2011 LSBC 24
Report issued: August 24, 2011
Oral Reasons (on Facts and Determination): April 21, 2011
Citation issued: October 27, 2009

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

**Gregory Charles Cranston**

Respondent

**Decision of the Hearing Panel**
**on Facts, Determination and Disciplinary Action**

Hearing date: April 19, 20 and 21, 2011
Panel: David Renwick, QC, Chair, Haydn Acheson, Patricia Bond

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: David F. Sutherland and Dana L. Kripp

# Background

[1] The citation in this matter was authorized by the Discipline Committee on September 10, 2009 and issued on October 27, 2009 (the "Citation"). On November 12, 2009, the Discipline Committee authorized additional allegations and the schedule to the Citation was amended accordingly on January 19, 2010 (the "Amended Citation").

[2] The Respondent admits that he was served with the Citation and the Amended Citation.

[3] The Amended Citation relates to the Respondent's conduct as defence counsel in seven criminal matters and involves numerous missed Court appearances and several misrepresentations to the Court.

[4] The Amended Citation contains 17 separate allegations; however, at the commencement of the proceeding the allegations set out in 1, 4, 8 and 15 of the Amended Citation were not pursued by the Law Society.

[5] The remaining allegations assert that, on 17 separate occasions, the Respondent failed to attend at fix-date appearances, trial confirmation hearings and appearances, or failed to make arrangements to have an agent attend, as well as five instances in which he made misrepresentations to the Court.

[6] Counsel for the Law Society and for the Respondent have urged the Panel to accept the joint submission that, in all instances, the conduct of the Respondent amounted to incompetent performance of duties undertaken in his capacity as a lawyer as opposed to professional misconduct.

[7] At first blush, given the multiple allegations and the seriousness of the allegations, one might be inclined to suggest that this pattern of behaviour could only constitute professional misconduct. However, after carefully reviewing the circumstances surrounding each of the allegations, the representations of counsel, including details of the Respondent's extensive medical history, we are satisfied that the position taken by

counsel is the appropriate one and that, in all instances, the Respondent's conduct amounted to incompetent performance of duties undertaken in his capacity as a lawyer. Oral reasons were provided, and these are now our written reasons.

[8] The genesis of these allegations arose when the Respondent appeared as counsel in the matter for *R v. G*. NG was charged in February 2006, with impaired driving and operating a vehicle with a blood-alcohol level in excess of 80 mg. Two trial dates were adjourned, and the trial was scheduled to proceed in Sechelt Provincial Court on November 20, 2006. On November 17, 2006, the Respondent sought an adjournment of the trial on the basis that it conflicted with the Supreme Court assizes in Fort St. John commencing on November 20, 2006. The adjournment was denied, and NG's trial commenced on November 20, 2006 without the Respondent; however, as the trial did not complete, the matter was adjourned to December 8, 2006.

[9] On December 8, 2006, the Respondent appeared and made an application before the trial judge, A. Rounthwaite, PCJ, that she recuse herself on the basis that she had denied the adjournment application and had made certain comments to NG that he may have the basis to make a complaint against the Respondent to the Law Society. After hearing the argument, Rounthwaite PCJ, refused to recuse herself.

[10] In anticipation of an adverse ruling, the Respondent filed a prohibition application on December 7, 2006 "(the Prohibition Application"). On December 8, 2006, after Rounthwaite PCJ refused to recuse herself, the Respondent advised her that he had filed the Prohibition Application. The Prohibition Application was heard on January 24, 2007, and Mr. Justice Smart dismissed the application on February 7, 2007 and written reasons were issued on March 29, 2007.

[11] When *R. v. G* continued before Rounthwaite PCJ, and after certain misrepresentations were made by the Respondent to her, a formal complaint was made by the Chief Judge to the Law Society.

## CITATION

[12] The Amended Citation, with the remaining allegations that were proceeded with by the Law Society, sets out the nature of the Respondent's conduct to be enquired into:

> 2. You failed to attend one or both of the fix date appearances on January 23, 2007 and February 7, 2007 in *R v. G*, Provincial Court Information No. [number] (Sechelt Registry), in which you were defence counsel, in circumstances requiring your attendance.
>
> 3. You failed to attend one or more of the fix date appearances on March 12, 2008, April 9, 2008 and May 20, 2008 in *R. v. G*, Supreme Court File No. [number], in which you were defence counsel, in circumstances requiring your attendance.
>
> 5. On one or both of the occasions described below, you represented to the Court that you had filed a Notice of Appeal on behalf of your client, NG, against the Order of Mr. Justice Smart pronounced February 2, 2007 denying a writ of prohibition, when you knew or ought to have known that a Notice of Appeal had not been filed:
>
> > (a) March 26, 2007 during the course of proceedings on *R. v. D*, Provincial Court Information No. [number] (Sechelt Registry);
> >
> > (b) May 16, 2007 during the course of proceedings in *R. v. G*, Provincial Court Information No. [number] (Sechelt Registry).
>
> 6. On one or both of the occasions described below, you made representations to the Court concerning

the reason a Notice of Appeal had not been filed on behalf of your client, NG, against the Order of Mr. Justice Smart pronounced February 2, 2007 denying a writ of prohibition, when you knew or ought to have known that the representations were false:

(a) Appearance on June 4, 2007 during the course of proceedings in *R. v G*, Provincial Court Information No. [number] (Sechelt Registry).

(b) In a Notice of Application for Extension of Time to Appeal filed on June 14, 2007 in *R. v. G*, Court of Appeal File No. [number].

