2012 LSBC 23
Report issued: July 03, 2012
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

Paris Ari Hart Simons

Respondent

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

Hearing date: May 17, 2012
Submissions received: May 22, 2012 and May 24, 2012
Panel: **Majority decision**: Thelma O'Grady, Chair, Jennifer Reid **Minority decision**: Carol Gibson

Counsel for the Law Society: Carolyn Gulabsingh
Appearing on his own behalf: Paris Simons

BACKGROUND

[1] On December 21, 2010, a citation was issued to the Respondent pursuant to the *Legal Professional Act* and the Rules of the Law Society. It sets out four allegations, which arise from the Respondent's representation of ST (the "Client") in a claim filed by the Client's previous counsel in the Supreme Court of British Columbia, (the "Court Action") seeking damages for negligent chiropractic treatment. The Court Action was dismissed for want of prosecution.

[2] The allegations are that the Respondent failed to provide the Client with the quality of service the Law Society expects of its members; misled the Client regarding the status of her Court Action; provided misleading evidence to the court; and misled the Law Society during the investigation of the Client's complaint.

[3] The Respondent admitted the facts that prove the first and second allegations in the citation (quality of service and misleading the Client) and has admitted that his conduct constitutes professional misconduct. The Law Society did not proceed with respect to the third and fourth allegations of the citation.

FACTS

[4] In September 1996 the Client, through her counsel, commenced an action in the Supreme Court of British Columbia seeking damages for negligent chiropractic treatment she received. Unsuccessful applications by the defendants to dismiss the claim for want of prosecution were heard in September 2004 and January 2005. She later came to be at risk of having her claim dismissed unless she obtained a new counsel of record.

[5] Although he did not have any experience with medical negligence claims, Mr. Simons, with good intentions of helping the Client out, became her counsel of record in the action in January 2006. Mr. Simons agreed to take on the Client's matter on a contingency fee arrangement, but the Client did not sign the contingency fee agreement Mr. Simons presented to her. The Client was not in any position to pay for

expert reports or other disbursements, and at no time gave any retainer to Mr. Simons.

[6] During the time Mr. Simons remained the Client's counsel of record, the majority of their communication with each other was conducted via email. Mr. Simons and the Client also communicated by telephone, and on a few occasions, met in person.

[7] Before Mr. Simons was retained, the Client's matter had been scheduled for mediation in February 2006, and for trial in March 2006. Counsel for the defendants agreed to postpone the mediation and adjourn the trial after Mr. Simons became counsel of record for the Client.

[8] Mr. Simons did not file a Notice of Intention to Proceed in the Client's action after he became counsel of record, or at any time while he remained counsel of record for the Client. He did not take steps in the Client's litigation between January 2006 and May 2009, other than to familiarize himself with the file and attempted to assemble various expert reports he anticipated needing to prove the Client's claim.

[9] Between January 2006 and May 2009, Mr. Simons and the Client communicated via email about retaining experts and gathering evidence and documents to prove the Client's claim. At times, they also discussed the progress of, and problems with, the action that pre-dated Mr. Simons' representation of the Client.

[10] By February 2007, the Client began expressing to Mr. Simons her frustration with communicating with him and the delays in the progression of the advancement of her claim. The Client expressed her sentiments to Mr. Simons in an email dated February 12, 2007, and Mr. Simons replied by email on February 14, 2007.

[11] On March 26, 2007, the Client sent an email to Mr. Simons indicating that she was frustrated at his lack of reply to her email messages. Mr. Simons emailed the Client on March 27, 2007 to explain he had been ill, and was behind in his work. Mr. Simons told the Client he would speak with her after he completed and sent her the document he was working on, as discussed during their last conversation, which he anticipated finishing and emailing to her the next day.

[12] On March 28, 2007 Mr. Simons emailed the Client and advised that the document he had been working on was taking longer than he expected and that he would try to get it to her by email the next morning.

[13] On April 13, 2007, the Client told Mr. Simons via email that she still had not received the previously discussed document. Mr. Simons replied on April 13, 2007, and confirmed he had attempted to return her call. He then emailed the Client a second time on April 13, 2007 and attached a "chart of medical information" he had prepared.

[14] Between August 26, 2008 and September 2, 2008, Mr. Simons and the Client exchanged emails. On August 27, 2008, the Client sent an email to Mr. Simons asking him to provide her with a list of priorities and contacts to follow-up on to move the matter along. Mr. Simons told the Client via email that he would send her a longer email later that day, but he did not do so. The Client repeated her request to Mr. Simons via email on September 2, 2008.

