2013 LSBC 15
Report issued: June 13, 2013
Oral decision on Facts and Determination: February 26, 2013
Citation issued:

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

GLENN JOHN NIEMELA

Respondent

Corrected Decision: Paragraph [55](c) of the decision was amended on July 5, 2013

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

Hearing date: February 26, 2013
Panel: Thomas P. Fellhauer, Chair, Richard Lindsay, QC, Lawyer, Laura Nashman, Public representative

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

BACKGROUND

The Citation

[1] The Respondent faces a citation that alleges:

> Between August 2010 and December 2011, in the course of representing your client in a builder's lien action, you failed to respond promptly to some or all of the letters from opposing counsel dated August 18, 2010, August 25, 2010, August 27, 2010, August 31, 2010, November 1, 2010, December 3, 2010, December 6, 2010, January 14, 2011, May 10, 2011, August 24, 2011 and September 1, 2011, that required a response, contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook*.
>
> This conduct constitutes professional misconduct, pursuant to section 38 of the *Legal Profession Act*.

[2] The Respondent admits that, on September 28, 2012, he was served through his counsel with the citation and waived the requirements of Rule 4-15.

Facts

[3] The Law Society and the Respondent filed an Agreed Statement of Facts (the "ASF").

[4] In addition to the ASF, the Panel also heard evidence from the Respondent and received two medical reports from the Respondent, a psychiatric assessment of the Respondent dated August 13, 2012 by a Consultant Psychiatrist and a psychological assessment report of the Respondent dated February 22, 2013

from a Registered Psychologist (Exhibits 4 and 5).

[5] The Panel accepts the whole of the ASF including the tabbed attachments. The chronology of events is relevant. The ASF provides as follows:

Background of the Respondent

1. Glenn Niemela was called and admitted as a member of the Law Society on August 26, 1988.

2. Mr. Niemela practises in the areas of civil litigation, creditors' remedies and family law. He practises as a sole-practitioner in Vancouver and acts as an associate counsel with another firm with whom he does civil litigation on a referral basis

Builders' Lien Act Claim

3. On or about June 11, 2009, Mr. Niemela's client (the "Company") filed a Claim of Builders' Lien in the Vancouver Land Title Office against title to a property (the "Property").

4. In or about January 2010, Mr. Niemela was retained by his client in connection with a builders' lien matter.

5. On January 25, 2010, Mr. Niemela commenced an action in the Supreme Court of British Columbia between the Company as plaintiff, and four individuals as defendants (the "Lien Action").

6. On or about January 25, 2010, Mr. Niemela filed a Certificate of Pending Litigation ("CPL") in the Vancouver Land Title Office against title to the Property.

The Settlement

7. On or about June 11, 2009, counsel for the defendants wrote to Mr. Niemela with an offer to settle the Lien Action.

8. Between June and August, 2010, counsel for the defendants and Mr. Niemela negotiated the amount of costs to be paid to the Company to settle the Lien Action.

9. On August 16, 2010, counsel for the defendants wrote to Mr. Niemela with an offer to settle the Lien Action. In exchange, the Company was to execute and provide the documents forwarded to Mr. Niemela by counsel for the defendants in his letter of June 2, 2010.

10. On August 16, 2010, Mr. Niemela accepted the offer on behalf of the Company on condition that "the defendants provide a release to the Company".

Attempts to Finalize the Settlement

11. On August 18, 2010, counsel for the defendants wrote to Mr. Niemela to confirm the terms of the settlement reached (the "Settlement") and enclosed documents to reflect the final terms of the Settlement.

12. On August 25, 2010, counsel for the defendants again wrote to Mr. Niemela asking him to confirm when he would receive the various documents sent to Mr. Niemela on August 18, 2010. There was handwriting on the counsel for the defendants' letter indicating the matter was "urgent" and asking Mr. Niemela to provide the documents by noon on August 27, 2010.

13. By letter dated August 26, 2010, Mr. Niemela informed counsel for the defendants that the CPL release letter was available for pick up at his offices.

14. By letter marked “urgent” and dated August 27, 2010, counsel for the defendants confirmed that he had received the Form 17 cancellation of the CPL and asked Mr. Niemela to provide him with the outstanding documents.

