2013 LSBC 09
Report issued: March 18, 2013
Oral Reasons: February 15, 2013
Citation issued: October 1, 2012

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

ROGER DWIGHT BATCHELOR

Respondent

CORRECTED DECISION: PARAGRAPHS [59] AND [60] OF THE DECISION WERE AMENDED ON APRIL 10, 2013

Decision of the Hearing Panel

Hearing date: February 15, 2013
Panel: David Mossop, QC, Chair, Satwinder Bains, Public Representative, James E. Dorsey, QC, Lawyer

Counsel for the Law Society: Alison Kirby
Appearing on his own behalf: Roger Batchelor

OVERVIEW

[1] Law Society lawyers investigating complaints about lawyers face a daunting job. Their job is not akin to a licensed wedding official at a Las Vegas wedding chapel. That individual deals with happy couples all day long. A bad day for such an official is when one of the couples comes in a little bit too tipsy. A Law Society investigating lawyer is in the opposite position. At the start of the process, the complainant and the lawyer may be very unhappy, though for different reasons. The investigating lawyer does his or her best to resolve the dispute to the satisfaction of both parties. In many cases this can be done. In other cases, the investigating lawyer may decide to dismiss the complaint or refer the matter to the Discipline Committee of the Law Society for further disciplinary action. In such circumstances, one of the parties may be unhappy. Investigating lawyers, unlike the wedding official at a Las Vegas wedding chapel, have to deal with unhappy people. Such lawyers require a great deal of patience and have a great deal of people skills. Their job is one of the most difficult at the Law Society. Their work is under-appreciated. At times, investigating lawyers may secretly wish that they worked at a wedding chapel in Las Vegas. However, they carry on for they correctly perceive that their work is in the public interest.

[2] What is a bad day for the investigating lawyer? A bad day for an investigating lawyer is when the lawyer under investigation impedes or interferes with the investigation process. That is what happened here. The complainant filed a complaint with the Law Society against the Respondent centring on his representation of her in regards to a family law matter. The Respondent attempted to buy himself out of the Law Society's complaint process initiated by the complainant. He entered into a written agreement with the complainant in which he agreed to provide approximately $11,000 to her in exchange for her dropping all claims she had against him, including the complaint against him that was before the Law Society. This is professional misconduct under the *Professional Conduct Handbook*.

[3] To his credit, when the breach was brought to his attention by the Law Society, he quickly corrected the

agreement and admitted his mistake to the Law Society. His subsequent actions do not excuse his original transgressions. However, they are important in considering the disciplinary action imposed by this Hearing Panel

[4] This matter comes before the Panel as a conditional admission and consent to a specific disciplinary action pursuant to Rule 4-22 of the Law Society Rules. The citation, authorized on September 12, 2012 and issued on October 1, 2012, reads as follows:

> In or about December 2011, you attempted to resolve a complaint made by your client PP to the Law Society on or about March 14, 2011, by preparing and entering into a written agreement dated December 19, 2011 with her, the terms of which included that you would pay her $11,000 and she would withdraw the complaint.
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> This conduct is contrary to Chapter 2, Rule 1 or Chapter 13, Rule 3(c) of the *Professional Conduct Handbook* and constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[5] The Respondent admits service of the citation on October 3, 2012. The Panel accepts the conditional admission. This means the Panel accepts professional misconduct took place and accepts the proposed disciplinary action, which is that the Respondent will pay a fine of $3,000 and costs of $1,000 by April 30, 2013.

[6] In addition, the Panel orders a Sealing Order as set out at the end of these written reasons, which are a follow-up to the oral decision of the Hearing Panel issued on February 15, 2013.

FACTS

[7] This matter proceeded pursuant to an Agreed Statement of Facts. The facts are summarized below.

[8] Roger Batchelor was admitted to the Bar of British Columbia on September 21, 2005. He practises in the areas of family, criminal law and civil litigation in Victoria, British Columbia.

[9] In or about May 2009, Mr. Batchelor was retained by PP in connection with a family law matter.

[10] On or about March 14, 2011 PP made a complaint to the Law Society.

[11] The complaint related to, amongst other things, the amount of fees charged by Mr. Batchelor and the quality of service provided.