[15] On September 29, 2008 Mr. Simons and the Client exchanged emails, and the Client asked Mr. Simons:

> Please send the long discussed outline of how you plan to move forward in this case, with the estimated summary and timeline of events. As discussed, we are now going on 3 years of your kind representation. Please outline positive actions taken on my behalf and how you plan to move ahead by the agreed Dec. 15th, 2008 date without further delays, towards our common interests. As discussed, there is now additional med info as well. Please contact me asap.

[16] Mr. Simons replied that he would call the Client the next day and would email her again with more material before the phone call. Mr. Simons did not email the Client with the material as indicated he would.

[17] The Client repeated the request for an update on the progress of the matter in emails she sent to Mr. Simons on December 19 and 23, 2008. Mr. Simons did not provide a substantive response to the Client's emails and did not provide the list of priorities requested by the Client. Mr. Simons emailed the Client on December 23, 2008 to make arrangements for a meeting.

[18] On February 28, 2009 the Client sent an email to Mr. Simons in which she referenced a meeting between them on February 26, 2009. The email also referred to "an agreed timeline" that would establish a "court date" within six months and continuing the discoveries of the defendants in the first half of June 2009.

[19] On May 14, 2009, the Client and Mr. Simons exchanged emails again. The Client initiated the exchange by asking Mr. Simons to confirm dates discussed for discoveries and trial and asked him, "Please notify me asap on all matters in order to plan and prepare accordingly. thanks."

[20] On May 15, 2009 the Client emailed Mr. Simons and advised that she still had not heard from him and that he could call her. Mr. Simons replied and advised he did not have definite dates for the discoveries and that he had been checking with trial scheduling at Vancouver to schedule the trial, but the first available opening was in August, 2010.

[21] To make matters worse, Mr. Simons did not even contact counsel for the defendants about the Client's matter until 2009. On June 2, 2009, counsel for the defendants sent Mr. Simons a letter advising the defendants would apply to dismiss the Client's claim for want of prosecution. Mr. Simons did not provide a copy of this correspondence to the Client.

[22] Between June 17 and 19, 2009, Mr. Simons and the Client exchanged several emails. Mr. Simons advised the Client, "I am not yet finished preparing the documents." The Client asked Mr. Simons to provide a draft of the documents he was working on. Mr. Simons did not provide any draft to the Client, as he had not even started drafting any documents, despite his representations to the Client to the contrary.

[23] On June 24, 2009 the Client and Mr. Simons emailed each other. Among other things, the Client asked Mr. Simons in her last email that day to "pls confirm about any and all updates." Mr. Simons did not reply.

[24] On July 17, 2009 Mr. Simons and the Client exchanged emails. Mr. Simons still made no reference to receiving the letter from counsel for the defendants or the defendants' stated intention to apply to dismiss the case for want of prosecution. The Client wrote, "I am unclear if you have contacted opposing party and if they have submitted anything, or any other time constraints? You were going to send me a draft of the application weeks ago?"

[25] On July 24 and 26, 2009 Mr. Simons and the Client emailed each other, and the Client stated, "still waiting to hear from you as agreed. need to know all updates, status of application, risks associated with these delays ... ." Mr. Simons' email in reply still made no reference to receipt of the letter from counsel for the defendants or the defendants' stated intention to apply to dismiss the case for want of prosecution.

[26] Mr. Simons did not communicate with the Client between July 26, 2009 and September 24, 2009, despite the Client's emails to him dated August 17, 2009 and September 1, 2009 asking Mr. Simons to communicate with her.

[27] On September 1, 2009, the Client emailed Mr. Simons and copied the email to Law Society Professional Conduct staff. The Client indicated she was seeking assistance from the Law Society in engaging Mr. Simons to communicate with her. On or about September 22, 2009, the Law Society contacted Mr. Simons to encourage him to contact the Client.

[28] On September 24, 2009, Mr. Simons and the Client exchanged email messages. The Client re-iterated her request for details regarding status of the case, and a “specific plan for action”. On October 5, 2009, Mr. Simons and the Client exchanged email messages again. Mr. Simons told the Client he would be sending “further documents” via post. He did not.

[29] On October 7, 2009 the Client emailed Mr. Simons again seeking clarification of the status of the claim and his proposed plan of action. Mr. Simons did not reply.

[30] On October 9, 2009 Mr. Simons received the defendants’ application to dismiss the Claim for want of prosecution. Mr. Simons did not forward a copy of the defendants’ application to the Client.

