2013 LSBC 23
Report issued: August 29, 2013
Oral Reasons on Facts and Determination: June 25, 2013
Citation issued: February 13, 2013

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

Sean Patrick O'Neill

Respondent

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

Hearing date: June 25, 2013
Panel: David Mossop, QC, Chair, Adam Eneas, Public Representative, Dale G. Sanderson, QC, Lawyer

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

Background

[1] The Respondent has been cited for professional misconduct. The citation alleges:

> 1. Between September 2010 and February 2012, in the course of representing your client C Developments Ltd. in connection with its listing on a Canadian stock exchange by way of a reverse takeover of M Limited, you:
>
> > (a) acted in a conflict of interest by negotiating an Amended and Restated Finder's Agreement between C Developments Ltd., M Limited and CP when you had a direct or indirect financial interest in the subject matter of the contract, contrary to Chapter 7, Rule 1 of the *Professional Conduct Handbook* and your duty of undivided loyalty to your client;
> >
> > (b) took compensation directly or indirectly from CP without making full disclosure to your client C Developments Ltd. and obtaining its consent, contrary to Chapter 9, Rule 8 of the *Professional Conduct Handbook* and your duty of undivided loyalty to your client.
>
> This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[2] The Respondent agrees that he was served with the citation by delivery to his counsel, Henry Wood, QC.

[3] The parties submitted an Agreed Statement of Facts, which sets out in part:

> 1. Mr. O'Neill's firm was retained in February 2010 by a closely held Chinese company (the "Client") to assist it with "going public" in Canada and becoming listed on a Canadian stock exchange.
>
> 2. Mr. O'Neill introduced the Client to CP, a third party businessman, who would provide the Client with financial advice and assist in locating a suitable company which could be listed on a Canadian stock exchange. In February 2010, CP introduced the client to M Limited, a capital pool company listed on the TSX Venture Exchange.
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> 3. In February 2010, Mr. O'Neill prepared a Finder's Agreement for CP which was amended in May 2010. It was a tri-party Agreement between the Client, CP and M Limited which provided in part, that CP would be paid a finder's fee of $103,049.40 payable in shares in the new company based on a value of $0.05 per share.
>
> 4. In the fall of 2010 CP told Mr. O'Neill he was contemplating a gift to Mr. O'Neill of some of the shares he would receive as compensation for Mr. O'Neill's hard work.

5. In September, Mr. O'Neill prepared a draft "Services Agreement" providing that 420,610 shares of the new company (20 per cent of CP's shares) would be transferred to Mr. O'Neill's wife in exchange for her financial advice and services. This agreement was never executed or shown to anyone. Mr. O'Neill acknowledges that he contemplated the shares being transferred into his wife's name for tax purposes, i.e. "income sharing". We did not understand that his wife would actually provide advice or services.

6. On November 1, 2011, the previous tri-party Finder's Agreement was again amended. CP was to receive a finder's fee of $206,098.80 payable by $72,134.58 in cash and the issuance of 1,339,642 shares.

7. About Christmas, CP again told Mr. O'Neill that he was contemplating transferring to Mr. O'Neill some of the shares he would receive. Mr. O'Neill did not inform the Client that he might receive some share from CP.

8. On February 1, 2012, the transaction closed. On February 7, 2012, CP told Mr. O'Neill he would transfer 20 per cent of his shares in the new company to Mr. O'Neill. Mr. O'Neill asked CP to transfer them to his wife for income tax purposes. On February 13, 2012, 273,382 shares of the new company, C Corp., formally M Limited, were transferred to Mr. O'Neill's wife. Mr. O'Neill did not inform the Client.

9. During the trading period from February 1, 2012 to September 7, 2012, only 15,200 shares of C Corp. were traded at an average weighted price of $0.12 per share. The total paper face value of the shares traded was $27,338.

10. On March 9, 2012, Mr. O'Neill's law firm made a complaint to the Law Society. Mr. O'Neill was later dismissed from his law firm.

11. On October 12, 2012, Mr. O'Neill's wife transferred the shares back to CP.

[4] The Respondent admits the allegations contained in the citation and that such conduct constitutes professional misconduct.

HAS THE RESPONDENT BEEN GUILTY OF PROFESSIONAL MISCONDUCT?

[5] The Panel concludes that he has.

[6] The onus is on the Law Society to prove on a balance of probabilities that the Respondent has been guilty of professional misconduct (*Law Society of BC v. Schauble*, 2009 LSBC 11). 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." (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171, *Re: Lawyer 12*, 2011 LSBC 35 at para. 7.)

