

2013 LSBC 06

Report issued: February 13, 2013

Citation issued: February 22, 2012

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

Laird Russell Cruickshank

Respondent

Decision of the Hearing Panel

Hearing date: December 18, 2012

Panel: Vincent Orchard, QC, Chair, Don Amos, Public Representative, Jennifer Chow, Lawyer

Counsel for the Law Society: Alison Kirby

Counsel for the Respondent: Gerald Cuttler

introduction

[1] In 2011, two clients made complaints to the Law Society of British Columbia about the Respondent's work as their lawyer. In an Agreed Statement of Facts filed at the hearing, the Respondent admitted that he failed:

- to comply with Law Society Rules regarding contingency fee agreements and trust accounting rules;
- to provide quality professional service to his clients;
- to pay disbursements in a timely manner; and
- to communicate promptly with his clients and opposing counsel.

[2] The citation was issued on February 22, 2012, and the Respondent admitted service. At the hearing, the Law Society withdrew one of seven allegations. Of the six remaining allegations, the Respondent admitted that, in three of the allegations, his conduct amounted to breaches of the Law Society Rules, and in the three remaining allegations, his conduct amounted to professional misconduct.

[3] Mr. Cuttler, counsel for the Respondent, submitted that the Respondent's conduct did not involve dishonesty or bad faith but arose out of, as counsel put it, "sloppy practice."

Facts

Client DF – Motor Vehicle Accident Claim

[4] In 2000, Mr. Cruickshank was retained to represent DF in regard to a motor vehicle accident claim on a 25 per cent contingency fee arrangement. Mr. Cruickshank did not provide DF with a written contingency fee agreement.

[5] Mr. Cruickshank had a longstanding client relationship with DF's father in regard to various business matters. Over time, DF took over his father's business matters. Mr. Cruickshank acted for both DF and his father until about 2006. Given the longstanding relationship, Mr. Cruickshank frequently met the DF and his father at one of their restaurants, or one or both of DF and his father would drop into Mr. Cruickshank's office to discuss files. Mr. Cruickshank did not always keep notes of his meetings with DF and his father.

[6] On or about July 23, 2004, the Insurance Corporation of British Columbia paid \$16,502.34 to Mr. Cruickshank to settle DF's motor vehicle accident claim (the "Settlement Funds").

[7] From July 2004 to February 2005, Mr. Cruickshank used the Settlement Funds to pay the legal bills incurred by two companies owned by DF. Mr. Cruickshank admitted that he has no notes or

correspondence in his client files authorizing the use of the Settlement Funds to pay legal bills relating to DF's companies. Mr. Cruickshank also admitted that neither he nor his assistant have any specific recollection that DF gave any instructions to use the Settlement Funds to pay legal bills relating to DF's companies. Mr. Cruickshank says he mistakenly but honestly believed that either he or his assistant had verbal instructions to pay the legal bills from the Settlement Funds.

[8] DF kept his personal and business affairs separate. DF has denied giving Mr. Cruickshank instructions to pay any legal bills related to his business from the Settlement Funds.

[9] From July 23, 2004 to February 28, 2005, Mr. Cruickshank deducted the following amounts from the Settlement Funds:

- (a) Withdrawal of \$4,713.03 to pay Mr. Cruickshank's legal bill in regard to the motor vehicle claim;
- (b) Transfer and withdrawal of \$1,916.25 to pay Mr. Cruickshank's legal bill in regard to M Ltd.;
- (c) Withdrawal of \$673.53 to pay the balance of the contingency fee paid on the motor vehicle claim to Mr. Cruickshank's former firm, Ganapathi and Company;
- (d) Transfer and withdrawal of \$2,588.60 to pay Mr. Cruickshank's legal bill in regard to P Ltd.;
- (e) Withdrawal of \$1,056.39 to pay Mr. Cruickshank's legal bill in regard to the incorporation of a numbered company; and
- (f) Withdrawal of \$3,542.18 to pay Mr. Cruickshank's legal bill in regard to D Restaurant.

[10] On February 28, 2005, a balance of \$2,012.36 remained in trust from the Settlement Funds.

[11] In or about March 2006, DF sent various emails to Mr. Cruickshank requesting an accounting and payout of the Settlement Funds. In or about April 2006, Mr. Cruickshank stopped acting for DF and his companies.

[12] In April 2006, DF and Mr. Cruickshank met and briefly reviewed the payments made from the Settlement Funds. Mr. Cruickshank was to provide DF with further details and re-issue the legal bills to DF's companies so that the bulk of the Settlement Funds could be paid to DF personally.

