

2016 LSBC 25
Decision issued: June 21, 2016
Oral reasons: May 13, 2016
Citation issued: March 4, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KERRI MARGARET FARION

RESPONDENT

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

Hearing date: May 13, 2016

Panel: Craig A.B. Ferris, QC, Chair
June Preston, Public representative
Sandra E. Weafer, Lawyer

Discipline Counsel: Carolyn Gulabsingh
Appearing on her own behalf: Kerri M. Farion

BACKGROUND

[1] In February 2015, a lawyer (the “Complainant”) made a complaint to the Law Society concerning the failure of the Respondent to respond to his communications during the course of a litigation matter (the “Complaint”). Shortly thereafter, the Law Society opened a complaint file and commenced its investigations into the allegations made in the Complaint.

[2] In December 2015, the Law Society requested an interview of the Respondent, which was scheduled by agreement for January 26, 2016. On the day of the interview, the Respondent emailed the Law Society to cancel the interview as, she

asserted, an appointment with a medical specialist had come available that day. Thereafter, the Respondent failed to respond to repeated requests by the Law Society to reschedule the interview and failed to provide evidence of her attendance at the medical specialist on January 26, 2016 (the “Specialist Appointment”). In the Respondent’s words, she “got her back up” and did not respond because she did not think an interview was necessary.

- [3] The citation was authorized on March 4, 2016 and issued on March 5, 2016. The sole allegation is that the Respondent failed to respond to the Law Society’s request to reschedule the interview and to provide evidence of her attendance at the Specialist Appointment.
- [4] The notice of this hearing was served 51 days before the hearing. To that date, the Respondent still had not responded to the Law Society’s request to reschedule the interview, nor had she provided evidence of her attendance at the Specialist Appointment.
- [5] The citation alleges that this conduct constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act* (the “Act”).

HEARING BACKGROUND

- [6] The Respondent admitted service of the citation.
- [7] Given that the sole allegation in the citation is that the Respondent failed to respond to communications from the Law Society, this hearing proceeded pursuant to Rule 4-33 of the Law Society Rules (the “Rules”). Under that Rule, evidence may be tendered by affidavit.
- [8] At the outset of the hearing, the Respondent applied for an adjournment as she intended to call a former Law Society staff lawyer, Beverly Gallagher, as a witness at the hearing.
- [9] The Panel dismissed the Respondent’s application for an adjournment. The Respondent provided no evidence that she had made any attempt to contact the witness or to locate the witness in the 51 days between service of the notice of hearing and the date of the hearing. It was the Panel’s view that, given the marginal relevance of the proposed witness’s evidence (Ms. Gallagher relinquished conduct of the investigation into the Complaint approximately five months prior to the conduct at issue), to allow an adjournment of a hearing constituted to consider an allegation of a failure to respond to the Law Society on the basis that the Respondent had failed to prepare for the hearing was wrong. The Panel determined

that the public interest in the Law Society's ability to investigate the Complaint in a timely manner outweighed the interests of the Respondent in these circumstances.

- [10] In this proceeding, the Law Society relied upon the affidavit of Alexander M. Willms affirmed April 7, 2016. Mr. Willms is a staff lawyer in the Professional Conduct Department of the Law Society, and he has had conduct of the investigation into the Complaint from August 24, 2015. Mr. Willms was also cross-examined by the Respondent.
- [11] The Law Society also relied upon the affidavit of Chrysta Gejdos sworn May 11, 2016, a legal administrative assistant with the Law Society, and the affidavit of Michelle Robertson, the Law Society hearing administrator, sworn April 4, 2016.
- [12] The Respondent gave oral evidence at the hearing. She was cross-examined by counsel for the Law Society.
- [13] After the evidence was complete, the Panel heard argument with respect to the facts and determination phase of the hearing. The Panel then adjourned and deliberated. The Panel considered the evidence and determined that the Respondent had committed professional misconduct with respect to the allegation made in the citation.
- [14] The Panel then heard argument with respect to the disciplinary phase of the hearing. Again, the Panel adjourned and deliberated. After considering the evidence and the further argument, the Panel made an order that the Respondent pay a fine of \$2,500 by no later than October 31, 2016, pay costs in the amount of \$2494.60 by no later than October 31, 2016, provide by no later than May 27, 2016 a date for the interview to be conducted, which date must be prior to the end of June 2016 and provide by no later than May 27, 2016 proof or evidence of her attendance at the Specialist Appointment.
- [15] These are our reasons with respect to the facts and determination and disciplinary action phases of this hearing.

