

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

Brian John Kirkhope

Respondent

**Decision of the Hearing Panel
on Disciplinary Action**

Hearing date: October 29, 2013

Panel: Thomas P. Fellhauer, Chair, Ralston Alexander, QC, Lawyer, Patrick Kelly, Public representative

Counsel for the Law Society: Alison L. Kirby

Counsel for the Respondent: Henry C. Wood, QC

BACKGROUND

[1] By decision dated July 4, 2013, the Hearing Panel found that the conduct of the Respondent set out in the citation issued February 28, 2012 (the "Citation") constituted professional misconduct. This finding was set out in a decision of the Hearing Panel on Facts and Determination reported at 2013 LSBC 18.

[2] The finding of professional misconduct was made in respect of Mr. Kirkhope receiving a spousal support payment from his client and not paying it to his client's spouse when it was due pursuant to a court order but instead holding such payment to attempt to motivate a quicker settlement of the division of property issues that related to the settlement of the parties' rights arising under their marriage.

[3] The relevant facts are detailed in the Decision of the Hearing Panel on Facts and Determination.

[4] The Law Society has proposed a suspension from practice of two months and submitted a draft Bill of Costs.

[5] Counsel for the Respondent's position is that something less than a suspension is appropriate.

[6] Counsel for the Respondent also made submissions that certain costs, namely \$1,000 with respect to written submissions by the Law Society on its Application for Non-Disclosure dated February 5, 2013 and a disbursement of \$1,519.28 for the cost of the hearing transcript, should be omitted.

[7] Counsel for the Law Society did not oppose these proposed omissions to its Bill of Costs.

DISCUSSION

[8] It is for this Panel to determine the appropriate disciplinary action to be imposed in the circumstances of this Citation.

[9] The Panel considered the oral and written submissions of counsel for the Law Society and the oral submissions of counsel for the Respondent.

[10] The Panel was also provided with the opportunity to hear directly from the Respondent, to ask the Respondent questions, and to hear his responses.

[11] The mandate of the Law Society is to protect the public interest in the administration of justice. The authority to discipline members for professional misconduct is set out in s. 38 of the *Legal Profession Act* and Rule 4-35(1)(b) of the Law Society Rules.

[12] The Panel was directed to the factors set out in the *Law Society of BC v. Ogilvie*, 1999 LSBC 17 (“Ogilvie”) and the recent decision of the review panel in the *Law Society of BC v. Lessing*, 2013 LSBC 29 (“Lessing”).

[13] The hearing panel in *Ogilvie* set out a number of appropriate factors to be taken into account that are worth repeating here (from paragraph 10 of *Ogilvie*). While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:

- (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.

[14] The review panel in *Lessing* noted that not all the *Ogilvie* factors would come into play in all cases and the weight given to these factors would vary from case to case.

[15] In considering the *Ogilvie* factors, we note the following:

The nature and gravity of the conduct proven

The Respondent participated in a strategy that resulted in a breach of a court order. The Respondent was well aware of the court order as he participated in the court hearing where the order was made. Compliance with court orders is fundamental to the administration of justice, and failure to uphold a court order is a serious matter. As a result, we consider this to be an aggravating factor.

The age and experience of the Respondent

The Respondent has been practising for over 23 years and is very experienced in family law matters and civil litigation generally. We consider this to be an aggravating factor.

The previous character of the Respondent including details of prior discipline

The Respondent has two prior citations. In September of 2004, there was a finding of professional misconduct for the Respondent's conduct in receiving and using an illegally intercepted privileged communication. In October of 2010, there was a finding of professional misconduct for the Respondent's conduct in causing and permitting the execution and registration of a mortgage against his client's matrimonial home for the purpose of securing his legal fees when he ought to have known that the registration of the mortgage was in violation of a court order. We consider these two prior findings of professional misconduct to be an aggravating factor.

The impact upon the victim

The Respondent's conduct occurred in the context of a contested family matter. The spouse of the Respondent's client (the "Complainant") was entitled to monthly spousal maintenance. The Complainant lodged a complaint with the Law Society that set out, in part, the impact of the Respondent's behaviour on her. From this, we consider the impact of that behaviour to be an aggravating factor.