[12] Ruth Long, staff lawyer, was appointed by the Law Society to conduct the investigation into the complaint.

[13] On July 12, 2011, the Law Society wrote to Mr. Batchelor enclosing a copy of the complaint.

[14] On August 29, 2011, Mr. Batchelor replied to the Law Society's letter dated July 12, 2011.

[15] On or about December 19, 2011, Mr. Batchelor and PP settled their dispute. Under the terms of the Release and Settlement Agreement, Mr. Batchelor was to pay PP the sum of $11,000 and PP would withdraw the complaint and provide Mr. Batchelor with a release of all claims.

[16] It was an express term of the Release that:

> 2.09 The Releasor expressly agrees to contact the Law Society of British Columbia and any other governing body to which a complaint has been made and withdraw any complaints that have been made against the Releasees, and discontinue any action that the Releasor has filed against the

Releasees upon the execution of this agreement.

3.04 In the event of default, the Releasor shall be entitled to keep the $2,000 first payment and the Releasor shall be entitled to make a new complaint to the Law Society and the agreement will be set aside in its entirety.

[17] On December 19, 2011, Mr. Batchelor provided PP with a cheque in the amount of $2,000.

[18] On or about December 22, 2011, Mr. Batchelor informed Ms. Long that he had reached a settlement with PP and that she was going to withdraw her complaint.

[19] On January 18, 2012, the Law Society wrote to PP about the complaint. PP immediately forwarded the email to Mr. Batchelor. The relevant part of the January 18, 2012 letter reads as follows:

> We discussed what your wishes were regarding the complaint. As I explained to you, my investigation has been on hold since October, pending receipt of the judgments and transcripts from you. You explained that you are torn about withdrawing your complaint because you feel he did such a terrible job on your case. At the same time, you are anxious to receive repayment from him and that was the condition he imposed.
>
> As I explained to you, it is your decision to make whether you wish withdraw [sic] your complaint or be further involved in pursuing this complaint. Although the Law Society can in some instances continue an investigation after a complainant withdraws the complaint, I do not think we would do so with respect to this complaint. *Based on my review of the information you and Mr. Batchelor have provided and my review of the client file, we do not have sufficient evidence of professional misconduct by Mr. Batchelor in handling your case that would to support [sic] disciplinary action being taken* . In the absence of receiving any further information from you in support of your allegations, I will, in all likelihood, close this file under Rule 3-6(1)(b) of the Law Society Rules which states:
>
> > Rule 3-6(1) After investigating a complaint, the Executive Director must take no further action if the Executive Director is satisfied that the complaint
> >
> > (b) does not disclose conduct serious enough to warrant further action.
>
> I will not take that step until you advise me on whether you wish to withdraw your complaint. Please confirm whether or not you are withdrawing your complaint **by January 31, 2012**.
>
> I have not seen the written agreement you entered into with Mr. Batchelor. Based on what you have told me, however, if it contains the conditions you described, it raises a new professional misconduct concern, unrelated to your previous complaint. It is improper for a lawyer to make it a requirement of a civil settlement that a person refrain from making or proceeding with a complaint to the Law Society. I am requesting that you provide me with a copy of the agreement so that I may review it. Any new investigation that might result from a review of the settlement agreement would be pursued as a Law Society complaint, not as a new complaint by you. Please provide me with a copy of the agreement **by February 24, 2012**.
>
> [emphasis added]

[20] On January 18, 2012, Mr. Batchelor forwarded a revised Release to PP for execution.

[21] On January 20, 2012, Mr. Batchelor advised Ms. Long that he had revised the Release to remove the reference to the complaint.

[22] On January 24, 2012, Mr. Batchelor provided PP with a cheque in the amount of $5,007.50.

[23] On February 14, 2012, Mr. Batchelor provided PP with a cheque in the amount of $4,000.

[24] In addition, the Agreed Statement of Facts had attached to it various documents that form part of the factual background to this case.

ADMISSION OF CONDUCT

[25] The Respondent admits that in or about December 2011, he attempted to resolve the complaint made by his client PP to the Law Society, by preparing and entering into a written agreement dated December 19, 2011 with her, the terms of which included that he would pay her $11,000 and she would withdraw the complaint, as set out in the citation.

