2011 LSBC 12
Report issued: April 15, 2011
Oral Reasons: March 2, 2011
Citation issued: September 28, 2010

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

Mark Ronald Epstein

Respondent

Decision of the Hearing Panel on Facts, Determination and Disciplinary Act

Hearing date: March 2, 2011
Panel: David Renwick, QC, Chair, Leon Getz, QC, Kenneth Walker

Counsel for the Law Society: Maureen Boyd, Carolyn Gulabsingh
Counsel for the Respondent: Leonard T. Doust, QC and Nicholas Isaac, articled student

Background

[1] The substance of the allegation in the citation to the Respondent is that he failed to serve his client, SS, "in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation" and, in particular, that he failed:

> (i) to keep his client reasonably informed;
>
> (ii) to answer within a reasonable time communications from his client that required a response;
>
> (iii) to do the work that he had been engaged to do promptly so that its value to the client would not be diminished or lost; and
>
> (iv) to do the work accurately.

[2] The facts are not in dispute. They are set out in detail in an Agreed Statement of Facts. The Respondent has admitted that he did not serve his client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation; and that his conduct constitutes professional misconduct.

[3] The Law Society seeks a fine of $7,500 and an order that the Respondent reimburse it for $2,000 in costs. At the conclusion of the hearing, having considered the submissions made by Ms. Boyd on behalf of the Law Society and Mr. Doust on behalf of the Respondent, we accepted Mr. Epstein's admission of professional misconduct, imposed a fine of $4,500 and made an order for costs of $2,000, both amounts to be paid in full on or before June 30, 2011. We said our reasons would follow. These are those reasons.

The Facts

[4] On November 27, 2006, the client, SS, a California resident, contacted the Respondent by telephone. She explained that she was the executrix of the estate of her deceased partner, JW, also of California, who before he died told her, and she believed, that his principal asset was an interest as one of three tenants in

common in valuable real property located in Whistler, British Columbia; and that there had been a disagreement over expenses and rental income with his two co-owners. She wished to arrange to transfer JW's interest in the property to his estate and to retain the Respondent to do the necessary legal work.

[5] The Respondent told SS that he would have to be formally retained, that he would do a property search to determine the ownership structure and that in the usual course an application would be made to probate the estate in British Columbia and to transfer JW's interest in the property to his estate, after which it could be sold. The Respondent also told SS he would require certain documents from her in order to proceed.

[6] During the course of their initial conversation the Respondent did an online title search and told SS that JW was indeed registered as an owner of the property. He failed to notice, however, that the search revealed that the title had been cancelled on July 17, 2006.

[7] In January 2007, the Respondent sent a formal retainer letter to SS. He asked for a retainer of US $1,000. The letter was signed and returned to him around January 28 together with the US $1,000 and copies of certain other documents that he had requested, including a State of Title Certificate. He deposited the retainer funds in trust.

[8] On February 21, 2007, the Respondent prepared a memo to file in which he noted, among other things, that "we should do an updated title search of this property on BC Online and also BC Online search of [JW]". The latter was done the same day, but the Respondent once again failed to notice that the title had been cancelled and ownership of the property had been transferred to the other two co-owners. He did not do a proper or complete property search.

[9] Later that month, not having heard further from him, SS telephoned the Respondent who told her that a title search had been done and there was "no problem". Around the same time, a Caveat was prepared in the Respondent's office, but no steps were taken to file it in the Land Title Office.

[10] On March 30, 2007 the Respondent wrote to SS saying, among other things, that "we are in the process of filing a Caveat on the property that is in the name of [JW]". He did not, however, file the Caveat or take any other steps to probate the estate. Because he did not know of the transfer of title in July 2006, he did not think there was any urgency in proceeding with the probate of the Estate or the filing of a Caveat. He only learned that JW was not a co-owner in September 2007.

[11] In May and the first part of June 2007, SS made a number of attempts to reach the Respondent by telephone but these were unsuccessful. They finally spoke on June 18. The Respondent told her that he had a title search and that a Caveat was being placed on the property.

[12] In September 2007, concerned at the Respondent's inactivity, SS decided to consult R. David Bellamy. On September 7 she learned that title to the property had been transferred on July 27, 2006.

[13] By the end of September 2007 it had been determined that the property had been sold pursuant to an Order of the Supreme Court made in February 2005 and that a Vesting Order had been made on June 26, 2006. In February 2008, SS was substituted for JW in the proceedings and the Court ordered the payment out to her of approximately $43,200 that had been paid into Court on July 20, 2006. She incurred and paid additional legal fees to resolve matters related to the Estate's claim of an interest in the Property and the proceeds from its sale.

[14] Sometime in September or October of 2007, the Respondent left a voice mail message for SS in which he apologized for his delay and his oversight in not reading the title search properly. He refunded the US $1,000 retainer that had been provided.

Discussion

[15] The test for determining whether professional misconduct has occurred is that set out in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [171], namely, "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members." The panel in *Martin* also noted (at paragraph [154]) that a lawyer's conduct meets that standard if it "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."

[16] The Law Society's *Professional Conduct Handbook* is one source of information as to the conduct the Law Society expects of its members. Chapter 3, Rule 3, headed "Quality of Service", reads, in part:

> A lawyer shall serve each client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. Without limiting the generality of the foregoing, the quality of service provided by a lawyer may be measured by the extent to which the lawyer:
>
> (a) keeps the client reasonably informed,
>
> (c) responds, when necessary, to the client's telephone calls,
>
> (f) answers within a reasonable time a communication that requires a reply,
>
> (g) does the work in hand in a prompt manner so that its value to the client is not diminished or lost,
>
> (h) prepares documents and performs other legal tasks accurately,

[17] In light of this and of the facts that the Respondent has admitted, we do not think it could sensibly be argued that he served his client, SS, in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. It follows, in our view, that his conduct in this matter constituted a marked departure from that which the Law Society expects of its members; and taken as a whole amounted to gross culpable neglect of his duties as a lawyer. The Respondent's admission that his conduct was professional misconduct is wise and appropriate and we accept it.