7. You failed to attend one or more of the fix date appearances on February 6, 2007, February 27, 2007 and March 12, 2007 in *R. v. C,* Provincial Court Information No. [number] and [number] (Smithers Registry), in which you were defence counsel in circumstances requiring your attendance, resulting in a bench warrant being issued for your client on March 12, 2007.

9. On September 12, 2007, you failed to attend a trial confirmation hearing in *R. v. F*, Provincial Court Information No. [number] (Sechelt Registry), in which you were defence counsel, in circumstances requiring your attendance.

10. In the course of your representation of the accused in *R. v. F*, Provincial Court Information No. [number] (Sechelt Registry), you represented to the Court on December 24, 2007 that you had filed a Notice of Appeal against Conviction of your client, NG, Provincial Court Information No. [number] (Sechelt Registry), when you knew or ought to have known that the Notice of Appeal had not been filed.

11. On January 21, 2008, you failed to attend and failed to make prior arrangements for an agent to attend, on your or your client's behalf, an appearance in *R. v. M*, Supreme Court No. [number] (Fort St. John Registry), in which you were defence counsel.

12. On February 10, 2009, you failed to attend and failed to make prior arrangements for an agent to attend, on your or your client's behalf, a trial confirmation hearing in *R. v. C*, Provincial Court Information No. [number] and [number] (Smithers Registry), in which you were defence counsel.

13. On February 16 and 17, 2009, you failed to attend the trial confirmation hearing in *R. v. S,* Provincial Court Information No. [number] (Burns Lake Registry), in which you were defence counsel, in circumstances requiring your attendance, resulting in a bench warrant being issued for your client on February 17, 2009.

14. On February 17, 2009, you failed to attend the trial confirmation hearing in *R. v. C*, Provincial Court Information No. [number] and [number] (Smithers Registry), in which you were defence counsel, in circumstances requiring your attendance, resulting in a bench warrant being issued for your client.

16. You failed to attend the appearance on February 2, 2009 in *R. v. S*, Supreme Court File No. [number] (Fort St. John Registry), in which you were defence counsel, in circumstances requiring your attendance, resulting in a bench warrant being issued for your client.

17. You failed to attend and failed to make prior arrangements for an agent to attend, on your or your client's behalf, appearances on December 8, 2008 and/or March 9, 2009 in *R. v. S*, Supreme Court File No. [number] (Fort St. John Registry), in which you were defence counsel.

[13] The Respondent admitted that his conduct constituted incompetent performance of duties undertaken in his capacity as a lawyer but was not prepared to admit that his conduct amounted to professional misconduct.

[14] The Respondent further admitted that he failed to attend as required and that he made the misrepresentations as set out in the Amended Citation.

[15] For the purpose of our analysis, we have grouped the allegations relating to the failure to attend at Court to fix dates and separated those from the allegations of misrepresentation.

# Facts

[16] An Agreed Statement of Facts ("ASOF") was tendered as an Exhibit in these proceedings. It provides a very thorough and comprehensive analysis of the factual underpinnings for each of the allegations. It is important to have an understanding of the substance of each of the allegations to assist in appreciating how the Panel came to its decision of accepting that the Respondent's conduct amounted to incompetent performance of his duties as a lawyer. Therefore, it is necessary to provide a summary of the facts for each of the allegations.

## Missed Appearances

### Allegation 2

[17] As a result of Rounthwaite PCJ's refusal to recuse herself on December 8, 2006, the continuation of the trial in *R. v. G* was scheduled to be heard some time after the Prohibition Application was heard. The Respondent had advised that the Prohibition Application was scheduled to be heard on January 16, 2007. A continuation date for *R. v. G* was not arranged on December 8, 2006. Instead the matter was adjourned by a Justice of the Peace to December 19, 2006 to fix a date, which was called ahead to December 18, 2006 and then adjourned at the Respondent's request to January 23, 2007 to fix a date.

[18] The Respondent did not attend the appearance on January 23, 2007. As a result of the failure to attend, the Crown sought a bench warrant for the arrest of NG. NG's non-appearance was noted and the application for bench warrant was put over until January 24, 2007. On January 24, 2007, a lawyer appeared as agent for the Respondent and for NG. The lawyer explained that the Respondent mistakenly thought the appearance was set for January 24, 2007 rather than January 23, 2007. The matter was then referred to the trial scheduler, who had difficulties in confirming the continuation date with the Respondent and, therefore, Crown Counsel added the matter to the Court List on February 7, 2007 to confirm the date. Crown Counsel sent a letter to the Respondent on February 2, 2007 advising of the February 7, 2007 date. The Respondent did not attend on February 7, 2007.

[19] The Respondent admits that he failed to attend the fix date appearances on January 23 and February 7, 2007.

### Allegation 3

[20] Ultimately, NG was convicted on October 30, 2007. The Respondent filed an appeal against conviction in Supreme Court on December 31, 2007.

[21] The appeal was initially scheduled for February 27, 2008, but as the Respondent had not filed a factum nor the transcripts, an agent appeared on behalf of the Respondent and requested an adjournment on the basis that the Respondent had mis-diarized the appeal date for March 27, 2008. The adjournment was granted and the matter was put over until February 29, 2008 to fix a date for the appeal. On February 29, 2008, the Respondent appeared in Court and adjourned the fix date to March 12, 2008.

[22] The Respondent did not attend the appearance on March 12, 2008, or the subsequent appearances on April 9 and May 20, 2008, which dates the Respondent was aware of.

