2013 LSBC 04
Report issued: January 25, 2013
Oral Reasons on Facts and Determination: November 14, 2012
Citation issued: December 15, 2011

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

Thomas John Johnston

Respondent

Decision of the Hearing Panel

Hearing date: November 14, 2012
Panel: Gregory Petrisor, Chair, Dennis Day, Public Representative, David Layton, Lawyer

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: J. Grant Hardwick

preliminary matters

[1] The citation in this matter was issued December 15, 2011. The Respondent admits service of the citation. He admits certain of the allegations in this citation which are as follows (using the numbering from the citation):

> 1. In or about late 2008 and in 2009, in the course of representing PT and BT and VT and WT (the "Clients"), …you failed to serve the Clients in a conscientious, diligent, and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*, and in particular by some or all of the following:
>
> (a) failing to follow the Clients' instructions to proceed to trial expeditiously;
>
> …
>
> (c) failing to file a trial certificate not less than 14 days before the scheduled trial date of February 23, 2009, as required by Rule 39(19) of the Rules of Court;
>
> …
>
> (e) failing to obtain the next available trial dates;
>
> (f) making an offer to settle by letter dated April 2, 2009, which was not in accordance with the Clients' instructions;
>
> (g) failing to withdraw the offer to settle made by letter dated April 2, 2009 when instructed by PT to do so;
>
> …
>
> (i) agreeing in Court on July 16, 2009 that the Clients would provide a general release, when you

had no such instructions; and

(j) after the termination of your retainer, failing to deliver in a reasonably timely way the Client's file to them or to their new counsel.

This conduct constitutes professional misconduct or incompetent performance of duties undertaken in the capacity of a lawyer.

…

3. In 2009, in the course of representing PT and BT and VT and WT, … you made some or all of the following representations to PT that were not true and which you knew were not true, in particular:

(b) by a letter dated April 17, 2009, you misrepresented the procedure to set a matter for trial by writing words to the effect that a trial date could be set only in the discretion of the court registry and only when settlement negotiations have failed,

(c) by a letter dated April 17, 2009, you misrepresented that a judge may impose a settlement by writing words to the effect that a judge may impose a settlement.

This conduct is contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* and constitutes professional misconduct.

[2] The allegations contained in the citation that were not admitted were withdrawn by counsel for the Law Society at the outset of the hearing.

AGREED STATEMENT OF FACTS

[3] The Panel had the benefit of the comprehensive Agreed Statement of Facts, and the thorough supporting documentation, assembled by counsel. The Agreed Statement of Facts was obviously the product of a considerable amount of work and we thank counsel for that. We accept and rely on the Agreed Statement of Facts in its entirety, and note the following background facts taken from the Agreed Statement of Facts:

1. Thomas Johnston was retained by the Clients on or about December 19, 2008.

2. When he accepted the retainer, he knew:

(a) that the trial was scheduled to commence on February 23, 2009;

(b) the state of the preparations and the fact that examinations for discovery still had to be conducted;

(c) the Clients' instructions were to proceed to trial expeditiously and on the date scheduled (February 23, 2009); and

(d) the Clients' previous counsel withdrew because the Clients were not willing to follow his advice to settle the Action on the basis that the outcome was uncertain and the trial would be uneconomical.

3. On January 8, 2009, PT had a telephone conversation with Mr. Johnston's legal assistant and confirmed her instructions to schedule examinations for discovery as soon as possible because she did not want the trial to be delayed or cancelled, which instructions were relayed to Mr. Johnston.

4. By letters dated January 14 and 16, 2009, Mr. Johnston sought instructions from the Clients

authorizing him to settle. PT, on behalf of herself and the other Clients, instructed Mr. Johnston to proceed to trial on February 23, 2009.

5. Examinations for discovery were not completed before February 23, 2009. A Trial Certificate was not filed on time, and the scheduled trial dates during the week of February 23, 2009, were lost.

6. On April 3, 2009, Mr. Johnston forwarded a counter-offer to opposing counsel. After she saw the letter containing the counter-offer, PT, on behalf of the Clients, instructed Mr. Johnston to withdraw the counter-offer because its terms did not match the Clients' instructions given to Mr. Johnston. Mr. Johnston did not withdraw the counter-offer.

7. Mr. Johnston's legal assistant obtained potential trial dates for the week of May 4, 2009. A Requisition was required to be filed to secure those dates, but was not filed.

