

2013 LSBC 33

Decision issued: November 27, 2013

Oral decision on Facts and Determination: June 20, 2013:

Citation issued: April 9, 2013

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

PHILIP RICHARD DERKSEN

Respondent

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

Hearing date: June 20, 2013

Panel: Greg Petrisor, Chair, John Ferguson, Public representative, Shona Moore, QC, Lawyer

Counsel for the Law Society: Carolyn Gulabsingh

Appearing on his own behalf: Philip Derksen

introduction

[1] Philip Derksen (the “Respondent”) is the subject of a citation that alleges:

1. You failed to provide a substantive response promptly to communications from the Law Society concerning its investigation regarding a judgment you did not report to the Law Society, contrary to one or both of Chapter 13, Rule 3 of the *Professional Conduct Handbook*, or Rule 7.1-1 of the *Code of Professional Conduct for British Columbia* and in particular you failed to respond substantively to some or all of:

(a) letters dated September 6, 2012, December 13, 2012, January 15, 2013, January 30, 2013, February 20, 2013, March 6, 2013, and March 26, 2013; and

(b) a voice mail message left on March 26, 2013.

This conduct constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act*.

2. You failed to provide a substantive response promptly to communications from the Law Society concerning its investigation regarding concerns arising from the compliance audit of your practice conducted on or about October 10 to 12, 2012, contrary to one or both of Chapter 13, Rule 3 of the *Professional Conduct Handbook*, or Rule 7.1-1 of the *Code of Professional Conduct for British Columbia* and in particular you failed to respond substantively to:

(a) letters dated December 13, 2012, January 15, 2013, January 30, 2013, February 21, 2013, and March 26, 2013; and

(b) a voice mail message left on March 26, 2013.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[2] The Respondent was served with the citation on April 10, 2013.

[3] Rule 4-24.1(1)(c) provides that the Law Society may proceed with a summary hearing in respect of a citation that alleges only that the Respondent failed to respond to communications from the Law Society. Accordingly, the Law Society introduced its evidence in support of the allegations against the Respondent by way of affidavits. Rule 4-24.1(1) provides that the Hearing Panel may consider facts, determination, disciplinary action and costs, and make one decision respecting all aspects of the proceeding.

[4] In affidavits submitted by the Law Society, a staff lawyer with the Professional Conduct Department deposed to telephone conversations and correspondence exchanged with the Respondent.

Correspondence from the Respondent included a letter dated May 15, 2013 that provided a partial response to requests from the Law Society for information and documents requested in earlier correspondence. Counsel for the Law Society characterized the Respondent's response to requests made of him for information and documents as an incomplete response, but acknowledged the Respondent had provided a response. Counsel advised that the Respondent had provided further material to her on the date of the hearing, but without time to review that material, she could not say if the material answered all of the requests for information made of the Respondent.

[5] The Respondent admitted service of the citation. He took issue with the allegation that he failed to respond substantively to letters dated December 13, 2012, January 15, 2013 and January 30, 2013, but he admitted that, in a global sense, he failed to provide prompt or adequate responses to Law Society communications regarding both investigations he was involved in. He characterized his efforts to respond as imperfect and ongoing rather than a refusal to respond. He acknowledged that he had not, prior to the date of the hearing, provided a full response to the requests for information made of him by the Law Society.

[6] The Respondent admitted at the hearing that his conduct constitutes professional misconduct.

[7] We found, after consideration of the affidavit evidence and the Respondent's admission, on a balance of probabilities, that the Respondent failed to provide a substantive response promptly to communication from the Law Society, in respect of an investigation regarding an alleged unreported judgment against him, and an investigation regarding concerns from a compliance audit of his practice.

[8] We also found that the Respondent's conduct constitutes professional misconduct. We advised the Respondent and counsel for the Law Society that we would provide written reasons to follow. We received oral evidence from the Respondent and heard submissions regarding the disciplinary action to be imposed. We reserved our decision in that respect. These are our reasons.

[9] Law Society counsel applied under Rule 5-6(2) for an order sealing the affidavits of Howie Caldwell, a Law Society staff lawyer, as well as the second affidavit of Michelle Morris, process server, sworn May 14, 2013, to protect confidential information contained in those documents. The Respondent did not make any submissions in respect of that request. As previously stated, the investigation of the Respondent was the result of concerns arising from a compliance audit of the Respondent's practice. Material generated in that investigation, contained in Exhibits to Ms. Morris' second affidavit and Mr. Caldwell's affidavits, includes names of clients of the Respondent as well as details of financial transactions between the Respondent and named clients. We are of the view that the order sought sealing those specified affidavits is appropriate and necessary for the protection of the privileged client information described.

