2013 LSBC 19
Report issued: July 08, 2013
Oral Reasons: May 7, 2013
Citation issued: July 30, 2012

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

Robert Mitchell Culos

Respondent

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

Hearing date: May 7, 2013
Panel: Kenneth Walker, QC, Chair, John Lane, Public representative, Karen Nordlinger, QC, Lawyer

Counsel for the Law Society: Alison Kirby
Counsel for the Respondent: Shane Dugas

BACKGROUND

[1] The citation was authorized by the Discipline Committee on July 12, 2012 and issued July 30, 2012. The Respondent admits that he was served with the citation pursuant to the requirements of Law Society Rule 4-15.

[2] The citation alleged that the Respondent had acted in a conflict of interest on two separate client matters. In an oral decision on May 7, 2013, we found the Respondent had committed professional misconduct, having acted in a conflict of interest contrary to the interests of his clients. We ordered that the Respondent:

(a) pay a fine of $15,000 by December 31, 2013;

(b) pay costs of $6,748 by December 31, 2013; and

(c) obtain the services of a practice supervisor approved by the Practice Standards Committee to assist with conflict decisions for one year following appointment. .

PRELIMINARY APPLICATION

[3] At the hearing Mr. Dugas, on behalf of the Respondent, sought an order to restrict public access to the hearing. Mr. Dugas also sought to restrict public access to the exhibits filed at the hearing including the Agreed Statement of Facts. Ms. Kirby on behalf of the Law Society agreed that solicitor-client interests were contained in the material and agreed that the complainant, AN, should not have access to material of another client.

[4] AN was present at the hearing but offered to step out of the hearing room during the portion of the ML complaint. We considered his kind offer and the submissions of counsel.

[5] We considered Rules 5-6 and 5-7 which state:

Public hearing

5-6 (1) Every hearing is open to the public, but the panel or review board may exclude some or all members of the public in any circumstances it considers appropriate.

(2) On application by anyone, or on its own motion, the panel or review board may make the following orders to protect the interests of any person:

(a) an order that specific information not be disclosed;

(b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).

(3) Despite the exclusion of the public under subrule (1) in a hearing on a citation, the complainant and one other person chosen by the complainant may remain in attendance during the hearing, unless the panel orders otherwise.

…

Transcript and exhibits

5-7 (1) All proceedings at a hearing must be recorded by a court reporter and any person may obtain, at his or her expense, a transcript pertaining to any part of the hearing that he or she was entitled to attend.

(2) Subject to solicitor-client privilege or an order under Rule 5-6(2), any person may obtain, at his or her own expense, a copy of an exhibit entered in evidence when a hearing is open to the public

[6] Both counsel agreed that AN should not have access to solicitor-client privileged material irrelevant to him. We ordered that he be permitted to have a copy of material relating to his relationship to the Respondent, and we ordered that the exhibits be sealed and not be available to the public pursuant to Rule 5-6(2). We accept that solicitor-client privilege and privacy interests are a sound basis for such restriction.

[7] We ordered that the hearing remain open to the public. AN was free to stay for the hearing of both complaints. We asked counsel to be mindful of solicitor-client privilege and the privacy interests arising from that privilege. Counsel were encouraged to use initials when necessary to refer to the clients and witnesses during the hearing. The public interest is served by open hearings, and that interest requires the hearings be open to the public except in extraordinary circumstances. No extraordinary circumstances existed in this hearing.

FACTS

[8] The Respondent has admitted professional misconduct in two separate client matters. He acted against the interest of his client ML when he accepted a retainer to collect an outstanding debt for a funeral home. He acted against the interest of AN when he accepted a retainer to divert funds to a trust in favour of BH. The facts are admitted in an Agreed Statement of Facts. A summary of conflict of interest in the two complaints are:

ML Complaint

1. In 2008 Mr. Culos was retained by ML to administer the estate of ML's deceased mother. During this estate file Mr. Culos transferred estate property (both real estate and a motor home) to ML.

