

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 dates: July 29, 2014 and September 24, 2014

Panel: Elizabeth Rowbotham, Chair
Paula Cayley, Public representative
Carol Hickman, QC, Lawyer

Discipline Counsel: Alison Kirby
No one appearing on behalf of the Respondent

BACKGROUND

[1] The citation in this matter was issued on November 19, 2013 and alleges that:

1. In the course of representing your client, Mr. A, in a matter arising from a motor vehicle accident, you failed to respond promptly to some or all of the following communications, that required a response, from your client's former counsel, Lawyer B, regarding imposed trust conditions and the client file contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook* then in force:
 - (a) letters dated August 8, 2012, August 29, 2012, October 3, 2012, and November 19, 2012; and

(b) telephone messages left on December 6, 2012, December 7, 2012 and December 10, 2012.

- [2] It is further alleged that this conduct constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act*.
- [3] The Respondent was served with a copy of the citation on November 20, 2013. This was confirmed in the affidavit of Lawrence P. Dirk sworn November 25, 2013 and marked as Exhibit 2 in these proceedings.

DECISION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

- [4] This matter was initially scheduled for hearing on June 2 and 3, 2014. The Respondent was advised of the dates by the Hearing Administrator of the Law Society of British Columbia (the "Law Society"), Michelle Robertson. Ms. Robertson provided an affidavit of service, which was sworn February 28, 2014 and was marked as Exhibit 3 in these proceedings.
- [5] On May 26, 2014 the Respondent applied for a stay of proceedings, which was dismissed. At that time, the citation was adjourned generally.
- [6] A pre-hearing conference was scheduled for June 24, 2014. The Respondent did not attend or participate in the pre-hearing conference. The Chambers Benchler directed that the hearing of the citation be scheduled for July 29, 2014.
- [7] A Notice of Hearing and the notes from the pre-hearing conference were sent to the Respondent on June 26, 2014 by Ms. Robertson by email and regular mail. The Respondent provided a response to Ms. Robertson, via email, that he was not available on the date scheduled, July 29, 2014.
- [8] Ms. Robertson advised the Respondent on July 2, 2014 that he was "at liberty to apply for an adjournment," which the Respondent did not do. This is all set out in the affidavit of Ms. Robertson sworn July 28, 2014 and marked as Exhibit 4 in these proceedings.
- [9] On July 28, 2014 at 5:36 pm, via email, the Respondent advised counsel for the Law Society that he had been hit by a cyclist and would be kept overnight in the hospital. In that email, the Respondent stated that he would "send the supporting documentation as to why I will not be able to attend tomorrow."

- [10] At 7:50 am July 29, 2014, Chrysta Gejdos, an assistant for the Law Society, contacted the hospital and was advised that the Respondent had been admitted and discharged. Due to patient confidentiality, no further information, including time of admission and discharge, was provided. This was confirmed in the affidavit of Chrysta Gejdos sworn July 29, 2014 and marked as Exhibit 6 in these proceedings.
- [11] In light of the circumstances, this Panel decided to adjourn the hearing of this matter to September 24, 2014, a date identified by the Respondent to the Law Society in late June, 2014 as being available to him.
- [12] The September 24, 2014 date was made peremptory on the Respondent by this Panel. This Panel also ordered the Respondent to deliver to the Law Society, by August 22, 2014, supporting documentation as to why he was unable to attend the hearing on July 29, 2014, including confirmation of his medical condition and admission to the hospital on July 28, 2014.
- [13] On July 30, 2014 counsel for the Law Society sent the Respondent, by email and courier, a copy of this Panel's July 29, 2014 order. This is confirmed in the affidavit of Katherine Shaben, sworn September 23, 2014 and marked as Exhibit 9 in these proceedings.
- [14] On September 11, 2014 the Respondent advised the Law Society that he was seeking to obtain counsel, but that counsel was out of the office until September 15, 2014.
- [15] This Panel reconvened on September 24, 2014. The Respondent did not appear. Trevor Kaatz, staff lawyer with the Law Society, testified that he had spoken to the Respondent's proposed counsel, Mr. Martin from Lindsay Kenney LLP, during the week of September 15, 2014. Mr. Martin advised him that he was not, at that time, retained to represent the Respondent.
- [16] The citation states that, "If you fail to appear at the hearing, the Hearing Panel may proceed with the hearing in your absence and make any order that it could have made had you been present."
- [17] Section 42(2) of the *Legal Profession Act* states that a panel may proceed, in the absence of a Respondent, if the panel is satisfied that the Respondent has been served with notice of the hearing.
- [18] The Respondent had notice of the hearing and must have been aware that the hearing may proceed in his absence if he decided not to attend. Further, the July

29, 2014 date was adjourned to September 24, 2014, which was a date provided by the Respondent.

