2010 LSBC 28
Report issued: December 16, 2010
Citation issued: July 5, 2010

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

Richard Donald Payne

Respondent

Decision of the Hearing Panel on Facts, Verdict and Penalty

Hearing date: November 10, 2010

Panel: David Mossop, QC, Single Bencher Panel

Counsel for the Law Society: Stephen B. Jackson
Counsel for the Respondent: R. Keith Oliver

Background

[1] The citation issued July 5, 2010 sets out two allegations of failure to respond substantively to requests for information made in the context of the Law Society's investigations, and in particular, with respect to the Respondent's failure to provide a substantive response to letters dated April 6, 2010, April 29, 2010, and/or May 21, 2010.

[2] This matter proceeded as a summary hearing pursuant to Rule 4-24.1. The Respondent did not attend but was represented by counsel.

[3] The parties agree that the Respondent engaged in professional misconduct in not replying promptly to communications from the Law Society. The parties have also agreed to the penalty that has been imposed. The Panel agrees that the Respondent has committed professional misconduct and agrees with the proposed penalty. This decision is divided into the following parts:

(a) facts and verdict; and

(b) penalty

Facts and Verdict

Review of the Evidence

[4] On March 2, 2010, the Law Society received a complaint about the Respondent from SB, a former client of the Respondent. SB complained that the Respondent had failed to respond to communications from her.

[5] With respect to SB's complaint, Ruth Long of the Law Society wrote three letters to the Respondent seeking his response, as follows:

a. April 6, 2010, sent by mail;

b. April 29, 2010, sent by mail and fax; and

c. May 21, 2010, sent by courier.

[6] Ms. Long contacted the Respondent by telephone on two occasions to discuss SB's complaint, as follows:

a. March 25, 2010; and

b. May 14, 2010.

[7] Despite these communications, no substantive response was received from the Respondent in respect of SB's complaint in a timely manner.

[8] The evidence of Ms. Long shows that the Respondent was aware of SB's complaint and that he received at least some of these letters:

a. Ruth Long spoke with the Respondent on March 25, 2010 about SB's complaint. The Respondent told Ms. Long that he would be writing to SB to advise her of the status of her matter and that he would provide Ms. Long with a copy of that letter. Ms. Long told the Respondent to expect her letter enclosing a copy of SB's complaint.

b. Ms. Long spoke with the Respondent on May 14, 2010 about SB's complaint, and in particular, about why the Respondent had not responded to her letters. Ms. Long told the Respondent that she would be sending a third letter and that she required a response to that letter within five days. Ms. Long told the Respondent that he could not simply ignore Law Society communication and that, if he required more time, he should call to arrange for an extension.

This evidence shows that the Respondent was aware that the Law Society required his written response to SB's complaint.

[9] On May 21, 2010, Ms. Long advised the Respondent by letter that his failure to respond to SB's complaint would be referred to the Discipline Committee if his response was not received by May 26, 2010.

[10] The Law Society has now received a substantive response from the Respondent in respect of SB's complaint. This response was received August 20 or 23, 2010, after the citation was issued and shortly before the citation was originally scheduled to be heard on September 1, 2010. That hearing date was adjourned at the request of the Respondent.

[11] The response was deemed adequate by the Law Society (other than the issue of timeliness) for the purposes of the Law Society investigation of SB's complaint.

[12] The evidence shows an unacceptable and unwarranted persistent failure to respond to communications from the Law Society that required a response.

Adverse Determination Pursuant to s. 38 (4) and Test for Professional Misconduct

[13] It is well established in the case law that a failure to respond to communications from the Law Society is professional misconduct. The Respondent agrees with this statement.

[14] "Professional misconduct" is not a defined term in the *Legal Profession Act*, the Law Society Rules or

Professional Conduct Handbook, but has been the subject of consideration by hearing panels in several cases, including *Law Society of BC v. Martin*, 2005 LSBC 16. The hearing panel in *Martin* considered the question of what constitutes professional misconduct and concluded that the test is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.": *Martin, supra,* at 15 (para. 171). In *Martin*, the panel also observed at paragraph 154 that

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is, whether it displays gross culpable neglect of his duties as a lawyer**.**

[15] In the recent review decision of *Re: Lawyer 10*, 2010 LSBC 2, the review panel further articulated the applicable test for professional misconduct established in *Martin* by stating, at paragraphs 31 to 33, that:

> The formulation of the marked departure test developed in *Hops* and *Martin* is complete only if one adds the factor that the conduct must be culpable or blameworthy. Both decisions make findings that the conduct in question was a marked departure from the norm and that the member was culpable. To put it more precisely, it may not be professional misconduct if one's conduct falls below the norm in a marked way if that occurs because of: a) events beyond one's control; or b) an innocent mistake.
>
> A respondent must be culpable in order to have committed professional misconduct. The conduct must not only be a marked departure from the norm, but must also be blameworthy.
>
> In order to determine whether the Applicant's conduct is both a marked departure from the norm and blameworthy, one needs to consider precisely what it is that he did wrong.

