2017 LSBC 05
Decision issued: February 9, 2017
Citation issued: June 16, 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:	October 19, 2016
Panel:	Dean Lawton, QC, Chair Dr. Gail Bellward, Public representative Richard Lindsay, QC, Lawyer
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	Ross McLarty

BACKGROUND

[1] On June 16, 2016 a citation was issued against the Respondent pursuant to the *Legal Profession Act*, s. 38(4) and Rule 4-17 of the Law Society Rules. The citation reads as follows:

> 1. You failed to comply with an order made by a hearing panel on May 13, 2016 contrary to Rule 7.1-1(e) of the *Code of Professional Conduct for British Columbia* by failing to provide by May 27, 2016 proof or evidence that you attended a medical specialist appointment on January 26, 2016, as

requested in the Law Society's communications to you dated February 2, 12, and 23, 2016.

This conduct constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act*.

[2] The requirements for service of the citation on the Respondent, pursuant to Rule 4-19 of the Law Society Rules, were admitted by counsel for the Respondent.

[3] The matter was brought before the panel as a summary hearing under Rule 4-33, which states:

> **Summary hearing**
>
> **4-33** (1) This rule may be applied in respect of the hearing of a citation comprising only allegations that the respondent has done one or more of the following:
>
> (a) breached a rule;
>
> (b) breached an undertaking given to the Society;
>
> (c) failed to respond to a communication from the Society;
>
> (d) breached an order made under the Act or these rules.
>
> (2) Unless the panel orders otherwise, the respondent and discipline counsel may adduce evidence by
>
> (a) affidavit,
>
> (b) an agreed statement of facts, or
>
> (c) an admission made or deemed to be made under Rule 4-28 *[Notice to admit]*.
>
> (3) Despite Rules 4-43 *[Submissions and determination]* and 4-44 *[Disciplinary action]*, the panel may consider facts, determination, disciplinary action and costs and issue a decision respecting all aspects of the proceeding.

FACTS

[4] In support of the proposition that the Respondent engaged in conduct constituting professional misconduct, the Law Society introduced into evidence the affidavit of A. Willms affirmed on July 7, 2016. There was no objection to this evidence, and this affidavit is the primary basis for our factual findings.

[5] Mr. Willms was employed by the Law Society as a staff lawyer in the Professional Conduct Department.

[6] He deposed that the Respondent was called and admitted as a member of the Law Society on December 4, 2006. Her practice was as a sole-practitioner in Vancouver, primarily in the area of civil litigation.

[7] As further deposed by Mr. Willms, "a citation was issued against the Respondent on March 3, 2016 for failing to respond to requests made by the Law Society in its investigation of complaint file [number] **(**the "first citation")."

[8] According to the affidavit of Mr. Willms:

(a) A summary hearing into the first citation was held on May 13, 2016. The Respondent attended the hearing and applied for an adjournment. Her adjournment application was dismissed and the hearing proceeded.

(b) During the hearing the Respondent cross-examined Mr. Willms on his affidavit filed in that proceeding.

(c) After hearing the evidence and submissions from the parties, the hearing panel found the Respondent's failure to respond to the Law Society amounted to professional misconduct.

(d) The hearing panel ordered the Respondent to pay a fine in the amount of $2,500 on or before October 31, 2016; to pay costs in the amount of $2,494.60 to the Law Society on or before October 31, 2016; and to provide a complete substantive response by May 27, 2016 to the inquiries made in the Law Society's letters to her dated February 2, 12, and 23, 2016.

(e) The panel specifically ordered the Respondent to provide the dates the Respondent was next available to attend an interview with the Law Society in May and June 2016 and proof or evidence she had attended a medical specialist's appointment on January 26, 2016.

(f) On May 18, 2016, Mr. Willms arranged with the Respondent that she would attend an interview on May 20, 2016.

(g) Mr. Willms reminded Ms. Farion of her obligation to provide "proof or evidence" of her attendance at the medical specialist's appointment on January 26, 2016 by May 27, 2016.

