

2016 LSBC 16
Decision issued: May 20, 2016
Oral reasons on Facts, Determination
and Disciplinary Action: December 15, 2015
Citation issued: August 27, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GAVIN CLARK CRICKMORE

RESPONDENT

**DECISION OF THE HEARING PANEL
ON FACTS, DETERMINATION, DISCIPLINARY ACTION
AND COSTS**

Hearing date: December 18, 2015

Panel: Elizabeth Rowbotham, Chair
Donald Amos, Public representative
Shona A. Moore, QC, Lawyer

Discipline Counsel: Kieron Grady
Counsel for the Respondent: Henry C. Wood, QC

BACKGROUND

[1] On August 27, 2015, a citation was issued against Gavin C. Crickmore (the “Respondent”) pursuant to the *Legal Profession Act*, Rule 3-5(7) and (11) of the Law Society Rules, and Rule 7.1-1 of the *Code of Professional Conduct for British Columbia* as a result of the Respondent’s failure to respond fully and substantively by not answering all the requests for information and documents made by the Law Society in:

- (a) an email dated February 19, 2015;
 - (b) a letter dated March 19, 2015;
 - (c) an email dated April 22, 2015; and
 - (d) an email dated May 5, 2015.
- [2] The Respondent admits that the citation was served in accordance with Rule 4-15, and this citation proceeded by way of summary hearing pursuant to Rule 4-33.
- [3] The Law Society has the onus of proving the allegations in the citation on a balance of probabilities.
- [4] During the hearing the Respondent gave oral evidence to explain, rather than contradict, the facts advanced by the Law Society. The Respondent admits that he engaged in professional misconduct when he failed to respond promptly and fully to a Law Society request that he provide additional documentation and information potentially relevant to the Law Society's investigation of a complaint made by JL.
- [5] The Law Society asked the Panel to impose a fine of \$4,000 and an order to pay costs in the amount of \$1,772.50. The Respondent agreed to costs of \$1,772.50.
- [6] At the conclusion of the hearing we gave an oral decision, with these written reasons to follow, that the Respondent:
- (a) engaged in professional misconduct as alleged;
 - (b) must pay a fine in the amount of \$2,500;
 - (c) must pay costs in the amount of \$1,772.50; and
 - (d) the fine and costs must be paid on or before June 15, 2016.
- [7] At the conclusion of the hearing, the Panel reserved its jurisdiction to entertain an application from the Law Society and the Respondent concerning whether some parts of the materials should be sealed in order to preserve the privacy of the Respondent's professional conduct record.
- [8] On January 15, 2016, the Law Society, with the consent of the Respondent, made an application for a non-disclosure order and a sealing order on the following terms:

- (a) if anyone who is not a party to these proceedings applies for a copy of the transcript of the proceedings, before the transcript is provided, it will be redacted to anonymize references to information that identifies the Respondent's clients, other parties and the Respondent's Professional Conduct Record ("PCR");
- (b) if anyone who is not a party to these proceedings applies for a copy of the citation (Exhibit 1 in these proceedings), identifying information about the client referred to in the citation will be anonymized;
- (c) if anyone not a party to these proceedings applies for a copy of the affidavit of Paula Kalsi (Exhibit 2 in these proceedings), all identifying information about the Respondent's client or other parties will be anonymized; and
- (d) Exhibit 5, the Respondent's PCR, be sealed.

[9] Below are our reasons for our decision on discipline and exclusion of the public member for a portion of the hearing, and our decision and reasons on the application for a non-disclosure order and a sealing order.

FACTS

- [10] In or about 2014, JL made a complaint against the Respondent in connection with his representation of her infant child in 1995 on a "slip and fall" matter. JL complained that the Respondent did not advance her son's claim (the "L Claim") in a timely way.
- [11] When the Respondent dealt with JL in 1995, he had been called to the bar for approximately eight months and was employed as a junior litigation associate with Campney & Murphy. Campney & Murphy ceased to practise as a firm in August 2003.
- [12] In early September 2014 Ms. Kalsi wrote to the Respondent to let him know that she had been retained by the Law Society to investigate a complaint by JL regarding the L Claim and to ask the Respondent to provide an explanation of the circumstances of his involvement with JL. The response was due by October 6, 2014.
- [13] Ms. Kalsi wrote a follow-up letter to the Respondent on October 10, 2014 and, when she received no response, she left a voicemail message for him on October 27, 2014. The Respondent called her back and told her that he had been away from

work for a number of weeks, and he advised that he had a draft response prepared and that she would receive it by October 31, 2014.