[23] The Respondent admits that he failed to attend the fix date appearances of March 12, April 9 and May 20, 2008.

### Allegations 7, 12 and 14

[24] The Respondent represented HC who was charged with impaired driving and operating a vehicle with a blood-alcohol level in excess of 80 mg. The trial of *R v. C* was initially scheduled for November 7, 2006; however, this trial date was adjourned on application of the defence and rescheduled to December 6, 2006. This trial date was subsequently adjourned on application of Crown Counsel. Fix date appearances were adjourned from time to time, and the Respondent's assistant, LB, attended those appearances as agent for the Respondent. Ultimately, a fix date appearance was scheduled for February 6, 2007. The Respondent did not attend or have an agent appear on his behalf on February 6, 2007. As a result, the fix date was put over to February 27, 2007. The Respondent again did not appear nor have anyone appear on his behalf or on behalf of his client. The fix date was put over to March 12, 2007. The Respondent again did not attend. A bench warrant was issued for the arrest of his client.

[25] The Respondent admits that he failed to attend one or more of the fix date appearances on February 6, February 27 and March 12, 2007. However, as the Respondent did not appear on February 6, 2007, he was unaware of the appearances set for February 27 and March 12, 2007.

[26] The trial in *R. v. C* was subsequently rescheduled to March 5, 2009, with a trial confirmation hearing scheduled for February 4, 2009. An agent appeared for the Respondent on February 4, 2009, and adjourned the trial confirmation hearing to February 10, 2009, and advised the Respondent, by fax, of that date. The Respondent did not appear on February 10, 2009.

[27] The Respondent admits that he failed to attend the hearing set for February 10, 2009, or that he failed to have an agent appear on his behalf or on behalf of his client. He had, however, instructed an agent to appear in a different matter scheduled for February 10, 2009, in the Smithers Courthouse, where the *R. v. C* matter was also scheduled.

[28] *R. v. C* was scheduled for a trial confirmation hearing on February 17, 2009, but the Respondent did not appear nor make arrangements for his client or an agent to appear on his behalf.

[29] The Respondent admits that he failed to attend the trial confirmation hearing on February 17, 2009.

### Allegation 9

[30] The Respondent represented SF who was charged with impaired driving and operating a motor vehicle with blood-alcohol level in excess of 80 mgs. A trial date was scheduled for October 25, 2007 with a trial confirmation hearing scheduled for September 12, 2007.

[31] The Respondent admits that he failed to attend the trial confirmation hearing set for September 12, 2007. The Respondent was in hospital on September 12, 2007.

### Allegation 11

[32] The Respondent represented PM who was charged with impaired driving causing death and operating a vehicle with a blood-alcohol level in excess of 80 mgs. The accused was committed to stand trial, and a

trial confirmation hearing was set for January 21, 2008. The Respondent admits that he did not attend, nor have his client attend, nor make prior arrangements for an agent to appear on his behalf or his client's behalf on January 21, 2008. When the matter was called in Court it was stood down so that a lawyer, who had previously appeared for the Respondent as agent, could attempt to contact the Respondent, which she did and subsequently appeared as his agent. She advised the Court that he had "forgotten".

### Allegation 13

[33] The Respondent represented WS who was charged with impaired driving and operating a vehicle with a blood-alcohol level in excess of 80 mgs. The trial was scheduled for March 9, 2009, and a trial confirmation hearing was scheduled for February 10, 2009. The Respondent was advised by his agent, who appeared on February 10, 2009, that the trial confirmation hearing was adjourned to February 16, 2009. The Respondent was to appear by telephone; however, he did not make the appearance on February 16, 2009 and the matter was adjourned to February 17, 2009. On February 17, 2009, the Respondent had contacted the Court and indicated that he was in court in Kitimat, and that as his luggage, including his diary and his cell phone charger, had been sent to Smithers instead of Kitimat; he therefore was unable to receive the call on February 16, 2009, nor appear on February 17.

[34] The Respondent admits that he did not appear on February 16 or 17, 2009.

### Allegation 16 and 17

[35] The Respondent represented SS who was charged with impaired driving causing bodily harm and operating a vehicle with a blood-alcohol level in excess of 80 mgs. After a preliminary hearing, SS was committed to stand trial, and the trial was scheduled to commence on March 23, 2009, and a pre-trial conference was scheduled for December 8, 2008. When the matter was called on December 8, 2008, a lawyer, who had previously appeared for the Respondent as agent, advised the Court that she would try and contact the Respondent to obtain his instructions. However, she did not have instructions prior to the matter being called. The matter was stood down and the lawyer spoke to the Respondent and then advised the Court that he would be available for some of the five days scheduled beginning on March 23, 2009. Madam Justice Bruce adjourned the proceedings to February 2, 2009, for a pre-trial conference. The Respondent did not appear, nor have his client appear, nor make arrangements for an agent to appear on February 2, 2009. As a result, the trial scheduled for March 23, 2009, was cancelled and the matter was adjourned to March 9, 2009 to fix a new date.

[36] The Respondent admits that he did not appear on December 8, 2008, February 2, 2009 or March 9, 2009, nor make prior arrangements for an agent to attend.

[37] All of the missed appearances involve fix date appearances, pre-trial conferences or trial confirmation dates and did not involve any missed trial dates.

