

2014 LSBC 42
Decision issued: September 8, 2014
Oral reasons: July 16, 2014
Citation issued: May 2, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JOHN EDWARD ROBERTS

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date: July 16, 2014

Panel: W. Martin Finch, QC, Chair
William Everett, QC, Lawyer
Clayton Shultz, Public representative

Counsel for the Law Society: Kieron Grady
Appearing on his own behalf: John E. Roberts

BACKGROUND

[1] The Respondent is the subject of a citation alleging that he failed to provide a full and substantive response promptly or at all to communications from the Law Society concerning its investigation of the complaint of PM contrary to Rules 3-5(6) and (10) of the Law Society Rules and Chapter 7, rule 7.1-1 of the *Code of Professional Conduct for British Columbia*, and in particular:

- (a) a letter from the Law Society dated February 19, 2014; and
- (b) one or more of the follow-up letters from the Law Society dated March 15, 2014, March 25, 2014 and April 2, 2014.

- [2] The citation alleges that this conduct constitutes professional misconduct or a breach of the Act or Rules pursuant to section 38(4) of the *Legal Profession Act*.
- [3] At the commencement of the hearing, the Respondent advised the Panel that he admitted to professional misconduct and the facts alleged.

FACTS

- [4] The Law Society filed an affidavit of Kurt Wedel, an investigator for the Law Society, sworn June 6, 2014 in support of the citation. This affidavit was marked as an exhibit. The Respondent had been given a copy of the affidavit in advance of the hearing.
- [5] Attached to the affidavit were 14 exhibits that were in the nature of correspondence and emails between the Respondent and various representatives of the Law Society.
- [6] In addition to the affidavit evidence filed, the Respondent testified under oath to his understanding and recollection of events.
- [7] The Panel accepts the whole of the affidavit evidence of Mr. Wedel.
- [8] The Panel found as fact that, on or about October 7, 2013, the Law Society opened a complaint file concerning the Respondent based on a complaint received from PM. PM advised that he was a former client and trucking business partner of the Respondent. The complaint related to the Respondent's involvement in or with that trucking business. The Law Society investigated the Respondent, *inter alia*, in relation to the extent to which he provided legal services to the business.
- [9] The allegations made by PM related to various forms of conflict of interest and failures to advise, misrepresentations regarding the structure of business, unauthorized withdrawal of funds from the business, attempted backdating of loan documents and failure to report a claim promptly to the Lawyers Insurance Fund.
- [10] On or about December 11, 2013, Mr. Wedel wrote to the Respondent advising him of the complaint. Mr. Wedel further advised that he did not at that time require a response to the complaint, but did request information in writing by Wednesday, December 18, 2013 as to whether the Respondent had notified the Lawyers Insurance Fund of a court action that had been commenced against him by the complainant. This letter was delivered to the Respondent by email and Canada Post.

- [11] On December 17, 2013, the Respondent sent an email to Mr. Wedel confirming that he had notified the Lawyers Insurance Fund of the court action.
- [12] On December 18, 2013, Mr. Wedel asked the Respondent by email what date he had notified the Lawyers Insurance Fund of the court action.
- [13] The Respondent did not reply to the email of December 18, 2013, and on January 3, 2014 Mr. Wedel sent a further email to the Respondent asking for a response by January 8, 2014.
- [14] On January 8, 2014 the Respondent replied he had sent a letter to the Lawyers Insurance Fund on December 12, 2013, and had spoken to someone there, either that day or the day before.
- [15] On or about February 19, 2014, Mr. Wedel wrote the Respondent regarding the complaint and asked him to provide a response by March 12, 2014. This letter was sent by email.
- [16] On March 14, 2014, Mr. Wedel had not received a response from the Respondent to the letter of February 19, 2014. As a result, he sent a follow-up letter on March 14, 2014. The letter was misdated March 15, 2014.
- [17] The misdated March 15, 2014 letter advised the Respondent that rule 7.1-1(a) of the *Code of Professional Conduct for British Columbia* requires that a lawyer must:
- (a) reply promptly and completely to any communication from the Society.
- [18] The letter advised him that his failure to respond to the Law Society may result in a referral to the Discipline Committee. The letter further required the Respondent to respond to all the requested materials previously sent by March 24, 2014.
- [19] On March 25, 2014, Mr. Wedel received a letter dated March 21, 2014 from the Respondent.
- [20] The Respondent's letter of March 21, 2014 indicated that the Respondent did not receive the Law Society's letter of February 19, 2014. The letter further advised that Mr. Roberts was not working currently outside of law.
- [21] In his reply to the Respondent, Mr. Wedel, on March 25, 2014, wrote the Respondent and advised him that a response to his letter of February 19, 2014 was required by April 1, 2014. This letter was sent by email and courier.

