2014 LSBC 32
Decision issued: July 30, 2014
Oral reasons: May 22, 2014
Citation issued: December 17, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

DOUGLAS BERNARD CHIASSON

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	May 22, 2014
Panel:	Thomas Fellhauer, Chair Don Amos, Public representative Jennifer Chow, Lawyer
Counsel for the Law Society:	Alison Kirby
Appearing on his own behalf:	Douglas Chiasson

BACKGROUND

[1] On December 17, 2013, the Law Society issued a citation against the Respondent alleging that:

1. Between December 2010 and November 2012, in the course of representing a client, ("PM"), in a motor vehicle accident claim (the "Claim"), you failed to serve your 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 in a similar situation, contrary to Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook* then in force. In particular:

    (a) between December 23, 2010 and May 2012, you failed to take any substantive steps to advance the Claim;

(b) between December 23, 2010 and May 2012, you failed to answer reasonable requests from your client for information;

(c) after December 23, 2010, you failed to provide your client with progress updates as to the status of the Claim;

(d) between May 2012 and November 2012, after being told by your client that you were fired, you continued to act on the client's behalf without communicating with her; and

(e) you failed to make all reasonable efforts to provide prompt service to your client.

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

2. On or about December 7, 2012, in the course of representing client PM in a personal injury matter in which you were retained on a contingent fee basis, you withdrew funds from trust in payment of fees, contrary to Rule 8-1(2) of the Law Society Rules, in an amount representing 25 per cent of both the amount recovered on your client's behalf and an amount awarded as costs, when you knew or ought to have known that you were not entitled to 25 per cent of the amount awarded for costs because:

(a) the contingent fee agreement did not entitle you to any percentage of the costs, or

(b) if the contingent fee agreement did entitle you to a percentage of the costs, the agreement was contrary to section 67(2) of the *Legal Profession Act*.

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

RULE 4-22 HEARING

[2] Pursuant to Rule 4-22 of the Law Society Rules, the Respondent has made a conditional admission of a disciplinary violation and consented to a specific disciplinary action.

[3] Rule 4-22 can promote creative and fair settlements by providing a degree of certainty as to the outcome. Therefore, there is a degree of deference given to the

parties once they have arrived at a conditional admission and proposed disciplinary action. Under Rule 4-22, the Hearing Panel has a limited role. It may only accept or reject the proposed disciplinary action.

[4] By letter dated March 19, 2014 to the Chair of the Discipline Committee, the Respondent admitted that he committed professional misconduct by committing the disciplinary violations set out in the said citation. He agreed that the facts and circumstances of the misconduct were set out fully in the Agreed Statement of Facts signed by him on March 19, 2014. The Respondent also consented to specified disciplinary action as follows:

(a) a fine in the amount of $4,500; and

(b) costs in the amount of $1,000.

[5] On April 10, 2014, the Discipline Committee considered and accepted the Respondent's proposal, and counsel for the Law Society was instructed to recommend acceptance of the proposal to this Hearing Panel.

FACTS

[6] In the Agreed Statement of Facts, the Respondent admitted to the following particulars:

1. In March 2007, Mr. Chiasson and PM entered into a written contingency fee agreement that provided that Mr. Chiasson would be paid, among other things, an amount equal to necessary disbursements and 25 per cent of any settlement money.

2. From March 2007 to May 2010, Mr. Chiasson:

(a) corresponded with the Insurance Corporation of British Columbia ("ICBC") regarding the particulars of PM's Part 7 benefits and ICBC's position on liability;

(b) waited for PM to "reach maximum medical recovery" from soft tissue injuries;

(c) met with PM to review the file's status and to sign medical consent forms;

(d) filed a Writ of Summons and Statement of Claim;

(e) corresponded with various medical practitioners and ICBC;

(f) provided ICBC with a settlement offer and followed up with a telephone call and discussed the possibility of settlement; and

(g) arranged for service of the Writ and Statement of Claim.

