witness when in fact he had not witnessed the proper party sign, the Panel ordered the Respondent to pay a fine of $5,000 and the costs of the hearing.

The least of the penalties imposed in these cases is that of Mr. Hart. The Respondent submits that, because his conduct was much less severe, and because his record of practice is unblemished, the penalty imposed should be less than the fine imposed on Mr. Hart, and should be limited to a reprimand by the Hearing Panel.

Conclusion

[27] We agree with Law Society counsel that the proposed fine of $2,500 is at the low end of the possible range of fines, given the jurisdiction under the *Act* to order a fine of up to $20,000. The Law Society's submission is that the level of fine can be relatively low in this case because of the significant mitigating factors in the Respondent's favour. Nonetheless, it is submitted that a fine, and not the lesser penalty of a reprimand, is appropriate given the serious nature of the misconduct, its harmful effect, and the need for general deterrence.

[28] The Panel finds that, notwithstanding the strong mitigating factors that are present in this case, a fine rather than a reprimand is required.

[29] The Panel says that a fine at the low end of the range, namely $1,500, is the appropriate penalty for the Respondent, and we so order.

[30] The Panel orders the fine to be paid within 30 days of the delivery of these reasons.

Anonymous Publication

[31] The rule governing anonymous publication is Rule 4-38.1 of the Law Society Rules, which provides, in relevant part, as follows:

> (1) Except as allowed under this Rule, a publication under Rule 4-38 *must* identify the respondent.
>
> (3) The panel may order that publication not identify the respondent *if*
>
> (a) the panel has imposed a penalty that does not include a suspension or disbarment, and
>
> (b) publication *will cause* grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication.
>
> 1. (6) If a panel orders that a respondent's identity not be disclosed under subrule (3), the panel must state in writing the specific reasons for that decision.
>
> [emphasis added]

[32] Rule 4-38 creates a presumption of publication. It provides (in part) as follows:

> (1) Subject to Rule 4-38.1, the Executive Director *must* publish and circulate to the profession a summary of the circumstances and of any decision, reasons and action taken
>
> (a) at the conclusion of the facts and verdict portion of a hearing on a citation,
>
> (a.1) at the conclusion of the penalty portion of a hearing on a citation, ...
>
> [emphasis added]

[33] The language of both rules is mandatory (" *must* publish" and *must* identify") and recognizes " the interest of the public and the Society in full publication" (Rule 4-38.1(3)(b)).

[34] The Respondent may make application for anonymous publication and, in order to be successful, must satisfy the Panel that he or she meets the test set out in Rule 4-38.1(3). This onus is on the Respondent, and if the Panel finds that the Respondent has met that onus, it " must state in writing the *specific* reasons for that decision" (Rule 4-38.1(6), *emphasis added*).

[35] The first part of the test involves a determination of the nature of the penalty. If the penalty imposed includes a suspension or disbarment, anonymous publication is not available: Rule 4-38.1(3)(a).

[36] In this case, the Panel has ordered a fine. The Respondent is therefore entitled to attempt to satisfy his onus in Rule 4-38.1(3), namely that " publication *will cause* grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication" (*emphasis added*).

[37] There are three key elements to the second part of the anonymous publication test set out in Rule 4-38.1(3)(b):

> (a) first, the test uses the verb " will cause" ; it does not say " may" cause. We find that there must be

clear evidence of harm that will flow from publication, and not mere speculation or conjecture;

(b) second, the harm must be " grievous" ; and

(c) third, even if the harm is " grievous" , it must still be weighed against " the interest of the public and the Society in full publication" .

Previous Decisions

[38] In the decision of the Benchers on Review in *Re: Lawyer 7*, 2008 LSBC 33, the test was applied as follows:

> [45] Both sides accepted before the Panel and at the hearing of this Review that the proper analysis of an application under Rule 4-38.1(3) is sequential, as set out in *Doyle*, (*supra*) at para. [25]:
>
> (a) Firstly, the member must not be subject to a suspension or disbarment. In other words, by necessary implication, the impugned behaviour must not be so serious as to have attracted penalties from the draconian end of the spectrum.
>
> (b) Secondly, the Panel must analyze what harm the member says he or another identifiable individual may suffer if his name were to be published. The harm must be so severe as to be characterized as grievous harm.
>
> (c) If the harm is found not to be grievous, that ends the matter.
>
> (d) If the harm in publishing the name is found to be grievous, only then does the Panel move on to weigh that grievous harm in publishing the name against the public interest and the Law Society's interest. Only if the grievous harm outweighs those two interests should the Panel exercise its discretion to grant an order directing that the member's name not be disclosed.