## Misrepresentations

### Allegation 5

[38] The Respondent represented AD who was charged with impaired driving and operating a vehicle with a blood-alcohol level in excess of 80 mg. AD's trial was scheduled for March 26, 2007, before A. Rounthwaite PCJ. On that date, the Respondent appeared and made an application to have Rounthwaite PCJ recuse herself and adjourn the trial, on the basis that there was a reasonable apprehension of bias on the part of

the judge against the Respondent as a result of the proceedings in *R. v. G*, including the Prohibition Application, which his client was aware of. The Respondent advised the Court that a Notice of Appeal from the decision of Mr. Justice Smart in the Prohibition Application proceedings had been filed. The Respondent stated:

> AD is aware of the situation in G. That was the case where Your Honour declined my application for an adjournment because of the Supreme Courts [sic] in Fort St. John, and proceeded on the matter in my absence. That matter has gone to the Supreme Court on a prohibition application. My application was denied there. It's now gone to the Court of Appeal.

He went on to state:

> … I can tell you, yes, there has been a notice of appeal filed in the Court of Appeal. It's not something conjectural; it has been filed.

[39] On May 16, 2007, the Respondent appeared before Auxier PCJ in *R. v. G* and requested an adjournment of the continuation of the trial on the basis that he had filed a Notice of Appeal in the Prohibition Application proceedings and that his client had made a complaint to the Judicial Council against A. Rounthwaite PCJ. He said that the trial should be adjourned awaiting the outcome of those processes.

[40] In that proceeding, the Respondent stated:

> I can tell you as counsel, that the Court of Appeal (sic) has been filed and I've seen a copy of the letter that NG tells me has been sent to the Judicial Council.

The Court indicated:

> … I certainly accept what you've stated, Mr. Cranston, that a notice of appeal has been filed to the Court of Appeal regarding the decision of the Supreme Court refusing your writ of prohibition, and I think on that basis I'm prepared to adjourn the continuation that is set for this trial …

[41] The Respondent had signed the Notice of Appeal and given instructions to have it filed, but it was not filed.

[42] The Respondent admits that he represented to the Court on March 26 and May 16, 2007, that he had filed a Notice of Appeal in the Prohibition application proceedings, when he ought to have known that the Notice of Appeal had not been filed.

### Allegation 6

[43] The Respondent appeared before A. Rounthwaite PCJ in the matter of *R. v. G* on June 4, 2007 and the following exchange took place:

> Mr. Cranston: Thank you. I'd like to speak to the suggestion of false information, Your Honour. And I expect what Your Honour is referring to is the fact that the Notice of Appeal wasn't filed in the Court of Appeal?
>
> The Court: Yes.
>
> Mr. Cranston: Well, it turns out that the Notice of Appeal was drafted, was signed, and was sent by me well within the 30 days' time, and for some reason the company that delivers the documents took it to the Supreme Court, not the Court of Appeal. And I am currently making an application, which looks like it will simply be a desk order, to the Court of Appeal to have the matter accepted by them. So it's not quite false information.

[44] In the materials filed for an extension of time to file a Notice of Appeal, the Respondent stated that the Notice of Appeal was "inadvertently delivered to the Supreme Court Registry by West Coast Title Search on [March 2, 2007]." In fact, the Notice of Appeal had not been taken nor delivered to the Supreme Court Registry as alleged.

[45] The Respondent admits that the representations he made during the appearance on June 4, 2007 and in the Notice of Application for Extension of Time to Appeal concerning the reason the Notice of Appeal had not been filed were false and he ought to have known the representations were false.

### Allegation 10

[46] The trial in *R. v. F* was scheduled for December 24, 2007, before A. Rounthwaite PCJ. The Respondent appeared with SF and applied to adjourn the trial on the basis that he had filed an Appeal against conviction in *R. v. G* and that one of the grounds of appeal was a reasonable apprehension of bias against the Respondent as counsel at trial. The Respondent stated:

> Mr. G has instructed me to file a notice of appeal, which has been done.

He later stated:

> The appeal is filed …

And later:

> … and to my knowledge, it has been filed. I did not personally physically file it. I have seen a copy of it, but I don't even know that that matters. The point is that there is a Notice of Appeal from NG. He was only sentenced, I think it was on the 10th of December. The appeal went in a few days later. I was not here. I was out of the country and I only came back on Thursday.

[47] The Notice of Appeal in the G matter had been dated and signed by the Respondent's legal assistant on December 17, 2007, however it was not filed in the Supreme Court Registry until December 31, 2007.

## EVIDENCE

[48] In addition to the ASOF, medical reports from Dr. Phan, dated May 6, 2010 and April 14, 2011, and a report of Richard Gibbs, QC, were filed. As well oral evidence was provided by the Respondent, his co-worker, Ann Pollak, and his wife, BB.

[49] The May 6, 2010 letter from Dr. Phan sets out the extensive medical history for the Respondent, which includes:

> (a) Treatment by medication for high blood pressure since 2004.
>
> (b) Arterial flutter/fibrillation, or an irregular heartbeat, first diagnosed in 2004; treated by medication.
>
> (c) An excessively slow heart rate, aka third degree (complete) heart blocks, first documented on February 13, 2007. The low pulse rate together with intermittent sleep apnea caused the Respondent to not breathe at times during the night.
>
> (d) Diagnosed with a complete heart block on July 10, 2007, and as a result a pacemaker insertion occurred in October 2007 in Vancouver General Hospital.
>
> (e) Atrial flutter diagnosed on July 10, 2007, treated by cardioversion which involved electrically

applying hand paddles to the surface of the chest.

(f) The Respondent's first cardioversion occurred on November 25, 2007. Subsequent cardioversions occurred on April 21, 2008, December 12, 2008 and June 8, 2009.