Sanctions

[18] The primary purpose of proceedings such as this is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. We are constituted to decide upon a sanction or sanctions that, in our opinion, protects the public, maintains high professional standards and preserves public confidence in the legal profession.

[19] These considerations are among those referred to in what has now become the leading decision on sanctioning, *Law Society of BC v. Ogilvie*, [1999] LSBC 17. In that case the panel set out a useful list of considerations to be taken into account in deciding on an appropriate sanction. The list is not intended to be exhaustive. We set out below the considerations identified in Ogilvie that we think are relevant here.

The Nature and Gravity of the Conduct Proven

[20] The Respondent's misconduct consisted of a failure to serve his client competently in two particular respects: first, by failing, on two separate occasions, to perform accurately the same fairly elementary task of reading carefully the results of a title search and in the result failing in a timely way to advance his client's

objectives and carry out her instructions; and second, by failing to respond in a timely way to her enquiries.

[21] These cannot in our opinion be considered trivial departures from the standard of conduct expected in the circumstances. They are serious. Each represents a failure to do something quite elementary - to do necessary work carefully and to keep a client properly informed - not only in terms of the standard of practice but also from the point of view of the reasonable expectations of a client.

The Impact upon the Victim

[22] The Respondent knew that his client, SS, lived in California and was, in her words, "dealing with the death of a loved one"; that she required assistance in dealing with what she had been led to believe was both the principal asset of the estate of the deceased and one of significant value; and that she was quite unfamiliar with how to proceed. While none of these considerations changed the nature or extent of the Respondent's professional obligations, they did give special point to the need to perform them accurately and promptly. In this, he failed her.

The Previous Character of the Respondent, Including Details of Prior Discipline

[23] The Respondent is no neophyte. He was called to the bar in 1991, initially practising with his father, the late Irving Epstein, QC and Henry Wood, QC, both widely respected members of the legal profession. His mother died in 2001 and his father, following a lengthy illness, in June 2002. The Respondent attempted to step into his father's rather large shoes and manage both his own practice and that of his father, while at the same time trying to deal with his parents' estates. He found this difficult and stressful. He continued to practise together with Mr. Wood until the end of September 2009, since which time he has been a sole practitioner.

[24] The Respondent was the subject of Conduct Reviews in October 2000 and again in September 2006; and in addition, of a Practice Review ordered by the Practice Standards Committee in 2006. It is neither necessary nor helpful to explore in detail the circumstances that gave rise to these procedures. There are, however, certain recurring features of the two Conduct Reviews that have echoes in the present case. There is evidence in each of them of inattentiveness and lack of care in performing fairly basic procedures, not unlike his behaviour here. There is also evidence of some degree of disorganization in the conduct of his practice - which gave rise to some fairly detailed recommendations in the Practice Review as to how these might be addressed. In December 2008 the Practice Standards Committee closed its file on the Respondent so we assume that those recommendations were acted on.

[25] More generally, we note that part of the background to the matters referred to in paragraph [24] was that the Respondent was at the time suffering through a major depression that impaired his capacity to fulfill the demands of his practice. He sought and obtained medical assistance and advice in dealing with those issues. We have no evidence that they have had any bearing on the matters that have given rise to these proceedings.

Range of Penalties Imposed in Similar Cases

[26] Counsel for the Law Society referred us to earlier cases in which lawyers were sanctioned for having failed to provide an appropriate quality of service. The number of those cases is not large; seven decisions in the ten years from 1997 to 2007. The sanctions imposed cover a spectrum between, at the lower end, a reprimand, as in *Law Society of BC v. Tsang*, 2005 LSBC 15, 2006 LSBC 17; and, at the high end, a suspension (for one month in *Law Society of BC v. Smiley*, 2006 LSBC 31; and for 45 days in *Law Society of BC v. Williamson*, 2005 LSBC 04, 2005 LSBC 19). In the latter two cases, there were aggravating

factors. In *Smiley* these included misleading the client and failure to respond to the Law Society; and in *Williamson*, failure to respond to the Law Society and to comply with certain of its requirements.

[27] In three of the cases to which we were referred, a fine was imposed – *Law Society of BC v. Plested*, 2007 LSBC 45 ($1,000), *Law Society of BC v. Rai*, 2005 LSBC 37 ($3,000) and *Law Society of BC v. Campbell*, [1997] LSDD No. 58 ($3,000). Ms. Boyd quite properly pointed out that these could hardly be considered to provide a sufficiently representative range to guide our determination. As we have noted, she sought on behalf of the Law Society the imposition of a fine of $7,500.

[28] The Respondent's failure to provide the quality of service of a competent lawyer in performing an elementary legal task, in this case, seems to be part of a recurring pattern of carelessness and inattention that has continued despite prior remedial and disciplinary intervention by the Law Society. Although, to his credit, he apologized to SS and refunded her retainer funds, our concern is to bring this pattern of conduct sharply to an end. At the same time, we do not wish to impose upon him an unmanageable financial burden. We believe that a fine in the amount of $4,500 is likely to have the required result. We cannot be certain of this, however, and feel constrained to say that, if the Respondent does not take steps to ensure that the pattern does end, he faces the prospect of far more serious consequences.

[29] As indicated, we have ordered that the Respondent reimburse the Law Society for $2,000 on account of its costs.

[30] The Respondent will have until June 30, 2011 to pay both the fine and the costs.