

2016 LSBC 24
Decision issued: June 20, 2016
Oral reasons: May 10, 2016
Citation issued: September 30, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MICHAEL SAUL MENKES

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date: May 10, 2016

Panel: Pinder K. Cheema, QC, Chair
Shona A. Moore, QC, Lawyer
Graeme Roberts, Public representative

Discipline Counsel: Carolyn Gulabsingh
Appearing on his own behalf: Michael Menkes

BACKGROUND

[1] On September 30, 2015 a citation was issued to the Respondent pursuant to the *Legal Profession Act* and the Rules of the Law Society. The citation was amended on December 1, 2015 (“the Citation”). The Citation alleges that the Respondent failed to provide his client, MD, with the quality of service at least equal to that expected of a competent lawyer in a similar situation during the course of his representation of MD in a personal injury matter between November 2009 and December 2013.

[2] The Respondent admits that he was served with the Citation.

- [3] The matter came on for hearing pursuant to Rule 4-30. Under this Rule, the Respondent made a conditional admission of professional misconduct and agreed to proposed disciplinary actions. Rule 4-30 requires that a hearing panel consider the conditional admission and the proposal and, if the panel finds them acceptable, impose the proposed disciplinary action.
- [4] In this case, the Respondent admits the allegations set out in the Citation that, in summary, he delayed in taking steps to advance his client's claim, failed to respond to communications from his client and failed to take steps that he told his client he would take. The Respondent also admits that this conduct constitutes professional misconduct.
- [5] The Law Society and the Respondent propose that disciplinary action be a fine of \$7,500 payable on or before October 31, 2016. This would result in the circumstances summarizing this matter being published pursuant to Rule 4-48 and that publication identifying the Respondent by name.
- [6] At the conclusion of the hearing, we gave an oral decision that the conduct described in the agreed statement of facts at issue in these proceeding constitutes professional misconduct. The Panel accepted the proposed specified disciplinary action and ordered a fine in the amount of \$7,500 payable on or before October 31, 2016. The Law Society sought, and the Respondent consented to, an order for costs in the amount of \$1,259.39 payable on or before October 31, 2016, and we so ordered.
- [7] What follows are our reasons for those decisions.

AGREED STATEMENT OF FACTS

- [8] An Agreed Statement of Facts was filed. Below are portions of the Agreed Statement of Facts that we have anonymized to protect the identity of the Respondent's client and preserve solicitor-client privilege.

Member background

1. Michael Saul Menkes (the "Respondent") was called to the bar and admitted as a member of the Law Society of British Columbia on May 17, 1996.
2. Since his admission to the British Columbia bar, the Respondent has practised as a sole practitioner in New Westminster, primarily in the areas of criminal law and civil litigation.

Background facts

3. On or about April 23, 2009, MD, who was 18 years old at the time, was walking along the side of a house near a park in Vancouver with a friend when a police dog attacked her and dragged her to the front of the house. The dog bit her fourth finger near the tendon of her right hand and her right leg on the outer and inner thigh, causing two large lacerations of four inches each.
4. On or about November 5, 2009, MD and her father, TB, retained the Respondent to handle MD's personal injury claim. TB provided a \$500 cash retainer and the Respondent gave TB a receipt.
5. At the initial meeting on November 5, 2009, the Respondent spoke to MD and TB about the limitation period to file a claim and advised that he needed to provide notice to the City of Vancouver right away, and file a claim within six months of MD's 19th birthday.
6. On or about November 5, 2009, the Respondent drafted a letter to the City of Vancouver reporting the injury of MD. The Respondent has not provided proof that this letter was sent to, or received by, the City of Vancouver. The copy of the letter in the Respondent's client file was unsigned.
7. The Respondent drafted a notice of claim, naming the City of Vancouver and the Vancouver Police Board as defendants. The notice of claim was filed with the Vancouver Small Claims Registry on November 10, 2009. The Respondent did not serve the notice of claim on the City of Vancouver or the Vancouver Police Board.
8. On or about November 12, 2009, the Respondent issued an invoice to MD, but did not send a copy of the invoice to her. The Respondent removed the retainer funds from trust to pay the invoice the same day. The Respondent has no recollection of sending a copy of this invoice to MD, and MD told the Law Society she did not receive it.
9. In or about late December 2009 or early January 2010, TB obtained MD's medical records from the hospital where MD was treated after the incident.
10. TB dropped off MD's medical records to the Respondent's office in or about late December 2009 or early January 2010. The Respondent's office marked the records with a "date received" stamp, which reflects the records were received on "January 1, 2010"; however, the Respondent said his office was not open on January 1, 2010.

