2017 LSBC 26
Decision issued: July 6, 2017
Citation issued: November 9, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

SUMIT AHUJA

RESPONDENT

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

Hearing date:	May 31, 2017
Panel:	Craig A.B. Ferris, QC, Chair Ralston S. Alexander, QC, Lawyer Don Amos, Public representative
Discipline Counsel:	Mark P. Bussanich
Counsel for the Respondent:	Henry C. Wood, QC

BACKGROUND

[1] On November 9, 2016, a citation was issued against Sumit Ahuja (the "Respondent") pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Chief Legal Officer of the Law Society of British Columba on the direction of the Chair of the Discipline Committee.

[2] The citation contains two allegations, as follows:

1. On or about April 5, 2016, in the course of representing your client PH in connection with a Supreme Court hearing in Kelowna, British Columbia, you instructed your assistant to file with the court a requisition for a telephone attendance that contained false or misleading information about

the reason you were unable to attend the hearing on April 5, 2016 in person, contrary to one or more of Rules 2.1-2(c), 2.2-1 and 5.1-2(e) of the *Code of Professional Conduct for British Columbia*.

2. On or about April 5, 2016, in the course of representing your client PH in connection with a Supreme Court hearing in Kelowna, British Columbia, you made false or misleading representations to your client about the reason you were unable to attend the hearing on April 5, 2016 in person, contrary to one or both of Rules 2.2-1 and 3.2-2 of the *Code of Professional Conduct for British Columbia*.

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

[3] An Agreed Statement of Facts ("ASOF") was submitted to the Panel, in which the Respondent acknowledged the conduct described in the citation and agreed that the facts as acknowledged in the ASOF constituted professional misconduct. The Respondent acknowledged that the service of the citation upon him complied with Rule 4-15 of the Law Society Rules.

FACTS

[4] On the night before the Respondent was to travel to Kelowna to attend a contested hearing, he attended a firm event (Canucks Hockey Game). As a result, he was out later than planned and, in addition, consumed some alcohol. He slept through his alarm.

[5] When he woke, realizing that he was not going to get to Kelowna in time, he embarked on a series of initiatives aimed at "damage control."

[6] He spoke to his assistant and asked her to send a memo to the court in Kelowna advising that he had missed his plane because the flight had been overbooked. He provided a similar explanation in a call to his client in Kelowna.

[7] He spoke to opposing counsel by telephone and advised that he had missed his flight. He did not advance the overbooking excuse to opposing counsel.

[8] He was permitted to attend the hearing by telephone, and the matter was adjourned to later in the same week. Before the Respondent joined the proceedings by telephone, the Judge noted to opposing counsel that he had been advised that the Respondent had missed his flight due to overbooking. The explanation for the missed flight was not further canvassed when the Respondent joined the proceedings. The Respondent advised that he had missed his flight and apologized to the court.

[9] The Respondent did not immediately go in to the office on this day. In several email messages to partners of the firm, the Respondent apologized profusely for missing the plane but did not correct the explanation offered. The Respondent attended the Vancouver office of the firm (his usual office was in Langley) and met the partner responsible for the client. He handed over the file.

[10] It was not until the evening of the day following the missed plane that the Respondent admitted the truth of the circumstances to the partnership. We find that the Respondent feared that a promised transcript of the proceedings would expose his misleading comments. He could not remember what he had said in the telephone attendance in court.

[11] At 9:07 pm on the second day following the event, the Respondent sent an e-mail to several of the partners, in which he confirmed that he had earlier provided wrong answers to direct questions on the issue of whether he had told the client that he had missed the plane due to it being overbooked. He confirmed that he did not remember what he had said in court and noted that the transcript would likely provide clarity on that matter.

[12] In that email he noted "you asked me point blank, and I didn't tell you the entire truth."

[13] The Respondent sent letters of apology to the court and to the client. He self-reported the events to the Law Society several weeks later. The explanation for the tardy self-report was the time taken to retain counsel and take advice.