[22] On April 4, 2014, the Respondent telephoned Mr. Wedel and left a voice message advising that he was in the office and had received the letter. He indicated he would not be able to deal with the substantive matters by the deadline.

[23] In response, Mr. Wedel phoned the Respondent on April 4, 2014 and asked the Respondent to reply in writing.

[24] On April 8, 2014, Mr. Wedel received a letter by mail from the Respondent dated April 4, 2014. In the letter the Respondent provided some information, but also stated:

With respect to the balance of your letters, I will have to provide you with a further response in the future.

He indicated that he hoped to be able to provide the further information by April 18, 2014.

[25] The Respondent did not reply further to Mr. Wedel after his letter of April 4, 2014.

[26] On March 31, 2014, the Law Society received a letter from the Respondent dated March 21, 2014 in which he advised that he was in the process of taking steps to close his current law practice as a sole practitioner under his law corporation. He further indicated he was seeking part-time status for insurance, and may or may not apply for “non-practising status in the future.” He intended in the short term to take time off from the practice of law due to personal matters and evaluate his future.

[27] At the date of hearing, July 16, 2014, the Respondent had not responded to the requests contained in Mr. Wedel’s letter of February 19, 2014 as follows:

1. He had not produced the requested client files.
2. He provided an incomplete response to questions relating to the establishment of the trucking business.
3. He had not provided any response to questions relating to:
 - (a) the operation, sale or winding down of the trucking business;
 - (b) the alleged request to backdate a general security agreement;
 - (c) use of the Respondent’s law firm trust account; and

(d) the apparent failure to report to the Lawyers Insurance Fund in a timely manner.

- [28] The Respondent did not dispute the emails sent to him at his email address. He denied, however, that he had received the emails and disregarded them. He said that he did not receive emails during the period from mid-December 2013 to April 30, 2014. He testified that his office was shared with two other lawyers. He further testified that his computer system had been updated, and in the Fall of 2013 he was advised that his software was so out of date that it would not function properly. He testified that he had put off making the upgrades because he was unsure if he was going to continue in the practice of law.
- [29] The Respondent testified that he had been in the office from the end of November 2013 to the middle of December 2013 every second week for only one day. During that time his computer was crashing regularly, and as a result he was not getting emails. The Respondent said that he did not have the money to upgrade his computer, and denied seeing the February 19, 2014 email in his inbox.
- [30] The Respondent testified that when he responded to the Law Society's queries in his letter of April 4, 2014 he knew there were things that he still had to do to comply with the requests of the Law Society investigator. He said he knew it would take him quite awhile to fulfill the requests, and regretted not being able to do that.
- [31] The Respondent said that he was concerned that the information he would give to Mr. Wedel would be communicated in some way to PM, which could affect the lawsuit brought by PM against him.
- [32] The Respondent provided no evidence to defend his failure to provide all of the information and materials requested, but did say that he had been extremely busy as a project manager.

ISSUES

- [33] The issue in this case is the appropriate disciplinary action for the admitted professional misconduct.

FINDINGS

- [34] Ultimately, the Respondent did not offer a defence, but rather an explanation, to the allegations in the citation.