[13] Mr. Cruickshank, however, did not immediately attend to the details of the re-issuance of the legal bills. Between 2006 and 2011, DF repeatedly contacted Mr. Cruickshank to follow up on their discussion.

[14] Mr. Cruickshank did not re-issue his legal bills to DF's companies. On May 20, 2011 Mr. Cruickshank paid the remainder of the Settlement Funds in the amount of \$2,012.36 to DF. Subsequently, Mr. Cruickshank met with DF and gave him a full accounting to DF's satisfaction.

[15] In regard to DF's complaint, the Respondent made admissions that his conduct amounted to breaches of the Law Society Rules and professional misconduct.

Client 2 – Family Matters

[16] In 2008 and 2009, Mr. Cruickshank was retained by a former client, Client 2 on two matters concerning her child (the "Child").

Child Access

[17] The first matter related to Client 2's application to vary an order of Judge Lytwyn granted in 2005 that gave unsupervised access to the Child to her former partner, (the "Lytwyn Order"). Mr. Cruickshank was retained on that matter on December 29, 2008.

[18] Before Christmas in 2008, Client 2 denied her former partner access to the Child. In response, her former partner brought an application before Judge Cohen to enforce the Lytwyn Order. Client 2 in turn brought an application to vary the Lytwyn Order. Her former partner then sought production of documents from third parties (the "Access Dispute").

[19] On January 21, 2009, Judge Cohen ordered production of documents from the RCMP and a provincial ministry in regard to the complaints filed by Client 2. As a specific term of the order, Judge Cohen also required a party to pay for copies forthwith after delivery of the copies (the "Cohen Order").

[20] In February 2009, opposing counsel delivered to Mr. Cruickshank copies of documents obtained under the Cohen Order along with a photocopying invoice for \$40.32. More copies of documents were delivered in April 2009, along with an additional photocopying invoice for \$166.43.

[21] From October 2009 to January 2011, Mr. Cruickshank was contacted eight times by email, letter or phone by opposing counsel's office requesting payment of the photocopying invoices. Mr. Cruickshank did not respond with payment.

[22] On January 6, 2011, Mr. Cruickshank sent payment of the invoices. In his cover letter, Mr. Cruickshank apologized for the delay in sending the cheque as well as in endorsing the form of order pronounced by Judge Cohen on July 31, 2009.

[23] In regard to the Access Dispute, the Respondent admitted that his conduct amounted to breaches of the Law Society's *Professional Conduct Handbook*.

Child Adoption

[24] The second matter related to an application by Client 2's current husband to adopt the Child. Client 2 wanted to cut all ties between the Child and his biological father, RC, and between the Child and her former partner, who had access to the Child. Mr. Cruickshank was retained on that matter on March 16, 2009 (the "Adoption").

[25] Mr. Cruickshank admitted that he knew in 2009 that certain steps were required for the Adoption by Client 2's husband, including:

- (a) the requirement under the *Adoption Act* to serve the former partner with the adoption documents because he had court-ordered access rights to the Child;
- (b) the requirement to attach a copy of the Lytwyn Order to the requisition for a desk order adoption;
- (c) the requirement under the *Adoption Act* for an entered copy of the Lytwyn Order; and
- (d) the requirement under the *Adoption Act* for a written report from a social worker, including the Child's view on the proposed adoption.

[26] On March 27, 2009, Mr. Cruickshank's office sent Client 2 rough drafts of the Adoption documents. Mr. Cruickshank's assistant informed Client 2 that two steps were still required for the Adoption by Client 2's husband: a written report on the Child's views on the adoption and notification of the adoption to the former partner given his court-ordered access to the Child.

[27] In early April 2009, a social worker was retained to prepare the written report under the *Adoption Act*, and that report was finalized in August 2009.

[28] Between August 2009 and April 2010, Mr. Cruickshank and Client 2 agreed to put the Adoption matter on hold given the proceedings in the Access Dispute.

