

2005 LSBC 05

Report issued: February 3, 2005

Citation issued: April 17, 2002

The decision is published anonymously as the Court of Appeal overturned the decision

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Re: Lawyer 4

Respondent

**Decision of the Hearing Panel
on Penalty**

Hearing date: November 10, 2004

Panel: Ralston S. Alexander, Q.C., Single Bencher Panel

Counsel for the Law Society: Todd R. Follett

Counsel for the Respondent: Terrence L. Robertson, Q.C. and Rebecca Breder

Background

[1] On April 3, 2003, this Panel found the Respondent guilty of professional misconduct as alleged in a citation issued by the Law Society on April 17, 2002. The decision of the Hearing Panel on Facts and Verdict has not previously been circulated but it is attached to these reasons on Penalty.

[2] Through no fault of the Law Society or the Panel, the hearing of the Penalty phase of this matter was delayed considerably, a period in excess of nineteen months.

Overview

[3] The Respondent was found guilty of professional misconduct for attempting, while attending at a Provincial Correctional Facility, to introduce an acquaintance who accompanied her to the Facility, as an assistant to her. The person in company with the Respondent at the Provincial Correctional Facility was not her assistant but was instead the common-law spouse of the prisoner the Respondent was seeking to interview. The circumstances of these events are fully described in the decision of the Hearing Panel on Facts and Verdict.

Law Society Position on Penalty

[4] In seeking to assist the Panel in its analysis of the appropriate penalty, counsel for the Law Society characterized the various components of the professional misconduct in the context of the penalty reasons issued in a disciplinary case involving one *Charles Ogilvie*, cited as [1999] LSBC 17. The *Ogilvie* decision sets out a variety of considerations that a Panel should consider in determining an appropriate penalty.

[5] The *Ogilvie* considerations are as follows, with the Law Society's comments in respect of each of them

noted.

The nature and gravity of the conduct

The Law Society characterizes this conduct of attempting to mislead jail guards as "fairly grave". It is noted that the interaction between members of the legal profession and the individuals which serve as correctional officers at Provincial facilities is a relationship that depends for its efficacy upon a high degree of trust. It is tautological that circumstances involving deceit by a member of the legal profession in an interaction with prison guards will adversely impact upon this trust relationship. It is my view that "fairly grave" understates the seriousness of this behavior.

The age and experience of the respondent

The Respondent is 39 years of age, but she has only been a member of the Law Society of British Columbia since 1998. At the time that these incidents transpired, she had been a member for just over two years and was a very junior member of the Bar. She had virtually no experience in the criminal law.

The previous character of the respondent, including details of prior discipline

There was no evidence before the Panel of any prior disciplinary proceedings although the Respondent's Professional Conduct Record indicated that she had had some engagement with the Practice Standards Committee of the Law Society, that group charged with responsibility for assisting lawyers to improve the manner in which they approach the practice of law. It was noted that as a result of this Respondent's interaction with the Practice Standards Committee, some improvement in her approach to practice matters had been realized.

The impact upon the victim

It is difficult to characterize the jailers in this instance as the "victims" of this Respondent's behaviour, but they were the parties who witnessed the behaviour and who responded negatively to it. It is clear from a review of the facts set out in the decision on Facts and Verdict that the jailers were considerably exercised by the circumstances surrounding the events on the night in question.

The Advantage Gained or to be Gained by the Respondent

There was very little to be gained by the Respondent in the circumstances of this incident and in fact she achieved nothing in the result. The considerations under this head of concern in the *Ogilvie* matrix more properly demonstrate the extraordinary lack of judgment exhibited by the Respondent at the material times.

The number of times the offending conduct occurred

It appears that the Respondent sought to introduce her companion as her associate on at least two occasions on the night in question, although no additional significance should be taken from the consistency demonstrated by that fact.

Whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances

It is the view of the Law Society under this consideration that the Respondent has not acknowledged the misconduct, and has taken no steps to disclose or redress the misconduct. It is the view of the Law Society that there are no other mitigating circumstances save for the fact that she was at the material time a very junior member of the Bar and that the offending behaviour occurred over a very brief period of time.

The possibility of remediating or rehabilitating the Respondent

This Respondent has no other discipline history and the Law Society notes that some considerable time has transpired between the events that are the subject of the citation, (October 2000) through to November, 2004, when the Penalty hearing was conducted. It notes that there is not a compelling argument for the need for some special rehabilitation measures in this case.

The Impact on the Respondent of Criminal or Other Sanctions or Penalty

There are no other sanctions or penalties contemplated in respect of these facts.

The Impact of the Proposed Penalty on the Respondent

The Respondent is a sole practitioner and the penalty of a suspension upon this member will be, in the words of the Law Society, substantial to severe.

