2012 LSBC 29
Report issued: October 01, 2012
Citations issued: March 23, 2011 and July 28, 2011

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

Aaron Murray Lessing

Respondent

CORRECTED DECISION: PARAGRAPHS [19], [24] AND [26] OF THE DECISION WERE AMENDED ON OCTOBER 22, 2012

Decision of the Hearing Panel on Disciplinary Action

Hearing date: July 30 and 31, 2012
Panel: David Renwick, QC, Chair, Graeme Roberts, Public representative, Donald Silversides, QC, Lawyer

Counsel for the Law Society: Alison Kirby
Counsel for the Respondent: Henry Wood, QC

BACKGROUND

The Citations

[1] Two citations were issued to Aaron Murray Lessing (the "Respondent") in 2011. The President of the Law Society of British Columbia (the "Law Society"), after considering an application pursuant to Rule 4-16.2(1)(b) that the two citations be determined in one hearing, allowed the application pursuant to Rule 4-16.2(4)(a).

[2] One of the citations in this matter (the "First Citation") was authorized by the Discipline Committee on March 3, 2011 and issued on March 23, 2011.

[3] The First Citation described the nature of the conduct to be inquired into as the Respondent's failure to notify the Executive Director of the Law Society in writing of the circumstances of eight monetary judgments against him and to provide a written proposal for satisfying the judgments as required by Rule 3-44 of the Law Society Rules.

[4] The second citation in this matter (the "Second Citation") was authorized by the Discipline Committee on July 14, 2011 and issued on July 28, 2011.

[5] The Second Citation set out the nature of the conduct to be inquired as that, in the course of representing himself in matrimonial proceedings in the Supreme Court of British Columbia between himself and his former spouse, the Respondent failed to comply with three court orders, which resulted in an order finding him in contempt of court.

Facts and Determination

[6] Our decision on facts and determination, for which a report was issued on May 28, 2012 (indexed as 2012 LSBC 19), was based solely on statements of facts agreed to by the Law Society and the Respondent and on submissions of counsel.

[7] We found that the Respondent did not satisfy any of the eight judgments described in the First Citation within seven days after the date of entry and that he did not notify the Executive Director as required by Rule 3-44(1) regarding any of the judgments. We found the Respondent was not aware of Rule 3-44 until he was informed of it by the Law Society on August 19, 2009, after the first six of the unsatisfied monetary judgments had been entered. We also found that, when the Respondent became aware of the entry of the seventh judgment on December 7, 2010 and the eighth judgment on February 21, 2011, he knew that he had an obligation to notify the Executive Director of them if he was unable to satisfy them within seven days and that his failure to do so constituted a blatant disregard of his professional obligations.

[8] With respect to the First Citation, we determined that, by failing to notify the Executive Director of the first six monetary judgments, the Respondent committed breaches of the Rules of the Law Society and that by failing to notify the Executive Director of the seventh and eighth judgments the Respondent committed professional misconduct.

[9] With respect to the Second Citation, we determined the Respondent committed conduct unbecoming a lawyer by failing to comply with three court orders.

FACTS AND EVIDENCE

[10] Michael F. Elterman, PhD, a clinical and forensic psychologist, testified at the hearing relating to the disciplinary action to be taken with respect to the two citations. In addition to his viva voce testimony, letters from counsel for the Respondent to Dr. Elterman requesting his opinion dated March 1, 2012 and May 7, 2012 and Dr. Elterman's letters of opinion dated March 8, 2012 and June 27, 2012 were filed as exhibits.

[11] The Respondent consulted Dr. Elterman and attended at his offices for counseling on seven occasions between January 20, 2012 and May 17, 2012.

[12] Dr. Elterman's June 27, 2012 letter of opinion to counsel for the Respondent contained the following statements, amongst others:

> When I first met Mr. Lessing he told me emotionally that he wanted to understand why the avoidant behaviour he displayed during the dissolution of his marriage took place. To him, as experienced counsel, this was so uncharacteristic of him that he needed to understand the cause and what he needed to do to avoid it happening again. …
>
> From Mr. Lessing's description of the marital relationship both during and after the separation, this left him feeling beaten down and traumatized to a point where he became avoidant and highly anxious when dealing with his ex-wife and matters related to the divorce. In my practice I have seen this same behaviour numerous times before, where despite an intelligent client's best judgement, they emotionally can't face dealing with their day-to-day demands.
>
> My diagnosis of Mr. Lessing was that he went through a period of clinical depression and showed symptoms of post-traumatic stress disorder. My counseling work with Mr. Lessing focussed on his understanding of why he acted in the way that he did. I taught him psychological theory and framework within which to understand the interactions and transactions that took place between himself and his ex-spouse. He grasped this quickly and was able to provide a number of examples to illustrate that he understood and had gained insight into the transactions that had caused him to

> become so depressed. …
>
> My prognosis for Mr. Lessing is excellent. I believe that the risk of repetition is low and his ability to address similar stresses should they arise in the future, has been greatly enhanced and strengthened.
>
> Mr. Lessing has been a highly motivated client to the extent that he has bought the books and read the books that I have prescribed for him and he has energetically engaged in the discussions about how the psychological principles learned related to his own situation while married. I believe that the chances of his repeating this type of avoidant behaviour or getting into a similar state of depression and traumatized paralysis is low.