FACTS

- [16] In February 2015, the Law Society received the Complaint. The Complaint alleges that the Respondent had not responded to communications from the Complainant during a litigation proceeding.
- [17] Over the course of the next number of months there was a series of communications between the Law Society and the Respondent that culminated in

the Respondent providing a one-page response to the allegations made in the Complaint. The response was sent by the Respondent on October 1, 2015. However, due to the email address it was sent to, it did not come to Mr. Willms' attention until October 20, 2015.

- [18] After his review of the one-page response, Mr. Willms determined that an interview of the Respondent was necessary for the investigation. At that time, the Respondent was represented by counsel, and on December 7, 2015, Mr. Willms wrote to the Respondent's counsel requesting dates when the Respondent would be available to attend an interview and requested a response by no later than December 31, 2015.
- [19] On December 31, 2015 at 10:00 pm, the Respondent emailed Mr. Willms directly and advised that her preference was that the interview occur on January 26, 2016. On Monday, January 4, 2016, Mr. Willms confirmed the interview for 2:00 pm on January 26, 2016.
- [20] On January 26, 2016 at 10:59 am, the Respondent emailed Mr. Willms as follows:

I have just been contacted by one of the medical specialists I have been on the wait list to see and they have had a last minute cancellation for today at 2:30 pm. As such I will need to reschedule our meeting that was set for today at 2 pm. I regret the late notice however my health takes priority over this complaint made by [the Complainant]. Please let me know what dates are available for rescheduling.

- [21] Approximately 10 minutes later Mr. Willms emailed the Respondent and requested that she provide proof of her attendance at the Specialist Appointment. He also offered January 28, 2016 or January 29, 2016 as alternate dates for the interview.
- [22] The Respondent did not respond to Mr. Willms' email.
- [23] On February 2, 2016, Mr. Willms wrote to the Respondent as follows:

... We had an interview scheduled for 2 pm on Tuesday, January 26, 2016. By email at 10:59 am on January 26, 2016, you cancelled our interview as you were going to see a "medical specialist" at 2:30 pm. You asked me what other dates I had available, I advised you by email that I was available on Thursday, January 28, 2016 and Friday, January 29, 2016 and asked you to inform me which date you preferred. Additionally, I asked you to provide me with proof of your medical appointment. As of today's date, I have not heard back from you.

We would like to schedule your interview between February 17, 2016 and February 24, 2016. Please provide me with your available dates in writing by **February 9, 2016**. We will then contact you with the specific date and time. We anticipate that the interview will take approximately 1.5 hours.

Your counsel, Mr. W, may be present during the interview. ...

[24] The Respondent did not respond to the February 2, 2016 letter.

[25] On February 12, 2016, Mr. Willms again wrote to the Respondent as follows:

You have not responded to my letter dated February 2, 2016 in which I sought your response by February 9, 2016. I requested your available dates for an interview between February 17 and 24, 2016. I made this request because you cancelled our previously scheduled interview on January 26, 2016 several hours before we were set to meet.

I write to request the following:

1. Proof, or evidence thereof, that you attended a medical appointment on January 26, 2016 during our scheduled interview time; and
2. Your available interview dates from March 1 to 31, 2016.

....

The Law Society requires your available dates and the requested material by **February 19, 2016**. Please note that Rule 3-5(9) of the Law Society Rules 2015 requires you to personally respond and sign your response to the Law Society. ...

[26] The Respondent did not respond to the February 12, 2016 letter.

[27] On February 22, 2016, Mr. Willms left the Respondent a voicemail message with respect to rescheduling the interview and again requested proof of her attendance at the Specialist Appointment.