(h) Mr. Willms interviewed the Respondent on May 20, 2016 and again reminded her after the interview of her obligation to provide the proof or evidence of her attendance.

[9] The hearing of this citation (the "second citation") was scheduled to proceed on August 26, 2016. The hearing was adjourned by consent after the Respondent's counsel requested an adjournment in a letter dated August 22, 2016 to the Law Society. Attached to that correspondence was a letter on the letterhead of IMA Solutions dated August 19, 2016 (the "IMA Solutions letter"). The IMA Solutions letter was addressed to the Law Society and read as follows:

> To Whom It May Concern:
>
> This is to confirm that Kerri Farion was seen by one of the Physicians who contracts his services to IMA Solutions on January 26, 2016 at 2:30 pm. Her last minute appointment on that date resulted from another patient's cancellation of their appointment.
>
> We were asked by the physician to provide this letter due to privacy concerns of Kerri Farion and his office provided the above details, she was not referred to the physician via IMA Solutions.
>
> We trust this is sufficient.

[10] Despite the letters of February 2016 and the reminders from Mr. Willms, the Respondent did not provide any "proof or evidence" of her attendance with the medical specialist until her lawyer sent the IMA Solutions letter on August 22, 2016. No explanation was provided for the failure to comply in a timely manner with the order of the hearing panel.

[11] None of these facts are disputed by counsel for the Respondent.

THE STANDARD OF PROOF

[12] In *Law Society of BC v Schauble*, 2009 LSBC 11, at para. 43, the hearing panel quoted directly from *FH v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "… evidence must by scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But … there is no objective standard to measure sufficiency.

The burden of proof was also articulated by the hearing panel in *Law Society of BC v. Seifert*, 2009 LSBC 17, at para. 13:

> … the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities. In considering its findings in this matter, the Panel has applied that test.

[13] Clearly, the onus of proof is on the Law Society to prove on a balance of probabilities that the Respondent conducted herself in a way that amounted to professional misconduct.

THE DEFINITION OF PROFESSIONAL MISCONDUCT

[14] "Professional misconduct" is not a defined term in the *Legal Profession Act*, the Law Society Rules or *Code of Professional Conduct for British Columbia*, but has been the subject of consideration by hearing panels in several cases, including *Law Society of BC v. Martin*, 2005 LSBC 16.

[15] The hearing panel in *Martin*, at para. 171, considered the question of what constitutes professional misconduct and concluded that the test is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[16] In *Martin*, the panel also observed at para. 154 that:

> ... 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.

[17] The Respondent did not challenge the *Martin* test for what constitutes professional misconduct. She did however urge us to absolve her of a finding of professional misconduct on the basis the mere fact that she was late in providing the "proof or evidence" of her attendance with the medical specialist contained in the IMA Solutions letter was conduct on the lowest side of the "seriousness scale" and a non-practice related matter.

[18] At the hearing of the second citation we gave an oral decision on facts and determination. We concluded that the Law Society had met the burden of proving

"professional misconduct" by Ms. Farion. We informed counsel written reasons were to follow. These are those reasons.

REASONS FOR THE FINDING OF PROFESSIONAL MISCONDUCT

[19] Ms. Farion submits she has complied with the terms of the hearing panel's May 13, 2016 order, albeit late. Counsel categorizes her conduct as the absolute minimum on the "seriousness scale" and submits that this transgression is so minor that it does not constitute professional misconduct.

[20] The Respondent further argues that the penalty associated with her prior failures to comply with orders of the Law Society arising from the first citation constitutes sufficient sanction.

[21] The *Code of Professional Conduct for British Columbia* sets out in Chapter 7 provisions entitled "The Relationship to the Society and Other Lawyers." This Chapter articulates the broad responsibilities and expectations of lawyers in relation to the Law Society and the profession as a whole.