[13] During cross-examination, Dr. Elterman testified that he did not personally observe the Respondent's clinical depression and that his diagnosis was based on the Respondent's description of his behaviour in 2008 and 2009. He also testified that, before he provided his opinion, he had read the statements of facts with respect to the First Citation and the Second Citation that the Respondent and the Law Society had agreed to.

[14] Dr. Elterman testified that certain marriage relationships can trigger post-traumatic stress disorder. He testified that, although he did not diagnose the Respondent as suffering from post-traumatic stress disorder, his conduct, as related to him by the Respondent and as shown in the agreed statements of facts, did show symptoms of post-traumatic stress disorder.

[15] The Respondent also gave evidence at the hearing with respect to disciplinary action.

[16] The Respondent primarily practises family law litigation. He testified that after being encouraged by his current wife to do so, he consulted Dr. Elterman in an attempt to determine what it was that was happening to him that resulted in his inappropriate conduct. He also testified that the information he gave Dr. Elterman regarding his relationships and conduct was truthful, and we accept his testimony in this regard.

[17] With respect to his conduct described in the Second Citation, the Respondent testified that he was unable to deal with matters involving his divorce. He said that he was crying constantly, unable to eat, he stopped seeing friends who loved him and he thought of committing suicide.

[18] The Respondent testified that his income in 2010 was approximately $145,000 and that he expects his current annual income will be approximately $150,000. His expenses include child support of $900 per month for his daughter, $1,575 per month spousal support for his former spouse and current tuition fees for his current wife's daughter of $1,650 per month.

PROFESSIONAL CONDUCT RECORD

[19] The Law Society filed the Respondent's Professional Conduct Record as of January 4, 2012 as an exhibit. This Record showed that the Respondent was the subject of four Conduct Reviews conducted in November 1999, September 2003, August 2005 and February 2011. As well, his practice was reviewed by the Practice Standards Committee of the Law Society in 2003 and 2004 and, after receiving recommendations regarding his practice, the Practice Standards Committee concluded that the Respondent had satisfactorily followed the recommendations made by the review.

[20] The 1999 Conduct Review involved a transaction where the Respondent accepted and acted on a trust condition imposed by another lawyer and thereafter remitted funds subject to that undertaking with additional trust conditions imposed by the Respondent. The Conduct Review Subcommittee, after reviewing the circumstances with the Respondent, concluded that he fully understood the inappropriateness of adding

post-transaction undertakings and said they were convinced he would not do so again.

[21] The 2003 Conduct Review related to the Respondent's receipt of $10,000 in payment of his fees for which he had registered a judgment against his former client's property on the undertaking that he would "not deposit or use the funds in any way until such time as [he had] provided [the law firm who paid the monies] with a registered discharge/release of [his] judgment." The report of the Conduct Review Subcommittee stated the Respondent explained that he was not in the office and his secretary was on holidays when the letter containing the undertaking was received. The letter was placed in a closed file, and he was therefore unaware of the undertaking until the lawyer who paid him the monies complained to the Law Society. When he became aware of the undertaking, he registered a release of the judgment. The Conduct Review Subcommittee report concluded that a conduct review in the circumstances was inappropriate and should not have been ordered by the Discipline Committee.

[22] The 2005 Conduct Review resulted from the Respondent accepting instructions from a client to take judgment by default when opposing counsel had filed an appearance but did not file a statement of defence. That client had been represented in the action in question by a different lawyer who had received a letter from opposing counsel asking the previous lawyer not to take default proceedings without giving him the usual warning. The Respondent was not aware of that letter.

[23] Before taking judgment in default the Respondent reviewed Rule 12 of Chapter 11 of the *Professional Conduct Handbook*, which, at the time, provided that a lawyer should not take default proceedings "without inquiry and warning, unless expressly instructed by the client to the contrary, in which case such instructions should be communicated at the outset of the matter." The Respondent interpreted that Rule to mean that he had a duty to advise opposing counsel that he had been instructed to proceed in default only if those instructions had been conveyed at the "beginning of the matter" and, since the matter was well underway by the time he was retained, he thought the Rule did not apply to the action in question. The Conduct Review Subcommittee concluded that, after their meeting with him, the Respondent understood his professional duties under Chapter 11 and that it was very unlikely that he would repeat this error in the future. They also concluded that his misinterpretation of Rule 12 arose from a combination of a lack of judgment on his part and a lack of clarity in the drafting of the Rule. They agreed with the Respondent that Rule 12 was unfortunately worded and was capable of more than one interpretation, and they recommended that a change be made to Rule 12 to make it clear that the application of the Rule cannot be defeated simply by change of counsel.

