2017 LSBC 39
Decision issued: October 31, 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:	September 6, 2017
Panel:	Herman Van Ommen, QC, Chair Dennis J. Day, Public Representative Gillian M. Dougans, Lawyer
Discipline Counsel:	Carolyn S. Gulabsingh
Counsel for the Respondent:	Henry C. Wood, QC

INTRODUCTION

[1] Sumit Ahuja (the Respondent) is a member of the Law Society of British Columbia (the Law Society). He is currently subject to a voluntary undertaking not to practise that has been in effect since May 19, 2017 and will expire September 29, 2017 unless renewed.

[2] A citation was authorized on November 3, 2016, issued on November 9, 2016 and amended at the start of this hearing on September 6, 2017.

[3] The amended citation was submitted by the Law Society, with the Respondent's consent, pursuant to Rule 4-21(1)(b). The amended citation alleges professional misconduct for the following:

(a) Between approximately November 14 and November 18, 2014, in the course of providing legal services to your client, SB, in connection with a family law matter, you failed to follow your client's instructions to oppose an application for a divorce order returnable November 18, 2014.

(b) On or after November 18, 2014 in the course of providing legal services to your client, SB, in connection with a family law matter, you failed to correct your client's understanding that you had attended court on her behalf on November 18, 2014 to oppose an application for a divorce order, contrary to Rule 3.2-1 of the *Code of Professional Conduct for British Columbia*.

(c) In the course of providing legal services to your client, SB, in connection with a family law matter, you failed to serve your client in a competent, conscientious, diligent and efficient way so as to provide a quality of service at least equal to that which would be generally expected of a lawyer in a like situation, contrary to Rule 3.2-1 of the *Code of Professional Conduct for British Columbia*, by failing to advise her of the need to prepare for or seek an adjournment of a summary trial application scheduled for November 18, 2014.

[4] Each allegation was stated to constitute professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

[5] The authorization and service of the citation were admitted by the Respondent.

[6] The parties advised the Panel at the beginning of the hearing that they had reached an agreement on an admission of professional misconduct and requested an oral decision from the Panel on the Facts and Determination with a view to proceeding with the Disciplinary Action in the same hearing.

[7] The parties also made a joint submission for an order pursuant to Rule 5-8(2) that specific information would be redacted if a member of the public applied for a copy of the transcript or any exhibit. The Panel made that order on the following basis:

(a) The transcript will have the following information redacted:

i. Identifying or confidential information about the Respondent's client who will be referred to by her initials;

ii. Any personal information about the Respondent's medical history; and

iii. The circumstances giving rise to the Respondent providing an undertaking not to practise law; and

(b) The exhibits will have the following information redacted:

i. client names;

ii. identifying information; and

iii. any solicitor-client information.

[8] The Respondent admitted that the conduct described in the amended citation and the Agreed Statement of Facts (ASF) constitutes professional misconduct.

FACTS

[9] The Respondent first met his client SB on June 16, 2014 for an initial consultation in a family matter.

[10] The Respondent was retained by SB on July 17, 2014. She paid the Respondent a $5,000 retainer. At that time SB's husband had already scheduled a summary trial application (the "Summary Trial Application") for November 18, 2014 seeking a divorce, joint parenting responsibility, child support, a reduction of retroactive child support owed, and a division of family assets.

[11] There was no evidence that the Respondent did any work on SB's file until November 5, 2014 when he called her husband's lawyer, GB.

[12] GB's notes for November 5, 2014 indicate that the Respondent advised he was new counsel and asked for an adjournment of the November 18, 2014 Summary Trial Application. GB refused to adjourn citing inordinate delay.

[13] The Respondent did speak to his client on November 5, 7, 12 and 13, 2014 but did not make notes of any of those telephone calls.