[7] Counsel for the Law Society submits that there are two bases for considering whether the Respondent has committed professional misconduct.

[8] The first is the Respondent was in a conflict of interest in acting for the Client while at the same time agreeing to accept and accepting shares from CP.

[9] It is not disputed by the Respondent that, in British Columbia, there has been a long-standing recognition of the duty to avoid conflicts of interest. It is reflected in the case law and in Chapter 1, Canon 3(2) and Chapters 6 and 7 of the *Professional Conduct Handbook*. Chapter 7, Rule 1 of the *Professional Conduct Handbook* provides:

> Except as otherwise permitted by the Handbook, a lawyer must not perform any legal services for a client if:
>
> (a) the lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
>
> (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgement.

[10] As stated by Mr. Justice Binnie in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 1:

> A fundamental duty of a lawyer is to act in the best interest of his or her client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client.

[11] In the present case, the Respondent provided legal services to his client when he had a financial interest, not only in ensuring the transaction closed but also in the number of shares being transferred by the client to CP, because he stood to personally benefit by receiving 20 per cent of those shares on closing.

[12] The second basis advanced by the Law Society to support a conclusion of professional misconduct was the failure of the Respondent to fully disclose to the Client that any other fee was being charged or accepted, contrary to Chapter 9, Rule 7 of the *Professional Conduct Handbook*.

[13] Chapter 9, Rule 8 of the *Professional Conduct Handbook* further provides:

> A lawyer must take no fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation whatsoever related to the lawyer's professional employment from anyone other than the client or the person who is paying part or all of the lawyer's fee on behalf of the client, without full disclosure to and consent of the client or that other person.

[14] As stated by Gavin MacKenzie in his text; *Lawyers & Ethics: Professional Responsibility and Discipline* at page 25-15:

> Thus no fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation whatsoever related to the professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and consent of the client …

[15] The Panel concludes that the Respondent has breached Chapter 7, Rule 1 of the *Code of Professional Conduct* and Chapter 9, Rule 8 of the *Code of Professional Conduct*. The Panel concludes that the Respondent's conduct was a marked departure from that conduct that the Law Society expects from its members. Accordingly, the Panel concludes that the Respondent has committed professional misconduct.

[16] We conclude that there should be a finding of one act of professional misconduct. Although there were two breaches of the *Code of Professional Conduct*, they arise out of the same transaction namely, accepting shares without disclosure to his Client. As stated by Law Society counsel in her written submissions:

> 4. The Law Society submits that in this case the Respondent committed an act (taking of shares) which gave rise to a breach of two distinct rules of professional responsibility (failure to avoid conflict of interest and prohibition against taking hidden fees) but amounts to one finding of professional misconduct.
>
> 13. In this case, as recommended in the *McGuire* decision, the allegation is organized so that the Respondent's action with respect to this client matter says that he broke professional responsibility principle A (failed to avoid conflict of interest) and B (hidden fees). There is however only a single allegation and it is to be treated as a single instance of misconduct subject to discipline.

We conclude therefore that one finding of professional misconduct is appropriate. This approach was agreeable to both the Law Society and the Respondent.

Disciplinary Action

[17] The parties have agreed that the appropriate range of disciplinary action would be that the Respondent pay:

(a) costs of $4,124, payable by October 31, 2013; and

(b) a fine of $3,000 to $5,000 payable by October 31, 2013.

[18] The purposes of disciplinary proceedings are set out in *Law Society of BC v. Hill*, 2011 LSBC 16 at para. 3:

> It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our

task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

[19] In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the Panel detailed the following non-exhaustive list of factors to consider when imposing a penalty:

(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 on 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.

[20] The Panel has considered these factors and concludes as follows:

(a) The nature and gravity of the conduct is serious. The Respondent has committed professional misconduct. The duty to avoid conflicts and the duty of candour are components of the duty of undivided loyalty that every lawyer owes to his client. Those duties are essential to the administration of justice and the public confidence in the integrity of the legal system (*R. v. Neil*, 2002 SCC 70).

(b) The Respondent is now 44 years old. He had approximately seven years' experience at the time these events occurred. That was sufficient time and experience for him to understand and recognize that his actions were wrong.

(c) There is no evidence or suggestion of the Respondent being of bad character. There was one prior disciplinary sanction.

