2011 LSBC 22
Report issued: August 11, 2011
Citation issued: December 21, 2010

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

Andrew James Liggett

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: May 11, 2011
Panel: Gavin Hume, QC, Chair, Nancy Merrill, Thelma O'Grady

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: David Taylor

Background

[1] A citation was issued against the Respondent alleging that he made a misrepresentation to the Law Society. The allegation reads:

> 1. On or about September 9, 2010, in the course of applying to adjourn a citation hearing set for September 24, 2010 on the basis that you were scheduled to attend a two-day family trial on September 23 and 24, 2010, you misrepresented to the Law Society that you continued to be unavailable on September 24, 2010, when you knew that the proceeding on September 24, 2010 had been cancelled.
>
> Your conduct constitutes professional misconduct.

Facts

[2] On July 22, 2010, a letter dated July 19, 2010 from the Law Society was served on the Respondent. It notified him that the date for the hearing of a previous citation was to be mutually agreed upon and proposed that the hearing be held on Friday, September 24, 2010. It went on to provide that if the date was not agreeable, the Respondent was to advise the Hearing Administrator on or before 4:30 pm on Tuesday, August 3, 2010. It provided that, if the Respondent did not contact the Hearing Administrator by that date, the hearing would be set for Friday, September 24, 2010. The Respondent did not contact the Hearing Administrator. As a result the hearing was set for September 24, 2010.

[3] At the time that the Respondent was served with the letter dated July 19, 2010, he had a calendar conflict for September 24, in that he was committed to attend the second day of a two-day family law trial in which he was counsel for one of the parties.

[4] On August 6, 2010 the Respondent was served with a letter dated August 6, 2010 from the Law Society that confirmed that the hearing would proceed on Friday, September 24, 2010 as a summary hearing.

[5] In a letter dated August 10, 2010, received by the Law Society on August 12, 2010, the Respondent sought an adjournment of the hearing of the citation. The only ground advanced was a conflict with the second day of a two day family law trial that the Respondent, in his request for an adjournment, described as being set “months ago”.

[6] The Law Society opposed the application to adjourn. In its opposition, the Law Society submitted that the Respondent did not explain why he did not respond to the July 19, 2010 letter, which was served on him on July 22, 2010, when he must have known of the conflict in his schedule. In addition, the Law Society submitted that there was no substantiating documentation that he was on the record for a trial scheduled for September 24, 2010.

[7] The Respondent testified that he had a number of grounds for an adjournment. However, he did not take that opportunity to provide further information regarding his various grounds for an adjournment, but relied solely on his calendar conflict. On September 2, 2010, the Chambers Bencher considering the adjournment requested further information consisting of a copy of the Notice of Trial from the court action and the Respondent’s alternative dates in September. This request was communicated to the Respondent by email on September 2, 2010.

[8] On September 7, 2010, prior to providing the information requested, the Respondent attended a pre-trial conference in the family law matter, at which time the September 24, 2010 trial date was cancelled.

[9] The Law Society followed up with the Respondent by telephone and fax requesting the information the Chambers Bencher had requested on September 2, 2010. By September 9, the Respondent still had not provided the requested information. As the Chambers Bencher was now scheduled to be out of town, the Law Society once again reiterated its request for information and informed the Respondent it was now urgent.

[10] Thus, on September 9, 2010, the Respondent finally and hurriedly responded to the request by faxing a copy of the Trial Notice printed on July 27, 2010 to the Law Society and a separate letter setting out an alternate date. He did not disclose the fact that the September 24 trial date had been cancelled, nor did he advance any other grounds for an adjournment. The Law Society learned of the adjournment directly from the Provincial Court registry.

SUBMISSIONS OF THE RESPONDENT

[11] The Respondent testified that during the summer months of 2010, he was very busy with his sole practice and personal commitments. He also felt that, due to his schedule in the time-frame leading up to September 24, he did not have the time available to properly prepare for the citation hearing.

[12] The Respondent testified that he had a number of grounds upon which he believed he was entitled to an adjournment, but he determined he did not need to advance any grounds other than the position that he was committed to a trial appearance on the hearing date. He stated that his state of mind always incorporated the entirety of his busy schedule and all of the reasons why an attendance for the hearing on September 24 was problematic.

[13] The Respondent testified that, when he sent the Notice of Trial on September 9, 2010, he was substantiating the information he had provided in his request for the adjournment, namely that he was scheduled for trial.

[14] The Respondent also testified that he sent the information to the Law Society in a hurry due to the urgency of the request by the Law Society. He did not take time to review his files or pay attention to the specifics of the adjournment request. He testified that, because the various grounds for an adjournment were in his mind at all material times, he wrongly believed that all these grounds had been communicated to the Law Society.