Likelihood of Grievous Harm

[39] Re: *Lawyer 7* adopted the definition of " grievous harm" employed by the hearing panel in *Re: Lawyer* 5, 2005 LSBC 11:

> [13] *Defining of Grievous Harm* - Dictionary definitions merely restate the obvious by using such words as " serious" or " severe" . Certainly the nature of the harm must be much more than a one time snub or exaggerated civility from a colleague or from persons in the Respondent's general community of friends. Grievous harm, given the lack of limiting words in the Rule, must mean any one, some or all of the following:
>
> - deliberate withdrawal of professional courtesy
> - loss of clients
> - judicial mistrust
> - colleague mistrust
> - loss of personal friends
> - the Respondent's associates or family being the subject of adverse remarks
> - medical effects - psychological or psychiatric or both
> - loss of self worth and confidence

- loss of reputation

[14] Grievous harm need not be limited to these previous examples of harm. There may well be situations where publication may only cause one or two of the preceding or something not mentioned.

[40] The Review Panel in *Law Society of BC v.* Doyle, 2005 LSBC 24 made the following comments on " grievous harm" :

[26] What is grievous harm and when can it occur? This Review Panel finds that grievous harm can only occur in rare and exceptional circumstances, taking it out of the ordinary, or beyond what one would reasonably expect in the circumstances. The focus is on the member's personal circumstances. In order to be grievous, the harm must be exceptional, unusual, onerous, and injurious to a member, and cause a member to experience catastrophic loss both personally and professionally. The harm must involve significantly more than damage to the member's reputation or embarrassment that would normally be expected to flow from being found guilty of professional wrongdoing.

[41] The Review Panel in *Doyle* found that the addition of the word " grievous" to the anonymous publication rule in 2003 was intended to convey that the harm, to be grievous, must be " significantly more serious" than the previous test of special or undue prejudice to the member:

[27] The jurisprudence regarding identification of a member's name in discipline matters prior to the enactment of the present Rule in 2003, required that the effect on the member of identification must cause that member special or undue prejudice (see *Bell* No. 02/11, Oct. 2002). This Review Panel finds that the introduction of the word " grievous" in the 2003 amendment to the Rule was designed to convey that the harm that flows from identification must be significantly more serious in order to outweigh the obligations of the Law Society to be open and transparent.

[42] In *Re: Lawyer 5*, the Review Panel agreed that the addition of the word " grievous" to Rule 4-38.1(3) had " raised the bar" :

[55] It is clear that Rule 4-38.1(3) has substantially raised the bar in situations where a member is seeking an order for anonymous publication of his or her name.

[43] A certain amount of harm, in the sense of embarrassment and damage to one's reputation, is an inevitable consequence of being subject to the discipline process. By themselves, such consequences do not rise to the level of " grievous harm" . In *Re: Lawyer 7* made the same finding:

[25] Since the focus is on the individual it must be determined whether the harm is *exceptional, unusual, onerous and injurious* to a member, and would cause the member to experience catastrophic loss *both personally and professionally*. The harm must involve significantly more than damage to the member's reputation or embarrassment that normally would be expected to flow from being found guilty of professional wrongdoing. ...

[Italics in original, underlining added]

[44] Although anonymous publication was ordered in both *Re: Lawyer 5* and *Re: Lawyer 7*, and upheld on Review in both cases (although by the narrow margin of 5-4 in the latter), both cases were unusual in that the lawyer's practice comprised almost entirely work received from one significant or principal client, and that there was a significant likelihood of loss of that work ? and therefore the lawyer's entire livelihood ? if the lawyer's name were published. This factor is not present to the same degree in this case.

[45] In this case, the Respondent's evidence of harm is set out in two letters submitted in support of his application for anonymous publication (the " Letters"). This Panel finds that the Letters do not prove, and therefore the Respondent has not satisfied his onus to prove, that there is substantial likelihood of grievous harm to the Respondent.

[46] As paragraph [77] from *Re: Lawyer 7* points out, even if the lawyer's name is published, the lawyer's professional colleagues, clients and members of the general public " must be assumed to examine those decisions carefully and fairly" and " must be trusted to understand the full story and to form their opinion of the lawyer reasonably on the basis of the full story."

[47] We are completely satisfied that our reasons provide the full story and that any reasonable member of the public including existing or prospective clients of the Respondent will realize that the conduct that gave rise to the finding of professional misconduct arose out of a single, isolated incident many years ago, when the Respondent made a serious error of judgment in relying on the information supplied by others, but that he is otherwise a reputable and respected member of the legal community. The finding should not cast doubt on his integrity or competence. Finally, he should suffer no more negative consequences arising from the finding of professional misconduct than has already occurred.

