

2014 LSBC 11

Report issued: March 04, 2014

Citation issued: June 13, 2013

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

ROGER DWIGHT BATCHELOR

Respondent

Decision of the Hearing Panel

Hearing date: January 28, 2014

Panel: Lee Ongman, Chair, Dr. Gail Bellward, Public representative, Carol Hickman, QC,
Lawyer

Counsel for the Law Society: Patrick M. McGowan

Appearing on his own behalf: Roger Batchelor

Introduction and Background

[1] A citation was authorized by the Discipline Committee on June 5, 2013 and issued on June 13, 2013. The Respondent admits that he was served with the citation in accordance with the requirements of Rule 4-15 of the Law Society Rules.

[2] The Respondent was called to the bar in Ontario on October 4, 2002 and was called and admitted as a member of the Law Society of British Columbia on September 21, 2005.

[3] The citation sets out two allegations that arise from the Respondent's representation of defendants in an estate action in the Supreme Court of British Columbia. The allegations are:

(a) that the Respondent relied on two improperly commissioned affidavits that were filed electronically without compliance with the Rules of Court for electronic filing; and

(b) that the Respondent made a representation to the court to the effect that the exhibits to the affidavit of his client were commissioned by the lawyer before whom the client swore the affidavit when the Respondent knew or ought to have known that this representation was false because the Respondent knew that the exhibit pages had been signed by the Respondent in the client's absence.

[4] This is a decision of the Hearing Panel convened under Rule 4-22 of the Law Society Rules, which permits the Respondent to make an admission of a discipline violation conditional on a proposed disciplinary outcome. If the admission and proposal are approved by the Discipline Committee, the Rule requires a panel to consider the conditional admission and impose the proposed disciplinary action if the panel agrees it should be accepted.

[5] The Respondent admitted that he committed professional misconduct and consented to the following disciplinary action:

(a) a suspension from practice for one month;

(b) costs in the amount of \$2,000.

Issues

[6] The issues for the Hearing Panel are:

(a) whether the Respondent's admission of professional misconduct is acceptable; and

(b) whether the proposed disciplinary action is appropriate and acceptable.

Facts

[7] An agreed Statement of Facts was filed in these proceedings. The following are the relevant facts that have been agreed to.

Allegation 1

[8] Mr. Batchelor admits that, in the course of representing the defendants in a BC Supreme Court Action, he relied on two affidavits that he knew were improperly commissioned and that he knew were filed electronically without compliance with the Rules of Court respecting electronic filing. In particular, Mr. Batchelor's conduct included the following:

(a) he provided an affidavit to his client, to be commissioned before a notary in Hawaii in January 2012 (the "January Affidavit"), having already signed the exhibits to that affidavit;

(b) he caused the January Affidavit to be filed electronically without complying with the requirements set out in Rules 23-3(6) and (7) of the Supreme Court Rules. Specifically, Mr. Batchelor did not possess the original January Affidavit when he caused the copy of the January Affidavit to be filed electronically as required by Rule 23-3(7). Further, Mr. Batchelor did not compare the signature on the copy of the January Affidavit to the original or the copy of the January Affidavit to the original prior to electronic filing as required by Rule 23-3(6) and as he indicated he had done on the Electronic Filing Statement;

(c) he did not respond to or address concerns raised by opposing counsel in a letter dated June 4, 2012 regarding the commissioning of the January Affidavit;

(d) when Mr. Batchelor provided an affidavit to his client to be commissioned before a lawyer in Winnipeg in August 2012 (the "August Affidavit"), he did not provide copies of the exhibits with the affidavit, nor did he instruct her that the affidavit must be commissioned together with the exhibits to the affidavit;

(e) when Mr. Batchelor received the sworn August Affidavit back from his client without exhibits, he attached and signed the exhibits to the August Affidavit in the absence of his client who had previously sworn the August Affidavit before a lawyer in Winnipeg;

(f) he caused the August Affidavit to be filed electronically without complying with the requirements set out in Rules 23-3(6) and (7) of the Supreme Court Rules. Specifically, Mr. Batchelor did not possess the original August Affidavit when he caused the copy of the August Affidavit to be filed electronically as required by Rule 23-3(7). Further, Mr. Batchelor did not compare the signature on the copy of the August Affidavit to the original or the copy of the August Affidavit to the original prior to electronic filing as required by Rule 23-3(6) and as he indicated he had done on the Electronic Filing Statement.

[9] The Respondent admits that his conduct as set out in the previous paragraph amounts to professional misconduct.

Allegation 2

[10] Mr. Batchelor admits that, on August 14, 2013, in the course of representing the defendant, he made representations to the court to the effect that the exhibits to the affidavit of his client, filed on August 9, 2012 (the August Affidavit), were commissioned by the lawyer before whom his client swore the affidavit. These representations were false. At the time Mr. Batchelor made these representations, he did not know them to be true and ought to have known that they were false because he signed the exhibits himself five days earlier in the absence of his client.

[11] The Respondent admits that his conduct as set out in the previous paragraph amounts to professional misconduct.