[28] The Respondent did not respond to Mr. Willms' voicemail message.

[29] On February 23, 2016, Mr. Willms again wrote to the Respondent as follows:

Further to my voicemail message of February 22, 2016, please reply to my letters of February 2, 2016 and February 12, 2016 copies of which are enclosed for your reference.

The Law Society Rules 2015 state that, when a lawyer fails to reply to the Law Society, the matter may be referred to the Discipline Committee or its Chair pursuant to the summary hearing process. If your response and the requested materials are not received by **February 29, 2016** this matter will be referred to the Discipline Committee or its Chair with a recommendation that the Chair issue a citation for your failure to respond to Law Society correspondence. Details about the summary hearing process are set out in Rule 4-5 and 4-32(2) of the Law Society Rules 2015.

- [30] On February 24, 2016, the Respondent emailed the Law Society to advise that she had personal reasons to fly to Edmonton on February 22, 2016 and that she would be back in Vancouver on Thursday, February 25 and would “deliver the files to the Law Society.” No explanation was provided at the hearing or otherwise concerning what files were to be delivered to the Law Society or how delivering files was in any way responsive to the requests for an interview and for proof of her attendance at the Specialist Appointment.
- [31] On March 1, 2016, the Respondent again emailed the Law Society advising that she had “only got back to Vancouver yesterday” (February 29, 2016) and that “I will have the files to you shortly.” Again, no explanation was given at the hearing or otherwise concerning how the delivery of files would be responsive to the requests.
- [32] As at the date of the hearing, the Respondent had still failed to provide the Law Society with dates on which she would be available to be interviewed and had failed to deliver any proof of her attendance at the Specialist Appointment.

POSITION OF THE PARTIES

- [33] The Law Society’s position is that, notwithstanding various requests and opportunities to comply, the Respondent has failed to provide the Law Society with a date for the rescheduling of the interview and has failed to provide the Law Society with proof of her attendance at the Specialist Appointment. The failure to respond to these requests is submitted to be professional misconduct.
- [34] During the course of the hearing, the Respondent accepted responsibility for her failure to respond to the Law Society’s requests to provide a date for the interview and to provide proof of her attendance at the Specialist Appointment. However, the Respondent’s position is that the Law Society should have further investigated the Complaint, in particular by questioning the Complainant with respect to what she alleges are inaccuracies in the Complaint, prior to interviewing her. In addition, the

Respondent objects to providing any proof of her attendance at the Specialist Appointment because she says it is a breach of her privacy rights.

ISSUES

[35] The issues to be determined by this Panel are:

- (a) Does the Respondent's conduct in failing to provide a substantive response promptly, or at all, to communications from the Law Society concerning its investigation into the Complaint and in particular, the failure to respond to the letters dated February 2, 12 and 23, 2016, the email message dated January 26, 2016 and the voicemail message on February 22, 2016, constitute professional misconduct pursuant to section 38(4) of the Act?
- (b) If the Respondent's conduct does constitute professional misconduct, what is the appropriate disciplinary action to be imposed?

DISCUSSION AND ANALYSIS

Facts and determination

[36] Although "professional misconduct" is not defined in the Act, the Law Society Rules or the *Code of Professional Conduct for British Columbia*, it has been the subject of consideration by hearing panels in numerous cases including *Law Society of BC v. Martin*, 2005 LSBC 16. In that case, the panel set out the now well-settled test for professional conduct which is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members." The Law Society bears the onus to prove the conduct amounts to professional misconduct on a balance of probabilities (*Law Society of BC v. Tak*, 2009 LSBC 25).

[37] Rule 7.1-1 of the *Code of Professional Conduct for British Columbia* requires lawyers, among other things, to reply promptly and completely to any communication from the Law Society, provide documents as required to the Law Society, and cooperate with the Law Society investigations involving the lawyer. Law Society Rule 3-5(7) requires that a lawyer must cooperate fully in an investigation by all available means. Rule 3-5(8) states that, when conducting an investigation of a complaint, the Executive Director may require a lawyer to, among other things, attend an interview and answer questions and provide information relating to matters under investigation. Rule 3-5(11) requires a lawyer

who is required to provide files, document or other records, or to attend an interview, to comply with the requirement even if the information is privileged or confidential and the lawyer is to do so as soon as practicable and in any event by the time and date set by the Executive Director. In this regard, the Executive Director's functions have been delegated to the Professional Conduct Department of the Law Society.