[14] On November 13, 2014 GB sent an email to the Respondent stating the following:

> I have talked to my client and as proposed by you and your client, my client is agreeable to the divorce order being made on November 18, 2014 with the ancillary orders being adjourned to a mutually agreeable date. We have filed the applicant's record and I will send you the index. Please confirm that you have received this email and that as stated earlier by you, you and your client are agreeable to the divorce being granted on November 18, 2014. I will draft the consent order and send it to you.

[15] On November 14, 2014 the Respondent emailed his client:

> I confirm our telephone discussion. I have spoken to [GB] counsel for your husband.

> They have agreed to adjourn the Summary Trial. This was difficult to get consent on. Your husband wants to proceed with the divorce on the 18th of November.
>
> It may be that the Judge will not grant the divorce considering that all matters have not been resolved yet.
>
> We will select another date in the future for a Summary Trial. I believe we will need at least two days.
>
> Please respond to this email confirming that you agree.

[16] SB responded to this email on the same day:

> I agree.
>
> Please do everything that you can to stop the divorce on that day of November 18.
>
> Thank you very much. I really appreciate it.

[17] Next on November 14, 2014 the Respondent emailed GB:

> I confirm that we will adjourn the Summary Trial. You will proceed with your application for divorce. My client will not oppose the divorce order.
>
> As indicated, I may attend if I can free up my schedule.

[18] The next email was from the Respondent to GB on the morning of the Summary Trial Application, November 18, 2014 at 7:39 a.m.:

> I was unable to reschedule my other matter. I cannot attend today. I confirm as follows:
>
> 1. You will adjourn generally your client's application which is the basis for the Summary Trial today;
>
> 2. We will set two days of Trial;
>
> 3. You will attempt to obtain and [sic] Order for Divorce today. I would rather be there but cannot due to my schedule. If you make submissions on this, I trust you will advise the court that I could not attend and sought an adjournment. My client does not disagree with the divorce. ...

[19] The Respondent did not attend the Summary Trial Application on November 18, 2014.

[20] At the Summary Trial Application the judge granted the order for divorce and adjourned the remaining issues.

[21] On November 18, 2014 GB sent an email to the Respondent:

> I appeared before the court as your agent; divorce has been granted and all the other issues have been adjourned generally. I will draft the divorce order and I will send you a copy. I do not think that you have to sign it. I showed the judge your previous email. The one sent to me at 7:39 a.m. was accessed by me a couple of minutes ago. Let's book a summary trial; I am of the opinion that one day is more than enough, but if you feel two days are required then we will proceed accordingly.

[22] The Respondent met with his client on November 19, 2014 and advised her that she could appeal the divorce order but that he did not think the appeal had any merit. The Respondent ordered a copy of the summary trial proceedings and spoke to a lawyer at his firm about handling the appeal but this lawyer declined.

[23] GB's notes to file for December 15, 2014 state:

> … talked to Sumit Ahuja; he stated he will send me the signed divorce order and the appointment of counsel notice; also he stated that there were reconciliation talks between the parties; I told him I will contact my client and confirm because if reconciliation needs to happen then we are running short on time. …

[24] SB obtained a copy of the transcript from the Respondent's assistant sometime after December 17, 2014, and she filed a Notice of Intention to Act in Person on December 19, 2014.

[25] The Law Society contacted the Respondent in early February 2015 after a complaint was made by SB.

[26] The Respondent provided a detailed response to the complaint in a letter dated March 3, 2015, which was included in the ASF. In this letter the Respondent advised as follows:

(a) He knew in early 2014 that he would not be available for the November 18, 2014 hearing because he was attending a CBA conference in Phoenix, Arizona from Friday November 14 to Sunday November 16, 2014. He left for Phoenix on Thursday November 13 and returned to Vancouver on Tuesday November 17, 2014. He referred to having appointments that he could not change on November 18, 2014;

(b) The Respondent said he made SB aware that he could not attend on November 18, 2014 but did not have any notes of this discussion. He said that SB agreed to keep the November 18 date for the summary trial because EF would take over the file when she returned from maternity leave in late October; and

(c) The Respondent was advised by EF in late October that she would not take over SB's file as she was only doing personal injury work.

