2005 LSBC 15
Report issued: May 2, 2005
Citations issued: May 8, 2002, October 2, 2002
June 20, 2003 and January 12, 2004

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

**Rudi Gellert**

Respondent

**Decision of the Hearing Panel**

Hearing date: March 29, 2005

Panel: John J.L. Hunter, Q.C., Single Bencher Panel

Counsel for the Law Society: James A. Doyle
Counsel for the Respondent: Russell MacKay

[1] This is the penalty decision with respect to four separate citations of professional misconduct which were issued against the Respondent concerning conduct over a period of time from approximately 1999 to 2003.

[2] The four citations were heard at three separate hearings and in each case, the Hearing Panel determined that the Respondent had been guilty of professional misconduct. It is common ground that the root cause of the Respondent's erratic practice was depression for which he has now received treatment. The question at this phase of the hearing is the appropriate penalty to impose which recognizes the seriousness of the disciplinary offences but also gives effect to the medical circumstances which gave rise to them, all with a view to ensuring the protection of the public against misconduct by our members.

# Background

[3] Mr. Gellert was called to the bar on May 19, 1995, and has practiced as a sole practitioner, occasionally with an associate, since that time. He is 61 years of age and has a general practice.

[4] The four citations which were issued against the Respondent concerned a wide range of professional conduct. The conduct was specified in the citations in the following ways:

Citation #1

(a) Your conduct in that you failed to remit collected GST and PST, contrary to the provisions of the *Social Service Tax Act*, and the *Excise (GST) Act*; and

(b) Your conduct in that you misappropriated from your trust account the sum of $182.40 from funds held in trust on behalf of your clients, the Estate of H.J.U.

Citation #2

(a) You failed to serve your client, Mr. R., an Alberta lawyer, who retained you to act as his agent in a

matter in British Columbia, 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, contrary to Chapter 3, Ruling 3 of the *Professional Conduct Handbook*; and

(b) You failed to respond to the written requests of the Law Society for response to the complaint of Mr. R., contrary to Chapter 13, Ruling 3 of the *Professional Conduct Handbook*.

Citation #3

(a) You failed to respond promptly to the written request of the Member Services of the Law Society dated September 14, 2001, for an explanation of the exceptions and deficiencies noted in your accountant's report (Form 47) for the period ending May 31, 2001, contrary to Chapter 13, Ruling 3 of the *Professional Conduct Handbook*; and

(b) You failed to respond promptly to the written requests of the Member Services of the Law Society dated September 12, October 7, and October 29, 2002 for an explanation to the exceptions noted in your Form 47 for the period ending May 31, 2002, contrary to Chapter 13, Ruling 3 of the *Professional Conduct Handbook*.

Citation #4

1. You failed to respond promptly or at all to communications from the Law Society in relation to a complaint by S.S., contrary to Chapter 13, paragraph 3 of the *Professional Conduct Handbook*. These communications consisted of letters dated March 24, April 15, April 30 and May 12, 2003.

2. You failed to respond promptly or at all to communications from the Law Society in relation to a complaint by V.C., contrary to Chapter 13, paragraph 3 of the *Professional Conduct Handbook*. These communications consisted of letters dated March 31, April 22, May 7 and May 20, 2003.

3. You failed to serve your client V.C. and her company K. Inc. in a conscientious, diligent and efficient manner, contrary to Chapter 3, paragraph 3 of the *Professional Conduct Handbook*, particulars of which include one or more of the following:

> (a) You failed to file Annual Reports for K. Inc. with the Registrar of Companies from 1999 onward;
>
> (b) You failed to inform your client that you had not filed Annual Reports for K. Inc.;
>
> (c) You failed to inform your client that you received a warning letter from the Registrar of Companies dated September 14, 2001 that failure to file Annual Reports would lead to K. Inc. being struck from the Registrar.

4. In 2003, you represented a purchaser in a conveyancing transaction. As part of the transaction, you gave the following undertaking to the lender's lawyer, Gerard J. DeCario, in or about May 2003:

*"The writer's client has authorized me on its behalf to execute any and all security you may require to sure the $100,000.00 on the terms mentioned in this letter. I undertake to execute such security on demand by you."*

You breached the undertaking by failing to execute a Modification of Rights to Purchase document after Gerald J. DeCario made demand that you comply on or before June 20, 2003, contrary to Chapter 1, subparagraph 4(2) and Chapter 11, paragraph 7 of the *Professional Conduct Handbook*.

5. You failed to respond promptly or at all to communications from Gerald J. DeCario in relation to an undertaking you gave him in 2003, contrary to Chapter 11, paragraph 6 of the *Professional Conduct*

*Handbook*. These communications included telephone calls on June 18 and June 20, 2003 and letters dated May 29, June 17 and June 24, 2003.