[38] In *Law Society of BC v. Dobbin*, 1999 LSBC 27, it was determined that:

... it is the decision of the Benchers that unexplained persistent failure to respond to Law Society communications will always be *prima facie* evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct. ...

[39] This principle has also been followed subsequently in many cases, including *Law Society of BC v. Cunningham*, 2007 LSBC 17, *Law Society of BC v. Decore*, 2012 LSBC 17, *Law Society of BC v. Marcotte*, 2012 LSBC 18, *Law Society of BC v. Niemela*, 2012 LSBC 09, and *Law Society of BC v. Buchan*, 2013 LSBC 08.

Failure to respond

[40] In this matter, the Law Society's requests for an interview date and proof of attendance at the Specialist Appointment were clear and straightforward. There is no allegation that the Respondent did not understand the requests, and the Respondent does not assert that she failed to respond to the requests due to illness or other incapacity. The Respondent's evidence is that she "had her back up." The Respondent did not feel that a face-to-face interview was required or that she should be required to provide proof of her attendance at the Specialist Appointment. Accordingly, the Respondent ignored the requests and chose not to respond.

[41] To the date of this hearing, the Respondent had still refused to provide a date for an interview and had still refused to provide any evidence that she attended at the Specialist Appointment.

[42] Though *Dobbin* finds that the failure to respond is only "*prima facie* evidence of professional misconduct," in this case the Respondent has provided no evidence that would rebut this *prima facie* proof. The only explanation offered by the Respondent at the hearing was that she did not think an interview was necessary and that her medical information was private. If a lawyer were able to refuse to attend an interview on the basis that the lawyer did not believe it to be justified, the

Law Society's investigative processes would grind to a halt and complaints, required by the public interest to be investigated, would sit idle.

- [43] With respect to proof of attendance at the Specialist Appointment, the Panel finds that this information is not confidential nor does it raise privacy concerns as no medical information is sought; only proof of attendance. In any case, even if the information were confidential or private, the Respondent would still be required to disclose it, given its relevance to the investigation into the Complaint. Instead, the Respondent chose to ignore the request and did not raise any objections to it until this hearing.
- [44] In the Panel's view, the Respondent knowingly ignored the Law Society's requests. This is conduct that cannot be accepted and is a clear "marked departure" from the conduct expected of lawyers in British Columbia. We therefore find the Respondent's failure to respond to the Law Society by providing a date for an interview with respect to the Complaint and failure to provide proof or evidence of attendance at the Specialist Appointment is professional misconduct under section 38(4) of the Act. We find that the Law Society has proven the allegations contained in the citation.

DISCIPLINARY ACTION

- [45] Disciplinary proceedings are designed to fulfil the Law Society's mandate to uphold and protect the public interest in the administration of justice as set out in section 3 of the Act.
- [46] In assessing the appropriate penalty, the decision in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, provides for a non-exhaustive list of factors to be considered, which the Panel has considered in arriving at its determination of the appropriate disciplinary action in this proceeding.

Nature and gravity of the conduct proven

- [47] The failure to respond to the Law Society goes directly to the Law Society's ability to regulate its members in the public interest and, accordingly, should be considered as serious conduct. For example, in this case, the Complaint remains outstanding and unresolved some 15 months after it was made. Much of this delay can be attributed to the Respondent's failure to respond.
- [48] The seriousness of this conduct is further aggravated by the fact that, in the Panel's view, the Respondent's failure to respond was deliberate. The Respondent testified

that she “got her back up” and determined she did not view an interview as necessary and did not wish to submit any medical information, no matter how innocuous, to the Law Society. She maintains this position notwithstanding the repeated assurances of the Law Society that any investigation is confidential and that any information she provides will be treated as confidential.