[15] On September 13, 2010, the Chambers Bencher denied the adjournment application. The Law Society sent an email to the Respondent that stated:

> Mr. Renwick has advised that it would appear Mr. Liggett is no longer going to be in Court on September 24, 2010, and unless he has some other proven commitment he does not see the basis for an adjournment. Unless Mr. Liggett has something to add, it would appear the hearing in this matter will proceed on Friday, September 24, 2010, starting at 9:30 a.m.

[16] Despite this clear opportunity for the Respondent to provide additional information, he did not. He appeared on his own behalf at the citation hearing on September 24. Due to his lack of preparedness, it did not complete that day and was adjourned for continuation.

[17] The Respondent's position is that there was no misrepresentation made, and if there was, it was not made wilfully or with intent to deceive and therefore does not amount to professional misconduct.

SUBMISSIONS OF THE LAW SOCIETY

[18] The Law Society takes the position that the Respondent, as a result of his own inaction, allowed himself to become double booked with a calendar conflict.

[19] At the time the Respondent received the letter of July 19, 2010 from the Law Society, he knew the proposed hearing date would be scheduled in the absence of any response from him by August 3, 2010, and he knew he was committed to a trial on September 24, 2010. He took no action.

[20] Between the time the Respondent made an application for an adjournment by letter dated August 10, 2010 and the date of the hearing on September 24, 2010, the Respondent had several opportunities to advance additional grounds and provide additional information in support of his adjournment request. He did not do so.

[21] On September 9, 2010, when the Respondent faxed the Notice of Trial to the Law Society, he did not disclose the fact that the September 24 trial date in the court action had been cancelled. By not disclosing this fact, the Respondent misrepresented to the Law Society that he continued to be unavailable for the September 24 hearing.

[22] The Law Society argued that the Respondent made this misrepresentation either recklessly or with intent to mislead.

DISCUSSION

[23] It is well established that the onus is on the Law Society to prove the allegations on the balance of probabilities. The allegation made by the Law Society is that on September 9, 2010 the Respondent misrepresented that he was not available for the hearing scheduled by the Law Society on September 24, 2010 as a result of a two-day family trial that he was scheduled to attend.

[24] The Respondent applied for an adjournment of the hearing scheduled for September 24, 2010. The sole ground for the application was that he was not able to attend the hearing scheduled for September 24,

2010 as a result of the scheduled family law trial on the same date. The issue before the Chambers Bencher was whether or not the request from the Respondent for an adjournment should be granted. The sole ground advanced for the adjournment was a scheduled family law trial date. On September 9, 2010, when the Respondent provided the information requested, he continued to represent that he was not available because of the scheduled family law trial date. That in fact was not correct. To the Respondent's knowledge, on September 7, 2010, the family law trial date had been cancelled.

[25] The definition of misrepresentation in *Black's Law Dictionary* includes the following:

> The act of making a false or misleading assertion about something [usually] with the intent to deceive.

[26] Accordingly, a misrepresentation can occur in the absence of intent to deceive and requires consideration of the entirety of one's conduct.

[27] Recklessness involves "knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur." See, *R. v. Sansregret*, [1985] 1 SCR 570 at 584.

[28] The Respondent knew that there was a risk that the adjournment application would be decided on the basis that the calendar conflict still existed. We find that while this representation was not made with intent to mislead, it was made recklessly.

[29] The leading case concerning the test for professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16. It confirms that it is for the Benchers to determine what behaviour constitutes professional misconduct and that professional misconduct is no longer restricted to conduct that can be characterized as dishonourable or disgraceful. Where the facts disclose a marked departure from the conduct the Law Society expects of its members and the conduct is culpable or blameworthy, it is professional misconduct. (See also *Re Lawyer 10*, 2010 LSBC 02).

[30] With respect to the mental element required for a determination of professional misconduct, there are varying degrees of culpability. At the lower end of the scale, the marked departure test may be met when the Respondent has displayed a gross culpable neglect of his duties as a lawyer and member of the Law Society. Recklessness falls within this spectrum.

[31] The Chambers Bencher was considering the Respondent's request for an adjournment of the discipline hearing scheduled for September 24, 2010. The sole ground advanced by the Respondent was that he had a trial on that date. The Law Society opposed the application. One of the grounds was that there was no documentation substantiating that he was on the record for a trial on September 24, 2010. The Chambers Bencher requested confirmation. When the Respondent finally sent the requested confirmation the trial had in fact been cancelled. The Respondent knew that. In sending the Notice of Trial with that knowledge, he misrepresented that he continued to be unavailable. At a minimum the Respondent acted recklessly. His action was a marked departure from what is expected in such circumstances. We have concluded that this conduct constitutes professional misconduct.