[31] On October 11 and 26, 2009 the Client sent emails to Mr. Simons seeking updates, including the status of “the application begun in June” and the establishment of dates for discovery of the defendants. Mr. Simons did not reply.

[32] Mr. Simons wrote to counsel for the defendants on November 9, 2009 advising he intended to defend the application to dismiss the claim for want of prosecution, but Mr. Simons did not provide a copy of his letter to the Client.

[33] On November 4 and 28, 2009, the Client emailed Mr. Simons, and indicated she had not heard from him regarding the status of her claim since September, and asked him to contact her “ASAP”. Mr. Simons did not respond.

[34] On December 16, 2009 the Client emailed Mr. Simons and asked, “when can we chat asap” and “pls also send an update on current events and status as requested by email.” Mr. Simons did not respond.

[35] On January 4, 2010, counsel for the defendants wrote to Mr. Simons to confirm the defendants’ application to dismiss the case for want of prosecution would be heard in Vancouver on February 12, 2010. Mr. Simons received the letter via email and did not provide a copy of it to the Client.

[36] On January 4, 2010 Mr. Simons met with the Client in Anacortes, Washington. Mr. Simons still made no mention or reference to the defendants’ application to dismiss the case for want of prosecution. On February 9, 2010, Mr. Simons received the defendants’ submissions via email. He did not forward the submissions to the Client or provide her with a copy of them.

[37] On February 10 and 11, 2010, the Client and Mr. Simons emailed each other. The Client’s email to Mr. Simons said, “WE NEED TO TALK. pls confirm a telephone call thursday, feb 11, 2010 8 am or another suitable time asap. This is the 5th email request for communique.” Mr. Simons replied that he would call “at 5:30 p.m. or sometime close to or later than that (end of the day).”

[38] Mr. Simons left a voice mail message for the Client at approximately 5:30 p.m. The message was convoluted. Mr. Simons told the Client he had reported himself to the professional liability insurer as he was not comfortable with defending the application, and that the insurer would be looking at the situation with him and that he awaited advice from the insurer about whether or not he could or should continue to act for the Client.

[39] On February 12, 2010, Mr. Simons appeared before the court, advising that he had contacted his insurer, wished to be removed from the record and requested an adjournment. However, the Honourable Madame Justice Loo made an order dismissing the Client’s claim and awarded costs of the proceeding and the application to the defendants.

DISCUSSION

[40] The Law Society submitted, and the Respondent agreed, that the Respondent failed to keep the Client reasonably informed about the status and progress of the Court Action by failing to respond substantively or at all to 14 emails from the Client between February 2007 and December 2009.

[41] The Law Society submitted, and the Respondent agreed, that the Respondent failed to answer the Client's reasonable requests for information on approximately 20 occasions between February 2007 and December 2009.

[42] The Law Society submitted, and the Respondent agreed, that the Respondent failed to take action as described to the Client without explanation. This included not sending a chart of medical information to the Client until after a number of requests and failing to ever provide her with a list of priorities and contacts as promised.

[43] The Law Society submitted, and the Respondent agreed, that he had failed to answer communications requiring answers within a reasonable time. The Law Society set out, and the Respondent agreed, that a number of times the Respondent failed to do work promptly, or at all.

[44] And most seriously of all, the Law Society submitted, and the Respondent agreed, that he failed to disclose all relevant information to the Client and thus misled the Client. He represented to her that he was regularly calling counsel for the defendants to "get things moving" but in fact did not have contact with counsel for the defendants until 2009. The Respondent did not candidly advise her about the position of the Court Action and, even worse, did not advise her of the defendants' intentions to apply for dismissal of the case for want of prosecution.

DETERMINATION

[45] We thank counsel for their preparation of the Agreed Statement of Facts, and the Respondent for his forthright admissions. We find the first two allegations contained in the citation to have been proven and find the Respondent has committed professional misconduct with respect to each allegation.

DISCIPLINARY ACTION

[46] The primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate set out in Section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice.

[47] Chapter 3, Rule 3 of the *Professional Conduct Handbook* requires:

> 3. 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,
>
> (b) answers reasonable requests from the client for information,
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> (c) responds, when necessary, to the client's telephone calls,
>
> (d) keeps appointments with the client,
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> (e) having informed the client that something will happen or that some step will be taken by a certain date, does not allow that date to pass without follow-up information or explanation,

(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,…

(k) discloses all relevant information to the client, and candidly advises the client about the position of a matter, whether such disclosure or advice might reveal neglect or error by the lawyer,

(l) makes a prompt and complete report when the work is finished or, if a final report cannot be made, makes an interim report where one might reasonably be expected,…

[48] In *Law Society of BC v. Epstein*, 2011 LSBC 12, the hearing panel articulated that failing to communicate with a client can constitute professional misconduct as it is a failure to provide the expected quality of service to the client, by saying (at paragraphs [20] and [21]):

> 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.
>
> 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.