- [35] The Respondent failed to comply with the reasonable requests of the Law Society investigator. The investigator sought, by his letter of February 19, 2014, specific information related to the establishment of the trucking business, the operation, sale and winding down of the trucking business, information regarding allegations of a backdated signature on a general security agreement, and transfer of funds in relation to the trucking business.
- [36] The letter of February 19, 2014 requested detailed and specific information relating to the various topics. It sought explanations that were responsive to the breadth of complaint.
- [37] The fact that the Respondent has incompletely responded to the letter of February 19, 2014 by the time of the hearing displays a lack of compliance with Rules 3-5(6) and (10) of the Law Society Rules and rule 7.1-1 of the *Code of Professional Conduct for British Columbia*. The conduct does constitute professional misconduct for breach of the Act or Rules pursuant to Section 38(4) of the *Legal Profession Act*.
- [38] The Panel finds that the Respondent did commit professional misconduct as set out in allegation 1 of the citation.
- [39] The evidence supports this conclusion, and the Panel accepts the admission by the Respondent of such professional misconduct.
- [40] During the hearing, the Panel received evidence concerning the income of the Respondent. The Panel is satisfied that the Respondent has modest earnings that are insufficient to match his cost of living. The Respondent estimated that, in 2013, he had earned approximately \$20,000 from his law practice. In 2014, he had monthly income earnings of \$4,000 net and expenses of \$4,500. Obviously he is living on borrowed time with his creditors.
- [41] Mr. Grady, on behalf of the Law Society, sought a fine of \$5,000 to \$7,500. He further sought a condition the Respondent provide a complete and substantive response to the inquiries made in the Society's letter to him of February 19, 2014. Lastly, the Law Society sought costs.
- [42] At the conclusion of the Hearing, the Panel rendered an oral decision that:
- (a) the Respondent pay a fine of \$2,000 by December 31, 2014;
 - (b) the Respondent is ordered to provide a complete and substantive response to the inquires made in the Law Society's letter to him dated February 19, 2014 by September 2, 2014; and

- (c) the Respondent is to pay costs and disbursements in the amount of \$1,417.38 by December 31, 2014.

[43] What follows is the Panel's reasoning for this decision. The primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate to uphold and protect the public interest in the administration of justice.

[44] In *Law Society of BC v. Hill*, 2011 LSBC 16, the Hearing Panel commented at paragraph 3 that:

It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

[45] The failure of a lawyer to respond to inquiries from the Law Society is a serious matter. The Law Society's primary duty is to regulate its members in the public interest, and as a result the investigation of alleged misconduct is a matter of gravity. A failure to respond to such inquiries of the Law Society's investigators frustrates the Law Society's ability to properly regulate its members and protect the public. As a result, any failure to reply to the Law Society, particularly after continued requests, must be viewed with grave seriousness.

[46] Following a protracted period of time with continued requests, the Respondent failed to properly or completely respond to the requests of the Law Society, even in the face of a citation hearing. These are factors that can be taken into account in determining appropriate disciplinary action. Mr. Grady, on behalf of the Law Society, did submit that there was no apparent financial or personal advantage obtained by the Respondent through his misconduct.

[47] The Respondent is 47 years of age, and was called to the Bar and admitted as a member of the Law Society in November 1995.

[48] The Respondent's professional conduct record consists of a citation issued November 9, 2011. That citation related to the Respondent taking default judgment against a represented party and failing to respond to communications from opposing counsel. The Panel in that case fined the Respondent \$3,000 and ordered \$2,000 in costs. His professional conduct record is an aggravating factor.