[27] At the hearing, the parties advised the Panel that the divorce order was subsequently set aside by the judge when he learned that there were outstanding child support issues.

DETERMINATION

[28] The Panel adjourned briefly to consider the facts and admissions and returned to give an oral decision accepting the Respondent's admission of professional misconduct on the matters set out in the amended citation with written reasons to follow.

[29] The amended citation refers to professional misconduct generally and to Rule 3.2-1 of the *Code of Professional Conduct for British Columbia* (the "*Code"*) specifically.

[30] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules or the *Code*. The most frequently cited description is from the decision in *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 17, where the panel stated

> The test that this Panel finds is appropriate 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.

[31] Section 3.2-1 of the *Code* states as follows:

> A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

[32] The Panel found that the Respondent's actions did constitute professional misconduct for the following reasons:

(a) The Respondent failed to advise his client that he would not attend the Summary Trial Application on November 18; he failed to find other counsel to attend in his place; and he failed to obtain his client's instructions to apply for an adjournment;

(b) The Respondent failed to follow his client's clear instructions to oppose the application for a divorce order and in fact advised opposing counsel that his client did not oppose the divorce order;

(c) The Respondent failed to advise his client of his failure to attend court on her behalf and his advice to opposing counsel that she did not oppose the divorce and led his client to believe that she could pursue an appeal;

(d) Following client instructions is a basic obligation of lawyers. Lawyers can only act with their client's instructions. Unless a client has asked a lawyer to do something illegal, unethical or impossible, a lawyer is bound to follow their client's instructions. Lawyers are responsible to ensure that their clients make informed decisions and give informed instructions. A lawyer who disagrees with the instructions given has a responsibility to inform the client of the concerns and any risks so that the client always gives informed instructions. This is the conduct the Law Society expects of lawyers; and

(e) The Respondent's conduct was a marked departure from the conduct expected by the Law Society of British Columbia.

DISCIPLINARY ACTION

[33] With the agreement of the parties, the Panel heard submissions on disciplinary action. The parties advised that they had agreed that the appropriate penalty would be a one-month suspension. The Law Society submitted that the suspension should be consecutive to a pending suspension from another hearing; the Respondent submitted that a concurrent suspension would be appropriate.

[34] The Law Society filed the Respondent's Professional Conduct Record as an exhibit. That record discloses the following:

(a) In a decision dated December 10, 2009 the Credentials Committee approved the Respondent's application for enrolment in the Law Society Admission program on the condition that he provide a letter addressing the importance of truthfulness and candour in being a lawyer; and that he meet with a Bencher of the Law Society twice during his articles. The reason for this was that, in 2007 the Respondent, while driving under suspension, was stopped by the police and provided a false name to the officer.

(b) In a decision dated May 5, 2016 the Practice Standards Committee ordered a Practice Review.

(c) The Practice Standards Committee on September 29, 2016 resolved to recommend to the Respondent that he:

i. complete and obtain 100% score on all the quizzes for the Communication Toolkit Course to address shortcomings in his communication skills;

ii. complete the course "Boundaries for Lawyers" to address his issue with setting appropriate boundaries;

iii. use checklists to address high file load;

iv. use templates for retainer agreements to address the inconsistency in his use of retainer agreements;

v. keep a comprehensive record of each communication on every file;

vi. follow guidelines to address deficiencies in client communications;

vii. follow guidelines for closing letters;

viii. follow guidelines to address his inadequate task management and reminder systems.

(d) On May 19, 2017 the Respondent signed an Interim Practice Undertaking and Consent voluntarily undertaking not to practise law. This undertaking has been extended and currently expires September 29, 2017 unless extended.