15. By letter dated August 28, 2010, Mr. Niemela advised counsel for the defendants that he could deal directly with the Company to pick up the Form C Discharge of the builders’ lien.

Failures to Respond

16. By letter dated August 31, 2010, counsel for the defendants confirmed that the Form C Discharge of the lien and the CPL release letter had been filed in the Land Title Office. He asked Mr. Niemela to advise him when he would forward a filed copy of the Notice of Discontinuance of the Lien Action and the executed release (the “Outstanding Documents”).

17. Mr. Niemela did not reply to counsel for the defendants’ letter of August 31, 2010.

18. By letter dated November 1, 2010, counsel for the defendants wrote to Mr. Niemela requesting the Outstanding Documents.

19. Mr. Niemela did not reply to counsel for the defendants’ letter of November 1, 2010.

20. By letter dated December 3, 2010, counsel for the defendants wrote to Mr. Niemela again requesting the Outstanding Documents.

21. Mr. Niemela did not reply to counsel for the defendants’ letter of December 3, 2010.

22. By letter dated December 6, 2010, counsel for the defendants wrote to Mr. Niemela again requesting the Outstanding Documents.

23. Mr. Niemela did not reply to counsel for the defendants’ letter of December 6, 2010.

24. By letter dated January 14, 2011, counsel for the defendants wrote to Mr. Niemela, outlining the events and asking Mr. Niemela to provide him with the Outstanding Documents.

25. Mr. Niemela did not reply to counsel for the defendants’ letter of January 14, 2011.

26. By letter dated May 10, 2011, counsel for the defendants wrote to Mr. Niemela indicating that he had not received a response to his last three letters. Counsel for the defendants reminded Mr. Niemela of his obligation to respond to his communications, pointed out that there was an “ongoing cost to my client in attempting to finalize the settlement agreement concluded in August 2010, including bearing to continue to write reminder letters to you.” Counsel for the defendants asked Mr. Niemela to confirm receipt of the letter and when he would deliver the filed Notice of Discontinuance and Release executed by his client.

27. Mr. Niemela did not reply to counsel for the defendants’ letter of May 10, 2011.

Complaint to Law Society

28. On May 24, 2011, counsel for the defendants made a complaint (the “Complaint”) to the Law Society.

29. On July 11, 2011, Mr. Niemela was advised by the Law Society of counsel for the defendants’

complaint.

Response by the Respondent

30. On July 25, 2011, Mr. Niemela wrote to counsel for the defendants inquiring whether he wished to settle the Lien Action on the terms set out in their August 11 and August 16, 2010 correspondence. Mr. Niemela stated he was “in the process of drafting a Release to be signed by the defendants”. He offered to make arrangements to register the cancellation of the CPL and discharge of the builders’ lien in Land Titles.

31. On July 25, 2011, Mr. Niemela wrote another letter to counsel for the defendants enclosing a draft release to be executed by the three defendants.

Further Failures to Respond

32. By letter dated August 24, 2011, counsel for the defendants replied to Mr. Niemela’s letter of July 25, 2011. Counsel for the defendants enclosed with his letter a release signed by his client and a trust cheque in the amount of $6,173.34.

33. Mr. Niemela did not reply to counsel for the defendants’ letter of August 24, 2011.

34. On September 1, 2011, counsel for the defendants wrote to Mr. Niemela asking him to respond to his letter of August 24, 2011.

35. Mr. Niemela did not reply to counsel for the defendants’ letter of September 1, 2011.

36. On September 9, 2011, counsel for the defendants wrote to the Law Society with a copy of his letter to Mr. Niemela. In his letter, counsel for the defendants wrote:

> The reason why this letter is being sent to you is because once again [the Respondent] is not replying to my letters to him and the settlement of a very small lien claim continues to be dragged on, at the expense of my client.

Responses

37. On December 18, 2011, Mr. Niemela wrote to counsel for the defendants to advise that his client would not provide a release of two of the defendants.

38. On December 19, 2011, counsel for the defendants wrote to Mr. Niemela and confirmed that he required a filed Notice of Discontinuance and an executed release signed in favour of his client.

