

2003] LSBC 32

Report issued: September 5, 2003

Oral reasons: June 18, 2003

Citations issued: May 8, 2002

October 2, 2002

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 on Facts and Verdict

Hearing date: June 18, 2003

Panel: G. Ronald Toews, Q.C., Chair, Gordon Turriff, Q.C.
Michael Falkins

Counsel for the Law Society: Jessica Gossen
Appearing on his own behalf: Rudi Gellert

Background

[1] On May 8, 2002, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation directed that this Hearing Panel inquire into the Respondent's conduct as follows:

- " 1. Your conduct in that you failed to remit collected GST and PST contrary to the provisions of the *Social Services Tax Act* and the *Excise Act (GST) Act*.
2. Your conduct in that you misappropriated from your trust account the sum of \$240.92 from funds held in trust on behalf of your client, the estate of H.J.U."

[2] At the commencement of the proceedings, counsel for the Law Society applied to amend count 2 of the citation to show the amount of \$182.40 instead of \$240.92. The application to amend was consented to by the Respondent. This application was the result of the parties having noticed an accounting error after the Agreed Statement of Facts (including paragraph 13) had been signed. The Panel amended the citation as requested.

[3] On October 2, 2002, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 of the Law Society Rules by the Executive Director of the Law Society of British Columbia

pursuant to the direction of the Chair of the Discipline Committee. The citation directed that this Hearing Panel inquire into the Respondent's conduct as follows:

" 1. 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*.

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

[4] At the commencement of the Hearing the Respondent admitted that the requirements of Rule 4-30 respecting issuance and service of the citation had been met. The citations were marked at Exhibits 1 and 3 in these proceedings.

[5] Counsel for the Law Society submitted an Agreed Statement of Facts with respect to each of the citations.

[6] The Agreed Statement of Facts regarding the citation dealing with the GST and PST remittances and the misappropriation is set out below.

1. Rudi Gellert was called to the Bar in the Province of British Columbia on May 19, 1995.
2. Mr. Gellert practiced as a sole practitioner from May 1995 to May 1998. From June 1998 to present he practices as a partner with the firm Gellert & Associates.
3. On March 29, 2001, an audit was ordered to examine the books, records, and accounts of Mr. Gellert's practice pursuant to Rule 3-79 of the *Law Society Rules*.
4. Don Terrillon, of the Law Society Audit and Investigations Department, conducted the audit on April 4, 2001 and tendered his report dated July 12, 2001.
5. The audit revealed that Mr. Gellert's Goods and Services Tax (" GST") and Social Service Tax (" PST") remittances were not current.
6. As at December 31, 2000, Mr. Gellert owed a \$26,189.63 for PST and \$20,197.15 in GST remittances.
7. On July 27, 2001, Margaret Currie, Staff Lawyer of the Professional Conduct Department, wrote to Mr. Gellert requesting an explanation.
8. On September 21, 2001, Mr. Gellert responded by letter to the Law Society stating:

" The matter of the GST and PST remittances are being addressed. For personal reasons I will not discuss those items at this time. We will however provide you with further information on this matter in the near future."
9. On September 27, 2001, Ms. Currie wrote to Mr. Gellert requesting a further explanation to the GST and PST remittances. The Law Society did not receive a response to that letter.
10. On February 11, 2002, Mr. Terrillon attended at Mr. Gellert's offices and determined that the outstanding combined amount of PST and GST owing had increased to \$79,235.36. Mr. Gellert's general bank account for the same period of time showed a balance of \$11,135.84, leaving a shortfall of over \$68,000.00

11. Mr. Gellert acknowledges that his failure to remit PST and GST monies he collected in the course of his practice constitutes professional misconduct.

12. During the audit, Mr. Terrillon located a memorandum concerning the U. Estate dated December 20, 2000. In the memorandum, Mr. Gellert instructed his support staff member " Shobha" as follows:

" Finally on this file, I need you to do a Statement of Account. The total amount of the account will be \$496.97. Fees will be \$0.00. All of these things will be disbursements. Find out whatever disbursements you can find, that were incurred, like agent's fees, etc. We have three certified copies of the Grant of Probate and each one of them is \$31.00. After that you will have to courier charges and photocopies and stuff like that. Be creative. Get rid of all the money."

13. Mr. Gellert billed the U. Estate the amount of \$496.97, but invoices showing disbursements made on the file could support only \$256.05 of this amount.

14. Mr. Terrillon sought Mr. Gellert's explanation with respect to the instructions he gave his staff. His response is dated May 1, 2001.

15. Mr. Gellert acknowledges that his conduct in billing the U. Estate for disbursements not actually expended or supported by invoices is misappropriation and that it constitutes professional misconduct.

