

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

Robert Douglas Malcolm

Respondent

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

Hearing date: November 4, 2011

Panel: Joost Blom, QC, Chair, Don Amos, Alan Ross

Counsel for the Law Society: Carolyn Gulabsingh

Appearing on his own behalf: Robert D.C. Malcolm

preliminary matters

[1] Mr. Malcolm admits service in accordance with the requirements of Rule 4-15 of the Law Society Rules.

[2] The Citation was issued August 8, 2011.

BACKGROUND

[3] The Citation contains a single allegation that Mr. Malcolm has failed to respond promptly to communications from the Law Society. The allegation relates to an investigation of Mr. Malcolm's conduct while acting as a fiduciary managing the business interests of his client (the "Client").

[4] Throughout the hearing Mr. Malcolm took the position that he had no money and, as a result, he was unable to answer the Law Society's requests for information. He further accused the Law Society of pursuing and expanding the complaint against him, despite the fact that the Society had not pursued his complaint against another lawyer.

[5] Mr. Malcolm attempted to argue that he took reasonable steps to answer the Law Society's requests for information. However, as discussed below, his various positions relating to this defence did not make much, or any, practical sense. His testimony about his finances did not have the ring of truth. For example, despite the fact that he has been in practice since 1968 and was a partner at a large Vancouver law firm, at one point in the hearing Mr. Malcolm asked the Panel how he could declare bankruptcy. Further, despite having ample opportunity to do so, he disclosed no actual evidence of his impecuniosity. His protestations were not believable. They did not provide a reasonable excuse for his failure to respond to the Law Society's inquiries.

ONUS AND STANDARD OF PROOF

[6] The Law Society has the onus of proving the allegations in the Citation.

[7] The standard of proof is the balance of probabilities.

FACTS

[8] The evidence of the Law Society consisted of an affidavit of Mr. Henry Wood, QC as well as viva voce testimony by Mr. Wood under cross-examination by Mr. Malcolm. Mr. Malcolm also testified on his own behalf. Neither the cross-examination of Mr. Wood, nor Mr. Malcolm's testimony materially affected the core of the evidence presented by the Law Society in Mr. Wood's affidavit. As a result, the facts set out below are largely drawn from Mr. Wood's affidavit.

[9] The investigation that gives rise to this matter started after Mr. Malcolm complained about the actions of another lawyer. That lawyer acted for beneficiaries of the Client who were suing Mr. Malcolm.

[10] During the course of looking into the original complaint, the Law Society received information regarding Mr. Malcolm's alleged conduct and commenced the investigation. In order to complete its investigation, the Law Society required Mr. Malcolm to answer questions about his dealings with the Client and the related financial transactions.

[11] The Law Society's investigation was initially assigned to Ms. Shelley Ion, a staff lawyer in the Law Society's Professional Conduct department.

[12] Ms. Ion wrote a letter to Mr. Malcolm dated December 3, 2009 to which he replied by letter on or about December 14, 2009. Mr. Malcolm's letter indicated that his reply was only a partial response.

[13] The Law Society retained Mr. Wood to continue the investigation commenced by Ms. Ion. Mr. Wood first wrote to Mr. Malcolm by letter dated August 16, 2010. In his letter, Mr. Wood asked Mr. Malcolm to provide more comprehensive answers to the questions posed in Ms. Ion's letter dated December 3, 2009.

[14] Mr. Malcolm replied to Mr. Wood's letter dated August 16, 2010 by letter dated August 26, 2010. His letter provided a partial response to the questions posed and extended an offer to meet with Mr. Wood so Mr. Malcolm could explain his relationship and dealings with the Client as well as with the lawyer about whom Mr. Malcolm had complained.

[15] Mr. Wood met with Mr. Malcolm on January 4, 2011. Mr. Wood obtained various documents from him.

[16] After reviewing the documents, Mr. Wood wrote to Mr. Malcolm on May 17, 2011 asking more detailed questions of him. The letter did not contain a deadline for response but asked Mr. Malcolm to contact Mr. Wood within seven days to indicate how much time he would need to provide a comprehensive reply to the questions.

[17] Mr. Wood's May 17, 2011 letter was 11 pages long and included more than 20 questions for Mr. Malcolm to answer.

[18] Mr. Malcolm sent a three-line email to Mr. Wood on May 19, 2011. The email stated: "It may take me some time to digest and respond to your letter." He also attached affidavits, exhibits and transcripts from the proceeding in which he was being sued by the beneficiaries of the Client. The attachments to these emails did not answer the questions Mr. Wood posed to Mr. Malcolm.

[19] Mr. Malcolm told Mr. Wood by email on May 24, 2011 that he was "unable to give...any timeline."