(g) "Severe" obstructive sleep apnea diagnosed in July 2007.

(h) Kidney stones on June 8, 2007 and on October 9, 2007.

(i) An ablation procedure to treat his irregular heartbeat in June 2010.

[50] In Dr. Phan's opinion, the various medical conditions suffered by the Respondent produced significant health consequences:

1. The low resting heart rates might cause fatigue and inability to exercise so the heart rate would not increase like it normally should.

2. Symptoms of atrial flutter can include palpations, fatigue, lightheadedness, shortness of breath, fainting or pre-faint symptoms, angina or cardiac related chest pain, and low blood pressure.

3. The sleep apnea would include excessive daytime drowsiness and sleepiness, risk with driving and poor work performance, which can lead to heart disease such as high blood pressure, arrhythmias or even heart failure. The medications that he was on had side effects, which included fatigue and dizziness.

4. The sleep apnea would "severely restrict his ability to function as a trial lawyer, to handle stress, organize/execute work and life skills in general, contribute to short and long term memory impairments and significantly cause daytime fatigue and drowsiness."

[51] The Respondent testified and confirmed his own health problems and advised of other health issues by family members. His wife's sister was diagnosed with lung cancer in June 2006, and ultimately died in January 2009. His mother-in-law as well, had significant health issues during that same time period. With regard to his own health issues, he indicated that he would fall asleep in the courtroom or while driving. His sleep apnea made him incredibly tired, and he couldn't sleep well at night. He found that the pressures from work, together with his own and family health difficulties made it difficult for him to concentrate. He would set a date, but would forget to tell his secretary or put it into his own diary. The Respondent testified that he was "embarrassed that (he) missed a single date" and that he was generally proud of his reputation as being a good trial lawyer up until these proceedings. He also described his office systems including an unsatisfactory diary system.

[52] Ann Pollak, a lawyer since 1990, testified that she joined the Respondent in 2008 and has been instrumental in assisting in helping the Respondent with administrative matters, including proper scheduling of matters and recording those into the computer or other electronic devices. She described the Respondent as a "tenacious advocate, creative legal thinker, one who could keep all the balls in the air at the same time." She indicated that he is capable of getting to the "matter of a case" and that his arguments are "creative".

[53] His wife also testified on his behalf. BB has a nursing background, and in early January or February 2009, she was so concerned about his sleep apnea that she insisted he speak with a cardiologist. She described the effects of his various medical conditions and found that they were very, very stressful and that he suffered from insomnia, was not able to get any exercise and was not eating properly.

## DISCUSSION

[54] The onus is on the Law Society to prove the allegations on the balance of probabilities. Here, the Respondent has admitted that his conduct constituted incompetent performance of duties undertaken in his capacity as a lawyer.

[55] The discipline violations are serious and involve a number of missed appearances and misrepresentations over a lengthy period of time.

[56] Neither professional misconduct nor incompetent performance of duties are defined in the *Legal Profession Act*, Law Society Rules or the *Professional Conduct Handbook*.

[57] For our purposes in analyzing the relevant jurisprudence, we have again segregated the missed appearances from the misrepresentation allegations.

[58] In *Law Society of BC v. Nielson*, 2009 LSBC 8, the panel found that there was a degree of overlap between adverse determinations of incompetence and professional misconduct. At paragraph [23], the panel noted, “It is a fine point whether conduct that betrays an effective lack of any “lawyering” or judgment constitutes professional misconduct or incompetence”.

## INCOMPETENT PERFORMANCE OF DUTIES

[59] In *Law Society of BC v. Goldberg*, 2007 LSBC 03, upheld by the Benchers on Review, 2008 LSBC 13, the hearing panel determined that, in relation to one of the allegations, Mr. Goldberg was incompetent with respect to performing his duties in the way he prepared and submitted materials to the Court. In reaching that decision, the panel relied, in part, on the decision in the *Law Society of BC v. Eisbrenner*, [2003] LSBC 03. The panel wrote at paragraphs [49]-[50]:

> [49] … In Law Society of *BC v. Eisbrenner*, the Panel defined “competence”. It held that a lawyer should:
>
> a) have the intellectual, emotional and physical capacity to carry out the practice of law;
>
> b) demonstrate professional responsibility and ethics;
>
> c) set up, maintain office systems and file organization corresponding to the current or anticipated practice of the lawyer;
>
> d) communicate in a timely and appropriate manner with clients, counsel and others and document those communications in an appropriate manner;
>
> e) have an adequate knowledge of substantive and procedural law in the areas practiced, be able to relate the law to a client’s affairs and determine when the problems exceed the lawyer’s ability; and
>
> f) develop and apply technical skills such as drafting, negotiation, advocacy, research and problem solving to appropriately carry out a client’s instructions.
>
> [50] A useful discussion of competence can be found in *The Regulation of Professions in Canada* by James T. Casey, commencing at page 13 through to page 14. In summary, the question is whether or not a mistake or mistakes made by a professional will be of such significance so as to demonstrate incompetence. Assessing incompetence is a function of looking at the nature and extent of the mistake or mistakes and the circumstances giving rise to it or them. It may be self-inflicted or the result of negligence or ignorance. In considering this issue we bore in mind that we are not dealing with an allegation that the Respondent was incompetent generally. Instead, the

issue before us was the handling of the Dunbar Appeals and whether or not they were handled competently.