The Need for Specific or General Deterrence

The Law Society notes that while the frequency of misleading behaviour on the part of the members of the Law Society is not widely prevalent, it is not entirely unheard of either. It is the view of the Law Society that a strong message of condemnation must be published to the profession in respect of this behaviour so as to ensure that there can be no misunderstanding as to the views of the Benchers with respect to matters such as these.

The Need to Ensure the Public's Confidence in the Integrity of the Profession

It is the view of this Panel that this particular consideration of the *Ogilvie* array is of particular importance. There is much talk these days of the need to ensure the continued independence of the legal profession and of the need to preserve our entitlement to be self regulated. One of the characteristics of an independent Bar is that it is forthright and honest with clients, with the members of the public, and with other members of the profession. It is the view of this Panel that it is of particular importance and significance that a clear and unequivocal message is delivered in respect of behaviour that would serve to erode the public's confidence in the integrity of the legal profession.

The Range of Similar Penalties

The Law Society acknowledged in its argument that there is no particular helpful pattern or trend to decided cases in respect of misleading behaviour by a member. The Law Society directed the Panel's attention to a number of authorities that provided a range of penalties for misleading behaviour. Those penalties started from a high of six months in the case of *Robert Allen Moore-Stewart*, Discipline Case Digest 89/5, where the misleading behaviour involved the member appearing before a Justice of the Peace and providing that Court Officer with misleading information as to the significance of the evidence that a potential witness would give. The Hearing Panel determined that the member had no reasonable basis for the suggestion that the potential witness had relevant evidence to give and found that the member had intentionally misled the Justice of the Peace for an improper collateral purpose.

In the case of *Sheila Margaret Anderson*, the member was found guilty of professional misconduct in that she intentionally misled a client as to the state of affairs in respect of a particular litigation matter in which her client was interested. The Panel in that case noted that in the circumstance of lying to a client there must certainly be a suspension and noted that the range would be in the "neighborhood of two or certainly three months" absent exceptional circumstances, which the Panel did find in these circumstances and they imposed a one month suspension. The particular exceptional circumstances which were relied upon by the Panel are difficult to discern from the reasons but there appeared to be an accumulation of mitigating factors which suggested that a smaller than normal penalty was

appropriate.

A one month penalty was visited upon *Roger Clive Schiffer*, Discipline Case Digest 93/11. The Panel in the *Schiffer* case considered that in the normal course, the behaviour of the member would call for a substantial suspension or even disbarment. The *Schiffer* Panel determined that in the five years that had transpired since the misconduct, the member had faced great difficulties including significant health related problems caused by non hodgkins lymphoma. The Panel noted that Mr. Schiffer was terminally ill at the time of their imposing a penalty upon him, and that he, to his credit, sought to continue to provide services to clients for as long as his health permitted him to do so.

The case of *Charles Michael Jeffrey*, Discipline Case Digest 97/1 was a circumstance where a member failed to communicate an adjournment advice he had received from Court Registry staff with a view to continuing to enjoy the benefits that the pressure of the pending trial would have on the other side's inclination to settle. The Hearing Panel noted that a penalty of one to two months suspension would be appropriate in the circumstances but observed that that would not be effective in the case of Mr. Jeffrey because he had retired from practice.

[6] The Law Society drew the Panel's attention to several cases where the Respondents had been guilty of misleading behaviour but where no suspension penalty was visited upon those members. Those cases include *James Anthony Hall*, 98/02, *Laird Russell Cruickshank*, 98/08, *John Noel Laxton*, 99/16, and *Robert Bruce MacAdam*, 99/18. There is no basis for reconciling those four decisions with the earlier suspension decisions noted. It is possible that in the circumstances of those cases, the Benchers in question had a more accommodating view of the consequences of misleading behaviour by our members and its possible impact upon the image of the profession.

[7] The final case referred to by the Law Society was the case of *Gregory Louis Samuels*, 99/23, where that member misled the Court by suggesting that he had been in recent contact with the parents of his clients when in fact no such contact had taken place. That member received a ninety day suspension and the conduct was described by the Hearing Panel as a "very serious matter as the Court has to rely on the submissions given to it by counsel as fact. It is an essential cornerstone of our system of justice that counsel's submissions reflect actuality. Any departure is an assault on the integrity of that system."

[8] In view of all of the circumstances, the Law Society urged a penalty of from six weeks to three months suspension. It also sought an order for costs upon which more will be written later in these reasons.

Representations of the Respondent

[9] Counsel for the Respondent indicated that the Law Society had fairly presented a wide range of penalties and acknowledged that the array was substantially confusing. It was acknowledged that there was a range of penalty opportunities available to this Panel which began at no suspension and a fine through to a suspension of some duration, depending on which of the cases cited to me were thought to be relevant.