Failure to Respond

[16] The *Professional Conduct Handbook*, Chapter 13, Rule 3 places an obligation on a lawyer to reply promptly to any communication from the Law Society.

[17] While the *Handbook* is a guide and not every breach will necessarily amount to professional misconduct, with respect to a failure to respond to the Law Society:

> ... it is the decision of the Benchers that unexplained persistent failure to respond to Law Society communications will always be *prima facie* evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct.

This principle was set out in *Law Society of BC v. Dobbin*, [1999] LSBC 27 (at para. 25) and has been followed since, including in *Law Society BC v. Cunningham* 2007 LSBC 17 (para. 6) and *Law Society of BC v. Tak* 2009 LSBC 25 (para. 25).

[18] The Respondent concedes that his conduct in this case meets the "unexplained persistent failure to respond" standard established in the *Dobbin* case.

[19] In *Dobbin* (supra), the majority of the Benchers on a review held (at paras. 20 and 25:

> ... If the Law Society cannot count on *prompt, candid, and complete replies* by members to its

> communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.
>
> ... There is no doubt whatever that a persistent, intransigent failure to respond to Law Society communications brings the legal profession into disrepute.
>
> [emphasis added]

[20] In *Law Society of BC v. Cunningham* (supra), the respondent gave evidence that she knew she was required to respond to the Law Society, but was immobilized from doing so with respect to this particular complaint. The hearing panel accepted the Law Society's position that, to avoid a finding of professional misconduct, the respondent "must show an illness such as to incapacitate her to the extent of making her unable to answer correspondence." (para. 18) It held that, on the evidence, there was no incapacity sufficient to form a defence to the citation. The panel concluded that the respondent's conduct was professional misconduct (at paras. 20 - 21).

Penalty

[21] The primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate, as set out in Section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice: *Law Society of BC v. Tak*, 2010 LSBC 13 (para. 8).

[22] In *Lawyers and Ethics: Professional Regulation and Discipline*, McKenzie comments upon the purposes of disciplinary proceedings at page 26-1 (quoted in *Tak*, at para. 8):

> The purpose of the law society discipline proceedings are not to punish offenders and exact retribution, but rather protect the public, maintain high professional standards, and preserve the public confidence in the legal profession.

[23] The factors to be considered in assessing the penalty are set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17 (para. 10), as follows:

(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.

[24] The Law Society submitted that, in this case, the most important factors were the need for specific and general deterrence and the need to ensure the public's confidence in the integrity of the profession.

[25] A failure to respond to the Law Society is conduct that hearing panels have consistently regarded as a serious failure. In *Dobbin* (supra) the panel commented (para. 20):

> The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members.
>
> Its importance is such that a failure to respond may be considered evidence of ungovernability: *Law Society of BC v. Hall*, 2007 LSBC 26 (para. 27).

[26] Similarly, in *Law Society of BC v. Hall*, 2003 LSBC 11, the panel commented, at para. 2, that:

> ... it is essential for lawyers to respond to Law Society communications. Otherwise the Society cannot effectively discharge its responsibility of protecting the public interest in the administration of justice. It is simple: lawyers neither have the freedom not to respond nor the freedom to respond according to a schedule that suits them. They certainly cannot put their heads in the sand, as the Respondent said he did.

Factors Related to the Respondent

[27] The Respondent was called to the bar on May 11, 1982. The Respondent has a short Professional Conduct Record ("PCR") that includes one prior citation for failure to respond to the Law Society in 1995.

[28] The Respondent's prior citation for failure to respond to the Law Society is an aggravating factor. This is mitigated by the fact that the conduct that led to the issuance of a citation occurred in 1995 and the Respondent's disciplinary admission in respect of the citation was accepted in 1997. The Respondent's PCR is a relevant factor in determining disciplinary action.

[29] A further aggravating factor is that the Respondent did not provide a substantive response to Ruth Long's initial letters sent April 6, 2010 until August 20 or 23, 2010. The failure to respond in a timely manner and the length of the period for which the response was outstanding are both factors that may be considered in assessing penalty, as they were in *Law Society of BC v. Racette*, 2006 LSBC 29 (paras. 3 and 10), and *Law Society of BC v. Tak*, 2009 LSBC 25 (para. 35).