These responsibilities and expectations are integral to the Law Society fulfilling its statutory mandate under s. 3 of the *Legal Profession Act*. That mandate is as follows:

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[22] As part of the process of regulating the practice of law, there exists the *Code of Professional Conduct*, part of which includes Chapter 7.1-1 as follows:

> A lawyer must
>
> (a) reply promptly and completely to any communication from the Society;
>
> (b) provide documents as required to the Law Society;
>
> (c) not improperly obstruct or delay Law Society investigations, audits and inquiries;
>
> (d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;
>
> (e) comply with orders made under the *Legal Profession Act* or Law Society Rules; and
>
> (f) otherwise comply with the Law Society's regulation of the lawyer's practice.

[23] The citation in this case is specifically confined to 7.1-1(e).

[24] It is paramount that lawyers comply with chapter 7.1-1. Without compliance the lawyer potentially thwarts the basic premise of the Law Society "to uphold and protect the public interest in the administration of justice."

[25] Replying in a timely way, providing documents and cooperating during Law Society investigations are fundamental responsibilities of lawyers. Equally, if not more important, is the requirement to comply with legitimately made orders. Again, failure to do so has the potential to prevent the Law Society performing its critical role of protecting the public interest.

[26] One of the important investigative "tools" open to the Law Society is the ability to obtain orders under the *Legal Profession Act* or the Rules. The importance of such orders cannot be overstated.

[27] As noted in *Law Society of BC v. Jessacher*, 2016 LSBC 11 at paras. 44 and 45:

> The Law Society submits that non-compliance with orders, issued by the Law Society to secure a certain conduct, can only be considered serious misconduct.
>
> We agree. Where a hearing panel, having found the citation is proven, issues to a lawyer an order designed to enforce performance, *non-compliance with that order is not an option.*

> [emphasis added]

Similarly, in *Law Society of BC v. McLean*, 2015 LSBC 06, the hearing panel, in dealing with the failure to produce certain information stated at para. 75:

> ... we note that, while cooperation with Law Society investigations in all respects is important, Mr. McLean's conduct constitutes non-compliance with an order. *Non-compliance with the orders of statutory bodies and courts is considered grave*: *Law Society of BC v. Welder* 2014 LSBC 58. ...
>
> [emphasis added]

[28] Lastly the Law Society cites the following passage in *Law Society of BC v. Ben-Oliel*, 2016 LSBC 35 at paras. 20 to 22*:*

> The Respondent has failed to comply with the Order of the hearing panel made June 9, 2016. There has been no explanation provided for the failure to comply.
>
> This is prima facie evidence of professional misconduct, and the Respondent has not provided any evidence, let alone evidence to the standard of a persuasive burden, to explain her failure to comply with the Order.
>
> The Respondent's conduct in failing to comply with the Order constitutes professional misconduct. The allegations as set out in the citation have been proved by the Law Society on the balance of probabilities.

[29] The order in question in this proceeding arises from a hearing reported as *Law Society of BC v. Farion*, 2016 LSBC 25. The citation in that case related to the Respondent's failure, as of the date of the hearing, to respond "to repeated requests by the Law Society to reschedule the interview" and failure to provide evidence of her attendance at a medical specialist appointment on January 26, 2016.

[30] The context of the first hearing is important because the allegations of professional misconduct relate, in part, to the same failures. That is, failing to arrange an interview and failing to give evidence regarding her attendance at the specialist appointment. We do not consider the facts that led to the first hearing and the resulting order as factors in our determination of professional misconduct. The reasons in the first hearing are only relevant to the disciplinary action phase of this hearing. We are dealing specifically with the fact that, until August 22, 2016, there was non-compliance with the hearing panel order.

[31] At para. 40 the hearing panel wrote:

> 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.

[32] And at paras. 60 through 62 the panel ordered as follows:

> 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.
>
> 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.
>
> 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.

[33] As noted, the Respondent was found guilty of professional misconduct on May 13, 2016 in failing to respond to requests from the Law Society. That panel fined her $2,500.

[34] The hearing panel also ordered her, "no later than May 27, 2016," to comply with the requests for an interview date, to be no later than June 30, 2016 and "provide proof or evidence of her attendance at the Specialist Appointment."