[60] As further guidance, the panel in *Eisbrenner*, (supra) provided further direction in explaining incompetence:

> [50] The Law Society has a statutory mandate, enshrined in s. 3 of the *Legal Profession Act*, to establish standards, in the public interest, for competent practice. Provisions of the *Professional Conduct Handbook* require that a lawyer not only have, and maintain an adequate knowledge of substantive law, but also that he or she have and maintain *adequate skills to represent the client's interests effectively*. Competence means so much more than mere mental fitness to perform the functions of a lawyer: it means the possession of, and ability to use, a set of skills to serve the interests of a client. A lawyer may be highly intelligent and extensively educated and yet incompetent to deal with a particular area of practice in which he or she has no training or experience. A lawyer may have that training or experience and yet be unable or unwilling to utilize those skills in the client's interest. In the same vein, the Supreme Court of British Columbia, in the case of *Mason v. Registered Nurses Assn. (British Columbia)* (1979), 102 DLR (3d) 225, defined incompetence as a want of ability suitable to the task, either as regards natural qualities or experience, or a deficiency of disposition to use one's ability and experience properly. In that case, the court confirmed a finding of incompetence in circumstances in which a nurse demonstrated a pattern of carelessness and a disposition such that she failed to respond to advice as to her shortcomings.
>
> [emphasis in original]

## PROFESSIONAL MISCONDUCT

[61] The leading case concerning the test for professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16, where the hearing panel found 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."

[62] In reviewing *Law Society of BC v. Hops*, [1999] LSBC 29, the panel in *Martin*, (supra), concluded that conduct must display gross culpable neglect of the respondent's duties as a lawyer.

[63] Although the *Martin* test was considered in *Re Lawyer 10*, 2010 LSBC 2, we are satisfied that that case is unique to its facts and that it does not alter the marked departure test for professional misconduct.

[64] With this background, we need to consider the substance of these allegations relating to missed Court appearances and misrepresentations to the Court, bearing in mind the Law Society's statutory mandate provided in s. 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice.

## MISSED COURT APPEARANCES

[65] There are few decisions regarding missed Court appearances. Counsel have cited cases that resulted in a finding of professional misconduct, as opposed to incompetent performance of duties. Each of those cases is distinguishable on their facts. (cf. *Law Society of BC v. Goldberg* 2007 LSBC 55, *Law Society of BC v. Goldberg* 2009 LSBC 18, *Law Society of BC v. Layne*, Decision of a Hearing Committee (1985), *Law Society of Manitoba v. Walsh*, 1997 LSDD No. 96, *Law Society of Manitoba v. Nadeau*, [2005] LSDD 35, *Law Society of Alberta v. Rothecker*, [2006] LSDD No. 137). These cases suggest that there was a wilful or flagrant disregard for the lawyer's obligations to his clients or the Courts, which resulted in the finding of

professional misconduct.

## MISREPRESENTATION TO THE COURT

[66] In all of the cases cited, the conduct complained of resulted in findings of professional misconduct rather than incompetence. However, each of the cases needs to be looked at with greater scrutiny.

[67] In *Law Society of BC v. Galambos*, 2007 LSBC 31, the respondent, who was acting for a plaintiff in a civil matter, represented to a Master that the Notice of Motion had been served on the defendant when it had not been. At the time he made the representation, he knew he was misleading the court. In that case, the respondent admitted that his conduct constituted professional misconduct, which admission the panel accepted.

[68] In *Law Society of BC v. Lowther*, [2002] LSBC 5, the respondent admitted that he misled the Court Registry as to the availability of opposing counsel to attend a proposed hearing on short notice. The respondent acknowledged that he did not have sufficient information to be able to assert the opposing counsel's availability and that he failed to take the necessary degree of care to verify that his statements were accurate. He admitted his conduct constituted professional misconduct, which admission was accepted by the panel.

[69] In *Law Society of BC v. MacKinnon*, [2002] LSDD No. 11, the respondent admitted, and the panel accepted, that, when he filed a Praecipe stating that an application was adjourned by consent, he had failed to ensure that the opposing counsel had in fact consented to the adjournment, constituted professional misconduct.

[70] In *Law Society of BC v. Botting*, [2000] LSBC 30, the respondent represented to the Court that the opposing counsel had consented to access, and he subsequently misrepresented to the Law Society that he did not make such a representation to the Court. The hearing panel determined that the respondent's conduct constituted professional misconduct.

## ANALYSIS

[71] There is no suggestion that the Respondent's medical conditions resulted in incapacity such that he could establish that he did not have the intent required for a finding of professional misconduct or incompetence to perform his duties as was found in the *Law Society of BC v. Cunningham*, 2007 LSBC 17 and *Law Society of BC v. Williamson*, 2005 LSBC 19. However, the medical evidence was compelling evidence to help to explain the impact on him and his inability to adequately perform his duties as a lawyer during the relevant time.

[72] As we indicated, at first blush the conduct observed could be characterized as professional misconduct. However, given the overlap between the two adverse determinations, we are satisfied that, once each of the individual allegations is dissected, the appropriate disposition is a finding of incompetent performance of duties.

[73] The unique circumstances in this case and the extensive medical history provide the appropriate background for analyzing the complained of conduct. Regarding the missed Court appearances, the Respondent's medical issues and treatments had a significant effect on his general health, resulting in fatigue and memory issues. However, that is only a partial explanation. These factors appear to be more relevant to the missed appearances than to the misrepresentations.

[74] The Respondent attributes his problems to his health issues, which resulted in fatigue and faulty

memory, calendar conflicts and reliance on support staff to make arrangements for agency appearances and to file documents. Clearly, the Respondent, over the relevant period of time, did not provide adequate attention and care in approaching his practice such that he was able to meet his professional obligations, both to his clients and to the Courts.