DISCUSSION

[10] Chapter 13, Rule 3 of the *Professional Conduct Handbook* (the "Handbook") and Chapter 7.1-1 of the *Code of Professional Conduct for British Columbia* (the "Code") are similar but not identical in their wording.

[11] Chapter 13, Rule 3 of the Handbook begins:

A lawyer must

(a) reply promptly to any communication from the Law Society;

while Chapter 7.1-1 of the Code begins:

A lawyer must

(a) reply promptly *and completely* to any communication from the Society.

[emphasis added]

[12] Both the Handbook and the Code continue:

(b) provide documents as required to the Law Society;

(c) not improperly obstruct or delay Law Society investigations, audits and inquiries;

(d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;

...

(f) otherwise comply with the Law Society's regulation of the lawyer's practice.

[13] The Respondent argued that the current Code, and the requirement that a lawyer reply promptly *and completely* to any communication from the Law Society only came into force on January 1, 2013, which is after the date of the initial correspondence referred to in the citation. We reject that argument. The Handbook, in addition to requiring a prompt response to any communication from the Law Society, also requires the Respondent to provide documents as required, not improperly obstruct or delay an investigation, cooperate with an investigation, and otherwise comply with the Law Society's regulation of his practice. The Respondent did not meet those obligations. Further, his failure to respond promptly and substantively to communication from the Law Society continued after January 1, 2013, and the current Code's coming into force.

[14] The test for the determination of professional misconduct is well established. The test is stated in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [171], and followed in *Re: Lawyer 12*, 2011 LSBC 35 at paragraphs [8] and [42]. If the Respondent's conduct, as proven on a balance of probabilities, is a marked departure from that conduct the Law Society expects of its members, it constitutes professional misconduct.

[15] As previously stated, the Respondent admitted at the hearing that his conduct constitutes professional misconduct.

[16] The Law Society is charged with the regulation of its members. To effectively regulate its members, the Law Society must receive cooperation from its members in investigations, audits, and inquiries. Chapter 13, Rule 3 of the Handbook and Chapter 7.1-1 of the Code make those expectations clear. We find that the Respondent's conduct is a marked departure from that expected by the Law Society, and therefore constitutes professional misconduct.

Disciplinary Action

[17] The purpose of disciplinary action in Law Society proceedings is not to punish the Respondent or to exact retribution. In accordance with the Law Society's statutory mandate to uphold and protect the public interest in the administration of justice, as set out in section 3 of the *Legal Profession Act*, disciplinary action must be designed to protect the public, maintain high professional standards in the legal profession, and preserve public confidence in the profession. This principle is stated in Mackenzie, *Lawyers and Ethics: Professional Regulation and Discipline* at p. 26-1 and in decisions including *Law Society of BC v. Hordal*, 2004 LSBC 36 (paragraph 51), and *Law Society of BC v. Hill*, 2011 LSBC 16 (paragraph 3).

[18] *Law Society of BC v. Ogilvie*, [1999] LSBC 17, sets out a non-exhaustive list of factors for consideration in a disciplinary action. Those include the following:

The nature and gravity of the conduct proven

A failure by a lawyer to respond to communication from the Law Society is serious. Complete and timely cooperation from its members is necessary for the Law Society to effectively regulate the profession.

The age and experience of the Respondent

The Respondent was, at the date of the hearing, 55 years old. He was called to the bar in May, 1988. He is a senior member of the bar. That is an aggravating factor.

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

The Respondent has an extensive Professional Conduct Record. He was the subject of a practice review in 1992 that led to the Respondent undertaking not to practise in wills and estate matters or in solicitor's real estate matters. He was the subject of a Law Office Management Accounting Systems review in 2003 that led to the Respondent undertaking to restrict his practice to criminal law matters. In 2004 the Respondent was cited for failing to hold funds collected for GST and PST, and for practising for three months without having paid for professional liability insurance. The Respondent has been the subject of two Conduct Reviews in 2009 and 2011, both of which involved allegations of delay and

inactivity. The Respondent's Professional Conduct Record is an aggravating factor, and has an effect on the consideration of specific deterrence below.

The number of times the offending conduct occurred

The Respondent failed to respond substantively and promptly to several letters, and a voice mail message, over a period of months, at least up to the date of the hearing. That may be characterized as multiple instances of misconduct or a single instance of misconduct, but in either case the misconduct was persistent over an extended time period and is an aggravating factor.

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

As stated, the Respondent took issue with the allegation that he failed to respond substantively to the letters dated December 13, 2012, January 15, 2013, and January 30, 2013, but he did admit in a global sense that he failed to respond substantively or promptly to communication. Although late, the Respondent did make an effort to comply with the requests for information made of him up to the date of hearing. He also admitted professional misconduct. Those are mitigating factors.