[7] The Agreed Statement of Facts dealing with the complaint of Mr. Reid is set out as follows:

1. Rudi Gellert was called to the Bar in the Province of British Columbia on May 19, 1995.
2. Mr. Gellert practiced as a sole practitioner from May 1995 to May 1998. From June 1998 to present he practices as a partner with the firm Gellert & Associates.
3. In January 1999, Gregory Reid, an Alberta lawyer, retained Mr. Gellert as agent in British Columbia on a debtor-creditor matter initially to do searches in British Columbia, and ultimately to sue upon an Alberta Judgment in British Columbia and to enforce the B.C. judgment.
4. Mr. Gellert's associate, Mr. Chodha, initially handled the matter for Mr. Reid.
5. On January 28, 1999, Mr. Reid forwarded to Mr. Chodha the necessary court documents and relevant correspondence, and confirmed his instructions that Mr. Chodha was to sue and obtain judgment in British Columbia and, thereafter, to enforce the judgment.
6. After hearing nothing from Mr. Chodha, Mr. Reid wrote three letters to him dated March 9, March 23 and April 13, 1999, requesting a progress report on the matter
7. Mr. Reid then contacted Mr. Gellert, as he had not heard from Mr. Chodha, and asked that he look into the matter and get back to him.
8. On June 11, 1999, Mr. Chodha called Mr. Reid and advised he had some questions but would call back later that day to discuss them. Mr. Reid did not hear further from Mr. Chodha.
9. On June 28, 1999, Mr. Reid wrote to Mr. Chodha (with a copy to Mr. Gellert) confirming he had not heard back from him nor had he provided a progress report as Mr. Reid had requested several times. Again Mr. Reid requested a progress report immediately or the return of the file.
10. On July 14, 1999, Mr. Chodha responded by letter, apologizing for not having responded to Mr. Reid's several requests for a written report, and advising the actions had been commenced and the judgment had been registered against two properties.

11. On July 14, 1999, Mr. Reid spoke with Mr. Chodha and instructed him to proceed with summary judgment.
12. On September 3, 1999, Mr. Chodha sent an Affidavit to Mr. Reid for his client to swear. On September 9, 1999, Mr. Reid returned the Affidavit to Mr. Chodha with several proposed changes and further documents to attach.
13. On December 17, 1999, Mr. Reid, after receiving no response from Mr. Chodha, wrote to Mr. Gellert requesting a response to his letter of September 9, 1999 and asked when he might receive the revised Affidavit to apply for Summary Judgment.
14. On January 5, 2000, Mr. Reid wrote to Mr. Gellert requesting a response to his last letter.
15. On February 8, 2000, during a telephone conversation, Mr. Gellert advised Mr. Reid that he was unable to deal with the file and would return it to Mr. Reid.
16. On February 15, 2000, Mr. Reid spoke with Mr. Gellert again at which time Mr. Gellert advised he would immediately return the file.
17. On March 7, 2000, Mr. Reid left a message for Mr. Gellert. He did not receive a response.
18. On March 16, 2000, Mr. Reid wrote to Mr. Gellert stating that: Mr. Gellert had promised to do the work and did not; he promised to return the file and had not. Mr. Reid again requested the return of the file.
19. On March 30, 2000, Mr. Reid again called Mr. Gellert. He did not receive a response.
20. On April 7, 2000, Mr. Reid spoke with Mr. Gellert who indicated that he had gone through the file and he could not explain why the matter had been delayed. Mr. Gellert forwarded an Affidavit for Mr. Reid's client to swear. Mr. Gellert advised once he received the executed Affidavit, he would proceed with the Application for Summary Judgment.
21. On April 20, 2000, Mr. Reid returned the Affidavit, duly executed, and requested a report from Mr. Gellert.
22. On May 3, 2000, Mr. Gellert responded by letter advising that the application was set for June 5, 2000.
23. On May 9, 2000, Mr. Gellert advised Mr. Reid by letter that he had received a settlement offer.
24. On June 5, 2000, a settlement was not reached and Mr. Gellert obtained summary judgment. Mr. Gellert advised Mr. Reid that he would submit the Order for filing and, once he received the entered Order, which he thought would be in about three weeks, he would proceed with searches and do an Examination in Aid of Execution.
25. On July 24, 2000, Mr. Reid confirmed his instructions in a letter to Mr. Gellert.
26. On August 22 and September 6, 2000, Mr. Reid left messages for Mr. Gellert to call to which he did not receive a response.
27. On September 29, 2000, Mr. Reid spoke with Mr. Gellert who advised he had found some assets. He was going to do an Examination in early November. Mr. Gellert promised to report to Mr. Reid imminently.
28. On November 22, 2000, Mr. Reid spoke with Mr. Gellert who advised he had set the Examination in

Aid of Execution for December 4, 2000 and he would provide a report.