(e) A decision of the Law Society hearing panel dated July 6, 2017, *Law Society of BC v. Ahuja*, 2017 LSBC 26, was issued in respect of a second citation issued on November 9, 2016. This decision reports the following:

i. The Respondent admitted and the panel found that he was guilty of professional misconduct in April 2016 for providing false and misleading information to the court and to his client about the reason he missed a hearing in Kelowna on April 5, 2016;

ii. The Respondent had missed his plane because he overslept after attending a hockey game and drinking alcohol the night before. He told the court and his client that he had missed his flight due to overbooking;

iii. The panel observed 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." The panel imposed a one-month suspension to begin on the day that the voluntary undertaking would expire and payment of costs in the amount of $3,500; and

iv. In respect of the Respondent's disciplinary history the panel stated:

> 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.

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.

POSITION OF THE PARTIES

The Law Society's position

[35] The Law Society submits that a one-month suspension, consecutive to the pending suspension, plus costs in the amount of $7,351.43 is the appropriate penalty.

[36] The primary purpose of disciplinary proceedings is to fulfill the Law Society's mandate to uphold and protect the public interest in the administration of justice.

[37] The Law Society noted the long list of relevant factors historically considered by a panel is set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. In a more recent decision, *Law Society of BC v. Dent*, 2016 LSBC 05, it was decided that a panel need only consider four primary factors and the Law Society made the following submissions on those factors:

(a) Nature, gravity and consequences of conduct: Following a client's instructions is a fundamental expectation and acting contrary to a client's instructions is serious misconduct. The failure to follow SB's instructions had serious consequences for her; she asked the Respondent to do all he could to oppose the divorce, and the divorce was granted based on the Respondent's representation that SB did not oppose the divorce or, in other words, that she consented to it;

(b) Character and professional conduct record of the respondent: The Law Society submits that the Respondent's professional misconduct record shows challenges in two general areas: client communication and integrity;

(c) Acknowledgement of the misconduct and remedial action: The Law Society notes that the Respondent has admitted the misconduct alleged in the citation by signing the ASF though points out that he only signed it one day before the

hearing. The Law Society also notes the very different tone between the Respondent's first written response to SB's complaint in March 2015 and his letter to the Law Society dated October 6, 2016 which states:

> … I feel that I have gained considerable insight from my involvement with the Law Society. While it has taken me some time to come to this point, I see now that my response was fundamentally accusatory, and that it was not appropriate for me to respond this way.
>
> In light of all of this, I am far less defensive about dealing with the complaint now. I acknowledge that I let SB down by failing to communicate with her effectively. There was some obvious misunderstanding between us, but as the professional, I must take ultimate responsibility for that. Although I believed at the time that I had been clear with her about her options and that she understood my advice and what course of action we were taking, I accept that her complaint was genuine and that I should have done a better job in ensuring that she understood my advice to her by confirming her instructions before acting on what I presumed them to be.
>
> … I could and should have taken care to ensure that I correctly understood her instructions to me. …

(d) The Law Society notes that the referral to the Practice Standards Committee happened after the events leading to this citation and hopes that referral has been of some remedial benefit to the Respondent.

(e) Public confidence in the legal profession including public confidence in the disciplinary process. This is maintained when the sanction levied is fair and reasonable given the various factors present including the Respondent's conduct record, the prior sanctions imposed on him and the sanctions imposed in similar cases.

[38] The Law Society submits that the one-month suspension sought must be served consecutively to the pending one-month suspension imposed by the prior panel in order to have the intended message of specific deterrence and denunciation. Public confidence would be compromised if the substance of each citation was not addressed separately.

The Respondent's position

[39] The Respondent did not testify or address the Panel. He did not submit any letters of support or reference.

[40] Counsel for the Respondent says that his client is contrite and "accepts that he failed to deliver an expected quality of service in all the circumstances."

[41] The Respondent submits that a one-month suspension is the appropriate sanction but argues that it should be served concurrently with the one-month suspension already pending.