[48] The Respondent submits that the reasons on Fact and Verdict and these reasons cannot, by virtue of solicitor-client privilege, publish the information provided by the Respondent's client to him. The Respondent says that the absence of this information prevents the " full story" from being told. It is the practice, followed in this case, that the names of clients are not published in order to protect their privacy and confidentiality. In that way, we have ensured that the " full story" is told.

Public Interest

[49] However, even if this Panel finds that the publication of the decision would cause the Respondent grievous harm, it must nonetheless weigh that harm against the Law Society's and the public's interest in full publication.

[50] In *Doyle*, the Benchers on Review made the following general comment:

> [16] In recent years, in discipline matters the Benchers have determined that one of the means by which the public can be protected is to strive for optimal openness and transparency. The process of the Law Society has, therefore, been overhauled in order to move from a format of opacity to the general rule that the discipline process should be open and transparent and the results flowing from the discipline process should be published.

[51] In the result, the Review Panel in *Doyle* upheld the hearing panel's decision to order full publication, finding as follows:

> [41] This Review Panel agrees with the Panel below that the clear intention of Rule 4-38 and 4-38.1 is that the public should know who did what and that only in exceptional circumstances where full public disclosure will cause grievous harm to the member or another identifiable individual will that right be abrogated.
>
> [42] A fair, large and liberal construction of Section 3 of the *Legal Profession Act* and Rule 4-38 and 4-38.1 [sic] instructs the Benchers that it is not individual lawyers' interests or lawyers' interests as a group that ought to serve as the focus of any inquiry regarding non-identification. It is a question of how lawyers fit in to the larger public society. The discipline activities of the Law Society of British

> Columbia and the results of its hearings, where adverse to members, are of large interest and instruction and even occasional notoriety. Nonetheless justice must be done and equally importantly, must be seen to be done. This can best occur only with publication of disciplined lawyers' names.

[52] The minority decision in *Re: Lawyer 7* expresses, in the submission of the Law Society, the correct principles to consider in weighing the question of an applicant's understandable desire for anonymity against the interest of the public and the Law Society in full publication of a discipline decision:

> [77] The basis for the Rule of full publication is that it is in the interest of the profession and the general public that (as was said in *Doyle*, 2005 LSBC 24 at para. [39]) they know " with whom they are dealing" . Rule 4-38.1(3) reflects the fact that, in some circumstances, this interest may take second place, for the sake of fairness, to the need to protect the lawyer or another person from grievous harm. But we find it difficult to imagine a case in which the interest of the profession and the public in having full access to the facts about a lawyer would be outweighed by the apprehension that they may not judge those facts fairly. It is the responsibility of the Law Society to express disciplinary decisions as fully and accurately as possible. That done, it seems to us that the professional colleagues of the lawyer who is disciplined, as well as members of the general public, must be assumed to examine those decisions carefully and fairly. To say otherwise would contradict, in our view, the logical underpinning for the rule of full publication. The Law Society has recognized that the public have the presumptive right to the full story. By the same token, it seems to us, the Society has recognized that the public must be trusted to understand the full story and to form their opinion of the lawyer reasonably on the basis of the full story.

[53] In conclusion, even if this Panel is prepared to find, on the basis of the Letters, a " substantial likelihood" of " grievous harm" as defined by the cases interpreting Rule 4-38.1, it is submitted that this Panel must still order full publication unless it concludes that the harm outweighs the public's interest and the Law Society's interest in the fullest possible transparency of the disciplinary process.

[54] We find that any harm that the Respondent may suffer from the publication of his name does not outweigh the public's interest and the Law Society's interest in the fullest possible transparency of the disciplinary process.

Conclusion

[55] This Panel finds that the Respondent has not satisfied the onus of proving to us that the harm he will suffer from publication is grievous but rather is no different than the harm suffered by any other member.

[56] In addition we find that any harm that the Respondent may suffer from the publication of his name does not outweigh the public's interest and the Law Society's interest in the fullest possible transparency of the disciplinary process.

[57] The Respondent's application for anonymous publication is dismissed.

Costs

[58] Each of the parties may make written submissions regarding costs. The Law Society must file their written submission within two weeks of the issuance of these reasons. The Respondent must file his written submission in reply within two weeks of the receipt of the Law Society's submission. Any reply by the Law Society should be delivered within one week of the receipt of the Respondent's submissions.