- [49] There is a need for both specific and general deterrence when a lawyer improperly fails to respond to the Law Society. The Respondent's failure to comply with the Law Society's requests in part appears the result of his ongoing process of closing his practice and changing his status to either "non-practising" or "part-time". His heavy commitments to his family and work have certainly affected his dilatoriness in his professional misconduct. While this all may constitute an explanation, it does not constitute an excuse. A lawyer must respond to the requests of the Law Society in a prompt and complete fashion where an investigation is in process. To do otherwise is to frustrate that process.
- [50] In similar Law Society of British Columbia cases, there have been a wide range of sanctions. These range from reprimands to suspensions of up to two months depending on the number of allegations of failure to respond to Law Society requests.
- [51] In *Law Society of BC v. Marcotte*, 2010 LSBC 18, the respondent failed to respond to the Law Society in respect of three complaints made by her clients. The complaints themselves all touched on the issues of delay and failure to communicate. The matter proceeded by summary hearing, and the panel found that the respondent had not provided a substantive response to the three complaints. The respondent had a significant professional conduct record consisting of four prior conduct reviews and two referrals to practice standards. Three or more of the matters on the respondent's professional conduct record touched on the issues of delay and procrastination. The respondent was ordered to pay a fine of \$2,750 and provide a substantive response. In making the order regarding penalty, the panel said:
- Typically for a first citation, a fine in the neighbourhood of \$1,500 to \$2,000 is the appropriate penalty.
- ...
- Although this is a first citation, the Conduct Record is a significant aggravating factor. Therefore, the fine needs to reflect the fact that in reality this is not a first instance. Furthermore, three complaints during the same time period and no response having been provided yet, necessitates a fine at the higher end of the range. I am mindful of the financial circumstances of the Respondent. ...
- [52] In *Law Society of BC v. Malcolm*, 2012 LSBC 4, the respondent was cited for a single allegation of failing to respond to the Law Society. He had no prior discipline history. The respondent was found not to have responded to queries

from the Law Society regarding his role in managing the business affairs of a client. By the date of hearing the respondent still had not provided a substantive response. The respondent had been practising for 40 years and had no professional conduct record. He was fined \$2,000 and ordered to provide a substantive response within 29 days of the hearing.

- [53] The Respondent's conduct in the present circumstances and his prior record would suggest that, for the purposes of both general and specific deterrence, progressive discipline should be invoked. Thus, he properly should be fined an amount in excess of the \$3,000 he had previously been fined for his last finding of professional misconduct. But for the following factors, the Panel would have imposed a fine considerably higher than the \$3,000 previously imposed on the Respondent.
- [54] The Panel accepts that the Respondent has withdrawn from the active practice of law and is in the process of seeking a part-time status for insurance purposes, and may apply for non-practising status in the future. In the short term, in any event, he intends to take time away from the practice of law.
- [55] The Respondent is a single father with three children and has responsibility for them seven out of every 14 days. He is working full-time in the construction industry as a project manager and commuting to accomplish that work. Lastly, he is attempting to finish renovations at his home so that he can sell it to pay off debt that has burdened him since the failure of the trucking business.
- [56] The Panel considers the personal circumstances of the Respondent highly extraordinary. As a result, this decision should not be considered anything in the nature of a precedent for other cases.
- [57] The financial circumstances of the Respondent are of such an order that the imposition of a higher fine than in the circumstances the Respondent will not be able to pay, results in an ineffective penalty. But for the particular circumstances of the Respondent, the fine would have been much higher and with a shorter time to pay.
- [58] The Respondent's failure to comply with the requests of the Law Society, however, is not the product of financial incapacity, but rather lack of time and attention. In consequence, he is ordered to make full compliance with the requests of the Law Society. The matter cannot be concluded without observation that this order to comply only results in the Law Society being able to properly conduct its full investigation of the complaints made against the Respondent. Those matters are

not before us, and have not been considered in any way, and are not factors in this sanction.

ORDER

[59] Our order issued orally on July 16, 2014 is that the Respondent:

- (a) pay a fine in the amount of \$2,000 on or before December 31, 2014;
- (b) pay costs in the amount of \$1,417.38 by December 31, 2014; and
- (c) provide a complete and substantive response to the inquiries made by the Law Society's letter to him dated February 19, 2014 by September 2, 2014.