[42] The Respondent submits that this is not a situation where progressive discipline is appropriate since the conduct in question occurred in November 2014, whereas the conduct addressed by the pending suspension occurred in April 2016. The opportunity to learn from the previous disciplinary process does not exist.

[43] The Respondent submits that a one-month suspension is at the high end of the range for what he characterizes as simply a failure of quality of service. He argues that the citation was amended to remove the complaints involving integrity.

[44] The Respondent relied on two cases involving quality of service citations that both resulted only in fines, not suspensions:

(a) *Law Society of BC v. Wesley*, 2016 LSBC 07, in which a lawyer was given a $3,000 fine for failing to enter an order made in October 2011 until June 2013 and failing to advise her client of the risks of not entering the order or of the costs involved to settle the terms of the order. The panel accepted that this conduct applied to one client and one order only in the context of a 33-year career without relevant discipline proceedings; and

(b) *Law Society of BC v. Reith*, 2016 LSBC 19, in which a lawyer admitted and the panel found that he had professionally misconducted himself by acting for the buyer and seller in a real estate transaction without advising them of the nature of his retainer; failing to communicate on multiple occasions; failing to advise what would happen if a conflict arose; failing to explain the fee he would charge; preparing incomplete and inaccurate Statements of Adjustments; leaving on summer vacation without advising his clients when he knew they wanted the transaction to complete that summer. The Respondent did have a relevant Professional Conduct Record, including a Practice Review in 2012, a finding of professional misconduct in 2014 for similar circumstances on a joint retainer and a second conduct review in 2015 for failing to provide clients with notice of holiday plans and failing to make provisions to complete their real estate transaction. The panel seriously considered a suspension but ordered a $7,500 fine.

[45] The Respondent also argues that the effect of a citation and the fact that this hearing has been hanging over the Respondent for a long time, should be taken into account. The conduct in question was in November 2014 and the complaint was in early 2015. The process has taken a toll on the Respondent both professionally and personally. As well, the original citation was published immediately in November 2016 but was considerably revised at the start of the hearing and was "far less damning that what was initially alleged."

[46] The Respondent argued that SB was a difficult client, and he submitted correspondence from previous counsel noting her difficulty getting clear instructions and concern that SB was not accepting her advice. The Respondent was the fifth lawyer SB had retained, and this concerned him.

[47] Counsel for the Respondent argued that he has undergone a "significant evolution" in his attitude during the course of this matter. He points to the tone of his response in March 2015 as defensive and self-justifying, but in October 2016, with the benefit of a practice review, the Law Society course on Practice Management and the Boundaries for Lawyers course, he has greater insight into better handling of difficulties in practice.

[48] The Respondent submitted a copy of his apology letter to SB to show this evolution, along with the letter to the Law Society, both in October 2016, which states:

> With the passage of time and the benefit of my interaction with the Law Society, I have come to view your complaint from a very different perspective.
>
> In my response to your complaint, I was unfairly accusatory of you. This was not right and I regret having added more issues to your life by seeking to place the fault upon you for what occurred.
>
> You hired me to assist with a very sensitive matter. Although I believed that I was acting in accordance with your instructions, nevertheless I accept that there was a misunderstanding for which, as the professional, I should bear ultimate responsibility. I should have communicated with you more effectively and I should have taken more time to ensure that I understood your instructions correctly.
>
> After you informed me of your experiences with your previous lawyers, I wanted to be the one who could assist you with a suitable resolution of your matters. I ask you to accept that I believed I was always acting in your best interests. Despite my best intentions, however, it is apparent that I failed you.
>
> I hope you will accept my sincere apology.

[49] Counsel for the Respondent submits that the Respondent has demonstrated significant cooperation with the process (he admitted professional misconduct and almost reached an agreement on discipline) and has shown an appreciation of his wrongdoing and regret. These factors should serve to militate in favour of less severe discipline.