[26] The Respondent admits that his conduct in doing so constitutes professional misconduct.

ANALYSIS

[27] Chapter 2 Rule 1 or Chapter 13, Rule 3(c) of the *Professional Conduct Handbook* comes into play. Those sections read as follows:

> 1. A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.
>
> 3. A lawyer must
>
> > (c) not improperly obstruct or delay Law Society investigations, audits and inquiries.

[28] There is one applicable adverse determination that may be made under section 38(4) of the *Legal Profession Act* for breach of Chapter 2, Rule 1 or breach of Chapter 13 Rule 3(c): professional misconduct. The Hearing Panel has decided to make its decision under Chapter 13, Rule 3(c).

[29] "Professional misconduct" is not a defined term in the *Legal Profession Act*, the Law Society Rules or *Professional Conduct Handbook*. The test for whether conduct constitutes professional misconduct was established in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [171], as:

> … 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.

[30] In *Martin*, the panel observed at paragraphs [151] to [154] that a finding of professional misconduct did not require behaviour that was disgraceful or dishonourable. It concluded:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[31] The *Martin* test has recently been affirmed by the Benchers on a review in *Re: Lawyer 12*, 2011 LSBC 35.

[32] In considering whether the Respondent's conduct is a marked departure from conduct the Law Society expects of its members, the provisions of the *Professional Conduct Handbook* are relevant because they articulate the standards against which the Respondent's conduct is to be measured.

[33] An attempt to delay or obstruct a Law Society investigation by negotiating the withdrawal of a complaint has been found to constitute professional misconduct: see *Law Society of BC v. Carten*, [1999] LSBC 40 and *Law Society of BC v. Gerbrandt*, [1993] LSDD No. 190.

[34] In *Law Society of BC v. Carten*, the panel accepted the respondent's admission of professional misconduct in imposing a settlement condition on his spouse that required her to withdraw her complaint against him to the Law Society and in failing to report an unsatisfied judgment for costs.

[35] In *Law Society of BC v. Gerbrandt*, the panel found that the respondent had committed professional misconduct in attempting to impose, as a condition of settling a fee dispute with former clients, a requirement that they withdraw complaints made to the Law Society.

[36] In the view of the Hearing Panel, the Respondent's conduct in this case shows a marked departure from the conduct that the Law Society expects of its members. We accept that a determination of professional misconduct is appropriate and the Respondent's admission should be accepted.

APPROPRIATENESS OF DISCIPLINARY ACTION

[37] Deference should be given to the recommendation to accept the proposed disciplinary action if it is within the range of a "fair and reasonable disciplinary action in all of the circumstances." As stated in *Law Society of BC v. Rai*, 2011 LSBC 02 at paragraphs [6] through [8]:

> This proceeding operates (in part) under Rule 4-22 of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.
>
> This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"
>
> This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

GENERAL PRINCIPLES REGARDING DISCIPLINARY ACTION

[38] 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 by ensuring the independence, integrity, honour and competence of lawyers.

[39] The sanction to be imposed at the disciplinary action phase of the hearing should be determined by reference to these purposes.

[40] As set out in Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Carswell, 1993) at page 26-1:

> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.
>
> *In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes. …*
>
> [emphasis added]

[41] In British Columbia, the leading decision on the factors to be considered in imposing penalty is that of *Law Society of BC v. Ogilvie*, [1999] LSBC 17, in which the panel set out the following non-exhaustive list of factors:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[42] The Hearing Panel has considered those *Oglivie* factors that are relevant to this Respondent, namely:

(a) the nature and gravity of the conduct proven;

(b) the need for specific and general deterrence;

(c) the previous character of the respondent, including details of prior discipline;

(d) the range of penalties imposed in similar cases;

(e) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances.

NATURE OF MISCONDUCT AND NEED FOR GENERAL DETERRENCE

[43] The Law Society is mandated by section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice by, amongst other things, regulating the legal profession.

[44] One of the functions undertaken by the Law Society as regulator is the investigation of complaints and the determination of the appropriate outcome that should flow from that investigation process. The investigation of complaints and the appropriate treatment of them are at the core of the Law Society's work in the fulfillment of its regulatory function (see *Law Society of BC v. Luk*, 2005 LSBC 44 at paragraphs [18] and [19]).

