

2017 LSBC 35
Decision issued: October 2, 2017
Citation issued: March 23, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GERHARDUS ALBERTUS PYPER

RESPONDENT

**DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION**

Hearing date: August 11, 2017

Panel: Herman Van Ommen, QC, Chair
James Dorsey, QC, Lawyer
Dan Goodleaf, Public Representative

Discipline Counsel: Carolyn S. Gulabsingh
Appearing on his own behalf: Gerhardus A. Pyper

INTRODUCTION

- [1] In the decision on Facts and Determination issued on January 11, 2016 (2016 LSBC 01), this Panel found the Respondent had committed professional misconduct by signing and sending two letters while his right to practise law was suspended. This conduct was in breach of a suspension order and the Legal Profession Act, which prohibits the practice of law by persons not authorized to do so.
- [2] This hearing was held to determine the appropriate disciplinary action.

POSITIONS OF THE PARTIES

The Respondent

- [3] The Respondent gave evidence at this hearing. The majority of his testimony concerned his view that the Law Society had treated him unfairly, all of which had been previously considered by this Panel.
- [4] In addition, he complained that his application for readmission was not properly handled, being subject to lengthy, unexplained delay. Without explanation though, he advised that, earlier this year, he had withdrawn his application for readmission.
- [5] He also testified about the recent decision of the Supreme Court of British Columbia, enjoining him from practising law until he resumes membership in the Law Society of British Columbia (*Law Society of BC v. Pyper*, 2017 BCSC 1197).
- [6] He advised that he intended to appeal the decision, although the deadline for filing that appeal had already passed. He asserts that the Court of Appeal in another proceeding made a finding of fact that he was appointed a director of the company to circumvent the fact that he was not currently licensed to practise law. He says that finding is unsupported by any evidence.
- [7] He further testified that the courts have gone out of their way to deprive him of an audience in an unfair manner.
- [8] The factual background relied on by the court to grant the injunction, post-date both the subject matter of this proceeding and the findings of Fact and Determination made by this Panel.
- [9] The Respondent concluded by stating that he would not, in the same circumstances, sign the two letters he did and suggested that the appropriate disciplinary action be a reprimand.

The Law Society's Position

- [10] The Law Society submitted that the appropriate disciplinary action in respect to the proven misconduct should be a suspension of one or two months, to commence on the first business day following the Respondent becoming readmitted as a member of the Law Society of British Columbia.
- [11] The Law Society submitted that the proposed sanction reflected an appropriate balancing of the principles and factors relevant to the assessment of sanction in these circumstances. In particular, the Law Society submitted the proposed sanction was necessary for denunciation and deterrent purposes and for the purpose of sending the correct message to the profession and public.
- [12] The Law Society seeks costs in the amount of \$10,484.16, payable by October 31, 2017, or such other reasonable date proposed by the Respondent or ordered by this Panel.

DECISION

[13] It is well established that the primary purpose of disciplinary proceedings is the fulfilment 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.

[14] The purpose of disciplinary proceedings is also explained in *MacKenzie, Lawyers and Ethics: Professional Regulation and Discipline*, loose-leaf (Toronto: Carswell, 1993) at page 26-1 as follows:

The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

[15] In *Law Society of BC v. Hill*, 2011 LSBC 16, the panel wrote at paragraph 3 as follows:

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.

[16] In determining the factors relevant to sanction, we will dispense with a review of *Law Society of BC v. Ogilvie*, 1999 LSBC 17, and adopt the reasoning in the recent decision of *Law Society of BC v. Dent*, 2016 LSBC 05. At paragraphs 15 and 16, the panel wrote:

The present *Ogilvie* factors are 13 in number. Many times, hearing panels feel obligated to go through each and every *Ogilvie* factor. Many times these factors overlap with each other. In addition, depending on the case before the hearing panel, the hearing panel strains to find a rationale for each of the *Ogilvie* factors.

It is time to provide some simplification to this process. It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from Lessing, which talks about the different factors having different weight.

[17] The four general factors that we will consider are as follows: (1) Nature, gravity and consequences of conduct; (2) Character and professional conduct record of the Respondent; (3) Acknowledgment of the misconduct and remedial action; and (4) Public confidence in the legal profession including public confidence in the disciplinary process.

Nature, Gravity and Consequences of the Conduct

[18] In its Facts and Determination decision, this Panel stated at para. 65:

Practising law when he did was a clear breach of an order. This is misconduct of a serious nature. Lawyers must pay heed to and obey direct orders of the Law Society. The ability of the Law Society to govern the profession depends on that. This conduct occurred on two separate occasions.