3. Between May 2010 and October 2010, other than submitting further receipts to ICBC for Part 7 benefits, Mr. Chiasson did nothing to advance PM's claim.

4. Between October 2010 and December 2010, Mr. Chiasson corresponded with ICBC regarding Part 7 benefits.

5. In December 2010, Mr. Chiasson sent PM a letter enclosing a cheque from ICBC and updated PM on requests to ICBC for reimbursement of medical expenses.

6. Between December 2010 and May 2012, despite being contacted by ICBC counsel requesting information about service of the Writ and Statement of Claim, Mr. Chiasson did nothing to advance the Claim. In particular, despite periodic requests from PM, Mr. Chiasson failed to return telephone calls, failed to contact ICBC at PM's request, took no steps to advance the Claim and failed to provide progress updates to PM.

7. In May 2012, PM told Mr. Chiasson he was fired. Mr. Chiasson did not attempt to contact PM between May 2012 and November 2012.

8. In June 2012, PM made a complaint to the Law Society.

9. In November 2012, Mr. Chiasson contacted PM seeking instructions to settle her ICBC claim. ICBC offered to settle PM's claim for $37,950.80 plus taxable costs and disbursements. ICBC subsequently agreed to pay $5,326.15 in costs and disbursements and $2,885 in additional Part 7 benefits.

10. In December 2012, Mr. Chiasson accepted ICBC's offer to settle on PM's behalf. He then received a cheque from ICBC for $46,161.95 as settlement funds including costs and disbursements. Mr. Chiasson then provided PM with a cheque for $31,632.95 and a bill for legal services totalling $14,529 of which $11,540.49 was for legal fees and the remaining $2,988.51 was for costs, disbursements, and taxes.

11. A breakdown of the bill for legal services showed a contingency fee of $11,540.49 based on 25 per cent of the total sum of $46,161.95 that he had

received from ICBC on behalf of PM, which included $5,326.15 in costs and disbursements. Mr. Chiasson subsequently withdrew the sum of $14,529 (the amount billed) from his pooled trust account in payment of the legal fees.

PROFESSIONAL MISCONDUCT

[7] The primary purpose of this hearing is to fulfill the Law Society's mandate to uphold and protect the public interest in the administration of justice by ensuring the independence, integrity, honour and competence of lawyers (*Legal Profession Act*, s. 3).

[8] "Professional misconduct" is not defined in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook* or the *Code of Professional Conduct for British Columbia*.

[9] However, "professional misconduct" has been interpreted by previous hearing panels as "a marked departure from that conduct the Law Society expects of its members" (*Law Society of BC v. Martin*, 2005 LSBC 16, para. 171; see also *Re: Lawyer 12,* 2001 LSBC 11, para. 14).

[10] The "marked departure" test has been applied in a number of cases, including *Law Society of BC v. Gellert*, 2013 LSBC 22, para. 67. In *Gellert*, the hearing panel summarized the type of conduct that will support a finding of professional misconduct:

> Conduct falling within the ambit of the "marked departure" test will display culpability that is grounded in a fundamental degree of fault, but intentional malfeasance is not required – gross culpable neglect of a member's duties as a lawyer also satisfies the test.

[11] In considering whether to accept the Respondent's conditional admissions of professional misconduct, this Hearing Panel must be satisfied that the proposed admissions are appropriate.

THE FIRST ADMISSION

[12] The Respondent admits that the conduct set out in the citation constitutes professional misconduct, namely:

(a) failing to take any substantive steps to advance the Claim between December 2010 and May 2012;

(b) failing to answer reasonable requests from PM for information between December 2010 and May 2012;

(c) failing to provide PM with progress updates on the status of the Claim after December 2010;

(d) after being told by PM that he was fired, continuing to act on PM's behalf without communicating with PM; and

(e) failing to make all reasonable efforts to provide prompt service to PM.

[13] The Law Society submits that an adverse determination of professional misconduct is appropriate and that the Respondent's admissions should be accepted.