BURDEN OF PROOF

[14] The burden of proof in these circumstances is moot, given the admission of professional misconduct in the ASOF. We adjourned the proceedings briefly to consider our position on facts and determination and returned to render a finding that the Respondent had committed professional misconduct.

DISCIPLINARY ACTION

[15] With the consent of all parties, it was agreed that we would proceed immediately to the disciplinary action phase of the hearing, with a view to completing the entire matter in a single day.

[16] The Respondent was sworn and testified. He provided his affirmation of the ASOF. He spoke with some emotion on the extent to which he regretted his actions and acknowledged that he was motivated by panic and an abiding apprehension that the missed airplane would have catastrophic consequences upon

his future with his firm. Ironically, the Respondent learned later that at a meeting on the eve of these events, his quest for admission to the partnership had received a favourable reception.

POSITION OF THE PARTIES

[17] The Law Society urged a period of suspension of one month. Numerous authorities were referenced that suggested that, in circumstances where the court is misled, it is almost always the case that a suspension of some duration follows.

[18] The Law Society referenced several of the *Ogilvie* factors (*Law Society of BC v. Ogilvie*, 1999 LSBC 17). In restricting the consideration to only some of the *Ogilvie* factors, the Law Society acknowledged recent thinking that a more selective application of relevant *Ogilvie* factors has found favour (See *Law Society of BC v. Lessing*, 2013 LSBC 29, and *Law Society of BC v. Dent*, 2016 LSBC 05).

[19] The Law Society argued that the most significant *Ogilvie* factors are:

(a) the nature and gravity of the misconduct;

(b) the age, experience and character of the Respondent, including his professional conduct record;

(c) factors relating to the respondent arising from the process; and

(d) the range of penalties in similar cases.

NATURE AND GRAVITY

[20] There is no dispute that misleading both the court and a client is a serious matter. The integrity of the profession is seriously challenged in circumstances where the representations of a lawyer cannot be relied upon. There are equally compelling arguments about whether it is more serious misconduct to mislead the court or a client. We need not resolve that debate, except to note that both are extremely serious and deserving of significant penalty.

[21] It was noted in argument that most subjects of misleading statements are related to the substance of the matter in dispute. This circumstance is unusual in that it did not involve a representation at the heart of the dispute. We see little significance in the distinction. The outcome is identical. The court is misled and the client is disappointed by the lack of candour.

AGE, EXPERIENCE, CHARACTER AND CONDUCT RECORD

[22] The Respondent is a relatively new call. Five years at the Bar at the time of these events. His lack of experience is offset by the Law Society making reference to the resources of his firm available to him. The resources of the firm were not accessed by the Respondent at the material time, and no benefit was conferred.

[23] The Respondent's Professional Conduct Record provides some insight and assistance. There is a reference in the Conduct Record to a pre-admission requirement that the Respondent provide a letter to the Credentials Committee addressing the importance of truthfulness and candour in being a lawyer. This reference stood enigmatically unexplained until the Respondent testified. It refers to an admission made by the Respondent in the course of his application for admission that, while driving under suspension, he was stopped by the police and provided a false name to the officer. This compounded the problem of driving while under suspension.

[24] We are concerned about both driving while suspended and additionally providing misleading information to the police officer. This clearly suggests a gap in character and integrity at the time. The circumstances of this citation suggest that the letter to the Credentials Committee may not have provided the intended reminder that was contemplated by the request.

SANCTIONS IN SIMILAR CASES

[25] The Law Society presented several cases where misleading behaviour led to fines, though in most of the references the behaviour was not as clearly intentional, as in this citation. In one such case considered most analogous (*Law Society of BC v. McKinnon*, 2001 LSBC 38) a fine of $1,500 was ordered. The Law Society argued that the case was old and that *McKinnon* had no professional conduct record and did not mislead a client.