[19] In *Law Society of BC v. Coutlee*, 2010 LSBC 27, the lawyer had been suspended from practice of law in all fields except for defending persons in the field of criminal law and personal injury claims. In contravention of the suspension, the lawyer provided legal services to two siblings with respect to the will of a deceased relative.

[20] The hearing panel stated at paragraph 14 as follows:

... the blatant disregard of a restriction on practice imposed by a hearing panel must be regarded as misconduct of a most serious nature. It goes to the heart of the ability of the Law Society to impose and enforce discipline on lawyers.

Disciplining lawyers guilty of that type of misconduct is necessary to ensure the public has confidence in the Law Society to protect the public interest.

Character and Professional Conduct Record of the Respondent

[21] The Respondent's Professional Conduct Record consists of a conduct review in November of 2012, which considered the Respondent's conduct in breaching client confidentiality by providing opposing counsel with affidavits and exhibits detailing communications between the Respondent and his client without first obtaining the consent of his client to do so. The subcommittee made the following comments:

... notwithstanding that the Member was notified of the nature of the complaint and exchanged correspondence with Law Society staff in this regard prior to the Conduct Review, he did not seem familiar with the Handbook provisions relating to client confidentiality at the time the Subcommittee met with him. Further, the Member did not seem to be familiar with the specific, relevant facts which informed the applicability of the Chapter 5 rules to his situation. ...

... we are of the view that the Member would benefit from a careful study and review of the Handbook. ...

... The Subcommittee wishes to emphasize the concept of progressive discipline and to make clear to the Member that if he fails to improve his conduct, a citation may be issued in respect of any further misconduct. ...

[22] The Respondent's Professional Conduct Record also includes an investigation by the Practice Standards Committee in July 2012, which resulted in a report and

recommendations dated October 12, 2012. This practice review and the recommendations flowing from it focused on reducing the Respondent's file load and ensuring retainer agreements and client instructions were better documented.

- [23] A follow-up practice review was ordered, which was to take place by August 15, 2013. The March 2014 report resulting from that review included new recommendations directing the Respondent to ensure that he had made appropriate succession planning arrangements for his practice.
- [24] A further follow-up practice review was ordered to review the Respondent's new practice arrangements and the status of prior recommendations made to him. In January 2016, the Practice Standards Committee directed that the Respondent's practice standards file be closed and made new recommendations that the Respondent was to implement immediately concerning the lack of compliance with Law Society Client Identification and Verification Rules.
- [25] The Respondent's Professional Conduct Record also included an order made on March 20, 2014, imposing a number of interim restrictions and conditions on the Respondent's practice. The conditions included a requirement that he eliminate trust shortages and enter into a trust supervision agreement. On May 23, 2014, three Benchers ordered the Respondent be suspended primarily because he had not satisfied the Benchers that he had eliminated his trust shortages as required by the order made on March 20, 2014. This is the suspension order that we have found the Respondent breached in this proceeding.
- [26] On September 10, 2014, the same three benchers cancelled the Respondent's suspension, but imposed new interim practice restrictions, including that he not operate or be a signatory to any trust accounts. This order was rescinded on September 1, 2015, by consent, as the Respondent had ceased to be a member of the Law Society.
- [27] It is important to note that the Respondent was suspended on May 23, 2014 because he had not complied with all the terms of the previous order of March 20, 2014.

Acknowledgment of the Misconduct and Remedial Action

- [28] At the initial hearing, the Respondent did not admit that his conduct was in breach of the suspension order. He asserted that, because the May 26, 2014 letter was dictated before his suspension, he was entitled to sign and send it after. With respect to the second letter, he said that all he did was copy the letter the client had forwarded to him as a suggestion and was therefore not practising law. He testified that he had removed the designation "Barrister and Solicitor" from his letterhead in recognition of his suspension. In cross-examination, it became clear that the form of letter used was no different than the one he used prior to the suspension. He also asserted that he was not responsible for the June 13, 2014 letter because it was typed and sent by a Law Society employee. In fact, what had occurred was the custodian paid one of Mr. Pyper's employees to stay in the office and answer the telephone. The Respondent instructed the employee to prepare the letter, which she did, although she was paid by the Law Society at the time.

- [29] His lack of acknowledgment of the breach of the order is not an aggravating factor, but it does prevent him from saying that he acknowledged his wrongful conduct when it was first brought to his attention.
- [30] His admission at this hearing that he would not sign those two letters in the same circumstances was his first acknowledgment of wrongdoing.