[10] The Respondent submitted letters of reference in support although it must be said that none of the four letters provided in support spoke at any length to the central issue which confronts this Panel, which is the question of the integrity of this Respondent. That integrity is called into question by the events that led to the issuing of the Citation. Each of the members providing testimonial support for this Respondent spoke to her difficult family background and of her energy and perseverance in obtaining membership in the Law Society of British Columbia. It was the general view of respondents that she was improving in her ability to practise competently and that each of the parties providing the memoranda of support spoke to the fact that they were aware of the circumstances which had caused this Respondent to appear before this Hearing Panel. I

find the letters of support from members of the Bar and the single client testimonial to be unhelpful.

[11] Counsel spoke at length to the circumstances that are described fully in the decision on Facts and Verdict. He noted that the plan to pass off the bedraggled, impaired, sports clothing attired companion as her legal associate was a plan so fraught with difficulty that it had no reasonable chance of success. I note parenthetically that the Law Society observed in response that it had never alleged that the plan was a "good" plan, only that it was the plan.

[12] Counsel for the Respondent sought to distinguish those of the Law Society's cases where suspension penalties were imposed, and noted in several instances where no penalties were imposed that the fact patterns were, in the Respondent's view, in respect of behavior that was more troubling than that which had been exhibited by the Respondent.

[13] He noted in the decisions involving *MacAdams*, *Schiffer*, *Jeffrey*, and *Cruickshank* that in each of those cases the beneficiary of the lie was the member and that there was a personal benefit garnered from the misleading statements. He notes that no such personal benefit flowed to the Respondent in the circumstances of this case.

[14] He notes that in particular, and it must be acknowledged, that this Respondent acted unwisely and with poor judgment. He notes that the absence of personal benefit distinguishes this case from all of the others. He also notes a distinction between this case and those cited by the Law Society on the basis of the bizarre nature of the circumstances and the utter hopelessness of the plan. He finally concluded that the Respondent was making good strides in her attempt to practise more effectively and that it would be a significant step backwards if those improvements were not respected in the outcome of these proceedings.

[15] He finally spoke to the apparent lack of remorse by the Respondent in the circumstances and observed that that lack of remorse stemmed from the fact that the Respondent had undertaken appeal from the initial decision of this Panel on Facts and Verdict and that any decision taken by that Respondent member in terms of remorseful behaviour would have been inconsistent with the view that an appeal was warranted. He observed that if there had been no appeal pending from the decision of this Panel on Facts and Verdict then it is probable that a different presentation in respect of the remorse would have been evidenced. He noted that it would be a dangerous approach for this Panel to take a negative impression from the absence of remorse in the particular circumstances of this case.

Discussion and Decision

[16] It must be noted that misleading behaviour of our members to anyone is deserving of aggressive condemnation when that behaviour comes to the attention of the Law Society. It is arguably more significant when the misleading behaviour is directed to an official participating in the Court process. Those participants include other members of the Law Society, officials of Government agencies with whom lawyers deal, Court officials and Correction Officers.

[17] In all of these circumstances, the parties dealing with members of the Law Society of British Columbia must be entitled to rely upon unmitigated integrity in all of their dealings and a message to communicate that belief must necessarily be sent whenever behaviour that falls below that expectation is exhibited.

[18] In these circumstances, this Respondent intentionally misled a Corrections Officer with a view to encouraging that Corrections Officer to accept as her associate, the common-law spouse of her client. There is no count in the citation which deals with the consequences of what would have transpired had the plan been successful and it is not necessary for us to explore that circumstance in reaching these

conclusions. It is sufficient to note that the Respondent member attempted to mislead two representatives of the Provincial Corrections Service and that behaviour must be condemned in the strongest possible terms.

[19] I initially contemplated a suspension period of six months as I had determined that that period of suspension would send an appropriate message with respect to my opinion of the severity with which this behaviour should be viewed. However, it is my view that a suspension of that duration would be seen as an aberration having regard to the authorities to which I have been referred, as only in the *Ogilvie* circumstances was a penalty of that duration exacted for misleading behaviour.

[20] I have been persuaded that the personal circumstances of this Respondent have some mitigating and ameliorating impact upon the period of suspension that should be served by her. She has indeed suffered a difficult upbringing and her early years in practice have not been free from trouble. She has continued to persevere and has achieved some success in resolving issues that are outstanding with respect to her continued practice.

[21] While there is no particular assistance offered by the array of cases provided, it is perhaps necessary for this Law Society to note that as times change, so must our view of appropriate penalty in circumstances such as those before this Panel. In short, we must have less tolerance for behaviour that seeks to denigrate the standing of the profession in the eyes of the general public. It will become increasingly important over time that we respond vigorously and with resolve to address any behaviour that might lower the esteem in which the legal profession is regarded.

[22] This Respondent will be the beneficiary of what is essentially a transition time for the Law Society for while a penalty of six months to one year suspension might be an appropriate penalty in these circumstances it is a penalty that is out of step with historic precedent. It will be appropriate to note however that that precedent is evolving.