The advantage gained or to be gained by the Respondent

The Respondent has admitted that he participated in this strategy with the hope that it would motivate the Complainant and her legal counsel to speed up the process of a division of property and resolution of the other issues in dispute. This was to the benefit of the Respondent and his client. We consider this to be an aggravating factor.

The number of times the offending conduct occurred

The Respondent's behaviour occurred once. After the Respondent was contacted by the Law Society, he immediately ceased his involvement in this strategy. We consider this to be a mitigating 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 circumstances

The Respondent has acknowledged his misconduct and, as stated above, took quick action to redress the wrong. We consider this to be a mitigating factor.

The possibility of remediating or rehabilitating the Respondent

The Respondent has indicated that he has taken concrete steps to reduce and cease his involvement in disputed family files. The Panel acknowledges that the Respondent appears to be sincere in his commitment to taking steps to change his practice; however, we note that the Respondent has had two prior findings of professional misconduct, the most recent of which

involved a breach of a court order. That complaint was in progress at the very time the Respondent participated in this breach of a court order. Notwithstanding that the Respondent has provided statements to the Panel that he will change, we recognize that the Respondent had an opportunity to change prior to September, 2010 and chose not to. We consider this to be an aggravating factor.

The impact of the proposed penalty on the Respondent

The Respondent has made submissions as to the negative impact that a suspension would have upon him, his staff, and his clients. The Respondent works in a small office. He has two staff persons who rely upon him for their employment. He has ongoing client commitments, trials, and court appearances already scheduled in December, 2013 and in 2014. A suspension would have a negative impact. We consider this to be a mitigating factor.

The need for specific and general deterrence

With respect to specific deterrence, as we noted above, previous disciplinary action has not had the desired impact on the Respondent's behaviour. Under the principle of progressive discipline, it appears that his two previous penalties for professional misconduct in the nature of fines have not been effective. With respect to general deterrence, it is the view of this Panel that we must communicate comprehensive condemnation of a strategy that involves a breach of a court order. Therefore, we consider these to be aggravating factors.

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

As mentioned above, the public needs to have confidence that lawyers, as officers of the court, will not only obey court orders but will also not participate in strategies that involve a breach of a court order. The Respondent's conduct undermines the public's confidence in the integrity of the profession. We consider this to be an aggravating factor.

The range of penalties imposed in similar cases

Counsel for the Law Society provided a case table that outlined the penalties in seven other decisions involving a failure to comply with a court order. The penalties ranged from fines (\$2,500 to \$10,000) to suspensions (one week to two months).

[16] The Panel finds that the consideration of the Ogilvie factors is helpful, but ultimately it is the weighting of each factor that is important, as well as the Panel's general assessment of what is appropriate in these circumstances.

[17] In our view, the overall consideration of the aggravating factors and the mitigating factors suggest that a significant suspension is appropriate. While a significant suspension may have a negative impact on the Respondent's office staff and clients, we are concerned about the gravity of the Respondent's misconduct and his prior disciplinary record. The Panel believes that a suspension of 45 days is appropriate.

ORDER

[18] We order that the Respondent be suspended for a period of 45 days commencing on February 1, 2014.

[19] We order costs payable by the Respondent as set out in the Law Society's proposed Bill of Costs with

the omissions proposed by counsel for the Respondent, namely omission of \$1,000 with respect to item 14 – Law Society submissions on Application for Non-Disclosure dated February 5, 2013 and the disbursement of \$1,519.28 for the cost of the transcript, for a revised total fees and disbursements of \$7,725.20. Recognizing the Respondent’s submissions regarding the financial aspects of his practice, we order that costs be payable on or before September 30, 2014.

CONFIDENTIAL INFORMATION

[20] In the course of this hearing, the Respondent provided information about the financial aspects of his law practice. The Respondent requested that this information be kept confidential.

[21] Hearings of the Law Society are generally public proceedings, and the need for openness and transparency in the disciplinary process of the Law Society is critical to maintaining the public’s confidence in the ability of the Law Society to adequately regulate the legal profession.

[22] However, we are of the view that financial information with respect to the Respondent’s income and law practice need not be disclosed to the public in order to carry out the mandate of the Law Society; and therefore, pursuant to Rule 5-6(2)(a), we order that such references in the transcript of the proceedings must not be disclosed or published.