

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
on Disciplinary Action**

Hearing date: July 17, 2013

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

BACKGROUND

[1] On February 13, 2013, this Panel determined that the Respondent committed three counts of professional misconduct and three breaches of the Act or Rules concerning two clients.

[2] The Respondent admitted the following about the professional misconduct:

- (a) he failed to serve Client 1 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;
- (b) he failed to serve Client 2 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
- (c) he failed to pay disbursement accounts sent to him by opposing counsel and failed to respond promptly to opposing counsel in the matter involving Client 2.

[3] The Respondent admitted the following about the Act or Rules breaches:

- (a) he received remuneration from Client 1 pursuant to a contingency fee agreement, without having entered into an agreement in writing;
- (b) he failed to account to Client 1 in writing for all of the trust funds received; and
- (c) he withdrew some of Client 1's trust funds without authorization to pay bills of other clients.

[4] The Law Society submitted that the appropriate discipline should be a suspension for a period of two to four months and payment of hearing costs of \$6,948 based on a filed bill of costs. The Law Society conceded that, had it not been for the Respondent's extensive past disciplinary record, it would have sought a fine rather than a suspension. The Respondent submitted that a global penalty of \$10,000 representing both a fine and hearing costs is the appropriate discipline.

DISCUSSION

[5] The issue before the Panel is the appropriate discipline to be imposed based on the circumstances of the case and consideration of the factors set out in the leading case of *Law Society of BC v. Ogilvie*, [1999] LSBC 17.

[6] The Law Society's mandate is to uphold and protect the public interest in the administration of justice by ensuring the independence, integrity, honour and competence of lawyers. The Panel's task is to decide on a sanction that best protects the public, maintains high professional standards and preserves the public confidence in the legal profession: *Law Society of BC v. Hill*, 2011 LSBC 16, para. [3].

[7] Section 38 of the Legal Profession Act sets out a range of penalties from reprimand to disbarment for professional misconduct.

[8] The Panel has considered the *Ogilvie* factors as follows:

The nature and gravity of the conduct proven

The Respondent admits the allegations are serious but says none of them involved dishonesty, bad faith, sharp practice, conflicts of interest or other types of conduct generally considered to attract a suspension. The Panel notes that in 2012, the Respondent was suspended for one month in matters that did not involve any malice or deception.

The age and experience of the Respondent

The Respondent was called to the Bar on May 10, 1983 and is 58 years old. He is married with two teenage children. He maintains an active litigation practice.

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

The Respondent's professional conduct record for various matters includes four conduct reviews: in 1987, 1995(2) and 2012; and three disciplinary citations issued: in 1994 and 2011/2012 (heard together). From that record, three matters are significant. The first matter is the conduct review held in 1995 that involved the Respondent's failure to ensure timely payment of a file's disbursements after the transfer of a file to the Respondent's firm. The Panel notes this is not the first time the Respondent has failed to pay disbursements in a timely manner.

The second matter relates to a citation issued September 27, 1994 resulting in a finding that the Respondent had engaged in conduct amounting to professional misconduct by attempting to mislead the police in respect of an impaired driving charge laid in 1992 and in attempting to cause his client to mislead the police. The Respondent had allowed the passenger, who was also his client, to say he was the driver when it was the Respondent. The Respondent was fined \$6,000.

The third matter is the disciplinary hearing held in 2012, after a trust audit revealed irregularities and non-compliance, resulting in six allegations of professional misconduct for the period of 2005-2008 and four allegations of professional misconduct for the period of 2009-2010. The trust audit also revealed that, during 2005 to 2008, the Respondent failed to enter into written contingency fee agreements with five clients, suggesting a long-standing practice of failing to put contingency fee agreements in writing to protect his clients. In the 2012 matter, the Respondent agreed to a joint disciplinary submission. He was suspended for one month and paid costs of \$8,500.

The impact on the victim

The Respondent tendered several letters as character references and testified that he has made amends with Client 1. Of significance is a letter in which Client 1 suggested he might have reconsidered making the complaint had he understood the Respondent could be suspended. However, it is unclear from that letter, and a similar letter from Client 1's father, whether either or both knew of the Respondent's past disciplinary record. The Panel has no information regarding the impact on Client 2.

Any advantage gained by the respondent

The Respondent gained no advantage in this case.

The number of times the offending conduct occurred

The Respondent failed to serve two of his clients in a conscientious, diligent and efficient manner. In the course of serving Client 2, the Respondent also failed to communicate promptly with opposing counsel and to pay court-ordered disbursements in a timely manner.

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

At the disciplinary hearing, the Respondent expressed remorse and gave his assurance that appropriate office safeguards have been put in place, including the hiring of a bookkeeper. He also shared personal insight into why the events occurred as they did.

The possibility of remediation or rehabilitation of the Respondent

The Respondent admitted to the professional misconduct and breaches in this case. The Panel notes that none of the allegations in this case involved malice or deception. The possibility remains that the Respondent will not make the same mistakes again.

The impact on the Respondent of any criminal sanctions

This factor is inapplicable.

The impact of the proposed penalty on the Respondent

The Panel notes the Respondent's testimony that a two to four month suspension is excessive and disproportionate, will irreparably harm his practice and prejudice his clients.

The need for specific or general deterrence

The Respondent faces a total of six allegations involving professional misconduct and breaches of the Act and Rules. Accordingly, the Panel places particular emphasis on specific deterrence.

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

Given the circumstances of this case and the Respondent's previous disciplinary record, the Panel places particular emphasis on this factor to ensure that public confidence in the legal profession is maintained.

The range of penalties imposed in similar cases

The Panel acknowledges the Law Society's concern that progressive discipline be imposed because of the Respondent's extensive disciplinary record.

In several cases involving professional misconduct, the panels imposed suspensions of between three weeks and 45 days, notably *Law Society of BC v. Hill*, 2011 LSBC 16, *Law Society of BC v. Simons*, 2012 LSBC 23; *Law Society of BC v. Turner*, [1998] LSDD No. 126; *Law Society of BC v. Williamson*, 2005 LSBC 134; and *Law Society of BC v. Cruickshank*, 2012 LSBC 27.

DISCIPLINE

[9] The Panel takes a global view of the discipline to be imposed concerning the six allegations involving either professional misconduct or breaches of the Act or Rules.

[10] For the reasons above, the Panel determines that the appropriate discipline to be imposed on the Respondent is a 45-day suspension. The suspension is to start on the first day of September, 2013.

COSTS

[11] The Law Society submits that costs should be assessed against the Respondent in the amount of \$6,948, as calculated under the tariff of costs in Schedule 4 of the Law Society Rules. Rule 5-9 requires the Panel to have regard to the tariff when assessing costs. The Respondent submits that costs should be assessed in the amount of \$5,000. In our view, in this case, it is not reasonable or appropriate to depart from the amount based on the tariff.

[12] The Respondent is also required to pay the Law Society's costs of \$6,948 by October 31, 2013 or such other date as may be agreed on between the parties.