8. Mr. Johnston's legal assistant forwarded correspondence, dated April 17, 2009, to the Clients, which read in part:

> I also want to make it absolutely clear that there never was a trial date of May 4, 2009. We did talk about setting the matter down for trial and was [sic] in the process of doing so; however, it is not you or our office who decides when a matter is to be set for trial. That discretion lies solely with the Court Registry. As there was never a trial date set there is no trial date to release.
>
> The Registry generally sets matters down when the parties can agree and in this case, [the Plaintiff's] position is that she has already given all that she can in agreeing to you having the approximately $170,000.00 held in trust. Matters can only be set for trial when settlement negotiations have failed and [the Plaintiff's] point is that the settlement negotiations have been successful in that she had agreed that you could have all the money and there is no further monies that you can legally get from her.
>
> …
>
> In summary, there is no trial date for May 4, 2009 or any other dates; [other counsel] has advised that he will set a Judicial Settlement Conference to have a settlement imposed unless an agreement can be reached; and in all those circumstances I again would implore you to accept the funds we currently hold in trust to bring this case to an end.

9. Based on Mr. Johnston's advice, including the advice contained in the letter dated April 17, 2009, PT believed that the court could impose a settlement and that the settlement would not be in favour of the Clients.

10. In the latter part of April 2009 through to mid-July 2009, Mr. Johnston, either directly or through his assistant, was engaged in communications with PT aimed at persuading PT to accept the Plaintiff's settlement offer. He took no steps to schedule a trial date.

11. In the communications between counsel regarding settlement, other counsel did not indicate that the Plaintiff required a release to be signed by the Clients as a term of settlement. Throughout this time frame, Mr. Johnston knew that the Clients did not wish to settle if it meant that they could not pursue the Plaintiff in a separate action for certain matters arising in the past.

12. The Action eventually settled during the hearing of a summary judgment application on July 16, 2009 before Master Young. In those proceedings, Mr. Johnston agreed that the Clients would provide the Plaintiff with a general release as a term of settlement. He did so without instructions.

13. After the hearing on July 16, 2009, PT accompanied Mr. Johnston back to his office. Mr. Johnston

prepared a form of release for her to sign. Despite what was said at the hearing, Mr. Johnston drafted a limited release, which applied only to claims arising out of or in relation to the Action (the "Mutual Release"). Mr. Johnston arranged for all of the Clients to sign the Mutual Release that day.

14. At this point, PT did not understand that Mr. Johnston had already agreed to a general release. Mr. Johnston never clearly explained this to her.

15. On or about August 24, 2009, the Clients retained new counsel.

16. On September 25, 2009, new counsel specifically requested that Mr. Johnston release the client file immediately, and repeated that request on a number of occasions. Mr. Johnston did not provide any file materials until November 16, 2009. On that date, he provided some of the file contents. He did not provide the remaining contents until December 9, 2009.

[4] Counsel agreed that the appropriate determination of the Respondent's conduct in the circumstances is professional misconduct.

[5] On the date of hearing, after hearing counsel's submissions, the Panel considered the evidence contained in the Agreed Statement of Facts and the admissions of the Respondent. We advised counsel and the Respondent that we found, on a balance of probabilities, that the Respondent committed the misconduct alleged and admitted to. We also advised counsel and the Respondent that we found that misconduct to be professional misconduct. We invited counsel to make submissions regarding the appropriate disciplinary action, and advised we would provide our reasons on facts and determination, and our decision in respect of disciplinary action, in writing. These are our reasons and decision.

DECISION ON FACTS AND DETERMINATION

[6] There was no disagreement between counsel as to the appropriate adverse determination for the Respondent's conduct. Counsel agreed the adverse determination should be professional misconduct. The test as to whether or not the Respondent's conduct constitutes 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" as stated in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [171]. That analysis has more recently been confirmed as the applicable test in Re: Lawyer 12, 2011 LSBC 35 at paragraph [8]. The Respondent has admitted to failing to serve his clients properly, and to misleading them. In all the circumstances, given the Clients' instructions to the Respondent and his understanding of their expectations, we conclude that the Respondent's conduct does constitute professional misconduct.

Disciplinary Action

[7] Counsel for the Law Society and for the Respondent agree that a suspension prohibiting the Respondent from practising law for a period of time is the appropriate penalty. Counsel for the Law Society submits a suspension in the range from one month at a minimum, to three months, is appropriate. Counsel for the Respondent submits that a suspension of one month is appropriate.

[8] Counsel referred us to the decision of *Law Society of BC v. Ogilvie*, 1999 LSBC 17. In that decision, the hearing panel identified a non-exhaustive, suggested list of factors for consideration in disciplinary dispositions, which follows with commentary as it applies in this case:

The nature and gravity of the conduct proven

[9] The Respondent has admitted to a course of action that in essence forced his Clients to accept

settlement terms. There is no suggestion that the Respondent was acting in anything other than the best interests of his Clients as he perceived them. However, based on the evidence, he did clearly contradict his Clients' instructions and at times obviously misled his clients. The nature and gravity of the conduct is serious.