[29] In April 2010, Client 2 spoke to Mr. Cruickshank and gave him instructions to proceed with the Adoption by her husband. Despite those instructions, the Adoption moved slowly:

- (a) On April 17, 2010, Client 2 sent Mr. Cruickshank's assistant an email asking for an update on the status of the Adoption, including whether the Adoption documents had been filed;
- (b) On April 21, 2010, Client 2 called Mr. Cruickshank and emailed his assistant advising that she was waiting to receive the social worker's amended written report;
- (c) On May 8, 2010, Client 2 sent an email requesting an update as to the status of the Adoption. Mr. Cruickshank did not respond;
- (d) On May 21, 2010, Client 2 spoke to Mr. Cruickshank's assistant about her frustration in not having her calls returned. Mr. Cruickshank did not return her call;
- (e) On June 16, 2010, Client 2 called Mr. Cruickshank's office and left a message. That day, Mr. Cruickshank's assistant sent an email asking Client 2 to advise on how she would like to proceed with the Adoption;

- (f) The next day, Client 2 asked Mr. Cruickshank to go through with the Adoption;
- (g) On June 19, 2010, Mr. Cruickshank's assistant advised that they would proceed with the Adoption. That day, the social worker sent in her amended written report;
- (h) On July 27 and 30, 2010, Client 2 called Mr. Cruickshank and left voicemails each time. Mr. Cruickshank did not return her calls;
- (i) Client 2 called on August 4, 2010, when Mr. Cruickshank was on holidays and left a voicemail;
- (j) On August 11, 2010, Mr. Cruickshank's assistant requested information from Client 2 for the Adoption;
- (k) Mr. Cruickshank called Client 2 on August 25, 2010 after his return from vacation. The next day, Client 2 called twice but Mr. Cruickshank did not return her calls;
- (l) On September 1, 2010, Mr. Cruickshank called Client 2 and apologized for his delay in returning her call. He told her he would call her the next day, but did not;
- (m) On September 7, 2010, Client 2 called Mr. Cruickshank and left a voicemail. He did not return her call;
- (n) On September 9, 2010, Client 2 called Mr. Cruickshank, leaving a voicemail, but he did not return her call. Client 2 also sent him an email requesting an update. She wanted the Adoption to proceed quickly since it was important to her family. Mr. Cruickshank contacted Client 2's husband the next day;
- (o) On or about September 13, 2010, Mr. Cruickshank met with Client 2 regarding a new petition for Adoption by her husband and affidavit to comply with the new Rules of Court;
- (p) On September 20, 2010, Client 2 called Mr. Cruickshank and left a voicemail. He did not return her call; and
- (q) On September 29, 2010, Client 2 sent Mr. Cruickshank an email asking him to move forward on the Adoption by her husband. In her email, she wrote that she had left five telephone messages since September 13 and expressed frustration at the delay. Mr. Cruickshank contacted Client 2's husband the next day.

[30] On or about September 30, 2010, Mr. Cruickshank sent eight documents for a desk order Adoption order. Two key documents were missing: an entered copy of the Lytwyn Order and proof that the former partner was given notice of the Adoption by Client 2's husband. We note that the Respondent was Client 2's counsel when the Lytwyn Order was obtained, filed and entered.

[31] The Adoption materials were rejected on the initial filing:

- (a) On October 4, 2010, Mr. Cruickshank advised Client 2 that the Adoption documents had been filed but the Registry advised his office that the Adoption documents were missing an entered copy of the Lytwyn Order. He advised that he would let her know when the Adoption documents were completed;
- (b) On October 13, 2010, Mr. Cruickshank obtained an entered copy of the Lytwyn Order;
- (c) On November 24, 2010, Mr. Cruickshank re-submitted the Adoption documents for filing. He advised Client 2 that the Adoption documents were re-submitted to the court but not yet served on her former partner;
- (d) The court accepted the Adoption documents for filing on December 9, 2010.

[32] On January 14, 2011, the court rejected the desk order Adoption for the following reasons:

- (a) The draft order and identification particulars form needed revisions;
- (b) Confirmation that notice was given to the former partner was missing;
- (c) Payment of the Petition filing fee of \$280 was missing; and
- (d) The backing sheet for the draft Order was missing.

[33] That day, Client 2 called Mr. Cruickshank and left a voicemail. Mr. Cruickshank did not return her call.

The next day, Client 2 sent Mr. Cruickshank an email requesting an update on the Adoption, including whether her former partner would contest it. Mr. Cruickshank did not reply to the email.

[34] On February 23, 2011, Mr. Cruickshank contacted the former partner's counsel asking whether she could accept service of the Adoption materials.

[35] On March 3, 2011, Client 2 picked up the Adoption file from Mr. Cruickshank's office. That was the first time she learned that the desk order Adoption had been rejected and that service on her former partner was not attempted until February 23, 2011.

[36] In regard to the Adoption, the Respondent admitted that his conduct amounted to professional misconduct.