[45] Any attempt to undermine the Law Society's ability to regulate the profession should be strongly discouraged. A clear message should be sent to the legal profession that there will be no tolerance of lawyers attempting to undermine the Law Society's investigation of complaints by negotiating a withdrawal of the complaint.

PROFESSIONAL CONDUCT RECORD AND NEED FOR SPECIFIC DETERRENCE

[46] The Respondent has a Professional Conduct Record ("PCR") consisting of:

> (a) Conduct Review held in April 2012 in respect of his failure to comply with various accounting rules under Part 3 Division 7 of the Law Society Rules and inaccurate responses provided to the Law Society in two trust reports;
>
> (b) Practice Standards Referral conducted between August 2009 and December 2010 to address concerns about failure to clarify service expectations to clients, failure in duties to clients and opposing counsel, excessive delegation to staff and poor file documentation.

[47] The Respondent's prior disciplinary record shows a failure to comply with the Law Society's regulation of his practice.

[48] The Respondent's prior disciplinary record is an aggravating factor that requires an increase in the sanction to be imposed beyond the range of the sanctions imposed for similar misconduct by members without a disciplinary history. This increased sanction would be in accordance with the principle of progressive discipline, the need for specific deterrence and the need to ensure public confidence in the legal profession.

[49] The principle of progressive discipline stipulates that a lawyer who has had prior discipline, whether for the same or different conduct and whether that conduct has been joined in one proceeding or dealt with by way of successive proceedings, will be subject to a more significant disciplinary sanction than someone who has had no prior discipline.

[50] The principle is in accordance with the Law Society's obligation to protect the public and the reputation of the legal profession. It sends a clear message to the public and the legal profession that the Law Society will not tolerate lawyers who repeatedly ignore their professional responsibilities.

[51] This principle has been followed in recent Law Society decisions such as *Law Society of BC v. Niemela*, 2012 LSBC 09 at paragraphs [18] and [19].

[52] As set out in Gavin MacKenzie's book (supra) in paragraph 26.17 at page 26-43:

> Although most participants in the discipline process might agree that similar penalties should be imposed for similar cases of misconduct, the penalties imposed for similar misconduct differ

widely, both within and among jurisdictions. This is largely due to the fact that one of the main purposes of the process is to protect the public. It may be entirely appropriate that a lawyer who has proven to be incorrigible be disbarred for the same conduct for which a different lawyer is reprimanded if the discipline hearing panel is reasonably satisfied that the likelihood of recurrence is minimal in the latter case.

RANGE OF PENALTIES IN SIMILAR CASES

[53] There are insufficient disciplinary decisions relating to the negotiation of a withdrawal of a complaint to identify a range of penalties in similar British Columbia cases.

[54] In the absence of recent disciplinary decisions directly on point, the decisions made in cases involving a failure to respond to communications from the Law Society are of assistance in determining the appropriate disciplinary action. This is because a failure to reply promptly to communications from the Law Society in the course of their investigation has a similar effect as obstructing or delaying a Law Society investigation by attempting to negotiate the withdrawal of a complaint.

[55] Recent case law suggests that, in cases of first instance where the respondent has no disciplinary history, the appropriate disciplinary action is a small fine: see for example *Law Society of BC v. Cunningham*, 2007 LSBC 47 ($2,000 fine – no PCR); *Law Society of BC v. Tak*, 2009 LSBC 25 ($2,000 fine – no mention of PCR); *Law Society of BC v. Cuddeford*, 2010 LSBC 11 ($2,000 fine – PCR not mentioned); *Law Society of BC v. Malcolm*, 2012 LSBC 4 ($2,000 fine – no PCR); *Law Society of BC v. Decore*, 2012 LSBC 17 ($2,000 fine – prior administrative suspension for failing to complete CPD).

[56] In cases of a first instance of failure to respond to the Law Society where the respondent has a prior disciplinary history, the appropriate disciplinary action ranges from a higher fine to a suspension depending on the nature and extent of the prior discipline history: *Law Society of BC v. Marcotte*, 2010 LSBC 18 ($2,750 fine – four prior conduct reviews); *Law Society of BC v. Niemela*, 2012 LSBC 09 ($5,000 fine – prior citation for failing to respond to another lawyer); and *Law Society of BC v. Welder*, 2011 LSBC 25 (45 day suspension – five prior conduct reviews and four prior citations).