DISCUSSION ON FIRST ADMISSION

[14] Chapter 3, Rule 3 of the *Professional Conduct Handbook* (then in force) required a lawyer to provide a quality of service to his client that would be expected of a competent lawyer in a similar situation.

[15] The quality of service may be measured by considering whether the lawyer has:

(a) kept the client reasonably informed;

(b) answered the client's reasonable requests for information;

(c) responded to the client's telephone calls;

(d) answered communications requiring a reply within a reasonable time; and

(e) performed work in a prompt manner so that its value to the client is not diminished or lost.

[16] Chapter 3, Rule 5 of the *Professional Conduct Handbook* required a lawyer to make all reasonable efforts to provide prompt service to each client and to promptly inform the client of any foreseeable undue delay.

[17] There is no evidence of any intention, or deliberate or intentional dishonesty by the Respondent to mislead PM on the status of the Claim. The facts relate to only one client matter.

DECISION ON FIRST ADMISSION

[18] We are satisfied that the Respondent's first admission of professional misconduct is appropriate. The rules cited are a clear indication of the standard expected of lawyers. The Respondent's admission indicates that his conduct is a marked departure from that standard.

THE SECOND ADMISSION

[19] The Respondent admits the allegations in the citation and that, when he withdrew funds from his trust account to pay his fees, he ought to have known that he was not entitled to 25 per cent of the amount recovered on his client's behalf because:

(a) the contingency fee agreement did not entitle him to any percentage of costs; and

(b) if the contingency fee agreement did entitle him to a percentage of costs, the agreement was contrary to section 67(2) of the *Legal Profession Act*.

[20] The Respondent admits that his conduct in doing so constitutes professional misconduct.

[21] The Law Society submits that an adverse determination of professional misconduct is appropriate and that the Respondent's admissions should be accepted.

DISCUSSION ON SECOND ADMISSION

[22] Contingency fee agreements put a lawyer in an inherent conflict of interest arising from being paid on a percentage contingency fee basis and the conduct of a client's case. Contingency fee agreements pose a risk that a lawyer will: (a) set fees at a level that bears little relationship to the time and money spent on the claim; (b) have little incentive to settle a case unless he has maximized his own hourly return; and (c) inflate his fee by including an amount that should not have been included as part of the contingency fee.

[23] Sections 65 to 74 of the *Legal Profession Act* permit a contingency fee agreement to be reviewed to ensure it is fair and reasonable. In particular, section 67(2) of the *Legal Profession Act* provides:

> A contingent fee agreement must not provide that a lawyer is entitled to receive both a fee based on a proportion of the amount recovered and any

portion of an amount awarded as costs in a proceeding or paid as costs in the settlement of a proceeding or an anticipated proceeding.

[24] Rule 8-1(2) of the Law Society Rules prohibits a lawyer from preparing a bill for legal fees that exceeds the agreed fee provided under a contingency fee agreement.

[25] Rule 8-3 requires that a contingency fee agreement be in writing and contain a statement advising the client of the right to have the agreement examined. Rule 8-4 requires that a contingency fee agreement contain a statement of the limits that may be charged without court approval as a contingency fee amount in personal injury claims arising from a motor vehicle accident.

[26] The purpose of these Rules and sections 65 to 74 of the *Legal Profession Act* is to ensure that a contingency fee agreement is fully transparent and to partially mitigate the conflict of interest inherent when a lawyer conducts a client's case on a contingency fee basis.

DECISION ON SECOND ADMISSION

[27] Again, the rules provide the standard expected of lawyers, and the Respondent's admission indicates a marked departure from that standard. We are satisfied that the Respondent's second admission of professional misconduct is appropriate.

PROPOSED DISCIPLINARY ACTION

[28] The Respondent has consented to specified disciplinary action as follows:

(a) A fine in the amount of $4,500 pursuant to s. 38(5)(b) of the *Legal Profession Act*, payable on or before April 30, 2015; and

(b) Costs in the amount of $1,000.

