

2022 LSBC 46
Hearing File No.: HE20190081
Decision Issued: November 15, 2022
Citation Issued: December 12, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

MARC ANDRE SCHEIRER

RESPONDENT

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

Written Submissions:	February 23, 2022 June 30, 2022 July 19 and 25, 2022
Panel:	Dean P.J. Lawton, KC, Chair Clarence Bolt, Public representative Gavin Hume, KC, Lawyer
Discipline Counsel:	Mandana Namazi
Appearing on his own behalf:	Marc Andre Scheirer

INTRODUCTION AND BACKGROUND

- [1] On December 13, 2021, the Panel concluded that the Respondent, Marc Andre Scheirer, had engaged in professional misconduct on two grounds, namely:
- (a) between April 2018 and January 2019, the Respondent failed to provide the quality of service required by a competent lawyer, contrary to rule 3.2-1 of the *Code of Professional Conduct for British Columbia* (the “*BC Code*”); and
 - (b) the Respondent acted dishonourably, contrary to rule 2.2-1 of the *BC Code*, when meeting with his client at his home on November 22, 2018.
- [2] The hearing on Disciplinary Action was scheduled to proceed on March 1, 2022. The Law Society requested that the Respondent provide copies of his written evidence no later than February 11, 2022. The Respondent did not respond to that request in a timely way. However, on February 23, 2022, the Respondent filed a written submission including the evidence on which he apparently relied.
- [3] As a result, the Law Society sought an adjournment to determine whether further evidence or cross-examination was required. The Respondent consented to the adjournment. The hearing was rescheduled for June 13 and 14, 2022.
- [4] On June 7, 2022, the Respondent applied to adjourn the hearing because he was scheduled to undergo surgery on June 15, 2022. The Law Society did not take a position on the application to adjourn but submitted that if the hearing was adjourned, the matter should proceed on the basis of written submissions. This was not opposed by the Respondent.
- [5] The Panel agreed that the matter should proceed on the basis of written submissions, subject only to the Panel deciding whether a hearing was required after reviewing the submissions. The Law Society provided its written submission on June 30, 2022.
- [6] The Respondent filed a further written submission on July 19, 2022. The Law Society filed its final reply submission on July 25, 2022.
- [7] After considering the submissions, the Panel concluded that an oral hearing was not required and directed that the Law Society and the Respondent be advised of that decision.

FACTS AND DETERMINATION DECISION

- [8] The Panel, in our decision on Facts and Determination issued December 13, 2021 (2021 LSBC 51) (the “F&D Decision”), concluded that the Respondent engaged in professional misconduct in two respects:
- (a) Contrary to rule 3.2-1 of the *BC Code*, the Respondent did not keep his client reasonably informed about her family law matter, did not respond to requests for information, and did not return telephone calls from his client. In addition, the Respondent did not explain to his client that it was not possible to proceed in the manner that she wished, did not take substantive steps to advance her matter, and did not provide prompt service to her. Meanwhile, the Respondent did not maintain an appropriate file to preserve a factual and documentary history of his dealings with his client, the management of her legal issues, and the advice that he provided her.
 - (b) Contrary to rule 2.2-1 of the *BC Code*, the Respondent failed to act honourably and with integrity when meeting with his client at his home on November 22, 2018. In particular, the Respondent consumed alcohol prior to the meeting. At the meeting, he did not locate the client’s file in his office. On the premise that the file was at his home, the Respondent asked his client to meet in his home. She agreed to do so. At his home, the Respondent offered his client a martini, which she declined. Subsequently, he poured one for himself and changed from his business suit into shorts and an unbuttoned shirt. The Respondent was unable to find the file. Then, instead of sitting on a chair, the Respondent sat in close proximity to his client on the couch where she was seated and placed his arm behind her. The client was uncomfortable and offended by the Respondent’s actions. She pushed his arm away, stood up, and left.