The age and experience of the Respondent

[10] The Respondent is 61 years old. He practises in a small firm with two other lawyers who are significantly junior to the Respondent. He was called to the bar in 1983 and has spent his whole career practising in the Summerland area. The Respondent practises as a generalist, with a focus on civil and criminal litigation. The Respondent is mature, and a senior member of the bar. The Respondent knows or should know the importance of following his clients' instructions and of obtaining reasonable instructions. The Respondent also knows or should know the importance of being truthful to his clients. His age and experience are not mitigating factors.

The previous character of the Respondent, including details of prior discipline

[11] The Respondent has had a significant level of involvement in his community, including civic politics and his church. The Respondent submitted 15 letters of reference in his support: 10 from other lawyers, one of whom is the President of the Canadian Bar Association, BC Branch, three from politicians, and two from other persons. The Respondent does not have a relevant prior discipline history. Evidence of the Respondent's character is a mitigating factor.

The impact upon the victim

[12] The Respondent, through his conduct, denied his Clients the trial they wanted. His Clients were left with no choice but to agree to a settlement they did not want. Their instructions were subverted, and they were lied to, when they quite rightly expected their counsel to do the opposite. On the other hand, the result obtained at the end of proceedings was arguably as good as could ever have been achieved at trial. The difficulty that seems to have led to the complaint and ultimately this citation was the Respondent's agreeing to terms of a general release that were not authorized by the Clients. There is no evidence as to whether or not releases were eventually signed by all parties, and what, if any, impact that had on the Clients. The Respondent did fail to deliver the Clients' file to them or to their new counsel after the Respondent's retainer was terminated, and that was undoubtedly a source of frustration. That frustration, however, is impossible to quantify. A review of the Respondent's account by a Master of the Supreme Court resulted in a substantial downwards adjustment in favour of the Clients, and ultimately there is no evidence of any monetary impact upon the Clients from the Respondent's misconduct.

The advantage gained, or to be gained by the Respondent

[13] As previously stated, it appears that the Respondent was motivated by his perception of his Clients' best interests, and not by personal gain or potential gain for the Respondent. This is a mitigating factor.

The number of times the offending conduct occurred

[14] The conduct alleged and admitted to is not a single incident, but a course of action that took place over almost a year, from the time of the retainer being entered into to the delivery of the Clients' file to new counsel. As set out, there are several instances of specific misconduct, including several instances of the Respondent failing to follow the Clients' instructions, one incident of the Respondent exceeding his instructions in agreeing to a general release on behalf of his Clients, and the Respondent failing to provide the Clients' file to them or to new counsel after the termination of his retainer. The course of conduct is not a single incident of misconduct and is an aggravating factor.

Whether the Respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating factors

[15] The Respondent has admitted to a substantial number of the allegations made in the citation and acknowledges that misconduct constitutes professional misconduct. That is a mitigating factor.

The possibility of remediating or rehabilitating the Respondent

[16] Given the Respondent's prior history, there is no indication of a pattern of behaviour by the Respondent beyond this matter. As a result, remediation and rehabilitation of the Respondent are not factors in this case.

The impact on the Respondent of criminal or other sanctions or penalties

[17] There are no other criminal or other sanctions or penalties that we were made aware of.

The impact of the proposed penalty on the Respondent

[18] As stated, the Respondent practises in a small firm where he is the senior member, and one of the other members of the firm is currently on maternity leave. A suspension will undoubtedly have significant financial and professional impact upon the Respondent.

The need for specific and general deterrence

[19] As stated, the Respondent's actions were motivated by what he perceived to be the best interests of his Clients, rather than personal advantage or potential personal advantage. Also as stated, the proposed disciplinary action will have a significant impact upon the Respondent, which does address the need for both specific and general deterrence.

The need to ensure the public's confidence in the integrity of the profession

[20] On the evidence, the Respondent at times disregarded or exceeded his Clients' instructions in pursuing settlement. In our view, it is not acceptable for the Respondent to simply disregard his Clients' instructions, even though he considers his actions to be more consistent with his Clients' best interests. A member of the public is entitled to expect that his or her lawyer will follow his or her instructions, within the bounds of the lawyer's professional responsibilities. The range of sanction proposed by counsel is substantial, and in our view will ensure public confidence in the integrity of the profession.