39. On December 21, 2011, Mr. Niemela wrote to counsel for the defendants about amending the release. Counsel for the defendants replied by letter the same day.

40. By letter dated December 23, 2011, Mr. Niemela provided counsel for the defendants with the Notice of Discontinuance of the Lien Action filed on December 21, 2011.

41. Also by letter dated December 23, 2011, Mr. Niemela advised counsel for the defendants that he had forwarded the release to his client for execution.

Apology for Delay

42. By letter dated December 28, 2011, Mr. Niemela apologized to counsel for the defendants for the

delay in concluding the file.

Final Resolution of Litigation

43. The original release was eventually forwarded to counsel for the defendants on January 6, 2012.

[6] In the ASF, the Respondent admits that between August 2010 and December 2011, in the course of representing his client in a builders' lien action, he failed to respond promptly to the letters from counsel for the defendants dated August 31, 2010, November 1, 2010, December 3, 2010, December 6, 2010, January 14, 2011, May 10, 2011, August 24, 2011 and September 1, 2011 that required a response, contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook*, as set out in the citation.

[7] In the ASF, the Respondent admits that his conduct in doing so constitutes professional misconduct. The Respondent confirmed his admission to the Hearing Panel.

[8] The Hearing Panel considered the ASF and heard from the Respondent, his counsel, and the submissions made by counsel for the Law Society.

[9] The Hearing Panel provided its oral decision and agreed to provide written reasons and these are those reasons.

DETERMINATION

[10] Chapter 11, Rule 6 of the *Professional Conduct Handbook* states:

> A lawyer must reply reasonably promptly to any communications from another lawyer that requires a response.

[11] The onus is on the Law Society to prove the allegations it makes, and the standard of proof is the balance of probabilities, as stated in *Law Society of BC v. Tak*, 2009 LSBC 25.

[12] Given the facts set out in the ASF, the Panel finds that the Respondent did in fact fail to respond to communications from opposing counsel that he received (in particular, letters dated August 31, 2010, November 1, 2010, December 3, 2010, December 6, 2010, January 14, 2011, May 10, 2011, August 24, 2011 and September 1, 2011).

[13] The Hearing Panel considered the Respondent's responses to the Law Society in his letter dated January 16, 2012 and his response to the Panel at the hearing. The Panel has accepted the Respondent's admissions set out in paragraph 50 and 51 of the ASF that his repeated failures to respond constituted professional misconduct.

[14] As stated in *Law Society of BC v. Martin*, 2005 LSBC 16, and adopted by a Review Panel of Benchers in *Re: Lawyer 12*, 2011 LSBC 35, the test for 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.

[15] Having regard to all of the foregoing, we find that the Respondent's conduct is a marked departure from conduct expected of members of the Law Society and therefore does constitute professional misconduct.

DISCIPLINARY ACTION

The Law Society's Position

[16] The Law Society seeks a suspension of one to three months and costs in the amount of $6,000, calculated in accordance with the Tariff set out in Schedule 4 of the Law Society Rules, plus disbursements of $424, for a total of $6,424.

[17] Counsel for the Law Society referred to the decision of a hearing panel in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, as the leading decision on the factors to be considered in imposing a penalty. Counsel for the Law Society submitted that the most important factors relevant to this case are:

(a) the gravity of the misconduct and the need for general deterrence;

(b) the Respondent's prior discipline history and the need for specific deterrence, and

(c) the range of penalties imposed for similar misconduct and the need to ensure the public's confidence in the integrity of the profession.

[18] Counsel for the Law Society submitted that:

> The obligation to respond promptly to professional communications that require a response is key to the proper functioning of the legal profession. Members of the public who retain lawyers to assist and advise them on legal matters are entitled to expect prompt and professional service. A lawyer who fails to promptly respond to communications from other professionals not only fails to provide his own client with the quality of service expected but detracts from the quality of service being provided by opposing counsel by thwarting the timely resolution of the matter. The need for repeated follow up letters also increases the costs of legal services and undermines public confidence in the ability of the legal profession to operate in an expeditious and cost effective manner.
>
> In this case, what should have been a quick, straight-forward resolution of a small Builders' Lien claim ($6,173.34), dragged on for 17 months due to the Respondent's delay in finalizing the Settlement. As a result, the defendants incurred ongoing costs that they should not have had to incur.
>
> The Law Society needs to send a clear and unequivocal message to members of the profession that failure to respond reasonably and promptly to professional communications will not be tolerated.