SUBMISSIONS OF THE PARTIES

- [9] In his February 23, 2022 written submission, the Respondent submitted that the appropriate sanction for his misconduct would be an order to pay a fine of \$3,000, payable over a 12-month period, and no suspension.
- [10] In support of that submission, the Respondent submitted that there were mitigating factors to be considered with respect to his misconduct.

- [11] Concerning the failure to provide the appropriate quality of service, the Respondent submitted that after reviewing his client's file, he concluded that she did not have a case, that he had not received critical documents, and that his client's former lawyer would not provide her file until she was paid for billed legal services.
- [12] With respect to the dishonourable conduct, the Respondent submitted that he was between offices, that this was the only time he had met a client at his home, and that he had the flu and a fractured rib, the pain of which was alleviated by placing his arm on the back of the couch.
- [13] In his submissions, the Respondent discussed existing restrictions placed on his practice by the Law Society and resulting undertakings that he gave to the Law Society. He reviewed the financial impact upon him of these restrictions.
- [14] The Respondent discussed the four general factors described in *Law Society of BC v. Dent*, 2016 LSBC 05, namely: the nature, gravity and consequences of the misconduct; his character and professional conduct record; acknowledgment of the misconduct and remedial action; and public confidence in the profession, including public confidence in the disciplinary process.
- [15] With respect to the nature, gravity and consequences of his misconduct, the Respondent submitted, in part, that this was the first time he had met a client at his home, that the Complainant's objective was to recover her money retainer (which he said occurred and, therefore, she suffered no loss), that his practice was devastated, and that there were no criminal or civil proceedings against him as a result of his misconduct.
- [16] With respect to his character and professional conduct record, the Respondent described his practice, his successful treatment for alcohol dependency, his health and his family relationships.
- [17] With respect to acknowledgment of the misconduct and remedial action, the Respondent submitted that he was remorseful for his misconduct and that his remedial actions included treatment for alcoholism, better practice management and limitations on the scope of his practice.
- [18] With respect to public confidence in the legal profession, including public confidence in the disciplinary process, the Respondent reviewed *Dent, Law Society of BC v. Lessing*, 2013 LSBC 29 and *Law Society of Upper Canada v. Kiernan*, 2006 ONLSHP 98. He submitted that a fine in the circumstances was appropriate given his treatment for alcoholism, his limited financial circumstances and that, as

a sole practitioner in a small town, a suspension would cause him financial hardship. He placed particular emphasis on the 2006 decision in *Kiernan*.

- [19] In his July 19, 2022 written submission, the Respondent focused on health issues that he had experienced commencing in April 2022.
- [20] The Law Society's June 30, 2022 written submission sought a five to seven-month suspension, to commence on a date to be determined, and costs of \$24,084.86. The Respondent's July 19, 2022 written submission did not respond to the arguments raised in the Law Society's written submission.
- [21] The Law Society's submission reviewed the Panel's findings of fact and dealt with the evidence submitted by the Respondent in the disciplinary hearing. In addition, the Law Society provided affidavit evidence addressing the Respondent's history with the Practice Standards Committee.
- [22] The Law Society submitted that it is necessary to ensure public confidence in the ability of the Law Society to regulate lawyers. In support, it referenced *Lessing* and *Law Society of BC v. Ogilvie*, 1999 LSBC 17.
- [23] The Law Society submitted that in deciding on discipline where there are separate findings of misconduct, the Panel should not deal with each instance of misconduct separately, but instead should consider the separate acts of misconduct globally: *Law Society of BC v. Gellert*, 2014 LSBC 05 ("*Gellert 2014*"). The Law Society also submitted that while a suspension is a significant disciplinary action, it is appropriate in this instance because the misconduct involved repetitive acts of negligence as well as significant personal and professional misconduct: *Law Society of BC v. Martin*, 2007 LSBC 20. The Law Society posited that the Respondent's status as a sole practitioner is not a factor that should be taken into account when considering a suspension: *Law Society of BC v. Singh*, 2021 LSBC 12 (upheld on review, 2022 LSBC 13).
- [24] For its analysis, the Law Society submitted its use of the following factors from a list of factors outlined in *Ogilvie*, which factors a panel may consider in determining disciplinary actions:
- (a) the nature and gravity of the misconduct;
 - (b) the respondent's character, including their professional conduct record;
 - (c) the impact on the victim;
 - (d) the respondent's acknowledgement of misconduct;

- (e) the possibility of remediating or rehabilitating the respondent and the need for specific deterrence;
- (f) the need to ensure the public's confidence in the integrity of the profession; and
- (g) the range of penalties imposed in similar cases.