11. The Respondent says he was waiting to serve the notice of claim until he had received the medical records. He says he was planning to serve the notice of claim together with the certificate of readiness, as required by the Small Claims Rules.
12. The Respondent says he briefly reviewed MD's medical records when they were received at his office. He says he did not do anything with the records at that time.
13. Between approximately January 2010 and February 2014, TB attended the Respondent's office on approximately four to seven occasions to check on the matter. The Respondent says he saw TB once or twice on these visits when he dropped by his office without an appointment.
14. Between 2012 and 2013, TB called and left messages with the receptionist for the Respondent to call him, but the Respondent did not return the calls. The Respondent has no recollection of receiving these messages and admits that he failed to return TB's phone calls.
15. TB says that on one occasion in or around 2012, when TB attended the Respondent's office inquiring about the delay, the Respondent told TB that he was waiting for a settlement conference date, but the Respondent did not look in his file to confirm if this was true.
16. Between August 2011 and November 2013, MD had limited contact with the Respondent because she had moved to Toronto.
17. The Respondent says he believed he had filed and served the certificate of readiness after January 1, 2010, but he did not.
18. In August 2012, the Respondent had a heart attack and was diagnosed with high cholesterol and was prescribed various medications.
19. In or about July or August 2013, TB attended at the Respondent's office in New Westminster. The Respondent spoke with him in the lobby of his office building and advised TB that he would go to the court registry to check on the status of the file.
20. In or about November 2013, the Respondent attended at the Vancouver Small Claims Registry to check the status of the court file. The filed notice of claim was the only document contained in the court file. It was at this point that the Respondent determined that he was incorrect in his belief that he had filed the certificate of readiness and served the documents in 2010.

21. The Respondent failed to serve the defendants with the notice of claim or prepare and file with the court registry the required certificate of readiness regarding MD's claim, and he took no other steps to advance the claim.
22. In or about December 2013, MD and TB attended together at the Respondent's office in New Westminster. The Respondent told MD and TB that he had checked the court file and realized that he had not filed the certificate of readiness.
23. At the December 2013 meeting, the Respondent told MD and TB that he had a conflict of interest because MD had a potential claim against him and that they should consult with another lawyer.
24. During his interview, the Respondent provided the following explanations for the delay in advancing MD's file:
 - (a) he knew he had one year to serve the notice of claim. He did not input the limitations on a limitation system so there was no reminder system in place for the file;
 - (b) he held off on service of the notice of claim as he was waiting to receive a copy of the medical records to attach to the certificate of readiness;
 - (c) upon receipt of the medical records he had planned to file them along with the certificate of readiness and then serve the notice of claim and the certificate of readiness at the same time;
 - (d) when TB came to his office and inquired about the status of the file, he says he intended to investigate the status of the matter but failed to do so;
 - (e) initially, he thought the delay in being assigned a settlement conference date was a standard delay experienced with the court registry;
 - (f) when he checked the court registry file and realized the notice of claim was the only document in the file, his initial concern was that the certificate of readiness had gone missing from the court file, which caused the delay. The Respondent later realized that he was mistaken that he had filed the certificate of readiness, because he had not; and
 - (g) he does not recall much about this file because he did not take any action on the file because he forgot about it.

25. Between May 2011 and April 2014, the Respondent was required to provide monthly file status reports to the Practice Standards Department detailing the status of each of his client files, but the Respondent did not include MD's file in any of the monthly file status reports.
26. In or about September 2011, the Respondent began using Clio, a file management computer system, but inadvertently did not input MD's file into the system, which is why he says he failed to report on MD's file to the Practice Standards Department.

ISSUE

- [9] The issue in this case is whether the Respondent acted in a manner that constitutes professional misconduct and, if so, is the proposed disciplinary action within the acceptable range for this conduct.