6. You failed to respond promptly or at all to communications from the Law Society in relation to a complaint by Gerald J. DeCario, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*. These communications consisted of letters dated July 14, August 6, August 22 and September 3, 2003.

[5] Each of these citations went to hearing before a discipline panel. In each case the facts alleged were accepted by the discipline panel and the finding of professional misconduct was made.

[6] On December 16, 2003 Mr. Gellert gave an undertaking not to practice law until relieved of his undertaking and he has not practiced since that date.

Evidence at Hearing

[7] The evidence at this hearing consisted of oral testimony from the Respondent and medical evidence that went in by agreement.

[8] The Respondent testified that the problems in his practice originated around 1999, when he began to become very tense and found it increasingly difficult to make decisions. He described some of the events that led to the citations and was candid in accepting the facts set out in the various agreed statements of fact. He described his behaviour as inexcusable.

[9] When the Respondent began to experience problems in coping with his practice, it did not occur to him that he was suffering from depression because he did not feel sad and he associated depression with feelings of sadness. He continued to struggle in his practice throughout this period.

[10] The turning point for the Respondent came on October 14, 2003, which was the date of the hearing of the second citation. The Respondent represented himself. Ms. Gossen was counsel for the Law Society. The Respondent explained that during discussions prior to the hearing, Ms. Gossen suggested that he speak to the Lawyers Assistance Program about the difficulties he was encountering coping with his practice. During the hearing before me the Respondent wanted to express his appreciation to Ms. Gossen for this suggestion, which put him on a path to obtain medical assistance and an understanding of why he was failing in his professional responsibilities.

[11] On December 15, 2003, the Respondent was examined by Dr. Baker concerning what was described as his gradual deterioration in his ability to function as a lawyer. Dr. Baker diagnosed the Respondent's problem as severe untreated major depression and expressed the opinion that Mr. Gellert was not fit to work as a lawyer at that time as he was profoundly impaired by his depression. He also expressed the opinion that with proper treatment of his depression Mr. Gellert should be fit to work as a competent lawyer.

[12] The day after receiving this assessment, the Respondent voluntarily gave an undertaking to the Law Society not to practice law until relieved of the undertaking. He described himself as being in a fog during this time. He has not practiced law since December 16, 2003.

[13] Following this diagnosis of severe depression, the Respondent sought treatment from his family doctor and was placed on anti-depression medicine for about six months. He felt little difference for a month or so but then began to feel better. During this period he was also receiving cognitive behaviour therapy which he said helped.

[14] By about July 2004 he had ended the therapy and was being weaned off the anti-depression medication. He feels better now and has changed his life style to spend more time outside working in the garden and away from the stressors that seem to have led to his depression. He has not been practising

law but has been going to his old law office regularly and helping out with administrative matters for Mr. Chodha who is now running the practice.

[15] During this hearing the Respondent had a clear view of the factors that had led to the depression and which he is determined to avoid. He said he did not want to go back "in the trenches" with the responsibility of running a business, meeting a payroll and dealing with new clients. He described his period of depression as akin to being in a hole and looking up at the sky. He felt that if he returned to his old practice he would end up down in the hole and he does not want to do that. At the same time he would like to resume practising law in some capacity, both to earn a living and to demonstrate to himself and others that he has overcome this debilitating illness.

[16] The most recent medical reports are encouraging. Dr. Baker saw the Respondent in November 2004 and confirmed again his opinion that the cause of the Respondent's conduct in the 1999-2003 period was depression. He went on to say that the Respondent appeared to have successfully made the changes needed in his personal or professional life to deal with the issues that had led to the depression. At the same time Dr. Baker recorded the Respondent's conviction that he did not wish to return to the demanding practice of working "in the trenches" .

Penalty Considerations

[17] The task for me as a discipline panel is to fashion a penalty that is appropriate for the disciplinary offences referred to in the four citations, having as my primary responsibility the protection of the public but also giving recognition to the circumstances that gave rise to these events.

[18] The classic statement of the principles that should be applied by a discipline panel is found in the decision in *Re Ogilvie*, [1999] LSBC 17, where the Hearing Panel said this (at para. 9):

> Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct. Section 38 of the *Act* sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.

