2011 LSBC 23
Report issued: August 23, 2011
Oral Reasons: June 9, 2011
Citation issued: November 4, 2010

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

Donald Douglas McLellan

Respondent

Decision of the Hearing Panel

Hearing date: June 9, 2011
Panel: Kenneth M. Walker, Chair, Benjamin Meisner, Gordon Turriff, QC

Counsel for the Law Society: Carolyn Gulabsingh, Maureen Boyd
Counsel for the Respondent: Richard Fernyhough

Background

[1] The citation in this matter was authorized by the Discipline Committee on September 30, 2010 and was issued against the Respondent on November 4, 2010. The citation sets out the nature of the conduct of the Respondent to be inquired into:

> 1. Between 2002 and 2009, in the course of representing your client MC in British Columbia Supreme Court New Westminster Registry Action No. [number], you failed to serve your 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, contrary to Chapter 3, Rules 3 and 5 of the Professional Conduct Handbook, and in particular, you did not:
>
> (a) keep the client reasonably informed,
>
> (b) answer reasonable requests from the client for information,
>
> (c) do the work in hand in a prompt manner so that its value to the client was not diminished or lost,
>
> (d) make all reasonable efforts to provide prompt service to the client, and/or
>
> (e) disclose all relevant information to the client.

[2] This matter came before the Panel pursuant to Rule 4-22, which provides for, inter alia, the Discipline Committee to accept a conditional admission of a discipline violation and proposed disciplinary action. That Rule requires a hearing panel to consider the proposal and impose the proposed disciplinary action if it agrees that it should be accepted.

[3] In this case, the Respondent made a conditional admission of professional misconduct that he failed to serve his client in a conscientious, diligent and efficient manner as expected of a competent lawyer and

proposed a fine of $5,000 and costs of $3,000. The Discipline Committee accepted the admission and proposed disciplinary action.

[4] At the conclusion of the hearing, we gave our decision orally that the conduct contained within the citation was proven. We agree that in these circumstances the agreed fine and agreed costs are within the range of appropriate disciplinary action, and both the fine and costs are fitting. Accordingly, we ordered a fine in the amount of $5000 and costs of $3000. These are our written reasons.

[5] The Law Society and the Respondent, through counsel, filed an Agreed Statement of Facts. We thank counsel for their effort to agree to the facts in this case. Their effort assisted us. The names of the parties, with the exception of the Respondent, have been changed to initials.

[6] A summary of the facts are as follows:

1. The Respondent was retained to probate an estate in 2000. The estate was efficiently probated and distributed by 2002. During this time MC, the executrix, came to believe that the son (and financial advisor) of the deceased, had dissipated the assets of the estate. In particular, she was concerned that he had sold and purchased stocks without authorization for the purpose of “churning” the account, where the purpose of the transactions was to generate commission income for the financial advisor. MC believed the loss was substantial. The Respondent was instructed to recover these funds.

2. By mid 2002 the Respondent had investigated to determine the amount of the loss and believed the loss to be about $20,000. The Respondent drafted and filed a claim against the financial advisor and his employer investment house in 2002. The claim was renewed in 2003. There were problems locating the defendant son for purposes of service of the claim, but he eventually was found, and he notionally responded by filing an Appearance in October 2003.

3. Few steps were taken to advance the action in subsequent years. MC inquired several times as to how the case was being advanced and what progress was being made. The Respondent admits he failed to respond to MC and failed to advise her in writing that he believed there was no practical reason to pursue the claim or incur further costs.

4. In 2009 MC complained to the Law Society of British Columbia in desperation to seek assistance. She was reluctant to complain. She was loyal to her lawyer.

5. The Respondent admits that between 2002 and 2009, in the course of representing MC in the action, he failed to serve MC 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, contrary to Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook*, and in particular, that he did not:

(a) keep the client reasonably informed;

(b) answer reasonable requests from the client for information;

(c) do the work in hand in a prompt manner so that its value to the client was not diminished or lost;

(d) make all reasonable efforts to provide prompt service to the client, and/or

(e) disclose all relevant information to the client.

The Respondent admits that his conduct constitutes professional misconduct.

DISCUSSION

[7] The test for determining professional misconduct is that set out in *Law Society of BC v Martin*, 2005 LSBC 16 at paragraph [171]. In simple terms, professional misconduct occurs when the lawyer fails his client in a substantial way.

[8] In this case, the Respondent failed his client through a lack of appropriate communication. The Respondent admits he failed to respond to MC and failed to advise her that he believed there was no practical reason to pursue the claim or incur further costs. She perhaps did not share his view on this, but obviously he had failed to effectively communicate his opinion to her.

[9] While MC showed loyalty to the Respondent as her lawyer, it is unfortunate that her lawyer failed to reciprocate with the loyalty and service that he owed her. All she wanted was his valued opinion and his experience. He failed her. It may have been he did not want to be the bearer of bad news. However that was his duty.

[10] The Respondent has admitted that his conduct has met the test in *Martin*. He acknowledged during the hearing that he owed the duty and failed to respond to the client's many letters. The Panel agrees and accepts the Respondent's admission of professional misconduct.

SANCTIONS

[11] The Panel accepts and follows paragraphs [18] and [19] of the decision in *Law Society of BC v. Epstein*, 2011 LSBC 12, which describe the purpose of these kinds of disciplinary proceedings. Those paragraphs read:

> [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. ...

[12] We find the following factors in *Ogilvie* important when considering the appropriate sanctions:

Nature and Gravity of the Conduct

[13] The Respondent admits that between 2005 and 2009 he failed to respond to the numerous inquiries made by the client.

Impact upon the Client

[14] MC was loyal to the Respondent. She was loath to complain of his conduct. She was unreasonably delayed in pursuing the action she believed she had against the son (financial advisor).

Previous Character of the Respondent and Prior Discipline

[15] The Respondent has been disciplined before. His Professional Conduct Record reveals:

(a) a Conduct Review for breach of an undertaking in November, 1986;

(b) a proven citation for breach of undertaking in 2003 resulting in a fine of $3000;

(c) a Conduct Review for acting in a conflict of interest in 2010.

Personal Circumstances

[16] The Respondent has been a lawyer for over 40 years. There was no personal gain from the conduct. Indeed it appears that the Respondent was trying to save the client fees. In addition, the Respondent was suffering from difficult personal circumstances including a break-up in a relationship and difficulty with staffing in the office. The Respondent is apologetic and is remorseful. He knows that he did not help his client and that he ought to have helped, not delayed.

[17] Since this complaint the Respondent has reviewed all his files to ensure all are current and no similar non-responsive correspondence exist in his files. He has also taken five counseling sessions through Interlock to address personal issues. He has restricted his practice to areas within his experience.

Decision

[18] The cases provided by counsel range from a reprimand to a short suspension. Counsel and the Respondent have agreed that the appropriate disciplinary action in these circumstances is a fine of $5000 and costs of $3000. We agree that, in these circumstances, the agreed fine and agreed costs are within the range of appropriate disciplinary action.

[19] Accordingly, we order that the Respondent pay a fine of $5000 and costs of $3000 by October 31, 2011. The Executive Director is instructed to record the Respondent’s admission on his professional conduct record.