2016 LSBC 07
Decision issued: February 17, 2016
Citation issued: April 23, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MAUREEN JOYCE WESLEY

RESPONDENT

DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION AND COSTS

Hearing dates:	July 9, 2015 and January 14, 2016
Panel:	Herman Van Ommen, QC, Chair Woody Hayes, Public representative Bruce LeRose, QC, Lawyer
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	Henry C. Wood, QC

BACKGROUND

[1] In our decision dealing with the facts and determination phase of this proceeding (2015 LSBC 05), we found the Respondent committed professional misconduct when, in the course of representing a client in a family law matter, she failed to take the necessary steps to have an order made October 20, 2011 entered until June 25, 2013. She also failed to advise her client concerning the risks of not entering the order or the costs involved to settle the terms of the order.

[2] Our key findings are set out in paragraphs 24 to 28 of that decision as follows:

[24] Although the Respondent was aware in the fall of 2011, shortly after the JCC, that the other counsel did not agree with her form of order, she took no steps to resolve the issue at that time. She did not give her client any advice on the risks that she would face because the Order was not entered, nor did she give any advice concerning the costs and steps involved in having a Registrar settle the form of order.

[25] In the fall of 2012, when she learned from new counsel that the husband was resiling from his agreement to pay child support, she also failed to take steps to have the form of order settled. Further, she failed again to advise her client of the risks she was facing and the alternatives that were available to her.

[26] The prejudice her client suffered from the lack of an entered Order was twofold. Firstly, when the impasse developed, the husband was able to refuse to pay child support and demand her client's consent to a divorce in circumstances where there should have been an entered Order to compel his payment of child support. The impasse should never have occurred.

[27] Secondly, in January when advised that FMEP required an entered Order before taking steps to enforce, the Respondent again failed to take appropriate and effective steps.

[28] An appointment to settle the terms of the Order should have been obtained forthwith, and the Order could have been entered in short order. Instead the Respondent took months attempting to locate prior counsel and then further months debating over the form of order. The Respondent knew in January 2013 that her client was experiencing prejudice due to the fact the Order was not entered, and yet, because of the way the Respondent dealt with matters, the Order was not entered until June 25, 2013.

DISCIPLINARY ACTION

[3] The disciplinary action phase of this matter took place on two separate occasions. At the initial hearing on July 9, 2015 the Law Society sought a fine of $3,000 and costs in the amount of $6,456.25.

[4] The Respondent, appearing on her own behalf, pointed to her difficult financial situation, particularly her cash flow, and suggested that the total financial penalty, including costs, should be $5,000. She said she would need almost one year to pay.

[5] At the conclusion of the hearing on July 9, 2015, the Panel asked discipline counsel and the Respondent to make submissions regarding the applicability of s. 38(5)(f)(ii) and (iv) of the *Legal Profession Act*, which reads as follows:

> **Discipline hearings**
>
> **38**(5) If an adverse determination is made against a respondent other than an articled student, under subsection (4), the panel must do one or more of the following:
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> ...
>
> (f) require the respondent to do one or more of the following:
>
> (ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;
>
> ...
>
> (iv) practise law only as a partner, employee or associate of one or more other lawyers;

[6] The Law Society provided written submissions. The Respondent then retained Mr. Wood, who also provided written submissions. Oral submissions on these points were made at the January 14, 2016 hearing.

[7] Section 38(5) of the *Legal Profession Act* provides a panel with a range of penalties and orders it may impose following an adverse determination being made against a respondent. It is of course fundamental that the imposition of any sanction and the choice of a specific sanction must be consistent with the Law Society's statutory mandate to uphold and protect the public interest in the administration of justice in accordance with s. 3 of the *Legal Profession Act*.

[8] The Law Society noted in its submissions as follows:

> There should be a rational connection between concerns raised by the conduct and the sanction imposed, as well as a rational connection between the objectives to be served by the sanction in the particular circumstances of the case and the sanction itself.

[9] The Law Society noted that the citation did not allege incompetence but alleged failure to serve the Respondent's client in a manner so as "to provide quality of service at least equal to that which would be expected of a competent lawyer in a similar situation." Consequently, this Panel did not make a finding of incompetence in its reasons on Facts and Determination.

[10] The Law Society submitted that the misconduct alleged and proven included a competency component. The Law Society submitted therefore that an order requiring the Respondent to appear before a board of examiners to satisfy the board that she is competent to practise law had a rational connection to the proven misconduct. Such an order, it submitted, would aid in both rehabilitation of the Respondent and protection of the public.

[11] Counsel for the Respondent asserted that orders under s. 38(5)(f)(ii) or (iv) were inappropriate in light of the limited scope and nature of the misconduct in issue and the absence of any significant risk to other clients. He referred to the decision of the Law Society of Upper Canada in *MacLellan, Re*, 2003 CanLII 48925, in which the appeal panel stated at para. 43:

> In other words, in determining an appropriate penalty, a hearing panel should focus on the nature of the acts of professional misconduct … and the extent to which the nature of the misconduct presents a continuing risk to the public.

[12] Mr. Wood noted that the facts as found by this Panel relate to only one client and one order, although it occurred over a period of time. He also noted the Respondent has been practising for over 33 years in family practice without relevant discipline. He submitted that the facts as found do not properly raise a concern about her competence generally. He noted that Commentary 2 to Rule 3.2-1 in the *BC Code* in relation to quality of service states:

> [2] A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

[13] Although the Panel has found that the Respondent's failure in this instance was a marked departure from the norm, the findings relate only to one client and one order.