Professional Conduct Record

[12] The Respondent is an experienced practitioner. His professional conduct record in British Columbia shows nine recommendations from the Practice Standards Committee in 2010, a conduct review in 2012,

and a citation in September 2012.

Analysis

[13] It is well established that the test for professional misconduct is whether the facts as made out disclose a marked departure from that conduct the Law Society expects from its members. If so, it is professional misconduct. This test, set out in *Law Society of BC v. Martin*, 2005 LSBC 16, has been applied consistently in disciplinary hearings thereafter.

[14] In our view, the Respondent's conduct is without a doubt a marked departure from the standards that the Law Society expects of its members. Members of the profession are officers of the court and as such the defenders of the Rule of Law, which is inherent in the office and in their duties. Confidence in the court's ability to fairly and judiciously view and receive evidence is eroded when sworn affidavits are falsified.

[15] The legal authority in considering whether to accept or reject a proposal for disciplinary action under Rule 4-22, set out in *Law Society of BC v. Rai*, 2011 LSBC 02, in essence states that, in considering a matter, the panel must be satisfied that the proposed admission on the substantive matter is appropriate and must also be satisfied that the proposed disciplinary action is acceptable. *Rai* is the authority for the proposition that a specified disciplinary action is acceptable if it is in the range of a fair and reasonable disciplinary action in all the circumstances.

[16] The Law Society submits that the proposed disciplinary action is within the range of a fair and reasonable disciplinary action and cites a variety of cases to set out the range of penalties. Those authorities will be summarized later in this decision.

[17] The Law Society also submits that, in the case of *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the panel identified a non-exhaustive list of factors as worthy of general consideration in disciplinary proceedings and suggests that protection of the public (including public confidence in the disciplinary process and public confidence in lawyers generally) and the rehabilitation of the Respondent, are two factors that play an important role.

[18] In *Ogilvie*, the non-exhaustive list of factors to consider in discipline proceedings are:

- (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.

[19] The Panel considers the following to be of most importance in this case:

- (a) the nature and gravity of the misconduct;
- (b) the need to ensure the public's confidence in the profession;
- (c) prior discipline history; and

(d) the range of penalties imposed in similar cases.

Public confidence in the profession

[20] Practising law is an honour and a privilege afforded to a very small percentage of society, and with it comes significant responsibilities. Three of the most serious responsibilities are managing trust funds, providing undertakings and upholding the duty to the court. Lawyers are officers of the court, and as officers of the court, lawyers make representations to the court on which the Judges and Registry staff must be able to rely. Our court system functions only because lawyers are officers of the court and the court can rely on the representations they make. Those representations are the foundation of the important decisions the judiciary makes that directly impact the lives of those members of the public involved in the court process. There is no room for a cavalier attitude, sloppy practice, or dishonesty when it comes to these hallmarks of our legal system.

[21] The Agreed Statement of Facts shows the Respondent prepared affidavits for his clients to sign, he received the signed affidavits, and he knew the exhibits were not properly signed by the lawyer who commissioned the affidavit because he in fact was the lawyer whose signature is on the exhibits. The Respondent represented to the court upon questioning by the Judge that the exhibits were sworn in front of the lawyer who commissioned the affidavit. In addition, the Respondent proceeded to electronically file the documents for court use, and in the filing is an inherent undertaking to the court and court Registry that the lawyer has complied with the Rules in the documents being filed in the proper format. The seriousness of this misconduct cannot be overstated.

Range of penalties for similar conduct

[22] Counsel for the Law Society refers to seven Canadian decisions, many of which also refer to other similar decisions, to support accepting the proposed discipline action. The Respondent has not submitted additional decisions. They are reproduced here:

[23] *Law Society of BC v. Nielsen*, 2007 LSBC 35:

(a) The respondent altered an exhibit to the affidavit of his client, without the client's knowledge or consent, after the affidavit had already been sworn, and filed the affidavit as though properly sworn. The respondent also submitted a consent order for entry knowing that his client had not consented to the order. The respondent admitted to a disciplinary violation and consented to disciplinary action pursuant to Rule 4-22.

(b) Disciplinary history: not mentioned.

(c) Disciplinary action: reprimand and \$10,000 fine.

(d) Costs: \$5,000.

[24] *Law Society of BC v. Chiang*, 2013 LSBC 28 (under review):

(a) The respondent, in representing a company in which she had a significant personal financial interest before the Supreme Court of British Columbia, intentionally misled the court by seeking relief on short leave that went beyond that permitted by the order granting short leave. The respondent refused to acknowledge any wrongdoing and "engaged in a vitriolic attack on the motives and behaviour of the Law Society."

(b) Disciplinary history: one previous conduct review.

(c) Disciplinary action: one month suspension.

(d) Costs: \$10,000.

[25] *Law Society of BC v. Galambos*, 2007 LSBC 31:

(a) The respondent misled the court by incorrectly advising the court that the respondent to an application for short leave had been served with certain documents relating to the application. At the time these representations were made, the respondent did not know if the documents had been served. Upon learning that the documents had not been served, the respondent made no

effort to correct this error. The respondent in this matter admitted that his conduct amounted to professional misconduct; it does not appear that the respondent consented to a penalty pursuant to Rule 4-22.