[23] In the result a penalty of three months suspension is ordered and the commencement date of that suspension will be April 1, 2005.

Costs

[24] The Law Society submitted a Bill of Costs pursuant to Rule 5.9 of the Law Society Rules and Section 46 of the Legal Profession Act which Bill of Costs is made up as follows:

Hearing - January 14 and 15, 2003

Court Reporters Fees	\$2,309.92
Panel fees two days @750.00 per day	\$1,500.00
Counsel fees - preparation and attendance 36.1 hours @ 125.00 per hour	<u>\$4,512.50</u>
	\$8,322.42

Hearing - November 10, 2004

Court Reporters Fees (1/2 day)	\$160.50
Panel Fee (one day)	\$750.00

Counsel Fees - preparation and attendance	<u>\$1,237.50</u>
9.9 hours @ 125.00 per hour	
	\$2,148.00
TOTAL OF TWO HEARINGS	\$10,470.42

[25] Counsel for the Respondent argued that no compelling argument for ordering the transcripts had been advanced by the Law Society. He suggested that since both counsel were aware that an appeal had been taken, which appeal would necessarily involve the Respondent ordering transcripts, that the Law Society's transcripts were unnecessary. This argument overlooks the fact that there were nearly two full days of contradictory viva voce evidence. The contradictions in the evidence required resort to the transcripts. In addition, the transcripts for the appeal will not assist with the writing of the decision on Facts and Verdict.

[26] Counsel for the Respondent suggests further that the Panel ought to be mindful of the fact that these events have had a negative impact upon the ability of the Respondent to earn an appropriate living. He notes that her gross revenues have dropped dramatically as a result of these proceedings. It is not clear how these proceedings have resulted in the suggested impact on the Respondent's income and in any event how the Law Society can have responsibility for that outcome.

[27] The Respondent's counsel urges the Panel to note the impact that any penalty imposed on the Respondent will have on her. In particular, it was anticipated that a period of suspension would be the result of this Panel's determination, and it has been noted that any suspension would have an obvious negative impact upon the Respondent's ability to pay costs.

[28] The Law Society argues that all costs included within the Bill of Costs are reasonable, and that there is authority within the rules for assessing a full indemnity for costs if a Respondent is found to be guilty of professional misconduct. The Law Society cites *McNabb*, [1999] LSBC 02, as authority for this proposition. The Law Society also relies upon *Mah Ming*, [1999] LSBC 48 as authority for the full indemnity proposition as follows:

"The result of the *Taschuk* and *McNabb* decisions is that a panel, having determined that an order of costs against either the Law Society or a Respondent is appropriate, must order full indemnity of the successful party if satisfied that the costs as presented are reasonable."

[29] It has been observed elsewhere that to the extent that the Law Society is not fully indemnified in respect of its costs by the responsible Respondent, then the costs of the discipline process against individual members will be borne by the Law Society membership as a whole. The parties that identify that characteristic generally observe that on any consideration of the balancing of responsibility for such costs, it is generally preferable to visit the costs upon the party responsible, namely the member, rather than upon the profession as a whole.

[30] A hearing Panel recently considered the question of the need for a full indemnity of costs in the case of *Jeletsky* 2005 LSBC 02. This Panel concluded that the public interest would be better served by providing a costs basis for discipline hearings that did not discourage members from vigorously defending discipline proceedings when they were initiated against them. It was suggested in that decision that the public interest would be served by the development of a reliable body of case law that would result from the vigorous defense of a number of discipline matters, that vigorous defense being encouraged by modest orders of costs.

[31] I must specifically and respectfully decline to follow that line of thinking in this case, and any others in

which I may be involved, as it is my opinion that there is no shortage of cases upon which an appropriate body of law has been and can be developed. Neither is it necessary for the Law Society to encourage members to vigorously defend matters by reduced awards of costs at the expense of the general membership. This approach to cost awards seems to be wrong headed in that it encourages members to defend matters, perhaps on less than entirely sound grounds, and doing so with the expectation that they face no particularly great cost penalty in the result of an adverse decision.

[32] In the circumstances of this case, there is no basis upon which the membership of the Law Society should support this member in her defense of this citation. She has been found to have professionally misconducted herself as a result of events entirely within her own care and control. Any considerations of the financial impact upon the member in respect of this matter can be satisfied by providing an appropriate time to pay the costs as awarded.

[33] In that regard, and having determined that the costs as presented in this matter are reasonable, it is the order of this Panel that the Respondent pay to the Law Society costs as requested by the Law Society in the amount of \$10,470.42 and that those costs be paid to the Law Society, without interest on or before the second anniversary of the date that the Respondent is eligible to return to practice following the suspension ordered herein.