[19] Counsel for the Law Society summarized the Respondent's Professional Conduct Record. The Respondent's records consist of:

(a) A practice review in 2001, which resulted in recommendations for his practice, restrictions on his areas of practice, and required the Respondent to practise under the supervision of a Practice Supervisor. The Respondent was released by the Practice Standards Committee from the Practice Supervision Agreement in 2004.

(b) In 2008, the Respondent was cited for failure to respond to opposing counsel with respect to a discharge of a Lis Pendens registered against title to a property. The Respondent admitted that this constituted professional misconduct and was fined $1,500 with costs of $1,000.

(c) In 2011, in the course of investigating the complaint against the Respondent that is the subject of this citation (described in paragraph 28 above), the Respondent was cited for failing to respond to the Law Society. The Respondent admitted that this constituted professional misconduct and was fined $5,000 with costs of $2,000.

(d) In 2012, the Respondent appeared before a Conduct Review Subcommittee for failure to report a

number of judgments to the Law Society within seven days of entry in breach of Rule 3-44(1), remit source deduction amounts to Canada Revenue Agency in a timely manner, and ensure the accuracy of the Trust Report he filed with the Law Society for the period ending September 30, 2005.

[20] Counsel for the Law Society argues that the nature of the Respondent's professional conduct record is a significant aggravating factor for two reasons: (a) it displays the pattern of delay and procrastination; and (b) it demonstrates a failure by the Respondent to respond to prior remedial and disciplinary attempts to address his failure to meet the minimum accepted standards of practice.

[21] Counsel for the Law Society referred to the four letters of support from members of the profession provided by counsel for the Respondent and argued that the letters demonstrate that the Respondent is competent and is able to meet that expected standard of practice when he so chooses.

[22] Counsel for the Law Society submits that the repeated failure to respond to opposing counsel over a long time span that has occurred in this case resulted in excessive delays for what should have been a quick, routine matter. It added to the time, cost and frustration of opposing counsel. It necessitated the involvement of the disciplinary arm of the Law Society.

[23] Counsel for the Law Society referred to one of the two medical reports submitted by counsel for the Respondent (the February 22, 2013 psychological assessment report) and identified the following comments from the report:

(a) The Respondent has no insight into what has brought these troubles about repeatedly (bottom of page 3);

(b) People with his personality construct (narcissism) deem themselves quite fine as they are (page 7);

(c) The Respondent has not learned from previous infringements and consequences. The same pattern occurs (page 4);

(d) People with his personality construct (narcissism) are generally not motivated to change (page 7); and

(e) The Respondent has "some motivation not to end up in his current situation again" (page 7). That motivation appears to be tied to his concern that "more severe consequences could occur" (page 7).

[24] Counsel for the Law Society referred to five previous decisions to show the range of disciplinary actions for failure to respond to the Law Society or opposing counsel. The disciplinary action ranges from fines of $1,500 to $7,500 and suspensions from one month to 45 days.

[25] Counsel for the Law Society argued that the decision in *Law Society of BC v. Braker*, 2007 LSBC 42, is most similar. In *Braker*, the hearing panel ordered a one month suspension.

[26] Counsel for the Law Society argued that public confidence will be eroded if lawyers with significant discipline histories are not sent a clear message that further transgressions will not be supported.

[27] Counsel for the Law Society argued that 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 significant disciplinary history. This increased sanction would accord with the principle of progressive discipline, the need for specific deterrence and the need to ensure public confidence in the legal profession.

[28] Counsel for the Law Society advised that actual costs were approximately $6,000, which is perhaps slightly above normal, in part, because of an adjournment of the hearing requested by the Respondent.

The Respondent's Position

[29] The Respondent asked for a large fine rather than a suspension.

[30] There was no submission made on costs.

[31] The Respondent advised that he has significantly changed his practice and now pays more attention to the routine matters that must be dealt with after a file has settled.

