

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KEVIN ALEXANDER MCLEAN

RESPONDENT

**DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION**

Hearing date: September 23, 2014

Panel: A. Cameron Ward, Chair
Anna Fung, QC, Lawyer
Robert Smith, Public representative

Counsel for the Law Society: Alison Kirby
No-one appearing on behalf of the Respondent

BACKGROUND

- [1] The Law Society convenes formal discipline hearings when a lawyer’s alleged misconduct is “very serious”. For the reasons that follow, we have found that the allegations in this case do not warrant the imposition of disciplinary sanctions.
- [2] Here, the Law Society seeks a determination under section 38(4)(i) of the *Legal Profession Act* that the Respondent, Kevin Alexander McLean (the “Respondent”) committed professional misconduct by failing to respond to communications from a court reporter and by failing to meet his financial obligations incurred or assumed in the course of his practice, contrary to Rule 7.1-2 of the *Code of Professional Conduct for British Columbia* (the “BC Code”).

- [3] The citation issued on April 25, 2014 (the “Citation”) contains the following allegation:

Between approximately June 2013 and December 2013 in the course of representing clients or yourself in litigation matters, you failed to pay in a timely manner invoices received from TB, the court reporter, and you failed to respond to communications from TB regarding payment of those invoices. In particular, you failed to do one or more of the following:

- (a) pay in a timely manner Invoice no. 17259 dated June 12, 2013 in the amount of \$1,318.28 for services rendered on behalf of your client, NM, in the course of your representation of this client in a civil litigation matter, contrary to Rule 7.1-2 of the *BC Code*;
- (b) pay in a timely manner Invoice no. 17533 dated July 19, 2013 in the amount of \$416.33 for services rendered on behalf of your client, NM, in the course of your representation of this client in a civil litigation matter, contrary to Rule 7.1-2 of the *BC Code*;
- (c) pay in a timely manner Invoice no. 17575 dated July 25, 2013 in the amount of \$211.05 for services rendered on your own behalf in the course of your self-representation in a civil litigation matter;
- (d) pay in a timely manner Invoice no. 17556 dated August 19, 2013 in the amount of \$500.33 for services rendered on behalf of your client, VC, in the course of your representation of this client in a civil litigation matter, contrary to Rule 7.1-2 of the *BC Code*;
- (e) provide a substantive response to an email from TB sent to you on October 17, 2013, until after TB complained to the Law Society; and
- (f) provide a substantive response to a letter from TB dated October 23, 2013, until after TB complained to the Law Society.

- [4] The Respondent paid the four invoices in December, 2013. The principal factual issue on this hearing is whether his delay in satisfying the court reporter’s accounts, a period of approximately four to six months, constitutes professional misconduct.
- [5] We were faced with two issues of a preliminary nature: whether to proceed with the hearing in the absence of the Respondent and what effect, if any, to give to the contents of the Law Society’s Notice to Admit.

DECISION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

- [6] The Respondent did not appear at the hearing of this matter, nor did anyone appear on his behalf.
- [7] The hearing commenced as scheduled at 9:30 a.m. on September 23, 2014. As the Respondent was absent, the Panel adjourned for 15 minutes to accommodate any unintended delay by the Respondent. However, he was still not present when the Panel reconvened.
- [8] Section 42(2) of the *Legal Profession Act* permits a hearing panel to proceed in the absence of a respondent if the panel is satisfied that the respondent has been served with the notice of the hearing.
- [9] The Respondent was served with the Citation on May 20, 2014, pursuant to Rule 4-15, and he was served with the Notice of Hearing on June 24, 2014, pursuant to Rule 4-24. Counsel for the Law Society advised us that the Respondent had participated in selecting the hearing date and had been in contact with the Law Society as recently as September 22, 2014.
- [10] In the circumstances of this case, including our receipt of evidence that the Respondent had been served with the Notice of Hearing, we exercised our discretion to proceed with the hearing in his absence.

NOTICE TO ADMIT

- [11] On June 13, 2014, the Respondent was served with a Notice to Admit dated June 12, 2014. The Notice to Admit sought the admission of facts set out in 62 paragraphs and the authenticity of some 17 documents. The Respondent responded by email on July 1, 2014, stating simply “I deny each document and each fact as set out [in the Notice to Admit].”
- [12] The relevant provisions of Rule 4-20.1 provide:
- (1) At any time, but not less than 45 days before a date set for the hearing of a citation, the respondent or discipline counsel may request the other party to admit, for the purposes of the hearing only, the truth of a fact or the authenticity of a document.

...

(6) A response under subrule (4) must contain one of the following in respect of each fact described in the request and each document attached to the request:

(a) an admission of the truth of the fact or the authenticity of the document attached to the request;

(b) a statement that the party making the response does not admit the truth of the fact or the authenticity of the document, along with the reasons for not doing so.

...

(7) If a party who has been served with a request does not respond in accordance with this Rule, the party is deemed, for the purposes of the hearing only, to admit the truth of the fact described in the request or the authenticity of the document attached to the request.