[26] Recent cases involving misleading behaviour, where the intentional nature of the deceit is evident and the opportunity to correct the misinformation was not taken, have usually resulted in suspensions ranging from one to four months (See *Law Society of BC v. Penty*, 2015 LSBC 51, *Law Society of BC v. Batchelor*, 2014 LSBC 11, and *Law Society of BC v. Chiang*, 2013 LSBC 28). It is also the case that, in many of these cases, the respondents had a professional conduct record of significance.

[27] The Law Society referenced the *Law Society of BC v. Martin*, 2007 LSBC 20, on the factors relating to the appropriateness of a suspension. Those factors include;

(a) elements of dishonesty;

(b) repetitive acts of deceit or negligence; and

(c) significant personal or professional conduct issues.

[28] The Law Society discussed the significance of the professional conduct record and the consideration of progressive discipline, while noting that progressive discipline was not engaged here as this was the first discipline incident for the Respondent.

POSITION OF THE RESPONDENT

[29] Counsel for the Respondent argued that the facts of this case "did not call out for a suspension." He noted that no one was harmed by the deceit and the subject matter of the missed hearing was resolved in a subsequent hearing several days later. In fact, the result was unchanged by the deceit because, regardless of the explanation given, the Respondent had missed the plane and an adjournment was required.

[30] Counsel for the Respondent also noted that the facts of this case suggested that, not surprisingly, the Respondent reacted impulsively when confronted with a seriously challenging and troublesome situation. It was a panic-driven, irrational reaction to the immediacy of the trouble. It was not a carefully reasoned response by the Respondent.

[31] The Respondent cooperated with the Law Society in its investigation and has apologized in writing to both the court and the client. The Panel was urged to consider favourably the recent cases where fines were imposed.

DISCUSSION

[32] This is not a complex determination for the Panel. The professional misconduct is admitted, in addition to being obvious. It is simply for the Panel to consider whether a suspension needs to be imposed or if a sufficient message of deterrence is communicated with condemnatory language and a fine.

[33] We have considered the cases referenced above in addition to other decisions to which we have been referred by counsel.

[34] We are troubled by the recurring nature of the misleading behaviour. The subject of this citation has happened despite the "honesty reminder" letter written to the Law Society to gain admission. There are troubling similarities. Confronted with a difficult question from a police officer, the presumably panic-driven response is to provide a false name. If considered in isolation, this reaction is not of itself a persuasive determination of character and integrity.

[35] However, it must be considered in the context of the initial misbehaviour, namely driving while a driver's licence is under suspension. The Credentials Committee was obviously sufficiently concerned about the circumstances to impose an unusual pre-admission requirement.

[36] We believe that the recurring misbehaviour does indeed "call out for a suspension." It may be that absent the "honesty" reminder in the Professional Conduct Record, a suspension may not have been necessary, despite the preponderance of precedent pointing to that outcome. We do not decide this point.

[37] The similarities between this matter and the issue considered by the Credentials Committee are too stark to be ignored. It is apparent that the necessary lesson was not conveyed by the letter requested in support of this Respondent's initial admission to the Law Society. A reinforcement of the importance of honesty in all our dealings as a lawyer is necessary.

DECISION

[38] We have earlier confirmed that the Respondent is guilty of professional misconduct. We impose, as a penalty for that misconduct, a suspension for a period of one month. During the course of the hearing, an undertaking provided by the Respondent not to practise until a specified date was referred to. The undertaking was not explained to the Panel, and we have not considered it in reaching our conclusions. However, in light of the undertaking, the suspension will begin on the day that the referenced undertaking expires. If that undertaking has been concluded, then the suspension will commence on August 1, 2017, or on such other day as may be agreed between counsel for the Law Society and the Respondent (or counsel for the Respondent).

[39] We also order that the Respondent pay costs in the amount of $3,500 plus disbursements. We have established that amount by reducing the Law Society's submitted draft bill of costs to reflect the fact that this hearing was essentially concluded in one-half of a day while the draft bill was based upon one full day of hearing. The Respondent will have six months from the date he returns to full-time

practice to settle this obligation to the Law Society. If he has not returned to full-time practice by September 1, 2018, the costs must be paid by that date.