[19] For all of these reasons, this Panel decided to proceed with the hearing.

NOTICE TO ADMIT

[20] On February 18, 2014 the Respondent was served with a Notice to Admit. The Notice to Admit clearly states on the front page that the Respondent is requested to admit, for the purposes of the hearing only, the truth of the facts and the authenticity of the documents listed in the notice. The Notice to Admit also clearly states that, if the Respondent failed to respond to the Notice to Admit with 21 days, he would be deemed to admit the truth of the facts and the authenticity of the documents listed in the notice. This is in accordance with Rule 4-20.1,

[21] The Law Society did not receive a formal response to the Notice to Admit from the Respondent within the prescribed time period.

[22] On May 26, 2014, via email, the Respondent stated that he denied the first admission and admitted the remainder. The reason he gave for denying the first admission is because it “is improper as it seeks a conclusion of law regarding professional misconduct. Admissions only relate to facts.”

[23] The first admission in the Notice to Admit simply relates to the Respondent’s date of call and admission to the Law Society. This should not be a fact that is in dispute.

[24] Counsel for the Law Society consented to the withdrawal of the Respondent’s deemed admission of professional misconduct.

[25] Given the Respondent’s email of May 26, 2014, the Panel finds that the parties have agreed to the truth of the facts set out in the Notice to Admit and the authenticity of the documents attached to the notice. Had the Respondent not sent the May 26, 2014 email, we would have come to the same conclusion based on the application of Rule 4-20.1(7).

FACTS

[26] The Respondent was called and admitted to the Law Society in 2010.

[27] On July 2, 2012, the Respondent was retained to act on behalf of Mr. A in connection with a motor vehicle accident claim. At that time, Mr. A, through his *guardian ad litem*, was represented by Lawyer B.

[28] On August 8, 2012 Lawyer B sent a letter to the Respondent imposing undertakings. The relevant portions of that letter are as follows:

We enclose herewith the following folders:

A - Correspondence;

B - General document file (including photos);

C - Part 7 action file;

D - Medical document file

E - Disbursement file.

This letter and enclosures are provided to you on your undertakings as follows:

- 1) to pay our account for disbursements as set out in the enclosed bill forthwith;
- 2) to pay our account for services rendered in the amount agreed, or failing agreement, in an amount judicially determined as a first charge on settlement or judgment proceeds recovered;
- 3) to forthwith file a Notice of Change of Solicitor in the Part 7 action and to provide us with a filed copy of same in a timely fashion;

...

If you do not agree to the above undertakings, you are to return the enclosed file in its entirety without first copying same.

[29] The Respondent acknowledged receiving the August 8, 2012 letter and statement of account, but states that the client file was not enclosed with the letter.

[30] The Respondent contacted Mr. A's *guardian ad litem* and asked her to pay Lawyer B's disbursement account directly.

- [31] On August 29, 2012 Lawyer B sent a follow-up letter to the Respondent enclosing a copy of the August 8, 2012 letter.
- [32] The Respondent did not reply.
- [33] On October 3, 2012 Lawyer B sent a further follow-up letter to the Respondent. The Respondent did not reply.
- [34] On November 19, 2012 Lawyer B sent a further letter to the Respondent asking him to contact Lawyer B forthwith.
- [35] On December 6, 7, and 10, 2012, Lawyer B left telephone messages for the Respondent with the Respondent's receptionist. The Respondent did not respond to these telephone messages.
- [36] In total, Lawyer B sent four letters and made three telephone calls to the Respondent between August 8, 2012 and December 10, 2012. The Respondent did not respond.
- [37] On December 11, 2012 Lawyer B filed a complaint with the Law Society.
- [38] The Law Society contacted the Respondent regarding the complaint in February, 2013. It was not until after the Law Society contacted the Respondent that the Respondent followed up with the *guardian ad litem* to determine if Lawyer B's disbursement account had been paid.
- [39] On February 18, 2013, Lawyer B wrote to the *guardian ad litem* acknowledging receipt of a cheque on February 6, 2013 to cover his disbursement account.
- [40] On February 20, 2013, Lawyer B provided the Respondent with a photocopy of his original client file on the same undertakings as in the August 8, 2012 letter, with the exception that Lawyer B would relieve the Respondent of the undertaking to pay the disbursement account if the February 6, 2013 cheque cleared within 21 days.
- [41] On April 2, 2013, the Respondent filed a Notice of Change of Lawyer in the civil action.
- [42] Between February 20, 2013 and June 12, 2013, the Respondent and Lawyer B communicated regarding payment of Lawyer B's fees. The Respondent paid Lawyer B's account on or about June 12, 2013.