PROFESSIONAL MISCONDUCT

- [10] Professional misconduct is defined in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 154:

The real question to be determined is essentially whether the Respondent's behaviour displays culpability, which is grounded in a fundamental degree of fault that is whether it displays gross culpable neglect of his duties as a lawyer.

And at paragraph 171:

Whether the facts ... disclose a marked departure from the conduct the Law Society expects of its members ...

- [11] In this case, we are satisfied that the misconduct is serious. At the core of a lawyer's duty to his or her client is that a lawyer provides quality and appropriate legal services. In this case, the Respondent failed to meet that duty and responsibility. His conduct in handling MD's file was a marked departure from the conduct the Law Society expects of lawyers. Accordingly, we accept the Respondent's admission that he committed professional misconduct.

DISCIPLINARY ACTION

[12] The next question is whether the proposed disciplinary action is within the “range of fair and reasonable disciplinary action.” *Law Society of BC v. Rai*, 2011 LSBC 2 at paragraph 7. In assessing the proposal, we have considered the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17:

- (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 the redress the wrong and the presence or absence of other mitigating circumstances;
- (h) the possibility of remediating 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.

[13] The Respondent is an experienced lawyer who had the ability to conduct a civil litigation matter in a timely and confident way. He failed to do so. The Respondent admitted his misconduct and advised MD that she had a potential claim against him and she should seek independent legal advice.

- [14] The Respondent's Professional Conduct Record includes three conduct reviews and one referral to the Practice Standards Committee. The circumstances addressed in the conduct reviews do not lead us to conclude that the Respondent's professional misconduct before us in this case forms part of a pattern.
- [15] Further, a Practice Standards Review of the Respondent's practice was ordered in January 2011 and certain recommendations were made to the Respondent to address his struggle with procrastination and difficulties in ensuring his files move forward in a timely way. The Respondent was required to make monthly reports to the Practice Standard Department about his files. None of his reports included reference to the MD file. The MD file was not entered on the Respondent's file tracking system and was not caught by the file progress tracking system the Respondent put in place after his Practice Standards Review. We are satisfied on the evidence that this omission was not intentional.
- [16] After considering the submissions of the Law Society and the Respondent and after reviewing the authorities referred to us, we are satisfied that a fine in the amount of \$7,500 falls within the range of penalties awarded in similar cases.

COSTS

- [17] The Respondent consented to an order for costs in the amount of \$1,259.39 payable on or before October 31, 2016.
- [18] Our authority to order costs is set out in the *Legal Profession Act*, section 46 and Rule 5-11. The Rule now provides for a form of tariff and, in this case, the costs are calculated under section 23 of the tariff that applies to hearings conducted pursuant to Rule 4-30. The range set out in the tariff is \$1,000 to \$3,500, exclusive of disbursements. The only disbursement in the draft bill of costs is the court reporter fees and courier costs. The proposed costs assume a hearing of less than two and a half hours.
- [19] After hearing the submissions of the parties, we are satisfied that the order for costs in the amount proposed is reasonable and appropriate, particularly in light of the fact that the Respondent promptly indicated his willingness to make admissions and explore a consent resolution of the Citation.

DISPOSITION

[20] For the reasons set out above, and after considering all of the evidence and the submissions of the parties, we accept the proposed disciplinary action pursuant to Rule 4-30 and order as follows:

- (a) that the Respondent pay a fine in the amount \$7,500 on or before October 31, 2016; and
- (b) that the Respondent pay costs to the Law Society in the amount of \$1,259.39 on or before October 31, 2016.

[21] Publication of the circumstances summarized in this decision will be made pursuant to Rule 4-48, and that publication will identify the Respondent.

[22] We also instruct the Executive Director to record the Respondent's admission on his professional conduct record.

FURTHER ORDER

[23] At the request of the Law Society and by agreement of the Respondent, we make the following further order:

- (a) that, if anyone who is not a party to these proceedings applies for a copy of the Citation, of the agreed statement of facts marked as Exhibit 2 in these proceedings or of the transcript of the proceedings, the Citation, agreed statement of facts or transcript will be anonymized to remove references to information that identifies the Respondent's client and other parties.