[20] Mr. Wood wrote to Mr. Malcolm on May 25, 2011. Mr. Wood told him that his written response to the May 17, 2011 letter was required by June 25, 2011. Mr. Wood also cautioned Mr. Malcolm that any failure to respond to communications from the Law Society could be referred to the Discipline Committee pursuant

to the summary hearing process.

[21] On or about May 26, 2011, Mr. Malcolm emailed Mr. Wood and stated that he did not have “the resources to comply with your arbitrary deadline.”

[22] On or about May 30, 2011, Mr. Malcolm asked Mr. Wood to set up an appointment with him so he could reply to Mr. Wood’s requests. Mr. Wood responded by email indicating that Mr. Malcolm was still required to provide written replies to his inquiries by the stated deadline, unless he could show that he needed more time to gather documents to respond in a meaningful way.

[23] Mr. Wood wrote to Mr. Malcolm again on June 23, 2011 to confirm he had not received Mr. Malcolm’s written replies as requested. In this letter, Mr. Wood referred Mr. Malcolm to Chapter 13, Rule 3 of the Professional Conduct Handbook and reminded him again that any failure by a member of the Law Society to respond to questions and requests from the Law Society may be referred to the Chair of the Discipline Committee pursuant to the summary hearing process. Mr. Wood requested Mr. Malcolm’s substantive response to the letter dated May 25, 2011 by no later than July 7, 2011. Mr. Wood told Mr. Malcolm that if full and meaningful responses were not received by then, the matter would be referred to the Chair of the Discipline Committee.

[24] Mr. Malcolm emailed Mr. Wood on June 27, 2011 and asked, “Why are you bullying me?” The email stated that Mr. Malcolm had been prepared to meet with Mr. Wood since June 15, 2011 to discuss Mr. Wood’s letter dated May 25, 2011.

[25] Mr. Wood wrote to Mr. Malcolm on June 30, 2011 and confirmed that his replies were required in writing. Mr. Wood encouraged Mr. Malcolm to provide specific answers to the questions posed of him along with any related documents.

[26] Mr. Malcolm did not write again after his email of June 27, 2011. At that point the matter was referred to the Discipline Committee of the Law Society. The Citation was issued August 8, 2011.

[27] In cross-examination, Mr. Malcolm testified that the correspondence between him and Mr. Wood “spoke for itself.” He did not say that Mr. Wood’s letters had misled him into not responding. He said that he felt that there was no point in writing further because “...at some point we were just knocking heads.” He clarified that Mr. Wood was either going to agree to a meeting to review the documents or he was going to require a written response.

[28] As noted above, Mr. Malcolm testified that he did not have the funds necessary to respond to Mr. Wood. He also testified that the Client’s files, and hence the information necessary to answer the inquiries, were contained in boxes stored in his home.

ADVERSE DETERMINATIONS PURSUANT TO SECTION 38(4) AND THE APPLICABLE TESTS

[29] Pursuant to Section 38(4) of the *Legal Profession Act* there are four adverse determinations available to this Panel. The Law Society submits that the only appropriate finding in this case, involving failure to respond to communications from the Law Society, is a finding of professional misconduct.

TEST FOR PROFESSIONAL MISCONDUCT

[30] The Law Society cites *Law Society of BC v. Martin*, 2005 LSBC 16, as authority for the proposition that the test for “professional misconduct” 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.”

[31] As noted above, Mr. Malcolm's primary defence to the Citation was that he was impecunious and had made reasonable efforts to answer the Law Society's questions by trying to arrange a meeting with Mr. Wood.

SUBMISSIONS OF THE PARTIES

[32] The Law Society's position is that Law Society Rule 3-5(6) requires a lawyer to cooperate fully in an investigation by all available means. We note that, prior to June 18, 2011, Rule 3-5(6) required the lawyer's response to be in writing unless otherwise specified.

[33] Failure to respond to the Law Society is a serious matter and goes to the heart of the Law Society's ability to properly regulate the profession for the good of the public. As stated in *Law Society of BC v. Dobbin*, [1999] LSBC 27:

... 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.

[34] The Law Society's position is that Mr. Malcolm has not responded to Mr. Wood's correspondence and has not provided evidence that would excuse his conduct.

[35] Mr. Malcolm's position is that he has no funds to enable him to respond to the Law Society's inquiries. He says that:

(a) he provided a large number of documents to Mr. Wood; and

(b) he has done what he was financially and physically able to do, given that the information is contained in numerous boxes of client files.

[36] Mr. Malcolm did not introduce any information or evidence regarding his financial or health status.