[32] The Respondent also advised that there have been significant events in his personal life that have changed his behaviour and outlook in a positive way.

[33] Counsel for the Respondent provided four letters of support from other lawyers indicating they have not experienced problems regarding delays in responses when dealing with the Respondent.

[34] The Respondent submitted that he obtains good outcomes for his clients and that his competency is not in question.

[35] The Respondent advised that he is a sole practitioner and voiced concerns that a suspension would create difficulties for his clients and would make it difficult to continue to pay his staff.

[36] Counsel for the Respondent referred to the two medical reports, one dated August 13, 2012 from a Consultant Psychiatrist and the psychological assessment report dated February 22, 2013 from a Registered Psychologist. These reports were requested by the Respondent's counsel in order to find a cause for the Respondent's problems with delays.

[37] Counsel for the Respondent argued that although the August 13, 2012 report found that the Respondent's professional difficulties do not arise from a psychiatric condition, the Respondent exhibits a pathology that suggests an underlying problem that has not yet been diagnosed and that would benefit from an on-going course of treatment involving psychotherapy.

[38] The Respondent has advised that he has attended six counselling sessions with the Registered Psychologist.

[39] The Respondent expressed surprise by many of the comments in the February 22, 2013 report and has indicated a willingness to continue with sessions and psychotherapy to explore certain aspects of his personality set out in the report.

[40] The Respondent remains unable to explain adequately why he did not respond promptly to the counsel for the defendants. The Respondent is quite aware that he could have easily avoided the complaint and this citation had he taken a few hours to respond to the counsel for the defendants and complete the steps necessary to finalize the settlement of the builders' lien action.

[41] Counsel for the Respondent argued that the 2011 citation for failure to respond to the Law Society should not be considered as a prior act of misconduct since it occurred in the course of investigating the complaint that is the subject of this citation.

DISCUSSION

[42] Considering the facts and the Respondent's repeated failures to respond, even after the involvement of the Law Society, and considering the Respondent's previous professional conduct record, the principle of progressive discipline suggests that a suspension of one month is warranted.

[43] We are concerned that the Respondent has not responded to previous disciplinary action and cannot adequately explain why he failed to respond to opposing counsel.

[44] We are concerned that the Respondent does not pay enough attention to the more routine and mundane aspects of his practice.

[45] We are concerned that the Respondent does not appear to appreciate the impact that his actions (or his failure to act) have on other persons.

[46] We are concerned that the Respondent failed to respond to opposing counsel even though opposing counsel was very courteous and patient and tried to make the Respondent's remaining tasks as easy and simple to complete as possible.

[47] We are concerned that the Respondent practises on his own and does not appear to delegate tasks to his staff or put systems in place that will prevent failures to occur such as the ones that result in complaints against him.

[48] We are concerned about all the time and effort that has been expended by the Law Society over the last 11 years to attempt to assist the Respondent and to alter the behaviour of the Respondent. We are also concerned that such efforts have not been successful.

[49] We are also concerned that the two medical reports submitted to us indicate that the Respondent is resistant to change and unaware of the effect of his behaviour on others.

[50] However, we have considered that:

(a) While the professional misconduct caused great frustration and additional costs for the opposing counsel, his client, and the Law Society, the delays did not result in any permanent harm to any person.

(b) The Respondent has possibly achieved a new level of awareness of his behaviour through his recent psychological assessment; he appears willing to continue with psychotherapy and, notwithstanding that he has previously made similar statements and assurances, seems genuinely motivated to change and to avoid future disciplinary action.

(c) While a suspension is warranted, we see a possibility that, instead of a suspension, a large fine together with an extended period of practice supervision and the certainty that a suspension will result if the Respondent delays in complying with our Order will be more likely to motivate the Respondent to alter his behaviour in the future.

[51] We are prepared to give the benefit of the doubt to the Respondent to demonstrate that a substantial fine, rather than a suspension, will result in meaningful change by the Respondent.