[13] While there may be times where a succinct denial of facts or the authenticity of documents is a sufficient response to a Notice to Admit, we find, in the circumstances of this case, that the Respondent's response failed to comply with the requirements of Rule 4-20.1 and was therefore ineffective as a denial of the facts and authenticity of documents set out in the Law Society's Notice to Admit. It does not necessarily follow, however, that the Respondent's deemed admission of the facts and authenticity of documents set out in the Law Society's Notice to Admit, includes an admission that the facts alleged amount to professional misconduct. The Law Society must still prove to the satisfaction of this Panel, based on the preponderance of evidence, that the conduct alleged amounts to professional misconduct.

FACTUAL FINDINGS

[14] The Respondent was admitted as a member of the Law Society on August 27, 2010 and practises as a sole practitioner, primarily in the area of civil litigation.

[15] The Respondent hired Reportex Agencies Ltd. ("Reportex") to provide reporting services to him in connection with three actions commenced in the Supreme Court of British Columbia. Reportex issued and delivered four invoices dated June 12, July 19, July 25 and August 19, 2013 to the Respondent in connection with those services.

- [16] On September 9, 2013 and September 26, 2013, Reportex asked the Respondent to pay the four invoices. In emails of September 26, 2013, the Respondent requested information about the amount outstanding and apologized for the delay. Reportex immediately provided the requested information but the Respondent did not promptly pay the outstanding accounts.
- [17] On October 17, 2013 and October 23, 2013, Reportex repeated its request that the Respondent pay the account.
- [18] In its letter of October 23, 2013, Reportex reminded the Respondent of his professional obligation to pay his practice debts promptly and cited Chapter 2, Rule 2 of the *Professional Conduct Handbook*, the predecessor of Rule 7.1-2 of the *BC Code*. The author said, “any further delay on your part implies refusal to pay and will require us to contact the Law Society to request assistance in the collection of this account.”
- [19] The Respondent did not promptly reply to Reportex’s email of October 17, 2013 or its letter of October 23, 2013.
- [20] On October 29, 2013 Reportex made a complaint to the Law Society.
- [21] On November 5, 2013 the Law Society wrote to the Respondent about the complaint and referred him to Rule 7.1-2 of the *BC Code*.
- [22] On November 6, 2013, the Respondent sent an email to Reportex to the effect that he would be paying only one of the invoices and that his clients would be paying the other three invoices. On November 20, 2013, Reportex sent another email to the Respondent requesting payment.
- [23] On December 2, 2013 the Respondent sent Reportex two cheques in payment of the first three invoices. One of the cheques was returned NSF on or about December 17, 2013 and had to be replaced.
- [24] On December 13, 2013 the Respondent replied to the Law Society’s letter of November 5, 2013 and a subsequent letter of November 26, 2013 indicating that his explanation for his failure to promptly pay Reportex’s accounts was because he was “extremely busy”.
- [25] On December 30, 2013 the Respondent paid the fourth and final outstanding invoice.

ISSUES

- [26] The issue to be determined is whether the Respondent's delay in responding to Reportex's communications and paying its invoices constitutes professional misconduct.

DETERMINATION

Onus and standard of proof

- [27] The onus is on the Law Society to prove the allegations on a balance of probabilities.
- [28] In *Law Society of BC v. Schauble*, 2009 LSBC 11, the hearing panel summarized the onus and standard of proof as follows (at para. 43):

The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "... evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."

- [29] "Professional misconduct" is not a defined term in the *Legal Profession Act*, the Law Society Rules or *BC Code*. The test for whether conduct constitutes professional misconduct was established in *Law Society of BC v. Martin*, 2005 LSBC 16, at paragraph 171 as:

... whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

- [30] We take a "marked" departure to be a pronounced, glaring or blatant departure from the standard of expected conduct. A mere departure from the standard, it follows, is insufficient to constitute professional misconduct.

Failure to pay practice debts

- [31] In considering whether the Respondent's conduct is a marked departure from that conduct the Law Society expects of its members, we have considered the provisions of the *BC Code*. Rule 7.1-2 of the *BC Code* requires a lawyer to meet financial obligations in relation to his or her practice promptly. Commentary 1 to Rule 7.1-2 provides as follows:

Commentary

- [1] In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicated in writing that the obligation is not to be a personal one.
- [32] We accept that lawyers depend on access to a wide variety of products and services such as court reporting services, process serving services, courier services and services rendered by experts in the medical profession. These services are often provided on demand and on credit on the understanding that the lawyer will promptly pay the account once rendered. If that credit is impaired, the legal profession, the creditors and the clients may all suffer.
- [33] In this case, the Respondent provided no explanation for his failure to promptly pay his practice debts and respond to Reportex other than expressing that he was extremely busy. There is no evidence that he was in financial difficulty, that he had not received the invoices or correspondence, or that he was unaware of his professional obligations to pay the debts.
- [34] We note that three of the four invoices were rendered in what was traditionally the summer break for litigators (July and August) and that the Respondent is a sole practitioner. Nonetheless, it would have been preferable for the Respondent to satisfy Reportex's invoices more promptly.
- [35] Counsel for the Law Society referred us to a number of decisions in support of her submission that the Respondent should be found guilty of professional misconduct for failing to pay his practice debts.
- [36] In *Law Society of BC v. Finkelstein*, [1999] LSDD No. 52, a title search company commenced an action in 1993 against the respondent lawyer to collect payment of some 275 unpaid invoices totaling approximately \$20,000. It obtained a judgment in 1995, which was never paid. The respondent made an assignment in bankruptcy in 1996 and was discharged in 1997. He admitted that his failure to satisfy the judgment constituted professional misconduct.
- [37] In *Law Society of BC v. Jones*, 2004 LSBC 10, the respondent lawyer had an emotional breakdown and closed his office in June of 2002. He was cited for a number of violations, including failure to pay doctors for some 17 medical legal reports. Those accounts remained unpaid in 2004, and the respondent was found guilty of failing to meet his professional obligations in respect of them.

- [38] In *Law Society of BC v. Jackson*, 2008 LSBC 28, the respondent lawyer received another lawyer's account for agency work in December of 2004, but he did not satisfy it until April of 2007, some 28 months later. He admitted that this was a failure to meet his professional financial obligations.
- [39] In *Law Society of BC v. Angly*, [2001] LSBC 10, the respondent lawyer received a psychiatrist's account in November of 1998 and, although he was reimbursed for it by Legal Services Society, he did not pay the account until September of 2000. He admitted his misconduct.
- [40] Finally, in *Law Society of BC v. Melville*, [2000] LSBC 5, the respondent lawyer incurred debts to another lawyer in 1994. When the accounts remained unpaid in late 1997, the other lawyer commenced an action to recover the debt, which was settled a year later. The hearing panel found that the respondent failed to fulfill financial obligations incurred in the course of his practice, which amounted to professional misconduct.
- [41] Each of these cases involved conduct that was much more egregious than the Respondent's. The lawyers in question failed to pay their practice debts for years, if at all. Here, the Respondent paid the accounts within four to six months after they were rendered. While we do not condone his delay, we do not find that it constitutes professional misconduct.

Failure to respond to Reportex

- [42] The duty to answer with reasonable promptness all professional letters and communications from other lawyers that require an answer and to be punctual in fulfilling all commitments is found in Rule 7.2-5 of the *BC Code*.
- [43] Hearing panels have held that the obligation is owed not only to fellow lawyers and to the Law Society but also to non-lawyers with whom a lawyer may be dealing with in the course of acting for a client. In *Law Society of BC v. Smith*, 2005 LSBC 27, a lawyer was cited for having failed to respond to communication from staff at an insurance company in respect of a client matter. In concluding that this conduct constituted professional misconduct, the panel commented at paragraph 8:

The Panel emphasizes that the duty for all members to respond promptly is a duty that is owed not only to fellow members and to the Law Society but also to lay persons with whom the member may be dealing with in course of acting for a client.

[44] Similarly, in *Law Society of BC v. Goddard*, 2007 LSBC 46, the respondent lawyer was found to have committed professional misconduct in 14 different instances, among them, three different instances of failing to respond to another lawyer. At paragraphs 24 and 25 the panel commented:

[24] Chapter 11, Rule 6 of the *Professional Conduct Handbook* requires a lawyer to reply “reasonably promptly to any communication from another lawyer that requires a response,” and in *Law Society of BC v. Smith*, 2005 LSBC 27 at paragraph [8] the Hearing Panel made it clear, in our view entirely appropriately, that that obligation extends to communications from others who are not lawyers. ...

[25] We can think of no principle that justifies a different characterization of a failure to respond to a communication requiring a response from someone who is not a lawyer.

[45] *Smith* and *Goddard* were recently considered and followed by the hearing panel in *Law Society of BC v. Tak*, 2014 LSB 27, paras. 198 to 202.

[46] We do not consider that the Law Society requires a standard of perfection of lawyers in fulfilling their obligation to respond to communications from non-lawyers. Here, the Respondent actually replied to Reportex’s communications. He replied on September 26, 2013 to Reportex’s communications of September 9 and 26, 2013 and he replied on November 6, 2013 to Reportex’s letters of October 17 and 23, 2013 (but after Reportex had complained to the Law Society).

[47] While the Respondent could have been more prompt, we find that delays of 17 and 20 days, respectively, in these instances, do not constitute a marked (or pronounced, glaring or blatant) departure from the standard of conduct the Law Society expects of its members.

CONCLUSION

[48] For the above reasons, we find that the Respondent’s conduct, while imperfect and unfortunate, does not constitute professional misconduct. The Citation is dismissed.

[49] This panel remains seized of this matter with regard to costs. Counsel may make written submissions in that respect by the end of January 2015.