MITIGATING CIRCUMSTANCES

[57] In this case, the Respondent acknowledged his misconduct and immediately took steps to amend the Release to remove the requirement that his client withdraw the complaint to the Law Society.

[58] The acknowledgment of misconduct and immediate redressing of the underlying misconduct are mitigating factors as they show the Respondent's new understanding of his regulatory compliance obligations to the Law Society and a willingness to rehabilitate.

SUBMISSIONS OF THE RESPONDENT

[59] The Respondent agreed to the proposed disciplinary action. However, he made two points. The first point was that he was cleared (or words to that effect) of the original complaint. There was little evidence before the Panel on the investigation of the complaint after January 18, 2012. The decision not to take further action on the original complaint may have been motivated by a number of factors.

[60] Even if the Respondent were unequivocally cleared of the original complaint, this complaint would still be valid. In those circumstances, the lack of merit of the original complaint may have been a factor in mitigating disciplinary action. However, for reasons below, this Panel does not have to decide that issue.

[61] The second point raised by the Respondent is that he does a lot of community work including a great deal of free legal clinics. He should be congratulated for his efforts in this area. He maintains that this should mitigate any disciplinary action. The listed factors in the *Ogilive* (supra) are not exhaustive. However, the question becomes: does pro bono become another factor for a Hearing Panel to consider even though it is not mentioned or related to any of the factors mentioned in the *Ogilive* decision. To put it simply, does a new factor have to have some relationship to the other original factors or can it be a completed stand-alone factor? However again, for the reasons below, this Panel does not have to decide that issue.

[62] It is important to remember that the Respondent has agreed to the proposed disciplinary action. He also knew of these factors, namely his view that he was cleared of the original complaint and the factor that he does a great deal of pro bono work, before he entered into the proposed disciplinary action. He felt the proposed disciplinary action was fair and reasonable in the circumstances.

[63] The Panel can, in reviewing a proposed disciplinary action, decide that the lawyer faces too severe of a disciplinary action, even if he or she has agreed to it. In such circumstances, the Hearing Panel, theoretically, could send the matter back to the Discipline Committee. However, the whole focus of the conditional admission is to prevent “sweetheart deals” between respondents and the Law Society. Although, as stated above, it is theoretically possible for a hearing panel to send the matter back to the Discipline Committee based on the proposed disciplinary action being too severe. This would be an exceptionally rare case. On the facts of this case, a fine of $3,000 and costs of $1,000 are not too severe. In our opinion, the two points raised by the Respondent, even if we accept them, still leave the proposed disciplinary action within the range of a fair and reasonable disciplinary action.

CONCLUSION ON APPROPRIATE DISCIPLINARY ACTION

[64] The Hearing Panel accepts that the proposed disciplinary action is within the range of a fair and reasonable disciplinary action in all the circumstances.

COSTS

[65] The Law Society seeks costs in the amount of $1,000, inclusive of disbursements and counsel time and the Respondent agrees to this. The Hearing Panel accepts $1,000 as an appropriate award for costs in this matter.

SEALING ORDER

[66] Counsel for the Law Society sought a Sealing Order to protect the solicitor/client privilege between the complainant and the Respondent. The Respondent agreed to this order. The terms of the Order are set out below.

SUMMARY OF ORDERS

[67] The Hearing Panel orders as follows:

(a) The Respondent must pay a fine in the amount of $3,000, pursuant to s. 38(5)(b) of the *Legal Profession Act*, on or before April 30, 2013.

(b) The Respondent must pay costs in the amount of $1,000 to the Law Society on or before April 30, 2013.

(c) The following specific information contained in the Agreed Statement of Facts dated January 11,

2013 entered as Exhibit 1 in this hearing must not be disclosed under Rule 5-6(2) of the Law Society Rules:

i. The name of the client and any confidential information about the underlying family law matter; and

ii. Attachments 2 and 4 to the Agreed Statement of Facts in their entirety.

[68] The Executive Director is instructed to record the Respondent's admission on his professional conduct record.