2. By 2010 Mr. Culos was owed accounts by ML personally and by ML as administrator of the estate.

3. In 2010 a funeral service company retained Mr. Culos to collect a funeral service bill relating to the estate. Mr. Culos erred by accepting this retainer and acted in a conflict of interest by collecting this account for the funeral company against his client ML. Mr. Culos also collected his own accounts at this time.

4. During the collection of the accounts against ML, Mr. Culos used information from his initial file with ML. Through a bailiff, Mr. Culos seized a motor home which resulted in the collection of the outstanding accounts for the funeral home and Mr. Culos.

AN Complaint

5. In 2009 AN introduced BH to Mr. Culos. BH was about 90 years young but capable and competent. BH instructed Mr. Culos to prepare a power of attorney, an enhanced representation agreement, and a will. AN was named in all three documents and was the beneficiary in the will.

6. In 2010 AN retained Mr. Culos to act in the matter of the estate of the daughter of BH. BH was the sole beneficiary of this estate (recall that AN was the named beneficiary in the will of BH.). Mr. Culos obtained Letters of Administration in favour of AN in September of 2010.

7. On November 23, 2010 the estate received about $145,000 from a Pension Plan. This sum was placed into the estate trust account of Mr. Culos (AN was the Administrator).

8. Within days of receiving the $145,000, BH retained Mr. Culos to create a trust of $100,000 in favour of named charities. Mr. Culos transferred the $100,000 from the estate file to a new Charity trust file. Mr. Culos did not disclose the receipt of the $145,000 to AN, nor did he disclose the transfer of funds from the estate file ledger card to the new charity trust ledger card. Mr. Culos acted against the interest of one client (AN) in favour of another (BH) when he created this new trust for BH.

9. Immediately after the creation of the Charity trust, Mr. Culos knew that he had erred. He tried to get advice from senior practitioners and practice advisors at the Law Society. The decision to get advice was a good one but too late. The conflict had already been created.

10. Mr. Culos believed that it was important to act quickly based on the advice he was receiving from BH about AN. Mr. Culos believed that BH was taken advantage of by AN. This belief may explain his motivation but does not excuse or explain his professional misconduct.

11. AN was affected adversely by the actions of Mr. Culos. BH was also adversely affected. The $100,000 trust is now the subject of litigation that affects both AN and BH. The trust monies will remain protected until court order or until the parties reach an agreement.

[9] The Respondent admitted that he acted in a conflict of interest. We note that the Agreed Statement of Facts likely assisted him to make this admission. We commend the Respondent for working through those facts because, in the end, it assisted him and this Panel. The facts in written form is a very good way to come to understand the circumstances of the conduct. We recognize the admission of conflict in the AN matter occurred just before the hearing. We wish to thank counsel for the effort to create the Agreed Statement of Facts. We know it is hard work but the effort helped the Respondent and this Panel.

DISCUSSION

[10] The duty of “loyalty” is a core value of the profession. It has been expressed in the following way by the Benchers on a review in *Law Society of BC v. Coglon*, 2002 LSBC 21 at paras. [46] and [47]:

> The Respondent did not fail to spot a deer in difficult camouflage; this was a failure to spot an elephant in a living room. The conflicts of interest that the Respondent embraced were serious, flagrant, obvious and indefensible. …
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> … [C]onsideration of the Respondent's motivation is not helpful for determining whether professional misconduct has occurred. It is the usual case that members haven't realized, or have rationalized, why they should continue to act while keeping both clients. It is usual in conflict cases that the lawyer will lack some malign motivation and that he or she will have the strong hope that everything will work out for everyone. In a certain sense that is the problem: the Law Society cannot have, and the public interest cannot have, any real assurance that well-motivated actions taken in conflict of interest will cause less harm than those basely motivated. The problems come from the perturbations of thinking processes and judgment which result from acting with compromised loyalties.