Public Confidence in the Legal Profession Including Public Confidence in the Disciplinary Process

- [31] This, in the Panel's view, is the most important factor in determining the appropriate sanction for the Respondent in this case.
- [32] The disciplinary action we impose must have sufficient, specific and general deterrent value to maintain public confidence in the integrity of the legal profession. A strong message must be sent to the profession and to the public that this conduct will not be tolerated.
- [33] General deterrence is always a consideration in a circumstance such as this. Specific deterrence is also a relevant factor in the circumstances of this case because the Respondent is now a former member of the Law Society, subject to an injunction imposed by the Supreme Court of British Columbia not to practise law. The sanction we are imposing results from the Respondent practising law while prohibited from doing so.
- [34] As a result of our review of these four factors, we have decided that a period of suspension from the entitlement to practise law is required.
- [35] The cases this Panel finds most helpful in determining the appropriate length of a suspension are *Coutlee, Law Society of BC v. Farion*, 2017 LSBC 05, *Law Society of BC v. Ben-Oliel*, 2016 LSBC 35, and *Law Society of BC v. Jessacher*, 2016 LSBC 11.
- [36] In *Coutlee*, the respondent practised law in an area contrary to a panel's order. He was suspended one month for that conduct.
- [37] In *Farion*, the panel ordered the respondent be suspended for 30 days for breaching a prior hearing panel's order that, by a specified date, she provide a substantive response, which included her providing proof or evidence that she had attended a medical specialist appointment on the day that she did not attend an interview scheduled with the Law Society.
- [38] In *Ben-Oliel*, the respondent was suspended for two months for failing to comply with a hearing panel's order that she provide a response to certain correspondence from the Law Society. In that case, the panel wrote as follows at paras. 32 and 33:

The breach of an Order is a grave case of professional misconduct and requires the imposition of 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.

The Respondent should serve a significant period of suspension, and she should not be allowed to practise law until she has complied with the Order. A suspension that ended upon the Respondent's compliance with the Order could allow her to avoid the suspension that her conduct deserves by her immediate compliance with the Order. It is for this reason that the Respondent will be suspended for two months, consecutive to any suspension the Respondent has been ordered to serve. If, at any time, she has not complied with the Order of the hearing panel of June 9, 2016, she will remain suspended until she does comply.

...

[39] In *Jessacher*, the hearing panel ordered the respondent be suspended from the date the decision was served on her, with the suspension to terminate when she had provided the substantive responses required by the first citation hearing panel. In that case, she was found to have failed to comply with the order of a hearing panel to provide a substantive response by a specific date.

[40] The Respondent is not a member and is not currently seeking readmission. As a result, a suspension to be served at this time serves no purpose. He has no licence to suspend. For that reason, this Panel has determined that the Respondent should be suspended for a period of two months commencing the date on which he is readmitted to the Law Society of British Columbia in the future.

DISCLOSURE ORDER

[41] The Law Society seeks orders under Rule 5-8(2) of the Law Society Rules that the portions of the exhibits that are subject to client confidentiality not be disclosed to members of the public and that confidential information be redacted from the transcript of the proceedings before any portion of the transcript is provided to a member of the public.

[42] Although this matter was raised at the hearing, no submissions were made. Subsequent to the hearing the parties were requested to provide submissions in writing. The Law Society did so but the Respondent did not.

[43] Because the Law Society has the power under section 88 of the *Legal Profession Act* to compel production of confidential and privileged material, which is then used in a hearing, it must also ensure that the material that is confidential and privileged is not disclosed to any person except for a purpose contemplated by the *Act* and Rules.

[44] This panel orders, pursuant to Rule 5-8(2)(a), that:

- (a) If any member of the public applies pursuant to Rule 5-9(1) for a copy of the transcript of proceedings regarding this citation, the transcript must be redacted to remove any identifying or confidential information about the Respondent's clients and the transcript must refer to the Respondent's clients by their initials; and
- (b) If any member of the public applies pursuant to Rule 5-9(1) for a copy of any exhibit filed in these proceedings, the exhibit must be redacted to remove client names, identifying information and any solicitor-client information from the exhibit before it is released to a member of the public.

COSTS

[45] The costs sought by the Law Society are reasonable and in accordance with the tariff.

[46] The Respondent testified that, because of his loss of practising status, he has been unable to work. As a result, he said he would be unable to pay any order with respect to costs. He did not, however, provide any information about his assets or other sources from which he would be able to pay these costs.

[47] The Panel therefore orders the Respondent to pay costs in the amount of \$10,484.16, to be paid on or before April 1, 2018.