- (b) Disciplinary history: not mentioned.
- (c) Disciplinary action: one month suspension.
- (d) Costs: \$3,000.

[26] *Law Society of BC v. Walters*, 2005 LSBC 39:

(a) The respondent deliberately left the date upon which her client's affidavit was sworn blank so that an incorrect date could be inserted at a later time. The respondent admitted that her conduct amounted to professional misconduct but was not in agreement with counsel for the Law Society as to the appropriate penalty.

(b) Disciplinary history: previous conduct review relating to two incidents, one involving a conflict of interest and the other a threat to commence civil and criminal proceedings against a third party in the course of representing a client.

- (c) Disciplinary action: \$3,000 fine.
- (d) Costs: \$3,500.

[27] *Law Society of BC v. Hart*, 2007 LSBC 50:

(a) The respondent permitted his client to swear an affidavit he knew to contain incorrect statements, or failed to correct the affidavit upon learning that it contained incorrect statements. The respondent relied upon the affidavit in the BC Supreme Court and failed to advise the court of the inaccuracies, despite advising the client he would do so. The respondent admitted that his conduct amounted to professional misconduct.

- (b) Disciplinary history: three conduct reviews, two citations.
- (c) Disciplinary action: \$2,000 fine.
- (d) Costs: \$1,500.

[28] *Law Society of BC v. Wong*, 2012 LSBC 15:

(a) The respondent had his client swear a Financial Statement by having the client sign the jurat portion of the Statement prior to the completion of the affidavit and not in the lawyer's presence. The respondent then had the client send the signed portion of the document to his inexperienced associate, and instructed the associate to administer an oath and swear the document over the phone. The respondent admitted that his conduct amounted to professional misconduct.

- (b) Disciplinary history: one conduct review.
- (c) Disciplinary action: \$3,500 fine.
- (d) Costs: \$3,000.

[29] *Law Society of Upper Canada v. Watkin*, 2005 CanLII 50679 (ONLSHP):

(a) The respondent improperly commissioned an affidavit in an estate matter, and filed the affidavit, knowing it to be false. The respondent admitted his misconduct, and joined the Society in its submission as to penalty.

- (b) Disciplinary history: not mentioned.
- (c) Penalty: one month suspension, two practice reviews.
- (d) Costs: \$1,500.

[30] *Law Society of Upper Canada v. Maroon*, 2005 ONLSHP 21:

(a) The respondent improperly commissioned an affidavit signed by her client not in her presence,

and filed the improperly sworn affidavit in court. The opposing party, suspecting impropriety in the commissioning of the affidavit, brought an application to strike the affidavit. In response, the respondent swore a false affidavit stating that the client was present in her office when the affidavit was sworn. The respondent was convicted of improperly commissioning an affidavit and perjury, and received a nine-month conditional sentence. The respondent consented to a finding of professional misconduct, but disputed the penalty sought by the Law Society.

(b) Disciplinary history: none.

(c) Penalty: six-month suspension.

(d) Costs: \$1,500.

[31] *Law Society of Upper Canada v. Knowles*, 2008 ONLSAP 3:

(a) The respondent falsely noted her assistant as a witness to the execution of two wills and two powers of attorney, and had her assistant sign the documents as a witness when the assistant had not been present at the time they were executed. The respondent had also permitted her assistant to falsely witness documents on other occasions. The respondent later falsely swore affidavits indicating that her assistant had properly witnessed the execution of the documents, and permitted her assistant to swear affidavits to the same effect. The respondent admitted misconduct, but disputed the penalty sought by the Law Society.

(b) Disciplinary history: none.

(c) Penalty: one month suspension (reduced on review from three months).

(d) Costs: \$1,000.

Conclusion

[32] The behaviour of the Respondent in wilfully filing improperly sworn affidavits and representing to the court otherwise is one of the most serious transgressions that can be committed by a lawyer. It goes to the heart of the legal process before our courts.

[33] The Respondent has a significant disciplinary history in only eight years of practice in British Columbia.

[34] The scope of disciplinary action presented to us ranges from a reprimand to a fine to a suspension of up to six months. The seriousness of the misconduct and the Respondent's disciplinary history lead this Panel to the conclusion that a sanction at the higher end of the range would be appropriate. Rule 4-22 and the decided cases require a panel to accept a proposed sanction that fits within the range. In this case the range submitted is so broad that our exercise of judgment is almost meaningless. Nevertheless, we accept that the majority of the similar decisions before us ordered one month suspensions, and therefore the proposal is appropriate.

Decision

[35] The Panel accepts the Respondent's admission of professional misconduct with respect to both allegations in the citation.

[36] The Panel accepts the proposed disciplinary action.

Order

[37] The Panel finds that the Respondent has committed professional misconduct and orders that he:

(a) be suspended from the practice of law for one month commencing April 1, 2014; and

(b) pay costs of \$2,000 by June 2, 2014.

[38] The Executive Director is instructed to record the Respondent's admission on his professional conduct record.