The Panel will discuss each of these in its analysis of the parties' submissions.

[25] In its July 25, 2022 reply submission, the Law Society submitted that the health issues that the Respondent said he was experiencing in April 2022 were unrelated to his proven misconduct in 2018 and that, in any event, he had not provided medical evidence to support his submission about the impact of health issues upon him.

ANALYSIS

[26] In the F&D Decision, the Panel concluded that the Respondent engaged in two acts of professional misconduct: failure to provide the quality of service required of a competent lawyer; and failure to act honourably and with integrity, both contrary to the *BC Code*. The Panel agrees with the statement in *Gellert 2014* that the disciplinary decision it makes should deal with the separate acts of misconduct globally.

[27] The Respondent submitted that to impose a suspension on him as a sole practitioner, given his precarious financial circumstances created or exacerbated by the existing Law Society practice restrictions imposed upon him, would be inappropriate. The Panel does not agree. As discussed at para. 58 in *Singh*, the penalty should be appropriate for the misconduct. The disciplinary action should be based on the seriousness of the professional misconduct findings. There should not be a more lenient penalty because the Respondent is a sole practitioner. The public and the profession should know that the penalty for professional misconduct will not be reduced because a lawyer practises as a sole practitioner. However, in the Panel's view, the financial circumstances of a sole practitioner may be taken into account in providing for the payment of a fine or costs over time.

[28] The first *Ogilvie* factor to consider is the nature and gravity of the misconduct. Because the objective of the Law Society is to protect the public, the Respondent's failure to provide the quality of service required of a competent lawyer over an almost nine-month period is a serious shortcoming. As the hearing panel stated in *Law Society of BC v. McTavish*, 2018 LSBC 02, at para. 62:

The misconduct is serious. Ensuring quality and appropriate legal services are provided to the public goes to the heart of the Law Society's mandate to regulate the profession and uphold and protect the public interest in the administration of justice. One of the primary functions of a lawyer is to provide competent legal services to the members of the public who have hired a lawyer.

[29] The panel in *Law Society of BC v. Suntok*, 2005 LSBC 29 made the same point that the public interest must prevail:

[39] The single paramount consideration of the Law Society is the public interest. The public must remain confident in the integrity of the profession. This requires a penalty that recognizes that despite the efforts toward rehabilitation that the Respondent has accomplished, this is still his second criminal offence, committed in aggravated circumstances, when he was a Crown Counsel whose stock in trade is spousal assault charges, and where he breached his bail conditions thereafter, even though not charged. His behaviour shattered his professional integrity and placed the reputation of the legal profession at great risk because the public must see that such conduct is punished.

[40] As noted by Mr. Justice Sigurdson on the sentence appeal, general deterrence and denunciation is in the public interest in this case.

[41] However this Panel is mindful that the Respondent should not be crippled financially or professionally if he is at some point to be allowed to continue to practice. This Panel is also mindful of the impact that this penalty will have on those dependent on him, but notes that the public interest outweighs the Respondent's personal interests and, after all, he is not prevented from working outside the practise during this suspension to be imposed.

[emphasis added]

[30] The Respondent was retained to assist the Complainant in her family law matter. He took no meaningful steps to advance her case. Amongst his failures to provide appropriate service, the Respondent did not keep the Complainant informed, did not respond to her requests for information, did not respond to her telephone calls, never explained to her that he was unable to proceed with her legal claim as she wished, and did not maintain an appropriate file.