[75] It is of interest to note that, notwithstanding the multiple missed appearances involving seven different clients, not one of the clients complained to the Law Society about the Respondent's behavior.

[76] The evidence as a whole does not support a finding that, in his failure to attend the numerous Court appearances, the Respondent displayed a wilful or flagrant disregard to his obligations to his clients and to the Courts. In one instance, he was unable to attend as he was in the hospital. In another instance, he was not aware of the two subsequent dates as he had missed the first one. In some instances, the matters were arbitrarily added to the list by the Crown and not the Respondent, without once determining his availability. Nonetheless, the Respondent failed miserably in the proper running of his busy practice. He failed to have a proper diary system in place, and he failed to moderate his work load or hire additional help.

[77] He also failed to realize the effect that his medical condition had on his ability to properly function as a lawyer. His condition resulted in a lack of focus, failure to properly record Court appearance dates and an obviously unworkable situation.

[78] Furthermore, the evidence does not support a finding that the misrepresentations made to the Court were deliberate or that there was any intention to mislead. The Respondent provided evidence that, in each instance, the Notices of Appeal had been signed prior to his appearance in Court and he was under the mistaken honest belief that they had actually been filed in the Court Registry.

[79] He relied on his staff and expected that the Notices of Appeal would have been filed as he had instructed. However, he failed to determine the true state of affairs before making his representations. Clearly he was negligent in carrying out his responsibilities as a lawyer.

[80] We accept the position of the Law Society that the discipline violations are more fairly characterized as negligence over a two year period, flowing from an inability to manage his practice in a manner expected of criminal lawyers who take on a practice that requires numerous Court appearances in numerous Court locations throughout the Province. In this case, the Respondent's inability to manage his practice was exacerbated by his illness and his failure to limit his practice to a manageable level in light of the effects of the illness.

[81] This case is similar to the case of the *Law Society of BC v. Bell*, [2000] LSBC 6, in which the panel felt that Ms. Bell's medical condition, a psychological disorder, contributed to her incompetent performance of her duties as a lawyer.

[82] Furthermore, as this was a joint submission, serious consideration should be given to the recommendation unless the disposition is unfit or unreasonable or contrary to the public interest and should not be departed from unless there are good or cogent reasons for doing so (cf. *Rault v. Law Society of Saskatchewan* 2009 SKCA 081). Although that case applied to a penalty, its principle would also apply in the determination stage.

## PENALTY

[83] We have found that the Respondent incompetently performed his duties as a lawyer in respect of conduct over the course of two years by missing numerous Court appearances and making several misrepresentations to the Court.

[84] *Law Society of BC v. Ogilvie*, [1999] LSBC 17, which is cited with approval in virtually all of the discipline cases, sets out the factors relevant in determining the appropriate disciplinary action.

[85] In determining whether a suspension or a fine is the more appropriate sanction, the decision of the Benchers on review in Law Society of BC v. Martin, 2007 LSBC 20, also provides some guidance. When considering a suspension, the Benchers held in paragraph [41], one could look at:

> (a) elements of dishonesty;
>
> (b) repetitive acts of deceit or negligence;
>
> (c) significant personal or professional misconduct issues.

[86] We were referred to a number of cases in which there was a finding of professional misconduct where missed Court appearances were alleged. In these cases, there was a range of fines from $1,000 to $6,000 and suspensions from 30 days to three months (cf. *Law Society of BC v. Goldberg*, 2007 LSBC 55, *Law Society of BC v. Goldberg*, 2009 LSBC 18, *Law Society of BC v. Layne*, Decision of a Hearing Committee (1985), *Law Society of Manitoba v. Walsh*, [1997] LSDD No. 96, *Law Society of Manitoba v. Nadeau*, [2005] LSDD No. 35, *Law Society of Alberta v. Rothecker*, [2006] LSDD No. 137.

[87] We were also referred to a number of cases where misrepresentations to the Courts, characterized as professional misconduct, had a range of penalties from fines to suspension (cf. *Law Society of BC v. Botting*, 2009 LSBC 30, *Law Society of BC v. Lowther*, [2002] LSBC 5, *Law Society of BC v. MacKinnon*, [2002] LSDD No. 11, *Law Society of BC v. Galambos*, 2007 LSBC 31.

[88] The Respondent has a professional conduct record. On October 3, 1996, a conduct review was conducted. This matter arose over a dispute between the Respondent and the complainant regarding an account that was rendered. No further action was required. On July 21, 2006, a hearing panel accepted the Respondent's admission that the fixing of his signature as a witness on a Bill of Sale when the signatory had not signed in his presence amounted to professional misconduct. In that instance, he was fined $5,000, and costs in the amount of $3,500.

[89] In addition to hearing from the witnesses, a number of reference letters were filed attesting to the reputation of the Respondent. These were from defence counsel, Crown counsel, a native Court worker and other lawyers who do not practise in the criminal area. These letters provide an insight into the respect that the Respondent has earned, including such comments as:

> 1. A strong advocate on behalf of his client, explores every defence and is diligent in obtaining disclosure to assist in the defence of his clients.
>
> 2. Well prepared for court.
>
> 3. Very formidable advocate and always represents his clients capably.
>
> 4. Perseverance and persistence.
>
> 5. A true warrior of the courts.
>
> 6. Tireless in the defence of his clients.
>
> 7. Very articulate counsel, was well prepared, the quality of his work appears to be good to excellent.
>
> 8. Fearless and imaginative advocate.