- [14] The Respondent did not send in his response by October 31, 2014 but left a voicemail message for Ms. Kalsi on November 3, 2014 stating that his response needed approval by his firm and that she would receive it the next day. As things turned out, Ms. Kalsi received a series of messages from the Respondent that the review by his firm was taking longer than anticipated, and she did not receive the response until November 19, 2014.
- [15] In February 2015, Ms. Kalsi interviewed the Respondent, after which she made two requests for additional documentation and information: that the Respondent provide (a) the electronic version of his file notes and other documents regarding the L Claim; and (b) any notes of conversations or meetings with JL or her son.
- [16] Between early May and the end of June 2015, the Respondent tried to locate the electronic documents, files and notes and took steps to gain access to materials that were placed in storage subsequent to the closure of Campney & Murphy. The search was complicated by the fact that Campney & Murphy did not formally open a file in 1995. This made it difficult to locate the material associated with the L Claim. We accept on the evidence the fact that Campney & Murphy had wound down was a complicating factor for the Respondent and his efforts to locate materials.
- [17] On March 26, 2015, Ms. Kalsi received a letter from the Respondent that, amongst other things, explained that he did not have access to Campney & Murphy's file material relating to the commencement of the L Claim. By email dated April 22, 2015 Ms. Kalsi followed up with the Respondent to advise:
- ... There are still two outstanding items that you have not addressed:
1. I note that you have not yet provided an electronic version of your file notes and other documents regarding the L claim. Please provide these documents.
 2. You were also to look into whether you had any notes of conversations or meetings with [JL and/or her son] and if so, were to provide copies of same. Please advise.
- [18] The Respondent did not promptly respond to this request. At the time, the Respondent was in the midst of a trial and had a heavy trial workload associated

with the same, but the fact of the matter is that he did not respond promptly to Ms. Kalsi's inquiry and should have done so.

- [19] We turn now to the events of May 20, 2015. The Respondent was in a mediation and received a message from his assistant that she had located some or all of the documents requested by Ms. Kalsi. That morning the Respondent spoke with Lawrence Dirk, an investigator working with Ms. Kalsi, and told Mr. Dirk that the Respondent would have the electronic file/data ready by lunchtime that day. Mr. Dirk went to the Respondent's office only to learn that the Respondent was unable to finish the data collection as he had been tied up in a mediation that day.
- [20] The Respondent testified that he had returned to the office on May 20, 2015 to discover that the materials that his assistant had identified as "being the documents" were, in fact, the wrong documents and not those sought by the Law Society.
- [21] On May 25, 2015 the Respondent received an email from Mr. Dirk asking when the electronic data would be available. That very afternoon, however, the Respondent received Ms. Kalsi's letter of the same date which simply advised the Respondent that:
- ... this matter is now being referred to the Discipline Committee ("Committee") for review at its meeting on June 11, 2015. I will advise the Committee that despite repeated requests to produce your electronic file and any notes you may have, you have failed to produce the same.
- [22] The Respondent testified he was surprised by Ms. Kalsi's letter as it seemed to state that the entire matter was now being referred to the Discipline Committee. He said that he "composed" himself and then returned to completing trial submissions late into that evening.
- [23] Whether it was wise or sensible to do so, we accept the Respondent's evidence that he simply assumed, at that stage, that the Discipline Committee would consider the matter and there was nothing further he could do.
- [24] We are satisfied on the evidence that, up until May 25, the Respondent could not in good faith have told Mr. Dirk or Ms. Kalsi "I can't find the notes" because the Respondent himself, had not personally reviewed the work of his assistant. By May 25, though, to use the words of the Respondent, it would have been a simple matter to tell Ms. Kalsi or Mr. Dirk, "I can't find any further documents."

- [25] Ms. Kalsi wrote to the Respondent on June 22, 2015 and set out the chronology of his failure to respond to her substantively, that is, to provide the documents, and told him that, if she did not receive the electronic file and any notes he may have regarding the L Claim on or before June 26, 2015, the matter would be referred to the Discipline Committee with a recommendation that a citation issue for his failure to respond.
- [26] By this date, the Respondent had completed his personal review, and he should have immediately told Ms. Kalsi that the documents sought by the Law Society could not be located and may not exist. The Respondent admits that he was capable of responding and could have taken steps to respond and simply failed to do so.

DECISION AND REASONS ON CONDUCT

- [27] We accept the Law Society's position and the Respondent's acknowledgment that the appropriate finding in this case is one of professional misconduct. The question of what constitutes professional misconduct, set out in *Law Society of BC v. Martin*, 2005 LSBC 16, is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects from its members."
- [28] A lawyer has an obligation to respond promptly and substantively to inquiries made of the lawyer by the Law Society. The Respondent failed to meet that standard.
- [29] The Respondent acknowledges that, although he was under a great deal of pressure, including the pressures of a large trial, those work pressures and other pressures in his life do not rise to the standard of rendering him incapable of meeting his duty. We agree.