[14] Mr. Wood asserted that an order under s. 38(5)(f)(ii) was only appropriate where the panel had actually made a finding of incompetence. In *Law Society of BC v. Markovitz*, 2012 LSBC 25, the panel considered whether or not to make an order under s. 38(5)(f)(iii) suspending a respondent from practice until he had satisfied a board of examiners appointed by the panel that his competence to practise was not adversely affected by a physical or mental disability, or dependence on alcohol or drugs.

[15] The panel in that case wrote at para. 16:

> [16] On its face, section 38(5)(f)(iii) seems to require a finding (or an admission) that the lawyer's competence to practise law is adversely affected by dependency on alcohol or drugs. In this case the citation contains no allegation that the Respondent is not competent to practise law and that this is due to alcoholism; the Agreed Statement of Facts contains no admissions to this effect; we made no such findings when we accepted his admissions of professional misconduct (see generally, Decision on Facts); and there is little, if anything, in the evidence that we have to provide a foundation for such a finding.

[16] We are unable to agree that a panel must find that a respondent is incompetent before utilizing the power in s. 38(5)(f)(ii). The purpose of s. 38(5)(f)(ii) is to have a board of examiners, who presumably have expertise in the area, determine whether or not a respondent is competent. There would be no need to refer the matter to a board of examiners if the panel had already determined the Respondent was incompetent. The difficulty is determining when it might be appropriate to utilize this power.

[17] Mr. Wood submitted in the alternative that, absent a finding of incompetence by the Panel, there ought to be evidence of incompetence, meaning a generalized pattern of conduct that fails to meet the appropriate standards, rather than a failure in one instance.

[18] We find that we do not have sufficient evidence that the public interest is at risk or that the Respondent's standard of performance is less than that required of any other lawyer on other matters and therefore will not make an order under s. 38(5)(f)(ii). We do so without ruling on what the appropriate threshold ought to be.

[19] The Panel also sought submissions on the appropriateness of making an order under s. 38(5)(f)(iv). We find that there is insufficient evidence to consider making an order under that provision.

Factors in determining sanction

[20] The primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate set out in s. 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice. This purpose is recognized in the following often-cited passage from MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline*, loose-leaf (Toronto: Carswell, 1993) at page 26-1:

> The purposes of Law Society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.
>
> In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

[21] 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.

[22] A non-exhaustive list of factors to be considered in assessing sanction is set out in the 1999 decision in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, as follows:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) 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;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[23] It should be recognized first that the list of factors is not exhaustive and not all are relevant to each case. Second, they are only a starting point in determining the appropriate sanction. After a review of all the applicable factors there will generally be a few that require close consideration to determine the appropriate sanction.

[24] The nature and gravity of the conduct has been described. Although the Respondent's actions concerned only one order, there were different points in time at which she failed to advise her client adequately of the risks of the un-entered order.

[25] The Respondent has practised for 33 years, primarily as a family law lawyer.

[26] Her professional conduct record consists of one referral to the Practice Standards Committee in April 2010. The file was closed in May 2012. We do not find her professional conduct record of assistance in determining the appropriate sanction.

[27] This is the Respondent's first citation and only finding of professional misconduct.

[28] Her conduct did cause harm to her client as described in the reasons on Facts and Determination.

[29] In the hearing, the Respondent asserted that, overall, she felt she had served her client well. Although she did not express remorse directly, it was apparent that the Respondent recognized she did not deal with the un-entered order appropriately.

[30] Being the subject of a citation and a public finding of professional misconduct are in themselves noteworthy penalties that act as specific deterrence.

[31] The need for general deterrence, that is, demonstrating to the profession and the public that professional misconduct is a serious matter, requires more than a citation and a public finding of professional misconduct.

[32] In this case, we find that a fine is required.

[33] With respect to the amount of the fine, the Law Society referred to other cases where the fines ranged from $4,500 to $7,500, but the respondents in those cases had more significant professional conduct histories.

[34] The Respondent, in reference to both the amount of the fine and the quantum of costs, pointed to her low income. Although her income has been quite low for the last three or four years, she does have valuable but not liquid assets. She suggested she would need time to pay any significant amount.

[35] We do not believe her low income is determinative of the appropriate amount of the fine when she has valuable assets. We find that a fine in the amount $3,000 is appropriate in view of prior cases and gives adequate recognition to her limited income.

[36] At the July 9, 2015 hearing, the Law Society sought costs in accordance with Schedule 4 in the amount of $5,800 for the tariff items plus disbursements of $656.25.

[37] At the hearing on January 14, 2016, the Law Society increased the request for tariff items to $8,800. The increase was attributable to the Panel's request for additional submissions as discussed above and the additional one-half day hearing on January 14, 2016.

[38] As the request was made by the Panel and no order is being granted as a result of those additional submissions, we will not add those matters to the costs to be paid by the Respondent.

[39] The Law Society increased the claim with respect to disbursements from $656.25 to $2,117.33. A portion of the increase was due to the fact that the court reporter costs for the July 9, 2015 hearing were estimated to be $236.25 for a half day when a full day was in fact required for a cost of $472.50 (an increase of $236.25). In addition, the cost of a transcript of the Facts and Determination phase was not included initially but should have been. This increased the disbursements by an additional $183.75.

[40] The Respondent need not pay the additional disbursements relating to the Panel's request and the January 14, 2016 hearing. Disbursements are thus allowed in the amount of $1,076.25.

ORDER

[41] We order that the Respondent pay:

(a) a fine of $3,000; and

(b) costs in the amount of $6876.25.

[42] The Respondent has until November 1, 2016 to pay the fine and costs.