9. Wears his heart on his sleeve.

10. Capable and competent criminal lawyer.

[90] Some of these letters also comment on the differences in practising in the North vs. practising in Vancouver. They describe the endless number of adjournments, which are not useful, given the limited Court time and lack of judges, and result in split trial hearings.

[91] It is interesting to note that in *R v. F, A.* Rounthwaite PCJ stated:

> In fact, as I have said before in Court, when Mr. Cranston conducts the trial, as you have retained him to do for you, he does a good job. He fights hard for his client. He is a skilled cross-examiner. He has a wide array of legal arguments to present.

[92] The discipline violations committed by the Respondent are serious and significant in number and length of time in which they occurred. However, none of the violations involve dishonesty or intentional misconduct on the part of the Respondent. None of the missed appearances were for a trial, but were part of the process leading up to the actual trial date. The facts disclose a sloppy practice of ensuring that fix dates were noted. The Respondent failed miserably.

[93] The Respondent is a senior, experienced criminal lawyer. He has cooperated with the Law Society during the investigation and made admissions that shortened the hearing significantly. The Respondent testified as to the numerous efforts that he had made to resolve the matters. He indicated that, over the course of the investigation, the Law Society asked him in excess of 170 questions, and he responded to each and every one of them. He tried “nine times to settle” the matter, but in each instance, up until this hearing, he was unable to come to a resolution with the Law Society’s counsel. He also spoke of the frustration that he experienced when the allegations against him were posted on the Law Society website, many of which the Law Society did not proceed with. In his mind the damage had already been done. He candidly accepted full responsibility for his actions, was remorseful and acknowledged that he should have taken reasonable steps to deal with his health and file management issues.

[94] Counsel for the Law Society has conceded that the health issues the Respondent was suffering from in 2007 and 2008 were proper mitigating factors in this case.

[95] General deterrence may not be a particularly relevant factor in this case. However, any sanctions that are imposed are to be significant enough to send a message to lawyers that they must take steps to ensure that they are meeting their professional obligations to their clients and the Court. If personal circumstances such as illness affect their ability to do so, they must take reasonable steps to limit or manage their practice to minimize any impact on the clients and the administration of justice.

[96] In this instance, there is a joint submission on the fine to be imposed and, accordingly, we are prepared to agree with the recommendation of a $10,000 fine. We are of the view that this disciplinary action is appropriate in the circumstances.

[97] In the *Law Society of Upper Canada v. Paskar*, [1996] LSDD No. 189, the Discipline Committee quoted a resolution of Convocation (the Benchers) at paragraph 81:

> Convocation encourages Benchers sitting on Discipline Committees to accept a joint submission except where the Committee concludes that a joint submission is outside a range of penalties as reasonable in the circumstances.

[98] There was a dispute as to whether or not conditions on the Respondent’s practice should be imposed, and we are satisfied that conditions, pursuant to section 38(7) of the *Legal Profession Act*, ought to be

imposed.

[99] We order that the Respondent:

1. pay a fine in the amount of $10,000, pursuant to section 38(5)(b) of the *Legal Profession Act*.

2. continue in the care of his general practitioner(s) and any specialists to whom he is referred and adhere to any advice or treatments recommended by those physicians treating the medical conditions referred to in the reports prepared by Dr. Phan dated May 6, 2010 and April 14, 2011, or any other medical condition(s) which may be diagnosed.

3. submit to the jurisdiction of the Practice Standards Committee and abide by any orders, directions and recommendations of that Committee, within the time frame as directed by the Committee, including but not limited to the following:

(a) an order that the Respondent submit to a practice review;

(b) recommendations made following any practice review ordered;

(c) recommendation that the Respondent obtain, at his own expense, a medical, psychological or psychiatric assessment, or counselling, from a practitioner(s) approved by the Practice Standards Committee and direct the practitioner(s) to provide reports to that Committee;

(d) recommendations made following receipt of the reports referenced in subparagraph (c) above;

(e) recommendations that the Respondent practise in a setting approved by the Practice Standards Committee, including supervision by a lawyer approved by that Committee;

(f) recommendations to take any other steps intended to improve the Respondent's practice of law or otherwise protect the public interest; and

(g) any order made by the Practice Standards Committee pursuant to Rule 3-18 requiring the Respondent to pay costs.

[100] Any failure by the Respondent to abide by any term and order, direction or recommendation made by the Practice Standards Committee, within the time frames directed by that Committee, will constitute a breach of this Hearing Panel order that may trigger further disciplinary action, as would a breach of any other term of this Hearing Panel order.

## COSTS

[101] With respect to costs, the Law Society is not seeking full indemnity and suggests that a 25 percent recovery of counsel fees, which would result in an order of costs of $12,820, is appropriate. It is the Law Society's position that the reduction to 25 percent recognizes the withdrawal of the four allegations.

[102] The Respondent takes the position that no costs should be ordered against him. He suggests that his numerous attempts to resolve the matter need to be considered. Also, the fact that the Law Society did not pursue its claim that his conduct amounted to professional misconduct and the withdrawal of four allegations further supports his position.

[103] We are of the view that, given the Respondent's financial circumstances and his position in opposing some of the allegations that were subsequently withdrawn warrant a further reduction in fees. Accordingly,

we conclude that the appropriate amount to be awarded for costs is $10,000, and we so order.

[104] We understand that time is required to pay both the fine and the costs and, accordingly, we order the fine of $10,000 be paid on or before May 1, 2012 and that the costs of $10,000 be paid on or before May 1, 2013.