DISCIPLINARY ACTION

- [30] In assessing the appropriate disciplinary action we have considered the factors enumerated in *Law Society of BC v. Ogilvie*, 1999 LSBC 17.
- [31] The Law Society suggested that a \$4,000 fine payable by April 30, 2016 was appropriate in all the circumstances. Counsel for the Law Society acknowledged that this amount fell outside the usual range of \$2,000 to \$3,000 for cases dealing with a Respondent's first citation where there is little if any other disciplinary history. The Law Society suggested a higher amount was appropriate in part because of the time period over which the Respondent failed to advise the Law Society that the documents could not be found and may not exist and on the basis

that the limit on fines has recently been raised from \$20,000 to \$50,000. When viewed as a percentage of the maximum fine, counsel for the Law Society argued that a fine of \$4,000 fell within the “usual range.”

- [32] In reaching our decision on disciplinary action, we have taken into account that the Respondent was called to the bar in 1995 and this is the first time a citation has been issued against him.
- [33] In our view, this is a case in which there has been no impact on the complainant, although it has resulted in a potential delay in the course of the underlying investigation of the JL complaint. This is not a case in which there has been an additional negative impact on the public, nor is it a case in which the Respondent has gained any advantage whatsoever from his misconduct.
- [34] Although they do not constitute an excuse for the Respondent’s failure to respond promptly and substantively to Ms. Kalsi’s request for documents and notes, we recognize the practical challenges the Respondent faced, that flowed from the fact that he was a very junior lawyer at the time he was engaged by JL and that his former firm ceased to engage in the practice of law some number of years ago.
- [35] After considering the submissions of the Law Society, we are not persuaded of the Law Society’s position. Rather, we are satisfied that an appropriate penalty in this case is a fine in the amount of \$2,500 and that the Respondent pay costs in the amount sought by the Law Society, \$1,772.50.

DECISION AND REASONS ON EXCLUSION OF THE PUBLIC, NON-DISCLOSURE AND SEALING APPLICATIONS

Exclusion of the public and Sealing application

- [36] Pursuant to Rule 5-8, disciplinary hearings are open to the public. A member of the public attended the hearing. The Law Society and the Respondent requested that the public member be excluded for a short portion of the hearing for confidentiality reasons, and we agreed to that request.
- [37] We also grant the Law Society and the Respondent’s request that Exhibit 5, the Respondent’s PCR be sealed. This order applies to access to the exhibit only. The Law Society Rules mandate the disclosure and use of some information in a professional conduct record in certain circumstances. This order is not intended to affect the application of those provisions in the future.

Non-disclosure application

- [38] The Law Society and the Respondent request that certain information disclosed at the hearing be redacted to anonymize references to information that identifies the Respondent's clients, other parties and the Respondent's Professional Conduct Record.
- [39] This Panel adopts the views articulated in *Law Society of BC v Holland*, 2015 LSBC 36, at para 19:

It is important that clients not lose the protection of solicitor-client confidentiality simply because the Law Society has relied on documents containing confidential information for the legitimate purpose of bringing disciplinary proceedings against a lawyer or former lawyer. ...

- [40] This Panel therefore orders that all copies of any transcripts, the citation and the affidavit of Paula Kelsi should be redacted for names of clients and other persons that the redacted names be substituted with initials for anonymity of those persons before disclosure to the public of these documents.

ORDER

- [41] This Panel orders as follows:
- (a) The Respondent must pay a fine of \$2,500 by June 15, 2016;
 - (b) Pursuant to Rule 5-9(1), if anyone who is not a party to these proceedings applies for a copy of a transcript of the proceedings, before the transcript is provided, it will be redacted to anonymize references to information that identifies the Respondent's clients, other parties and the Respondent's Professional Conduct Record;
 - (c) Pursuant to Rule 5-9(2), if anyone who is not a party to these proceedings applies for a copy of Exhibit 1 (Citation), identifying information about the client referred to in the Citation will be anonymized;
 - (d) Pursuant to Rule 5-9(2), if anyone who is not a party to these proceedings applies for copy of Exhibit 2 (Affidavit of Paula Kalsi), all identifying information about the Respondent's client or clients and other parties will be anonymized;

- (e) Pursuant to Rule 5-9(2), Exhibit 5 (PCR) is to be sealed; and
- (f) The Respondent must pay costs of these proceedings in the amount of \$1,772.50 by June 15, 2016.