It occurred as a result of the law firm's investigation into this matter. The law firm discovered that the Respondent had billed a different client directly for travel disbursements he had incurred on behalf of that client. This was contrary to the law firm's policy. On February 16, 2012, the Respondent met with the firm's management to discuss his conduct relating to this citation. On February 17, 2012 while reviewing the Services Agreement on his office computer he came across the invoice on this other unrelated file. He deleted it to avoid further confrontation with the firm over non-compliance with the firm's policies. He said that he believed he had done nothing wrong or detrimental to the firm in invoicing in this manner. It is accepted that the invoice was for legitimate expenditures incurred on behalf of that client.

On February 28, 2013, a Conduct Review Subcommittee conducted a conduct review relating to this invoicing matter. The Subcommittee concluded that his conduct was inappropriate as it called into question the Respondent's integrity. The Subcommittee recommended to the Discipline Committee that they accept the report as appropriate disciplinary action and take no further action.

(d) There was no evidence or suggestion that the Respondent's conduct had any negative impact on the victim.

(e) The Respondent stood to gain by the transfer of the shares to his wife. The paper value of those

shares was approximately $27,000. However, the Respondent testified that he thought the shares would be of little or no real value. He did, however, accept them, probably in the hope they might be worth something. Ultimately, he did not gain anything.

(f) The Respondent testified that this was the first and only time he engaged in this type of conduct and the Panel accepts his evidence in that regard.

(g) The Respondent acknowledged his misconduct, assisted the Law Society with the investigation, apologized and expressed his sincere regret for what he had done. Again, the Panel accepts his evidence in this regard.

(h) The Panel accepts the Respondent's evidence and his counsel's submission that the Respondent had learned from his conduct and these proceedings. He says he will be more thoughtful and careful in the future. The Panel also accepts that evidence.

(i) We do not foresee any criminal or other sanctions or penalty being imposed on the Respondent, apart from the penalty imposed by this Panel.

(j) The Respondent and his counsel both said that the Respondent will suffer from the adverse publicity this will bring to the Respondent. His counsel submitted that, as we live in a "Google World", anyone who googles the Respondent will learn of these proceedings and he will carry that stigma with him forever.

We do recognize that possibility exists and that the Respondent may suffer somewhat from it in the future. However, we do not believe that is a significant factor for consideration. When lawyers have misconducted themselves, the adverse publicity that comes with that must be accepted by the lawyer. That is true for all lawyers and is not unique to this case. It should not, in our view, be a factor which should be considered to reduce the penalty that the Panel believes is otherwise appropriate.

All lawyers will face this potential embarrassment if they are disciplined for misconduct, and we believe that to reduce an otherwise appropriate penalty because of potential public knowledge of it would be wrong in principle. It could mean that all penalties should be reduced because of the adverse publicity about the lawyer. We do not believe that is a correct principle to follow.

(k) The impact of the proposed penalty, apart from the adverse publicity, was not addressed by the Respondent. We assume, therefore, that the penalty range agreed to would not be too burdensome for the Respondent.

(l) We are satisfied that the disciplinary action we impose will meet the need for specific and general deterrence. We do not think the Respondent will again engage in such conduct. We also believe that the disciplinary action is sufficient to discourage other lawyers in general from similar conduct.

(m) We conclude that the proposed disciplinary action will ensure the public's confidence in the integrity of the profession. The disciplinary action is proportional to the conduct of the Respondent when the Panel considers the mitigating factors described above. The disciplinary action is sufficient in our opinion to satisfy any public concern that the Law Society takes its role in protecting the public interest in the administration of justice seriously and that it appropriately disciplines its members if they step out of bounds.

(n) There were not many previous cases dealing with the taking of hidden fees. Cases that were helpful and dealt with conflict of interest imposed penalties ranging from a fine of $2,000 to a two-month suspension.

[21] In addition to considering all of these factors, we have also considered the fact that the Respondent was dismissed by the Firm and the importance of the fact that the range of penalties proposed have been agreed to by both Law Society and the Respondent. We also recognize the importance of the Respondent admitting the professional misconduct for the purpose of this hearing.

[22] This Hearing Panel has decided to include a reprimand in the disciplinary action. We have done this even though the parties have agreed to a specific range of a fine and costs. We do this because we feel it is in the public interest to show a general deterrent in conflict of interest matters.

ORDER

[23] Accordingly, the Panel directs that the Respondent:

(a) be reprimanded;

(b) pay a fine of $5,000 by October 31, 2013; and

(c) pay the costs of this hearing in the amount of $4,124 by October 31, 2013.