29. On January 10, 2001, Mr. Reid left a message for Mr. Gellert. He did not receive a response.

30. On January 26, 2001, Mr. Reid called Mr. Gellert who advised him the Debtor had not shown up for the Examination so he would get an order compelling him to appear. Mr. Gellert promised he would deal with this quickly.

31. On February 21, 2001, Mr. Reid wrote to Mr. Gellert requesting a report as promised.

32. On March 8, 2001, Mr. Reid spoke with Mr. Gellert who advised he would provide a report the following week without fail.

33. On March 21, 2001, Mr. Reid left a message for Mr. Gellert advising that there had been too many broken promises and again told him to send the file back.

34. On March 26, 2001, Mr. Reid wrote to Mr. Gellert requesting the return of the file as soon as possible.

35. On April 10, 2001, Mr. Reid spoke with Mr. Gellert who advised he was wrapping up the file and sending it back.

36. On April 11, May 9, May 23, June 6 and June 14, 2001, Mr. Reid wrote to Mr. Gellert requesting the return of the file.

37. On June 27, 2001, Mr. Reid spoke with Mr. Gellert who advised that Mr. Reid would have the file the following day.

38. On July 12, 2001, as the file had not been returned, Mr. Reid wrote a letter of complaint to the Law Society.

39. On July 25, 2001, Margaret Currie, Staff Lawyer in the Professional Conduct Department, wrote to Mr. Gellert requesting his response to Mr. Reid's complaint that raised allegations of delay, failure to respond, and failure to keep his client reasonably informed.

40. On August 14, 2001, Mr. Gellert wrote to Mr. Reid enclosing the file. Mr. Gellert explained that in preparing the transfer of the file, he noted the Order obtained June 5, 2000 had not been entered. He advised his office was currently in the process of entering it and would forward a copy as soon as it was available.

41. On August 16 and 31, 2001, Ms. Currie sent letters to Mr. Gellert requesting a response to the complaint.

42. On September 7, 2001, Mr. Gellert wrote the Law Society advising that all matters outstanding with Mr. Reid had been resolved with the exception of entering the Order obtained in the matter. Mr. Gellert advised that the Order had been submitted to the Registry and he anticipated obtaining the entered Order within the week.

43. On September 14, 2001, Ms. Currie wrote to Mr. Gellert and advised that his letter of September 7, 2001 did not respond to the specific allegations made by Mr. Reid and again requested his response.

44. On September 19, 2001, Mr. Reid advised the Law Society that, in mid-August, his office had received the client file from Mr. Gellert.

45. On October 1, 2001, having still received no response to Mr. Reid's complaint, Ms. Currie sent

another letter to Mr. Gellert requesting a response and advising that if one was not forthcoming, the matter would be referred to the Discipline Committee.

46. On November 12, 2001, Mr. Reid wrote a letter to the Law Society advising that he had still not received a copy of the entered Order from Mr. Gellert and did not even know if it had been entered.

47. On November 14, 2001, Mr. Reid wrote the Law Society again to advise that the counsel he had retained in place of Mr. Gellert had learned the Order had not yet been entered, despite Mr. Gellert's letter to the Law Society dated September 7, 2001 advising that he expected to have received the entered Order within a few days.

48. On June 5, 2002, Ms. Currie wrote to Mr. Gellert enclosing a transcript of the Law Society's interview with Mr. Reid and documentation Mr. Reid had provided to the Law Society. Mr. Gellert was again requested to respond to the complaint and was advised that if no response was received by June 28, 2002, the matter would be referred to the Discipline Committee for consideration of all of the matters raised by Mr. Reid's complaint and Mr. Gellert's failure to respond to the Law Society.

49. On July 30, 2002, the Discipline Committee resolved to issue a citation against Mr. Gellert alleging failure to serve his client 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 for his failure to respond to the written requests of the Law Society, contrary to Chapter 13, Ruling 3 of the *Professional Conduct Handbook*.

50. A citation was issued and served on Mr. Gellert by registered mail on October 2, 2002.

51. Mr. Gellert acknowledges that his failure to ensure that Mr. Reid's instructions were carried out in a prompt, competent and conscientious manner constitutes professional misconduct.

52. Mr. Gellert acknowledges that his failure to respond to the written requests of the Law Society for a response to the complaints to Mr. Reid constitutes professional misconduct.

[8] We have considered both Agreed Statements of Facts and we find that the allegations set out in the citations have been proved. We therefore find the Respondent guilty of professional misconduct on all counts on the two citations.

[9] The Penalty phase of this Hearing is adjourned to a date to be fixed by the Hearing Administrator.