[49] The hearing panel in *Law Society of BC v. Strandberg*, [2001] LSBC 26, also considered the importance of honesty, both to clients and to the Law Society, and concluded that when a lawyer has been dishonest to a client, it "stings the most" because of the impact it has on the reputation of the profession.

[50] The Law Society has taken the position, and the Respondent has acknowledged, that the Respondent's misleading of the Client and failure to provide quality of service constitutes professional misconduct.

[51] Misleading a client is serious misconduct, particularly in this instance as the impact on the Client was considerable – the Court Action was dismissed, without notice to her, and she was then without counsel. In this case, the Respondent misled the Client about the status of the court action and the quality of service he had provided to her in respect of the Court Action. The Respondent's failure to take steps to conclude the Court Action is exacerbated by his failure to communicate effectively with the Client.

[52] The Panel does take into consideration that the Respondent's misconduct appears to have conveyed little or no benefit to the Respondent. His misleading statements to the Client eventually caught up with him. The Client had not provided the Respondent with retainer funds, or signed a retainer agreement with him. The Respondent did not invoice the Client for any services he provided to her. As such, the services the Respondent did provide to the Client were provided without remuneration to the Respondent.

[53] This sad case has two victims. The Client obviously was abandoned in a vulnerable situation. The Respondent, who with good intentions of assisting his Client with her legal problems, was soon out of his depth. He had never handled a medical negligence case before. And, while he did seek assistance from more senior, experienced counsel, none of them could assist him or take over the case for him. He hung

onto the case and, in fact became paralyzed by it, as demonstrated by his lack of communication, lack of action and, finally, actual concealment of the fact that the defendants were bringing a motion to dismiss the case for want of prosecution. The aftermath of his actions has left him a broken man who has all but left the practice of law, and now ekes out a living as a sessional instructor at a college. What little legal work he now performs involves giving independent legal advice to mortgagors.

[54] However, the continued independence of the legal profession and the need to preserve its self-regulation is of utmost importance. One of the characteristics of an independent Bar is that it is forthright and honest with clients, with the members of the public, and with other members of the profession. The profession demands that a clear and unequivocal message is delivered in respect to behaviour that would serve to erode the public's confidence in the integrity of the legal profession.

[55] As set out in the case of *Law Society of BC v. Cooper*, [1999] LSBC 39, where a lawyer has lied, except in the most exceptional circumstances, a suspension should follow.

[56] We therefore order that the Respondent be suspended for one month, beginning July 15, 2012.

COSTS

[57] The Law Society is seeking costs of $4,524 inclusive of disbursements and counsel time. Rule 5-9(1.2) gives the Benchers discretion to order costs in an amount different than that permitted by the tariff, and also explicitly includes the discretion to not order costs. Case law requires that the award of costs be "reasonable". In *Law Society of BC v. Racette*, 2006 LSBC 29, the following factors were set out to consider in determining what costs are reasonable at paragraphs [13] and [14]:

> (a) the seriousness of the offence;
>
> (b) the financial circumstances of the Respondent;
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> (c) the total effect of the penalty, including possible fines and/or suspension; and
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> (d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[58] We find that, although the conduct here is serious, the Respondent cooperated with the Law Society and admitted the allegations in the citation. Given his precarious livelihood at this time – the impact of paying costs on top of a one-month suspension is too severe.

ORDER

[59] The Panel orders as follows:

1. That the Respondent be suspended for one month, beginning July 15, 2012.
2. That no costs be payable to the Law Society.
3. The dates for serving the suspension may be altered by agreement of the parties.

MINORITY DECISION OF CAROL GIBSON

[60] I concur with all of the above with the exception of the issue of costs. Being mindful that the primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate set out in section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice, as recognized

in the following often cited passage from MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline* at p. 26-1:

> The purpose of the law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve the public confidence in the legal profession.

[61] I am concerned that, from the public perspective, waiving all costs will not meet this purpose. I am also mindful of the fact that the Respondent has little income this year and therefore would propose that he only pay costs of $1,000, with terms for repayment to be arranged between the Respondent and the Law Society.