RESULT

[37] In summary, the Respondent made the following admissions, which were agreed to by the Law Society:

Allegation 1

[38] In or about 2002, in the course of representing his client DF in a motor vehicle accident claim, the Respondent entered into a contingent fee agreement with him and, in 2004, the Respondent received remuneration pursuant to such agreement, when he had not entered into such an agreement in writing with the required statements, contrary to Rules 8-3 and 8-4 of the Law Society Rules.

[39] The Respondent admitted Allegation 1 and that his conduct amounted to a breach of Rules 8-3 and 8-4 of the Law Society Rules.

[40] The Law Society recommended a finding of breach of the Rules because only one instance of misconduct was involved in this allegation, the contingent fee arrangement was discussed with the client, there was no evidence of dishonest intent, the amount of money involved was small and the breach seemed to arise from the Respondent paying little attention to the administrative side of his practice.

Allegation 2

[41] In or about July 2004, in the course of representing his client DF in a motor vehicle accident claim, the Respondent received trust funds of \$16,502.34 on his behalf but the Respondent failed to account to the client in writing for all of these funds, contrary to Rule 3-48 of the Law Society Rules.

[42] The Respondent admitted Allegation 2 and that his conduct amounted to a breach of Rule 3-48 of the Law Society Rules.

[43] The Law Society recommended a finding of breach of the Rules because the Respondent's delay in providing an accounting is the basis for the professional misconduct alleged under allegation 4.

Allegation 3

[44] In or about 2004 and 2005, in the course of representing his client DF in a motor vehicle accident claim, the Respondent received trust funds of \$16,502.34 on the client's behalf and, without his authorization or consent, the Respondent authorized the withdrawal of some of those funds from trust to pay a bill of another client, contrary to Rule 3-56 of the Law Society Rules, and in particular, some or all of:

(a) a bill dated July 27, 2004 issued to M Ltd., and

(b) a bill dated November 29, 2004 issued to P Ltd.

[45] The Respondent admitted Allegation 3 and that his conduct amounted to a breach of Rule 3-56 of the Law Society Rules.

[46] The Law Society recommended a finding of breach of the Rules regarding this allegation as well. The Respondent provided legal services to the corporate clients, which were closely held private companies controlled by DF, who had a long-term relationship with the Respondent. Again, the breach seemed to arise from the Respondent paying little attention to the administrative side of his practice.

Allegation 4

[47] At various times between 2004 and 2011, in the course of providing legal services to his client DF, the Respondent failed to serve his 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, contrary to Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook*, and in particular, the Respondent did not answer reasonable requests from the client for information regarding the handling and disbursement of the balance of \$11,115.78 of trust funds of \$16,502.34 that he received on behalf of the client.

[48] The Respondent admitted Allegation 4 and that his conduct amounted to professional misconduct under section 38 of the *Legal Profession Act*.

Allegation 5

[49] Between March 2009 and March 2011, in the course of representing Client 2 in an application for her current husband to adopt her child, the Respondent failed to serve his 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, and, in particular, some or all of the following conduct in which he, contrary to Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook*:

- (a) failed to keep his client reasonably informed,
- (b) failed to answer reasonable requests from his client for information,
- (c) informed his client that something would happen or that some step would be taken by a certain date, then allowed that date to pass without follow-up information or explanation,
- (d) failed to answer within a reasonable time communications that required replies,
- (e) failed to disclose all relevant information to his client, and to candidly advise his client about the position of a matter,
- (f) failed to make prompt and complete reports where reports might reasonably be expected, or
- (g) failed to make all reasonable efforts to provide prompt service to his client.

[50] The Respondent admitted Allegation 5 and that his conduct amounted to professional misconduct under section 38 of the *Legal Profession Act*.

Allegation 7 (Allegation 6 was withdrawn by the Law Society)

[51] Between February 2009 and December 2010, in the course of representing Client 2 in the Access Dispute, the Respondent:

- (a) Failed to pay two disbursement accounts sent to him by opposing counsel on February 3, 2009 and April 7, 2009 (the "Accounts") in a timely manner, contrary to Chapter 2, Rule 2 of the *Professional Conduct Handbook*, and
- (b) failed to respond promptly to communications from opposing counsel dated November 27, 2009, December 14, 2009, January 11, 2010, June 14, 2010, October 2, 4, and 28, 2010, and November 18, 2010, regarding payment of the Accounts, contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook*.

[52] The Respondent admitted Allegation 7 and that his conduct amounted to professional misconduct under section 38 of the *Legal Profession Act*.

[53] This Panel accepts the Respondent's admissions and finds that the Respondent has committed breaches of the Law Society Rules with respect to allegations 1, 2 and 3 and has committed professional misconduct with respect to allegations 4, 5 and 7.