- [49] Finally, the Respondent’s conduct is further aggravated by the fact that this Notice of Hearing had been outstanding for 51 days and the Respondent had still not provided a date for an interview or any evidence that she attended the Specialist Appointment. These failures are considered aggravating factors (*Decore, Law Society of BC v. Malcolm*, 2012 LSBC 04, and *Marcotte*).

Factors related to the respondent

- [50] On the other hand, the Respondent has no professional conduct record and did not gain any advantage, profit or benefit by the conduct at issue in this matter. She has been called to the Bar since December 2006 and so has practised for approximately nine years without incident.
- [51] Although the Respondent argued that she was suffering financial hardship, she did not provide any evidence of any financial hardship or the impact of a potential sanction on her.

Specific and general deterrence

- [52] The Law Society sought a fine of \$3,000 and costs of \$2,494.60 along with orders that a date be provided for an interview and that the evidence of the attendance at the Specialist Appointment be provided.
- [53] In argument, the Law Society advised the Panel that the range of fines for failure to respond was between \$2,000 and \$5,000. The Law Society relied upon four cases to support its view of the appropriate fine. We find in each of those cases the circumstances were somewhat more egregious than the current proceeding:
1. *Buchan* – In this case, a fine of \$3,000 was ordered. However, the respondent in that case had a history of not responding promptly, completely and substantively to the Law Society inquiries in relation to an earlier complaint.
 2. *Law Society of BC v. Kruse*, 2002 LSBC 15 – This complaint involved a lawyer who had ceased membership in the Law Society and had not participated in the hearing process. A fine of \$3,000 was ordered.

3. *Niemela* – The respondent in this decision had a professional conduct record that reflected a pattern of delay and procrastination. In that case, the respondent was fined \$5,000.
4. *Law Society of BC v. Jessacher*, 2015 LSBC 43 – The respondent failed to attend the hearing and, while she did attend an interview, refused to answer many questions and took the position afterwards that she would no longer cooperate with the Law Society. The fine in this case was also \$5,000.

[54] The Panel finds the circumstances are somewhat less egregious than the decisions referred to above. We also note that the Law Society also provided the Panel with reference to six cases (including *Law Society of BC v. Roberts*, 2014 LSBC 42 and *Tak*) in which a \$2,000 fine was ordered for a failure to respond.

[55] We find that a fine of \$2,500 is appropriate, and we so order.

COSTS

[56] The Law Society seeks an order for costs in the amount of \$2,494.60. This consists of \$2,000 for a one day hearing under Schedule 4 Tariff Item 24 and disbursements for the attendance of a court reporter in the amount of \$472.50 and a courier charge of \$22.10.

[57] Rule 5-11 requires the Panel to award the Tariff costs unless the Panel is satisfied that we should depart from the Tariff under Rule 5-11(4). *Law Society of BC v. Racette*, 2006 LSBC 29 at paragraphs 13 and 14 sets out some of the factors relevant to determining the reasonableness of costs. Based on our consideration of those factors, the Panel finds no reason to depart from the Tariff.

[58] Accordingly, we find that the Law Society is entitled to its costs in the amount of \$2,494.60, and we so order.

[59] The fine of \$2,500 and costs of \$2,494.60 must be paid by no later than October 31, 2016.

FURTHER ORDER

[60] Under section 38(7) of the Act, the Panel may make any orders or declarations and impose any conditions it considers appropriate. In the circumstances of this case, in order to facilitate the public interest mandate of the Law Society, the investigation into this Complaint must progress in a timely manner.

- [61] Accordingly, we order that the Respondent provide a complete and substantive response to the inquiries made in the Law Society's letters to her dated February 2, 12 and 23, 2016, by no later than May 27, 2016.
- [62] In particular, and to ensure that there is no ambiguity, we order that the Respondent, by no later than May 27, 2016, provide the Law Society with a date upon which it may interview her concerning the Complaint, with such date being no later than June 30, 2016, and that the Respondent provide proof or evidence of her attendance at the Specialist Appointment, also by no later than May 27, 2016.