The impact of the proposed penalty on the Respondent

Counsel for the Law Society proposed that the Respondent serve a one-month suspension from the practice of law. The Respondent is a sole practitioner. A suspension would have a substantial impact upon him. The Respondent urged us to impose a fine or at most a short suspension. He argued that his being cited and found to have committed professional misconduct would in itself have a significant impact upon him.

The need for specific and general deterrence

The Respondent acknowledged that he could have and should have made better efforts to respond to the correspondence sent to him. The sanction to be imposed must be significant enough to provide the Respondent with deterrence from similar conduct in the future. The Respondent's Professional Conduct Record is an important factor in that consideration. As well, other members of the profession need to be deterred from similar conduct.

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

The Law Society must be committed to and capable of the effective regulation of its members. Obtaining the full and timely cooperation of its members in investigations is critical to effective regulation. A serious sanction is necessary to illustrate that commitment and capability to the public.

The range of penalties imposed in similar cases

Counsel for the Law Society and the Respondent provided authorities which include the following:

Law Society of BC v. Dobbin, [1999] LSBC 27, in which a reprimand and costs of \$2,000 were ordered;

Law Society of BC v. Hall, 2003 LSBC 11, in which a one-week suspension and costs of \$500 were ordered;

Law Society of BC v. Hall, 2004 LSBC 01, in which a one-month suspension, a substantive response, an undertaking and costs to be assessed were ordered;

Law Society of BC v. Ashton, 2004 LSBC 11, in which a three-month suspension and costs of \$2,633.50 were ordered;

Law Society of BC v. Williamson, 2005 LSBC 04, in which a suspension of 45 days and costs of \$24,876.79 were ordered;

Law Society of BC v. Geronazzo, 2005 LSBC 40, in which a two-month suspension and costs of

\$1,000 were ordered;

Law Society of BC v. Braker, 2007 LSBC 42, in which a one-month suspension, a substantive response, an undertaking and costs of \$5,550 were ordered;

Law Society of BC v. Tak, 2009 LSBC 25, in which a fine of \$2,000, a substantive response and costs of \$2,000 were ordered; and

Law Society of BC v. Welder, 2010 LSBC 05, in which a 45-day suspension and costs of \$3,000 were ordered.

[19] In light of the factors listed above, and considering the Respondent's professional conduct history, we think a suspension is a more appropriate sanction than a fine or reprimand. The Respondent must take his obligation to cooperate and communicate with the Law Society seriously, and other members and the public must have confidence in the Law Society's ability to investigate and regulate its members.

[20] We think a suspension of one month is sufficient to achieve the objectives of general and specific deterrence and maintaining public confidence in the Law Society's regulation of its members. At the same time, a one-month suspension is sensitive to the Respondent's circumstances. A one-month suspension is within the range of sanctions imposed in several other decisions involving similar misconduct.

[21] The Respondent's misconduct is continuing, to the extent that he has not yet made complete and substantive responses to Law Society inquiries. He must take steps to set things right. There will be an order that he fully and promptly respond to outstanding inquiries from the Law Society.

COSTS

[22] Schedule 4, the Tariff for Hearing and Review Costs of the Law Society Rules specifies \$2,000 as the amount for costs for a one day summary hearing. Rule 5-9(1.1) requires any hearing panel to have regard to the Tariff for costs, but sub-rule (1.2) allows a hearing panel to order a different amount for costs if appropriate. We see no reason to award costs different from the Tariff amount, and accordingly set costs payable by the Respondent at \$2,000.

ORDER

[23] We order:

- (a) the Respondent must provide a complete and substantive response to the inquiries made in the Law Society's letters to the Respondent dated June 26, 2012; July 18, 2012; July 30, 2012; August 21, 2012; September 6, 2012; December 13, 2012; January 15, 2013; January 30, 2013; February 20, 2013; March 6, 2013; and March 20, 2013, by December 15, 2013;
- (b) the Respondent is suspended from practising law for a period of one month, such period to commence January 1, 2014, or such earlier date as agreed between the Respondent and Law Society counsel;
- (c) the Respondent must pay \$2,000 as costs to the Law Society by December 31, 2013; and
- (d) the following affidavits are hereby sealed and must not be disclosed despite Rule 5-7(2):
 - (i) affidavit of Howie Caldwell sworn May 3, 2013 and entered as Exhibit "4" at the hearing of this matter;
 - (ii) affidavit of Howie Caldwell sworn May 31, 2013 and entered as Exhibit "5" at the hearing of this matter; and
 - (iii) the affidavit of Michelle Morris sworn May 14, 2013 and entered as Exhibit "3" at the hearing of this matter.