DISCUSSION

[37] The Law Society's position is clear. Mr. Malcolm did not respond to Mr. Wood's inquiries and did not provide a valid excuse.

[38] Mr. Malcolm's position was that he did not have the financial resources available to him to provide answers to Mr. Wood's questions. Mr. Malcolm's testimony in this regard did not have the ring of truth. We note, as examples:

(a) Mr. Malcolm confirmed that the Client's documents are in his possession, but are stored in numerous boxes in his home. As a result, the answers to many of Mr. Wood's questions would have been accessible by reviewing documents in his possession;

(b) Mr. Malcolm appeared to be of the view that it would be Mr. Wood's responsibility to review the boxes of documents and determine the answers to his own questions. Mr. Wood's correspondence left no doubt that that was not the case;

(c) Mr. Malcolm was able to send short unresponsive emails to Mr. Wood. Longer, responsive emails would not have cost anymore;

(d) At one point in the hearing, Mr. Malcolm sought to introduce a number of documents into evidence. When counsel for the Law Society objected, in part because Mr. Malcolm did not have sufficient copies for all Panel members and parties, he stated that he did not have sufficient funds to make photocopies

of these documents. Given that the cost of making those copies would have been, we estimate, less than \$20, Mr. Malcolm's position was, frankly, absurd;

(e) As noted above, Mr. Malcolm asked the Panel how he could go about declaring bankruptcy. He also testified that he had earlier spoken to Law Society staff about taking this step. Leaving aside the incongruity of a lawyer with more than 40 years of experience asking the Law Society how to declare bankruptcy, Mr. Malcolm was faced with the obvious fact that, despite the passage of a substantial amount of time, he had not taken any steps to declare bankruptcy;

(f) Mr. Malcolm did not tender any evidence of his own impecuniosity apart from his own veiled statements that he does not have any money. He did not produce bank statements, foreclosure proceedings, collection letters or tax returns.

[39] Based solely upon his testimony, the Panel did not find Mr. Malcolm's claims of impecuniosity to be believable. It follows that we did not find that he had provided a valid excuse for not responding in writing to Mr. Wood's questions.

[40] As a result, we find that the evidence establishes that the Law Society, through Mr. Wood, made requests for information from Mr. Malcolm. Based upon the Dobbin decision (*supra*), that evidence sets up a strong *prima facie* case for Mr. Malcolm to meet. Mr. Malcolm did not meet the persuasive burden upon him. His failure to respond to the Law Society was persistent and unexplained. It continued to the date of the hearing.

DETERMINATION

[41] Based upon the foregoing, we find that Mr. Malcolm's actions in failing to respond to the inquiries of the Law Society constitute professional misconduct.

DISCIPLINARY ACTION

[42] We have reviewed the prior decisions included in the Law Society's Brief and considered the factors considered in *Law Society of BC v. Ogilvie*, [1999] LSBC 17. As noted above, the failure to respond to the Law Society promptly is a grave matter and goes to the heart of the protection of the public by the Law Society. As noted in the Dobbin decision (*supra*):

20. The duty to reply to communications from the Law Society is in yet another category. While it is true that the duty to reply is only found explicitly set out in Chapter 13, Rule 3, of the Professional Conduct Handbook it is a cornerstone of our independent, self-governing profession. 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 interest 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".

[43] The Law Society provided a number of cases indicating a range of penalties imposed in similar cases.

[44] Mr. Malcolm was called to the Bar in 1968. He retired from the practice of law as of July 1, 2011. He has no Professional Conduct Record.

[45] The Law Society submits that an aggravating factor is that Mr. Malcolm has still not provided a substantive response.

[46] The Law Society submits that the appropriate disciplinary action would be a fine in the amount of \$2,000 plus an order of the Panel that Mr. Malcolm provide a complete response to the requests set out in Mr. Wood's correspondence.

[47] Mr. Malcolm had left the hearing and did not make any submissions on disciplinary action.

[48] The Panel considers that the fine suggested by the Law Society is appropriate, based on the factors outlined in the Ogilvie decision (*supra*) and the authorities cited. We therefore impose a fine in the amount of \$2,000, payable on or before April 30, 2012.

COSTS

[49] With respect to costs, the Law Society indicates that the actual counsel costs in this case have been approximately \$5,356.50. The costs claim, in the amount of \$2,000, represents 30 to 40 per cent of the total. The Panel finds that an award of costs of \$2,000 is appropriate, payable on or before April 30, 2012.

ORDER TO RESPOND

Finally, as requested by the Law Society, the Panel orders that Mr. Malcolm provide complete answers to the requests for information contained in the correspondence of Mr. Wood on or before November 25, 2011.