[35] The Respondent did comply with part of the order, as demonstrated in the evidence of Mr. Willms that an interview did take place on May 20, 2016. However, at that

interview he made a further request for the proof or evidence of the Respondent's attendance at the specialist appointment. There was no response to that request until shortly before a scheduled hearing of a citation for professional misconduct for failing to comply with the order.

[36] The Respondent appears to have taken no steps to comply with the portion of the order regarding the specialist appointment until a few days before a further hearing set in August 2016. The attempt at compliance was the IMA Solutions letter sent by her counsel on August 22, 2016. No explanation for the delay has been given.

[37] The initial complaint in this matter was made in February 2015. The complaint according to the hearing panel was "concerning the failure of the Respondent to respond to communications during the course of a litigation matter."

[38] Almost two years later the investigation into the original complaint has not been completed, and the Respondent has demonstrated similar unresponsive conduct as set out in para. 10 in these reasons. We draw no inference from the incomplete investigation other than to note that the delay in such investigations is not in the public interest.

[39] The IMA Solutions letter appears to be sufficient "proof or evidence" required to comply with the order, and its brevity and simplicity demonstrates it would not have been onerous for the Respondent to obtain the letter much earlier. Her failure to do so is not, in our view, on the low end of the "seriousness scale" for professional misconduct. Her failure to provide an explanation for the delay is perplexing.

[40] As noted in other cases referred to earlier in these reasons, the deliberate failure to comply with an order of a panel constituted to look into the conduct of a lawyer is "grave" and constitutes professional misconduct. In our view, the Respondent having been ordered to produce proof or evidence of attendance at the specialist appointment, her failure to do so without explanation constitutes professional misconduct.

DISCIPLINARY ACTION

[41] The Respondent argued that the nature of the misconduct was relatively minor in that she has now complied with the order and accordingly a fine in the amount of $1,500 would be sufficient sanction. This submission came in the context of a fine in the amount of $2,500 having been ordered following a hearing of the first citation.

[42] The Law Society submitted the appropriate penalty would be a suspension of one month.

[43] To repeat, the primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate set out in section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice. This purpose was recognized by the hearing panel in *Law Society of BC v. Hill*, 2011 LSBC 16 at para. 3:

> 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.

[44] An oft cited and non-exhaustive list of factors to be considered in assessing sanction are set out in the 1999 decision in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45, 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.

Not all these factors are applicable in this case.

[45] Law Society counsel has submitted that the following factors are applicable and made submissions as reproduced below:

> *Acknowledgement of the conduct and remedial action*
>
> The Respondent has not acknowledged or admitted her misconduct, and did not comply with the Order until two months after the Citation was issued and nearly three months after the time requirement provided in the Order. This suggests that there is a need for specific deterrence in this case to bring a message directly to the Respondent that she does not have the option to ignore the terms of the Law Society order or comply with the terms only when convenient to her. The failure to acknowledge the misconduct before this hearing and when the previous citation was heard also suggests a strong message of specific deterrence is required. ...
>
> *Character of the Respondent and Professional Conduct Record*
>
> The Respondent is 42 years of age and was called to the bar of British Columbia on December 4, 2006. She has been practising law for approximately ten years and as such should have sufficient experience to realize the importance of fulfilling the obligations she owes to her profession's regulator. As the Respondent is a litigator, she should be well aware of the importance of complying with any order, and in particular the importance of complying with the Order, which sets out obligations she owes to her profession's regulator. ...
>
> The Respondent's PCR [Professional Conduct Record] also reflects that she was administratively suspended between April 1, 2015 and May 11, 2015 for failing to complete the necessary continuing professional development requirements, pursuant to Rule 3-32 of the Law Society Rules, and that she has been under a suspension pursuant to Rule 3-32 again since April 1, 2016.

> The Respondent has also been suspended since August 4, 2015 pursuant to Rule 3-81 of the Law Society Rules for failing to submit a trust report as required.