[29] Counsel for the Law Society submits that the proposed fine is within the range of a fair and reasonable disciplinary action in all the circumstances.

ANALYSIS

[30] In considering whether to accept the Respondent's proposed disciplinary action, this Hearing Panel must be satisfied that the proposed disciplinary action falls within the range of a fair and reasonable disciplinary action in all the circumstances (*Law Society of BC v. Rai,* 2011 LSBC 2, paras. 6-8).

[31] We have considered the leading factors to be considered when imposing disciplinary action (*Law Society of BC v. Ogilvie,* [1999] LSBC 17).

[32] We have further considered the facts and penalties imposed in recent Law Society decisions, including: *Law Society of BC v. Wilson*, 2012 LSBC 06; *Law Society of BC v. McLellan,* 2011 LSBC 23; *Law Society of BC v. Epstein*, 2011 LSBC 12; *Law Society of BC v. Boyd*, 2010 LSBC 21; *Law Society of BC v. Plested*, 2007 LSBC 45; *Law Society of BC v. Edwards*, [1996] LSDD No. 21; *Law Society of BC v. Murray*, 2006 LSBC 47; and *Law Society of BC v. Lail*, 2012 LSBC 32.

[33] We note there are no recent Law Society decisions relating to a lawyer's bill for legal fees including an improper percentage of fees as costs.

[34] The Respondent was called and admitted to the British Columbia Bar on May 18, 1990. Since October 1999, the Respondent has practised as a sole practitioner in Squamish, British Columbia. He practises primarily in the areas of family law, residential real estate law, civil litigation and wills and estates.

[35] The Respondent's professional conduct record consists of:

(a) a Conduct Review in 1999 for failing to advise opposing counsel that he was no longer retained to act when he was served with a short leave application;

(b) a referral to the Practice Standards Department in 2006 resulting in recommendations aimed at improving the Respondent's office and file management systems including client communications and managing client expectations. While some inferences may be drawn from those recommendations, they are not recognized as disciplinary action.

[36] We have considered the absence of any directly relevant or recent disciplinary history. We have also noted the absence of any dishonest or deceitful conduct.

[37] We were advised that the Respondent cooperated with the Law Society during the investigation and prosecution of this complaint and that he admitted professional misconduct at an early stage in the proceeding.

[38] The Respondent's misconduct shows a fundamental failure to act in accordance with his duties owed to the client. The absence of dishonest or deceitful conduct supports a fine rather than a suspension.

DECISION

[39] We find that the proposed disciplinary action of a fine in the amount of $4,500 is within the range of a fair and reasonable disciplinary action and we accept it.

COSTS

[40] The Respondent has consented to costs in the amount of $1,000 payable to the Law Society of British Columbia on or before April 30, 2015.

[41] Rule 5-9 of the Law Society Rules requires us to have regard to the tariff when calculating costs. We are to follow the tariff unless we determine that it is reasonable and appropriate to award no costs or a different amount of costs other than that permitted under the tariff.

[42] We consider the proposed amount of costs to be within the range under the tariff (Item 23: $1,000 to $3,500) and we accept it.

[43] At the May 22, 2014 hearing, the original proposal included a proposal to have the $4,500 fine and $1,000 of costs payable on or before April 30, 2015. We raised concerns with counsel for the Law Society and the Respondent over the lengthy time to pay $5,500. In our view, unless there are circumstances to justify a lengthy period to pay a fine, a one-year period to pay does not reflect the public interest in underscoring the seriousness of the allegations. The parties conferred and then agreed to a proposal to have the fine and costs paid on or before November 30, 2014. This is acceptable to us.

ORDER

[44] Based on all of the above, we order that the Respondent pay to the Law Society of British Columbia on or before November 30, 2014:

(a) a fine in the amount of $4,500, pursuant to s. 38(5)(b) of the *Legal Profession Act*; and

(b) costs in the amount of $1,000.

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