[30] However, there are some circumstances that can be viewed as mitigating. The Respondent has agreed that there is professional misconduct in this case, and has agreed to the penalty that is being suggested to the Panel. This has reduced the amount of time required to prepare and conduct the hearing. The

Respondent has also provided (although not in a timely manner) a substantive response to the original complaint by SB. The Law Society has deemed this response satisfactory for its investigation process.

[31] Counsel for the Respondent made submissions regarding the reasons for the failure to respond relating to the unfortunate death of his father. These circumstances are considered by the Panel as a mitigating factor. The Law Society noted that, in his prior citation for failure to respond in 1995, the death of his mother was offered by the Respondent as a mitigating factor.

Range of Penalties in Similar Cases

[32] The sanction for failure to respond ranges from a reprimand, through a small fine, to a suspension. Recent cases suggest that a small fine is the appropriate action in respect of a first citation for failure to respond. A fine of $1,500 to $2,000 was imposed in respect of a first failure to respond in: *Law Society of BC v. Braker*, 2006 LSBC 7, *Law Society of BC v. Cunningham*, 2007 LSBC 47, *Law Society of BC v. Currie*, 2008 LSBC 21, and *Law Society of BC v. Tak*, 2009 LSBC 25.

[33] In *Law Society of BC v. Tak,* 2009 LSBC 25, the panel commented (para. 31):

> There are numerous cases dealing with failing to respond to the Law Society. At the bottom end of the spectrum there are three cases in which a reprimand was issued. At the other end of the spectrum there are four cases in which suspensions ranging from one week to 45 days have been imposed. The more serious cases involving suspension had aggravating factors not applicable to this case.

[34] In the five cases considered by the panel in which fines were imposed, the fines ranged from $1,000 to $3,000.

[35] In *Racette* (supra), a reprimand was imposed, but the panel commented (para. 10):

> If the Respondent were still practising, a suspension would be appropriate given the length of time that passed without a response. However, since the Respondent has been out of the practice since September 16, 2003, no suspension is required.

[36] A one-week suspension was imposed in *Law Society of BC v. Hall*, (supra), but in that case the respondent was subject to another disciplinary proceeding in which the facts and verdict decision was published 17 days prior to the initial letter that resulted in the failure to respond citation, which was an aggravating factor.

[37] A subsequent finding of failure to respond on the part of Hall in *Law Society of BC v. Hall*, 2003 LSBC 34 and 2004 LSBC 01 resulted in a one month suspension and an order to provide a response within 10 days.

[38] The panel in *Law Society of BC v. Braker*, 2007 LSBC 1 and 2007 LSBC 42, relied on two prior conduct reviews for failure to respond, one of which happened immediately prior to the first letter from the Law Society that gave rise to the citation being considered, to support a penalty of one month suspension.

[39] *Law Society of BC v. Tak*, (supra), concerned a second citation for failure to respond. The panel imposed a suspension of 45 days, commenting (para. 12):

> [The] fact that the Respondent has recently been cited and sanctioned for the same type of misconduct as in this matter is strongly suggestive of the need for specific deterrence.

[40] The Law Society submitted that the appropriate penalty in this case is a fine of $4,000. This penalty is commensurate with the Respondent's experience and disciplinary history. The penalty acknowledges that this is not a first instance of failure to respond to the Law Society; however, it takes into account the time that has elapsed since the Respondent's first citation for failure to respond. A fine in the range of $3,500 to $5,000 is consistent with the concept of progressive discipline and specific deterrence.

[41] The Respondent agreed that a $4,000 fine is appropriate and so does the Panel.

Costs

[42] The Law Society seeks an order of costs in the amount of $1,000. The Respondent agrees that the actual costs of the law Society in this matter will exceed $1,000.

[43] The Benchers' authority to order costs is derived from section 46 of the *Legal Profession Act* and Rule 5-9 of the Law Society Rules. Law Society decisions support an award of costs against the Respondent on a full indemnity basis if reasonable in the circumstances. What is reasonable in any given case depends on the facts of each.

[44] The Law Society is not seeking recovery of costs on a full indemnity basis in this case. Instead, the Law Society submits that, in all of the circumstances, costs payable by the Respondent in the range of $1,000 - $2,000 is appropriate.

[45] As noted in *Law Society of BC v. Racette*, 2006 LSBC 29 (para. 13), the following factors may be considered in determining what costs are reasonable:

(a) the seriousness of the offence;

(b) the financial circumstances of the Respondent;

(c) the total effect of the penalty, including possible fines and/or suspension; and

(d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[46] The Law Society submitted that costs of $1,000 are reasonable in the circumstances.

[47] The Respondent agreed that costs of $1,000 are appropriate and so does the Panel.

Decision

[48] The Panel orders that the Respondent pay:

(a) a fine of $4,000, within 10 days of the date of this decision; and

(b) costs in the amount of $1,000, within 10 days of the date of this decision.