- [31] In his February 23, 2022 submission, the Respondent, in effect, repeated the submissions that he had made in the Facts and Determination hearing. He downplayed the significance of his failure to provide appropriate service and continued to suggest, after reviewing the file, that he had concluded that the Complainant did not have a case, that she had not provided critical documents, and that her former lawyer had refused to provide him with her file without receiving payment from her for previously billed legal services. The Panel believes that such submissions are untenable. The Respondent neither directly addressed the shortcomings of his actions nor explained or acknowledged them in any meaningful way.
- [32] The Law Society submitted that an analogy could be drawn between cases dealing with sexual harassment and unwanted sexual touching, and the findings made by the Panel. The Citation alleged, and the Panel found, that the Respondent failed to act honourably and with integrity contrary to the *BC Code*. The cases referenced by the Law Society describe sexual harassment by a lawyer of their client as a serious breach of trust. Clients should expect to be treated with integrity and respect. Relying on the Alberta Court of Appeal in *Adams v. Law Society of Alberta*, 2000 ABCA 240 at para. 26, *Law Society of Manitoba v. Davis* 2001 LSDD No. 29 at para. 15 and *Law Society of Upper Canada v. Sinukoff*, 2012 ONLSHP 12 at para. 42, the Law Society submitted that sexual harassment is as serious, if not more serious, than a misuse of trust funds. The Law Society submitted that such harassment can result in significant damage to a client's sense of personal integrity and dignity. The Panel agrees with those submissions. A client should never be subjected to any form of sexual harassment by a lawyer. However, sexual harassment was not an allegation in the Citation and, hence, the Panel made no finding on sexual harassment.
- [33] The next *Ogilvie* factor concerns the Respondent's character, including his professional conduct record. At the time of the misconduct referenced in the citation, the Respondent had been practising law for approximately 22 years. In their submissions, both the Law Society and the Respondent discussed the Respondent's professional conduct record, which consists of two Practice Standards recommendations and two undertakings limiting his practice of law. On October 22, 2019, the Respondent undertook not to practise criminal law and on January 26, 2021, he undertook not to practise family law. These undertakings are unrelated to this Citation.
- [34] The Law Society submitted that the Practice Standards Committee recommendations and the undertakings are relevant when considering the principle of progressive discipline. However, the Panel has concluded that in the

circumstances of this matter, including their unrelatedness to the citation, it is unnecessary to apply the concept of progressive discipline. Instead, the Panel's decision concerning the appropriate discipline is based solely on its findings with respect to the Respondent's professional misconduct as described in its determination following the Facts and Determination hearing.

- [35] The Respondent, however, relied on the undertakings to which he had agreed with the Law Society restricting his scope of practice to support his submission that he should not be suspended because of the negative impact these restrictions had on the financial viability of his practice. For the reasons that the Panel has expressed above, it rejects that submission.
- [36] A third *Ogilvie* factor is the impact on the victim. It was clear during the hearing on Facts and Determination that the Complainant was negatively affected by the failure of the Respondent to provide appropriate legal services and by his actions when they met at his home on November 22, 2018.
- [37] The Complainant relied on the Respondent to provide advice about her family law issue. This did not occur and was clearly concerning to her. She was visibly disturbed by the Respondent's attempt to argue during cross-examination at the Facts and Determination hearing that the delay in handling her matter was her fault, including the alleged failure to provide relevant documentation. As the Panel concluded in the F&D Decision, there was no evidence that the Respondent asked for further documentation from the Client, and he did not pursue acquiring the documentation from her former counsel.
- [38] In addition, the Client described, in detail, that she felt disgusted by the Respondent's actions when they finally met at his home in November 2018. As noted above, the Law Society submitted that an analogy could be drawn between cases dealing with sexual harassment/unwanted sexual touching and the findings made by the Panel, and that such treatment of a client by a lawyer is a serious breach of trust and can result in significant damage to a client's sense of personal integrity and dignity.
- [39] As also noted above, the Panel agrees with the point of those submissions but made no ruling on sexual harassment because it was not alleged in the citation. Nonetheless, there is strong public interest in deterring the kind of misconduct in which the Respondent engaged when he met with the Client at his home on November 22, 2018, and created an extremely uncomfortable situation for her when she was alone with him. He offered her a drink. When she refused, he made a martini for himself, changed into casual clothing, and instead of sitting in a separate location, sat next to her on a couch, placing his arm and hand behind her. All

clients, regardless of sex and/or gender, should expect to be treated in the same manner, with dignity and respect, without having to be concerned for their safety and personal autonomy.