[11] Lawyers have a duty of loyalty to each client. It is referred to as an undivided loyalty. Lawyers are trained to think about and recognize "conflicts". The Respondent failed to recognize or consider the conflict until it was too late. To adopt the analogy in *Coglon*, in both the ML and AN complaints, the conflicts were real and apparent. They were like angry bull elephants raging in the living room. Pretty hard to miss.

DISCIPLINARY ACTION

[12] The Law Society sought a one-month suspension as the sanction. Mr. Dugas on behalf of the Respondent sought a small fine. We considered the factors as outlined in *Law Society of BC v. Ogilvie*, [1999] LSBC 17. Those factors include:

(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.

[13] The Respondent was called in 1988 (25 year call). He is a sole practitioner with a good estate, wills and real estate practice. He has offices in Vernon and Armstrong. He is a proud contributor to numerous worthwhile community organizations and boards. He has in that way served his community well.

[14] He has a Professional Conduct Record comprising a 2000 Conduct Review relating to two complaints and a referral to Practice Standards between 2006 and 2008. This is his only citation.

[15] We are mindful that fines and suspensions are very dissimilar. We agree with the principles stated by the Benchers on a review in *Law Society of BC v. Hordal*, 2004 LSBC 36 paras. 54 and 55:

> [54] We disagree [with the hearing panel]. It is the view of the Benchers that there is significant difference in impact between a fine and a period of suspension. There is no useful purpose served in equating income foregone during a period of suspension with a similar amount in fine quantum. The two remedies, both available to Hearing Panels in penalty determinations, are dramatically different in import and impact. While the analogy is imperfect, it is worthy of consideration to compare the option of a fine versus a period of incarceration for a criminal offence. It is apparent that all offenders would choose the fine as the preferred option, particularly if that fine were calculated in some way as a function of the amount of income that the person would forego during a similar period of incarceration.
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> [55] The imposition of a period of suspension upon a member who has professionally misconducted himself, is a significantly more severe penalty than is the imposition of a fine. In the particular circumstances of this member, it is acknowledged that a fine would have perhaps a greater impact due to the modesty of this member's income, but panels must not seek to balance fine and suspension on a dollar for dollar basis. Suspensions are reserved for the more serious demonstrations of misconduct, and the Benchers on this review are of the view that the conduct demonstrated on these facts is that type of misconduct which warrants a significant period of suspension.

[16] We were also provided the case of *Law Society of BC v. Coglon*, 2002 LSBC 21. Mr. Coglan received a one-month suspension for acting in conflict. But *Coglan* was much more serious in our view. The *Coglan* case involved a familial aspect to the conflict and the facts involved surreptitiousness and deception.

[17] In this case, the Respondent did collect his account in the ML case, but there is no personal or familial aspect in these conflicts.

[18] We also believe that a clear message can be sent to the members of the legal profession by the fine imposed. The appropriate fine is higher than normal because there were two different complaints arising at or near the same time. Secondly, a high fine is supported because the Professional Conduct Record displays a sporadic but continuing lack of judgment. Thirdly, a higher fine is supported by the principle of progressive discipline. We were also satisfied that the Respondent could pay the fine given time.

[19] The public is protected (and hopefully the Respondent educated) by the practice supervisor in place for the next year. We recognize that the practice supervisor represents some financial cost to the practice as well.

[20] The practice supervisor will help the Respondent avoid similar issues in the future. We did not see a need to have the Practice Standards Committee receive reports from the mentor/supervisor.

[21] Costs were agreed at $6,748. Those costs are reasonable in these circumstances.

ORDER

[22] The Hearing Panel orders as follows:

The Respondent must

(a) pay a fine of $15,000 by December 31, 2013;

(b) pay costs of $6,748 by December 31, 2013; and

(c) obtain the services of a practice supervisor approved by the Practice Standards Committee to assist with conflict decisions for one year.