- [43] The Respondent made his first response to Lawyer B on February 17, 2013, after Lawyer B had filed the complaint with the Law Society. This was approximately six months after the initial letter sent to the Respondent in August 2012.

ISSUES

- [44] The issue to be decided is whether the Respondent failed to respond to Lawyer B in a timely fashion, contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook* and, if so, does this amount to professional misconduct.

DISCUSSION

- [45] The Law Society acknowledged that the onus of proof is on the Law Society and the standard of proof is the balance of probabilities. (*FH v. McDougall*, 2008 SCC 53; *Law Society of BC v. Schauble*, 2009 LSBC 11)
- [46] Chapter 11, Rule 6 of the *Professional Conduct Handbook* states, “a lawyer must reply reasonably promptly to any communication from another lawyer that requires a response.” This obligation is continued in Rule 7.2-5 of the new *Code of Professional Conduct* for British Columbia.
- [47] The Law Society submitted that the Respondent did not respond to Lawyer B for approximately six months and that this was too long for matters dealing with undertakings and client files.
- [48] Law Society counsel provided us with several decisions in which panels have found professional misconduct for failing to respond to communication from another lawyer. (*Law Society of BC v. Perrick*, 2014 LSBC 03; *Law Society of BC v. Pledsted*, 2012 LSBC 10; *Law Society of BC v. Clendening*, 2007 LSBC 10; *Law Society of BC v. Braker*, 2007 LSBC 01; *Law Society of BC v. Tsang*, 2005 LSBC 10; *Law Society of BC v. Williamson*, 2005 LSBC 19)
- [49] Most lawyers have busy practices and from time to time may not respond to communication as quickly as they ought to. However, the question for this Panel to decide is what is “reasonably promptly” in these particular circumstances.
- [50] This matter dealt with the transfer of a client’s file and a letter of undertaking from one lawyer to another. These are significant matters and must be dealt with in a timely fashion.

- [51] Clients provide lawyers with important and valuable documents. These must be treated with utmost respect and importance. When a client file is transferred, it is important that this is done in a timely fashion to ensure that no documents are lost or misplaced in that process.
- [52] Undertakings and trust conditions from one lawyer to another are one of the hallmarks of the legal profession. Letters that include an undertaking must be given priority and responded to in a timely fashion.
- [53] The Respondent did not provide a response to Lawyer B for approximately six months, and the response provided only occurred after Lawyer B had complained to the Law Society. This is not satisfactory and represents a breach of Chapter 11, Rule 6 of the *Professional Conduct Handbook*.
- [54] The next question is whether this delay represents professional misconduct.
- [55] The test for determining professional misconduct is a question of whether the facts “disclose a marked departure from that conduct the Law Society expects of its members.” (*Law Society of BC v. Martin*, 2005 LSBC 16)
- [56] This decision was recently affirmed in *Re: Lawyer 12*, 2011 LSBC 35.
- [57] As indicated above, given the serious nature of the subject matter: client files, undertakings and trust conditions, this matter should have been treated seriously and diligently, which the Respondent did not do.
- [58] This conduct represents a marked departure from the conduct required of a lawyer and accordingly constitutes professional misconduct.

SUMMARY

- [59] The Respondent was in breach of Chapter 11, Rule 6 of the *Professional Conduct Handbook*.
- [60] The Respondent’s conduct constitutes professional misconduct.
- [61] The disciplinary action phase of the hearing will take place on a date to be set.