We have considered these factors and agree. In addition we considered the "nature and gravity of the conduct proven."

[46] The Law Society made reference to other cases dealing with failures to respond to correspondence from the Law Society and with orders of hearing panels. The most recent case was *Ben-Oliel*, which is somewhat similar to this case in that the citation concerned a failure by the respondent in that case to comply with an order that she respond to requests from the Law Society.

[47] The hearing panel commented on the nature of breaching hearing panel orders at paras. 26 and 32:

> [26] The regulation of the legal profession in the public interest is the principal purpose of the Law Society. The effective regulation of the profession requires that members of the profession comply with the orders made by the Law Society. The failure to comply with an order of the Law Society made pursuant to the *Legal Profession Act* impacts upon the ability of the Law Society to regulate the profession in the public interest and *undermines the public's confidence in the integrity of the profession*. The breach of an order of a hearing panel requires a penalty that not only specifically deters the Respondent, but also provides a general deterrence to the profession as a whole. We find the Respondent's impugned conduct *a grave case* of profession misconduct.
>
> ...
>
> [32] The breach of an Order is a grave case of professional misconduct and requires the imposition of a suspension given the considerations from *Ogilvie* that are applicable in this case, in particular, the maintenance of public confidence in the integrity of the profession, the need for general and specific deterrence, the grave nature of the misconduct, and the Respondent's Professional Conduct Record. But for the fact that the hearing panel of September 1, 2016 imposed a four-month suspension commencing October 1, 2016, a longer suspension would have been imposed.
>
> [emphasis added]

[48] In *Jessacher*, the lawyer was ordered to comply with requests from the Law Society having been cited for failure to respond. The hearing panel ordered Ms. Jessacher suspended until she provided the substantive response required by the first citation.

[49] We agree with the assertion by counsel for the Law Society that non-compliance with a Law Society hearing panel order goes to the heart of the ability of the Law Society to regulate its members in the public interest and, accordingly can only be considered serious misconduct.

[50] At para. 44 of its decision, the hearing panel in the first citation found the Respondent "knowingly ignored the Law Society's requests" and "when non-compliance is deliberate, it elevates the seriousness of the misconduct."

[51] We also consider the element of deterrence in the overall context of the obligation of lawyers to respond to inquiries and orders of the Law Society. There can be no doubt that a lawyer who elects to ignore the Law Society courts the risk of significant sanction. To permit defiance of an order without a significant penalty would erode public confidence in the ability of the legal profession to regulate itself for the protection of the public.

[52] As noted in argument by counsel for the Law Society, "The public's confidence in the integrity of the profession is compromised if the Law Society is perceived to not be doing everything it can to properly regulate its members. If the Law Society does not require strict compliance with orders imposed on the members it regulates, public confidence in the profession and its self-regulation could be irretrievably lost." We agree with those statements.

DECISION

[53] The Respondent's failure to comply with the hearing panel's order arising from the first citation constitutes professional misconduct. The Respondent is suspended for a period of 30 days, the suspension to commence on March 1, 2017.

COSTS

[54] Pursuant to s. 46 of the *Legal Profession Act* and the Law Society Rules the Panel has the authority to order costs of this hearing. Rule 5-11 states we must have regard to the tariff of costs in Schedule 4 to the Rules in calculating costs payable by the Respondent.

[55] Prior to the enactment of the tariff, factors considered for the assessment of the reasonableness of costs were found in *Law Society of BC v. Racette,* 2006 LSBC 29, at paras. 13 and 14. Those factors included the seriousness of the offence; the financial circumstances of the Respondent; the total effect of the sanction, including possible fines and/or suspension; and the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely being saved.

[56] Counsel for the Respondent and Law Society agreed that the Bill of Costs ought to be adjusted to $2,492 to reflect that the hearing of the second citation was completed in half a day instead of the scheduled full day.

[57] We are satisfied that, in all the circumstances, costs and disbursements in the amount of $2,492 are appropriate, and are so ordered to be paid by the Respondent on or before April 14, 2017.