[24] The 2011 Conduct Review involved his current wife with whom he was then involved in a relationship. In 2008, his current wife was involved in matrimonial litigation with her husband at the time, and her husband was represented by counsel. The Respondent had originally represented his current wife in those matrimonial matters but had subsequently ceased acting for her and had arranged for other counsel in his firm to represent her. The Respondent, after he had withdrawn as counsel, met with her husband without his counsel being present and without his counsel's consent to do so.

[25] In our view, the 2003 and 2004 Practice Standards referral is not relevant to these proceedings, and in any event, it was concluded satisfactorily.

[26] The Respondent has been practising since May, 1991. None of the four Conduct Reviews that he was subject to involved actions that would be considered serious, and the conduct dealt with was not similar to the conduct that is the subject of the two current citations. As well, the 2003 Conduct Review Subcommittee concluded that no conduct review should have been conducted, and the 2005 Conduct Review Subcommittee found the *Professional Conduct Handbook* rule was poorly drafted and could be interpreted as the Respondent said he had.

[27] We therefore conclude that the Professional Conduct Record of the Respondent does not justify increasing the severity of any disciplinary action taken by us.

DISCIPLINARY ACTION

First Citation

[28] If, as is the case with the first six of the unsatisfied monetary judgments, all eight judgments had been entered when the Respondent was not aware of Rule 3-44 and his obligations under that Rule, we would have reprimanded the Respondent as the appropriate disciplinary action. The fact the Respondent was aware of his obligations under Rule 3-44 when the last two of the unsatisfied monetary judgments were entered warrants more severe disciplinary action.

[29] In respect of the First Citation, we order that the Respondent pay a fine of $2,000 no later than December 31, 2012.

Second Citation

[30] Failing to comply with court orders and being found in contempt of court by a judge of the Supreme Court of British Columbia is very serious conduct that undermines the Rule of Law, and failure to impose a significant sanction would be inappropriate.

[31] There are, however, mitigating circumstances.

[32] First, the Respondent represented himself in the matrimonial litigation in which the orders were made. This was a serious mistake on his part, and simultaneously acting as litigant and his own counsel undoubtedly clouded his judgment.

[33] Second, the first order with which the Respondent did not comply was a consent order requiring him to provide various information and documents to counsel for his spouse by August 29, 2008. The Respondent produced all of those documents except for the incorporation documents for a corporation (“A Ltd.”). The second order with which the Respondent did not comply required the Respondent to produce a list of documents on or before May 7, 2009, and the third order required the Respondent to deliver certain documents and information on or before May 27, 2009. The order finding him in contempt was made on June 4, 2009, which was less than four weeks after the deadline for production pursuant to the second court order and only seven days after the deadline for production pursuant to the third court order. Therefore, except for the incorporation documents for A Ltd., which should have been documents of public record, the delay in producing the documents required by the court orders was not substantial.

[34] Third, the court permitted the Respondent to cure his contempt by producing within 14 days the documents that the earlier orders had required him to produce, and the Respondent did so.

[35] Fourth, we accept the Respondent’s testimony regarding his mental state and his inability to deal with the matrimonial proceedings in which he acted as his own counsel, and we accept the testimony of Dr. Elterman that he concluded, based on the conduct in question and his interviews with the Respondent, the Respondent was suffering from clinical depression in 2008 and 2009.

[36] Balancing the seriousness of the conduct of the Respondent in failing to comply with the court orders with the mitigating factors, we believe that a significant fine is the appropriate disciplinary action.

[37] In respect of the Second Citation, we therefore order that the Respondent pay a fine of $12,000 no later than December 31, 2012.

COSTS

[38] Since both citations were heard at the same time, it is appropriate that the Respondent be ordered to pay only one set of costs.

[39] In April, 2012, Rule 5-9 of the Law Society Rules was amended to provide that hearing panels must have regard to the tariff of costs in calculating costs payable in respect of a hearing on a citation. In this case, the citations were issued and the hearing with respect to the Panel's findings of fact and determinations occurred before this change, while the hearing with respect to the disciplinary action occurred after the change.

[40] The Law Society submits that if costs are to be awarded on the basis of Rule 5-9 before it was amended in 2012, the actual cost incurred by the Law Society was $28,175 and that the Law Society would claim costs of $11,870.

[41] The Law Society submits that, if costs are ordered based on Rule 5-9 after amendment, the Law Society would claim costs of $14,772.

[42] After considering the total effect of the disciplinary action that will result in the Respondent being required to pay a fine in the amount of $14,000, we conclude that the costs payable by the Respondent should be less than either of the two alternative amounts claimed by the Law Society.

[43] We therefore order that the Respondent pay the cost of the hearing of the two citations in the amount of $8,000 not later than December 31, 2012.