- [40] A fourth *Ogilvie* factor is the acknowledgment of misconduct. Twice in his submission the Respondent submitted that he was remorseful. The first said: “I acknowledge and am remorseful for my misconduct.” In the second, the section headed REMORSE, he submitted: “I regret and apologize for my behaviour 4 years ago. I apologize to [the Complainant] and the legal community.”
- [41] In the Panel’s view, the Respondent was not sincere with respect to these statements. Throughout this submission, he repeated the same arguments and he relied on the same alleged facts that he had advanced in the Facts and Determination stage to support the propositions that he did not fail to provide the quality of service of service required by the *BC Code*, and that he did not fail to act honourably and with integrity as also required by the *BC Code*. The Respondent continues, with respect to both allegations, to shift blame onto the Complainant and does not explain for what he actually feels remorse. The Panel, therefore, concludes that the Respondent has not acknowledged his misconduct in a meaningful or sufficient way.
- [42] The next *Ogilvie* factor that the Panel considered is the possibility of remediating or rehabilitating the Respondent and the need for specific deterrence. The Law Society submitted that the primary responsibility of the Law Society to protect the public interest must be the foremost consideration of the Panel when considering the prospect of rehabilitation.
- [43] The Panel agrees. As the Saskatchewan Court of Appeal stated in *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56:

[119] The general approach to sentencing in disciplinary proceedings was explained by Wilkinson J.A. in *Merchant* (2009):

98 However, the sentencing approach in disciplinary proceedings is different than in criminal courts. In *Law Society of Upper Canada v. Kazman*, the Law Society Appeal Panel considered the philosophy of sentencing in disciplinary matters and its unique considerations. The panel quoted extensively from *Bolton v. Law Society*. The critical distinction between sentencing in criminal matters and sentencing in disciplinary matters is highlighted in this paragraph:

[74] A criminal court judge ... is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the accused licensee's peer group – the legal profession. According to *Bolton*, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law society's discipline process. It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind.

- [44] The Respondent submitted that he had been rehabilitated as a result of successfully completing a program for alcohol dependence at a residential treatment center, in addition to entering into a Monitored Recovery Agreement and related undertakings with the Law Society. He filed reports with respect to the treatment program and his compliance with the Monitored Recovery Agreement and related undertakings. In addition, the Respondent made submissions with respect to what he described as his recent bladder cancer diagnosis. In the Panel's view, however, there was no evidentiary link established between the Respondent's misconduct and the alcohol and bladder cancer issues, or with his agreements and undertakings with the Law Society. The Panel, therefore, does not place weight on these submissions. The Respondent made no other submissions regarding rehabilitation.
- [45] The next *Ogilvie* factor considered by the Panel is the need to ensure public confidence in the integrity of the profession. The obligation and role of the Law Society is to protect public interest. As stated in *McTavish*, providing quality and appropriate legal services is at the heart of public interest in the regulation of the legal profession. In the lack of action on the Client's file, the Respondent clearly failed to provide such services, a failure which undermines confidence in the legal profession.
- [46] Public confidence is also undermined when clients are not treated with dignity and respect, are concerned for their safety, and/or fear for violation of their personal space. As noted above, while the Panel made no finding of sexual harassment, not because it found that it did not occur, but because it was not asked to rule on that question, nonetheless, it concluded that the Respondent created an uncomfortable situation for the Client when she was alone with him at his house in November

2018. The Panel ruled that this situation was a failure to act with honour and integrity. The Respondent's behaviour was deemed professional misconduct. The Respondent has never acknowledged the inappropriateness of his behaviour. The public must be reassured that the Law Society finds such behaviour unacceptable and will take appropriate measures to ensure the protection of the public.