[19] The panel in *Ogilvie* then set out a series of factors 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 on the victim;

e) any advantage 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 redress the wrong and the presence or absence of other mitigating circumstances;

h) the possibility of remediation or rehabilitation of the respondent;

i) the impact on the respondent of any criminal sanctions;

j) the impact of the proposed penalty on the respondent;

k) the need for specific or 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 sheer magnitude of the disciplinary offences combined with the seriousness of some of them – in particular the breach of undertaking offence which is extremely serious in our profession – would in the absence of mitigating circumstances lead to the conclusion that the Respondent was not fit to continue his practice in the law. However in this case there are significant mitigating circumstances which must be taken into account.

[21] It is common ground that the root of this dysfunctional behaviour was the untreated depression which the Respondent was suffering and for which he has now received treatment. The Respondent has acknowledged fully the unacceptable nature of his conduct. He does not have a prior disciplinary record and this is not a case where the Respondent gained an advantage for himself through his conduct. There is a real possibility that the Respondent may be rehabilitated through the treatment he has received for his depression. The Law Society has not sought disbarment and I agree that disbarment would not be appropriate in these circumstances.

[22] Both the Law Society and the Respondent have agreed that the most appropriate way to approach penalty would be to combine all the counts on all four citations to be dealt with together. The Law Society suggests taking a global approach to penalty and has referenced the decisions in *Re Hart*, [1999] LSBC 26 and *Re Dobbin*, [2002] LSBC 16 as useful illustrations of this global approach. I agree that these decisions do provide a helpful approach to the imposition of penalties for multiple citations.

[23] The penalty the Law Society has proposed is a suspension of 18 months to reflect the gravity and extent of the disciplinary offences and the imposition of practice conditions, specifically a psychiatric evaluation and a practice supervision agreement, to address the factors that led to these incidents.

[24] The particular concern of the Law Society is that since the Respondent is no longer on medication and since he does not have a specific treatment plan, it is important first, that there be some objective indication that the Respondent is fit to resume practice and second, that he not end up in the same environment under the same influences that led to the depression.

[25] Counsel for the Respondent is in general agreement with the principles proposed by Mr. Doyle and the general area of penalty, although he has suggested that a suspension in the range of 12-15 months should be a sufficient sanction for the professional misconduct. The Respondent has indicated that he is agreeable to some form of practice supervision. He has also said that he does not intend to practice on his own.

[26] There are two distinct elements to consider in imposing a penalty for these offences. The first is the disciplinary sanction that is appropriate in these circumstances. In my opinion a suspension of 18 months, commencing on the date when the Respondent undertook to cease practice, namely December 16, 2003 is the appropriate sanction.

[27] The second element is the type of practice condition that should be imposed. I agree that one condition should be that the Respondent obtain a psychiatric evaluation performed by a psychiatrist acceptable to the Practice Standards Committee. I propose to impose a condition in relation to practice supervision which is

slightly different from the one proposed by the Law Society and accepted in principle by the Respondent.

[28] The Respondent has been very clear in his view that he should not practice alone or be "in the trenches" again. While practice supervision might suffice to achieve this goal, in my view it would be more prudent to require that supervision occur in the context of an employment relationship where the possibility of the Respondent taking on the burden of running his own practice can be minimized. Section 38(5)(f)(iv) specifically provides for an order to be made the Respondent practice law only as an employee of one or more lawyers, and I would make that order as well, subject to review by the Practice Standards Committee.

[29] I do not propose to make a specific term in relation to practice supervision, but rather to leave that issue to the Practice Standards Committee. The employment situation must be satisfactory to the Practice Standards Committee and in considering any proposed employment the Committee may wish to consider what degree of reporting would be appropriate.

[30] Similarly I will make no specific order with respect to responsibility for trust accounts. As an employee the Respondent will not have that responsibility. If the Practice Standards Committee lifts the employment restriction, that Committee will be in the best position to judge whether the Respondent is in need of further practice supervision in respect of his ability to operate a trust account. I would observe only that with the exception of one relatively minor matter, the Respondent's misconduct did not involve the improper use of a trust account.

# Decision

[31] For these reasons on the four citations I would impose the following penalty:

1. that the Respondent be suspended from the practice of law for a period of 18 months commencing December 16, 2003;

2. that prior to his reinstatement the Respondent obtain a psychiatric evaluation satisfactory to the Practice Standards Committee performed by a psychiatrist acceptable to the Practice Standards Committee;

3. that the Respondent practice only as an employee of one or more lawyers satisfactory to the Practice Standards Committee on such terms as to practice supervision as the Practice Standards Committee may impose, until such time as he is relieved of this condition by the Practice Standards Committee.

[32] The parties have asked that the issue of costs be deferred to a later date so I make no order at this time in respect of costs. If the parties are unable to agree, this can be dealt with at a later date.

[33] May I also express my appreciation with the constructive and helpful manner in which both counsel have approached this matter.