The range of penalties imposed in similar cases

[21] Counsel cited a number of decisions in respect of the length of suspension that is appropriate.

[22] In *Law Society of BC v. Marsden*, 2003 LSBC 47, that lawyer had:

(a) failed to inform his client of settlement proposals;

(b) entered into terms of a consent order without instructions to do so;

(c) failed to inform or advise his client with respect to terms of an order;

(d) failed to obtain instructions with respect to an affidavit from the opposing party; and

(e) advised the court that he had forwarded an affidavit to his client and received no response when he knew or should have known that the affidavit had not in fact been forwarded to his client.

In that case, the lawyer received a suspension of 30 days.

[23] In **Law Society of BC v. Simons**, 2012 LSBC 23, the lawyer admitted to failing to provide his client with

the quality of service the Law Society expects of its members and misleading his client regarding the status of her court action. The client's action was dismissed, without notice to her. In that case, the hearing panel ordered a one month suspension.

[24] In *Law Society of BC v. Smiley*, 2006 LSBC 31, the lawyer failed to provide his client with the quality of service at least equal to that which would be provided by a competent lawyer in a similar situation, in failing to follow his client's instructions and failing to keep his client reasonably informed of the status of the matter. The respondent further admitted that he had misled his client. The penalty imposed was a suspension of one month.

[25] In *Law Society of BC v. Addison*, 2007 LSBC 12, the lawyer misled other counsel about his intention to call a witness who was in fact deceased and whom the lawyer knew was deceased. The hearing panel in that case ordered a suspension of the lawyer for a period of one month.

[26] In *Law Society of BC v. Galambos*, 2007 LSBC 31, the lawyer misled a Master of the Supreme Court as to whether or not a party to the proceeding had been served with a Notice of Motion and Affidavit. At the time the lawyer in that case made the representation, he did not know whether or not the party had in fact been served with that material. Shortly after making the representation the lawyer was made aware that the party had not been served with that material. The lawyer did not return to Court to advise that his representation was not accurate. In that case, the hearing panel ordered a suspension of one month.

[27] In *Law Society of BC v. Liggett*, 2012 LSBC 07, the lawyer misrepresented his availability to attend a discipline hearing. The hearing panel found that the lawyer's misrepresentation was reckless rather than deliberate, and ordered a one month suspension.

[28] A common factor in the cases reviewed is the importance of maintaining honesty and integrity among members of the profession. The Respondent in this matter misled his clients twice, albeit in one piece of correspondence.

[29] As stated, the Respondent's actions occurred over many months. In respect of the Respondent's efforts to settle proceedings rather than conducting a trial, the Respondent's intentions appeared to have been well motivated, but his deliberate ignoring of instructions and misleading of his Clients is not justified. Even after the retainer was terminated, the Respondent failed to transfer the file to new counsel or deliver it to the Clients in a timely fashion.

[30] The Respondent has admitted his misconduct, and has admitted that the misconduct constitutes professional misconduct. The Respondent proposes a disciplinary action that is on the edge of the range of sanctions suggested by Law Society counsel. The Respondent submits that he has already suffered a loss of standing and reputation within his community as a result of this citation, and we have no evidence to the contrary or any reason to doubt that submission.

[31] We find a one-month suspension to be appropriate in the circumstances. It is within the range suggested by Law Society counsel, and it is the length of time suggested by the Respondent's counsel. A one-month suspension is in accordance with the range suggested by the authorities offered to us for consideration and cited in this decision.

COSTS

[31] Counsel for the Law Society suggested that costs be awarded in the amount of $6,448. That amount is in accordance with the Tariff of Costs contained in Schedule 4 of the Law Society Rules. The citation in this matter was issued prior to the adoption of Rule 5-9 in its current form and the Tariff of Costs. Counsel for the

Law Society submitted that the Tariff should be applied in this case, and counsel for the Respondent conceded that point. The only contentious matter was whether or not the units claimed for a day of hearing by Law Society counsel should be reduced to units for one half day of hearing.

[32] The hearing of this matter commenced at 9:30 a.m. and went straight through to almost 1:00 p.m. The amount of time spent in hearing was more than half a day, and in our view it is appropriate to award costs for attendance of a full day's hearing rather than half a day. Accordingly, costs in the amount $6,448, as claimed by the Law Society, are awarded.

ORDER

[33] We order the following:

1. The Respondent, Thomas John Johnston, is suspended from the practice of law for one month, such suspension to commence on February 1, 2013.

2. The Respondent must pay costs to the Law Society in the amount of $6,448, such costs to be paid by May 31, 2013.