The Law Society's reply

[50] In reply the Law Society points out that the cases relied on by the Respondent do not involve a failure to follow client instructions, which is more serious than a simple quality of service complaint.

DETERMINATION ON DISCIPLINARY ACTION

[51] The appropriate penalty should address two factors: the first is the protection of the public, including public confidence in the disciplinary process and public confidence in the profession generally, and the second is the rehabilitation of the lawyer. *Law Society of BC v. Lessing*, 2013 LSBC 29.

[52] The Panel imposes a suspension of one month to commence at the conclusion of the current one-month suspension. In other words, the Panel imposes a consecutive suspension. A concurrent suspension would effectively be no sanction at all for a completely separate event. The public interest would not be served.

[53] The Panel seriously considered asking the parties for additional submissions on a more severe sanction than just a one-month suspension, notwithstanding the parties' agreement. The Respondent's conduct, in failing to follow clear instructions from his client, was much more serious than a simple quality of service issue.

(a) The Respondent had clear instructions from his client to oppose the divorce order on November 18, 2014; and

(b) The Respondent did not simply fail to attend and oppose the divorce order but he sent an email to opposing counsel on the same day he had received his client's instructions and advised opposing counsel that his client did not oppose the divorce.

[54] The Respondent's letter to the Law Society and apology to his client in September 2016 do not show much insight into his conduct. He does not actually admit doing anything wrong. He describes his failure to follow instructions as a "misunderstanding" and only accepts responsibility because he is the professional, not because he has done anything wrong. He characterizes his misconduct as a failure to communicate or clarify instructions, but SB's

instructions were perfectly clear, and the email exchanges show that she and the Respondent were communicating frequently.

[55] The Respondent's conduct in this matter is disturbing because it involves a lack of candour. The Respondent was prepared to let his client think he was attending court and opposing the divorce order, but he was not planning to do either.

[56] The lack of candour extended to opposing counsel. The Respondent advised he might be able to attend on November 18 but was not actually planning to as he had arranged to attend an out of town conference and had "appointments" on that date. The Respondent knew or ought to have known that the language he was using in his emails would lead his friend and the court to believe that SB was consenting to the divorce order. He would have known that a consent order could not be appealed but helped his client explore that option as if the divorce order were an error made by the judge.

[57] SB does not appear to have been any more difficult than many family law clients. This is an area of law that is fraught with high emotions and conflict. Even if it was inevitable that the divorce order would be made, she was entitled to refuse to consent and to have her opposition to the divorce on the record.

[58] The Respondent knew when he was retained in July 2014 that he would not be available for the November 18 chambers date. He could have advised his client at that time, but scheduling conflicts are common and litigation calendars change frequently. If the Respondent thought his colleague EF, who used to act for SB, would take the file back when she returned from maternity leave in late October, that was a reasonable expectation. Once the Respondent knew that opposing counsel would not change the chambers date and that his colleague would not take this file back, then it was time to advise his client and arrange his calendar so that he could attend, find someone else in his firm (or outside his firm) to attend on November 18 or obtain instructions to make an application to adjourn.

[59] The Panel finds that the appropriate penalty is a one-month suspension to be served consecutive to the pending suspension ordered on May 31, 2017.

COSTS

[60] The Law Society seeks costs in the amount of $7,351.42.

[61] The Law Society spent a significant amount of time in negotiations leading to the amendment of the citation and Agreed Statement of Facts signed on September 4, 2017. There were 258 disclosure documents. A Notice to Admit was prepared but not tendered once the ASF was signed.

[62] The hearing occupied a half day as a result of the admissions and cooperation of the parties and the Panel awards half the amount claimed or 15 units for the hearing for a reduction of $1,500.

[63] The Respondent will pay costs in the amount of $5,851.43.

[64] Costs must be paid within three months of payment of the costs ordered on May 31, 2017 and no later than December 1, 2018.