- [47] The final *Ogilvie* factor considered by the Panel deals with the range of penalties imposed in similar cases. The Law Society proposed a suspension of five to seven months. In making that submission, the Law Society relied on several decisions, including the recent *Law Society of Saskatchewan v. Hale*, 2021 SKLSS 5 decision, in which a lawyer was found to have engaged in sexual harassment. In that case, when the lawyer first met his client, he ran his hand down the client's thigh and again, later in her vehicle, he leaned towards her and began stroking her thigh. The penalty in *Hale* was a six-month suspension.
- [48] The Respondent relied on the decision in *Kiernan*. This decision involved a lawyer who, over a period of four years, sexually harassed a client, and concluded that a suspension was not appropriate as the lawyer was a sole practitioner with a family to support and had a legal aid practice. Instead, a counselling program was ordered. The Respondent relies on this decision as support for his submission that he should not be suspended, but instead should pay a \$3,000 fine.
- [49] The Panel disagrees that a fine is a sufficient sanction in this case. The penalty in *Kiernan* does not reflect current standards. The *Hale* decision pointed out that it is important to recognize the evolution of how public and regulatory bodies perceive sexual harassment. The Law Society submitted that, in the current context, older authorities are not necessarily useful in determining appropriate sanction in cases where the finding of professional misconduct is a result of sexual harassment by a lawyer.
- [50] The Respondent submitted that because there was no finding of sexual harassment against him, that because this was a one-time incident, and that because he has attended counselling, a fine would be appropriate. Again, while the Panel agrees, for reasons stated above, that he was not found to have engaged in sexual harassment, his conduct was inappropriate. As the Panel has also noted, the reasons for which he was required to engage in counselling were not, on the evidence, related to the professional misconduct in which he engaged.
- [51] The Law Society, in support of its submission for a five to seven-month suspension, discussed quality of service penalties. While those penalties often result in fines and not suspensions, the Law Society, in relying on *Law Society of BC v. Di Bella*, 2019 LSBC 32, *Law Society of BC v. Gellert*, 2005 LSBC 15 and

Law Society of BC v. Cruickshank, 2013 LSBC 21, submitted that when paired with other more serious misconduct, suspensions are the appropriate result. The Panel agrees. As noted above, the Panel holds that separate acts of misconduct should be dealt with globally.

- [52] Given the circumstances of the Respondent's misconduct, the Panel concludes that a suspension from practice for a period of six months is the appropriate disciplinary action. This sanction fits the seriousness of the Respondent's misconduct, provides a confirmation to the profession that such misconduct is unacceptable, and addresses the foundational obligation of the Law Society to protect the public interest in the administration of justice and to maintain the public's confidence in the Law Society as a regulator of lawyers in the province.

COSTS

- [53] The Respondent does not contest the Law Society's calculation of costs of \$24,084.86. Given the history of the proceedings, this likely represents a fraction of the Law Society's true costs. Therefore, the Panel concludes that the Law Society is entitled to its costs as presented. However, given that the Respondent will be suspended for six months and has limited income, he shall have two years after the completion of his suspension to pay the costs on a periodic basis. The periodic payments should start six months after he returns to practice and be divided into equal monthly amounts paid over the 18-month period thereafter.

CONCLUSION

- [54] The Panel, therefore, orders that:

- (a) Pursuant to section 38(5)(d) of the *Legal Profession Act*, the Respondent is suspended from the practice of law for a period of six months, commencing on a date to be mutually agreed to by the Respondent and the Law Society. If an agreement cannot be reached, the Panel reserves the jurisdiction to set the date for the commencement of the suspension.
- (b) Pursuant to Rule 5-11 of the Rules, the Respondent must pay costs in the amount of \$24,084.86, as directed above.