[52] We are of the view that the Respondent would benefit from an extended period of practice supervision. The Respondent has indicated that he is willing to enter into such an arrangement and that he would be able to find a suitable practice supervisor. We are aware that practice supervision was attempted before and did not adequately change the Respondent's behaviour. However, we believe that a focus on the Respondent's specific recurring problems by a practice supervisor that the Respondent respects may result in a positive outcome and a more lasting result.

[53] The Panel is concerned that the Respondent has, on a number of occasions, expressed a desire to change but has not been able to carry through with the necessary action. Therefore, the Hearing Panel wishes to include in its order further consequences in the event the Respondent does not comply with the terms of this order within the dates specified.

[54] This appears to us to be the sort of situation that section 38(5)(d)(iii) of the *Legal Profession Act* is intended to deal with. While section 38(5)(c) allows a panel to impose conditions and limitations, such as an extended period of practice supervision, section 38(5)(d)(iii) allows a panel to ensure compliance with the conditions and limitations by imposing a suspension on a respondent who does not comply within a reasonable time specified by the panel. We will allow the Respondent until September 30, 2013 to arrange for and enter into practice supervision. If he is not in compliance by that date, he will be suspended until he is.

ORDER

[55] The Hearing Panel orders that the Respondent:

(a) pay a fine of $15,000 on or before September 30, 2013;

(b) enter into an arrangement on or before September 30, 2013 to practise under the supervision of a lawyer selected by the Respondent and approved by the Practice Standards Committee ("the Committee") pursuant to a practice supervision agreement in a form satisfactory to the Committee, until such time as he is relieved of this condition by the Committee; and

(c) in the event that the Respondent does not comply with the requirements set out in paragraph (b) above by the date specified, the Respondent is suspended effective October 1, 2013 until such time as he satisfies the requirements set out in paragraph above.

RECOMMENDATION

[56] The Panel is quite concerned that we may be wrong in our decision not to suspend the Respondent in the first instance and that the Respondent may repeat his behaviour in his practice and not change his behaviour in a meaningful way. If that occurs, in our view the Respondent will have failed to recognize the remedial intent of our order. If the Respondent is cited again for similar misconduct, a future hearing panel should consider a lengthy suspension.

COSTS

[57] Counsel for the Law Society has calculated costs in accordance with the Tariff set out in Schedule 4 of the Law Society Rules plus disbursements, totalling $6,424. We received no submission from the Respondent's counsel. Counsel for the Respondent may make submissions on costs within two weeks of this decision. Otherwise, costs and disbursements in the amount of $6,424 will be payable on or before September 30, 2013.

PUBLICATION AND RULE 5-6 NON-DISCLOSURE OF EVIDENCE

[58] The Hearing Panel has considered the written submissions of the counsel for the Respondent and counsel for the Law Society for an order under Rule 5-6(2)(a) that specific information not be disclosed to protect a person's interests. Counsel for the Law Society does not oppose the submission of the counsel for the Respondent.

[59] In our decision we have summarized some of the information and referred to some of the quotes from medical reports. The summary and quotes included in this decision were necessary to make the reasoning for our decision understandable. The information contained in the medical reports is of a highly personal and sensitive nature, and in this situation more disclosure of information is not needed. Therefore, pursuant to

Rule 5-6(2)(a), except for the use made in our reasons, the information contained in the medical reports tendered as Exhibits 4 and 5 must not be disclosed or made available for public inspection.

[60] In addition, under Rule 5-6(2)(a), the following specific information contained in the Agreed Statement of Facts dated February 18, 2013, which was entered as Exhibit 1 to this hearing, or in the transcripts of this hearing, must not be disclosed:

(a) the names and addresses of the clients of the Respondent and the complainant;

(b) the address of the property against which the claim of Builders' Lien was registered;

(c) the names and addresses of any other parties to the underlying Supreme court Builders' Lien action and the Settlement; and

(d) any information identifying the specific Supreme Court Builders' Lien action, the claim of Builders' Lien and the certificate of pending litigation which underlie the communications between the Respondent and the complainant.

[61] Also under Rule 5-6(2)(a), the following specific information contained in the transcripts of this hearing must not be disclosed:

(a) any confidential client information about the underlying Supreme Court Builders' Lien action and the Settlement; and

(b) any references to the Respondent's medical or financial circumstances.