

2022 LSBC 47
Hearing File No.: HE20210001
Decision Issued: November 18, 2022
Citation Issued: February 8, 2021

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

GERALD EDWARD PALMER

RESPONDENT

**DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION**

Hearing date: April 6, 2022

Panel: Catherine Chow, Chair
Kim Carter, Bencher
Paul Ruffell, Public representative

Discipline Counsel: Ilana Teicher

Appearing on his own behalf: Gerald Edward Palmer

Written reasons of the Panel by: Catherine Chow

INTRODUCTION AND OVERVIEW

[1] The citation in this matter was authorized by the Discipline Committee on January 28, 2021 and issued on February 8, 2021 (the “Citation”).

- [2] Pursuant to the Citation, the allegation against the Respondent is that between approximately March 2016 and February 2020, in the course of representing his client JF (the “Client”) in divorce proceedings, he failed to provide the Client with the quality of service required of a competent lawyer, contrary to one or both of rules 3.1-2 and 3.2-1 of the *Code of Professional Conduct for British Columbia* (the “*BC Code*”), by failing to do one or more of the following:
- (a) keep the Client reasonably informed about the status of her matter, including providing progress updates as to the status of her divorce;
 - (b) answer reasonable requests from the Client for information, including numerous telephone calls and messages;
 - (c) take appropriate steps to finalize the Client’s divorce;
 - (d) ensure that the Client’s matter was attended to in a timely manner; and
 - (e) give reasonable attention to the review of documentation in the Client’s matter to avoid delay, including desk order divorce documents that were filed at and rejected by the Chilliwack registry of the BC Supreme Court in May 2016.

ISSUES

- [3] The issues before the Panel are: i) whether the Respondent committed the acts alleged; and ii) whether those actions amount to professional misconduct or a breach of the *Legal Profession Act*, SBC 1998, c. 9 (the “*Act*”) or the Law Society Rules (the “*Rules*”), pursuant to s. 38(4) of the *Act*.

THE APPLICABLE LAW

Onus and standard of proof

- [4] The onus of proof in Law Society hearings is well-known and consistently applied. The standard was articulated by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, which held that the onus of proof is on the Law Society to prove the allegations of misconduct on a balance of probabilities, whereby the evidence must be sufficiently clear, convincing and cogent.

Test for professional misconduct

- [5] Because the term “professional misconduct” is not defined in the *Act*, the Rules or the *BC Code*, we must look to the leading case, *Law Society of BC v. Martin*, 2005 LSBC 16. In *Martin*, at para. 171, the panel defined professional misconduct to mean “whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members.”
- [6] The *Martin* “marked departure” test is an objective test, as widely accepted by subsequent hearing panels, and affirmed by a review panel in *Re: Lawyer 12*, 2011 LSBC 35.

FACTS

Notice to Admit and response

- [7] The Respondent was served with a Notice to Admit (“NTA”). The Respondent provided a response admitting to the facts, as set out in the NTA, except paragraphs 3, 14, 16, 17 and 32 to 37. Paragraph 3 has to do with the Respondent’s age, which is not contested. Paragraphs 32 to 37 of the NTA are characterizations of the Respondent’s conduct upon which the Law Society does not rely.
- [8] Accordingly, the only factual matters that remained contested at the hearing, for the purposes of the Law Society’s case, were those set out in paragraphs 14, 16 and 17 of the NTA.
- [9] A summary of the admitted facts and our findings in relation to the contested facts are discussed below.

The Respondent’s background

- [10] The Respondent was called and admitted as a member of the Law Society of British Columbia in May 1981.
- [11] Though he has practised in partnership previously, the Respondent currently practises as a sole practitioner in Chilliwack, British Columbia. His practice is primarily in the area of family law.

FACTUAL OVERVIEW

Admitted facts

- [12] The Respondent admits a detailed chronology of events. The Panel summarizes pertinent highlights that support our findings.
- [13] In March 2016, the Client retained the Respondent to obtain a desk order divorce. At the time the Respondent was retained, all matrimonial issues between the Client and her previous partner, MF, had been resolved by a separation agreement prepared by the Client's previous counsel.
- [14] The Respondent filed a Notice of Family Claim for the Client at the Chilliwack Court Registry on March 17, 2016.
- [15] On April 6, 2016, the Respondent's legal assistant served MF with the Notice of Family Claim and on May 9, 2016, the Client swore her supporting affidavit to apply for a desk divorce. The documents were sent to the Chilliwack Court Registry on the same day.
- [16] On May 16, 2016, the Desk Order Application for Divorce was rejected by the Chilliwack Court Registry on the following grounds:
- (a) document served not attached as Exhibit "A" to Affidavit of Service;
 - (b) child support affidavit must answer all paragraphs: 4, 5, 6, 8 and 11; and
 - (c) Notice of Family Claim Schedule 1(1) missing birth dates of parties.
- [17] The Dye & Durham invoice dated May 10, 2016 enclosing the desk order divorce package was stamped "REJECTED".
- [18] The Respondent claims that he did not receive the initial rejection notice.
- [19] The Client left telephone messages for the Respondent on at least five occasions from 2017 to 2019 as follows:
- (a) February 8, 2017;
 - (b) June 12, 2017;
 - (c) April 10, 2019;
 - (d) June 17, 2019; and

(e) June 28, 2019.

- [20] Following her visit to the court registry, the Client attended at the Respondent's office in June 2019 and informed him that her divorce had not been finalized.
- [21] The Respondent asked the Client to return on June 21, 2019 to sign papers, which were filed as an Amended Notice of Family Claim that same day.
- [22] On July 11, 2019, having not heard from the Respondent since the June 21, 2019 meeting, the Client filed a Law Society complaint.
- [23] On July 19, 2019, the Respondent's legal assistant served MF with the Amended Notice of Family Claim.
- [24] On July 24, 2019, the Respondent called the Client to advise that he would get everything filed and that he would call her in two weeks.
- [25] On September 12, 2019, the Respondent met with the Client in order to commission her Affidavit for Desk Order Divorce and Child Support Affidavit. These documents were filed by the Respondent or his office on November 1, 2019, together with a Desk Order Application for Divorce.
- [26] On November 5, 2019, the court registry rejected the Desk Order Application for Divorce and returned an annotated copy of the application requesting corrections to the Affidavit of Service, the Applicant's Affidavit, the Child Support Affidavit, and the draft order.
- [27] On December 24, 2019, the Respondent filed a corrected package of documents at the court registry.
- [28] The Final Order for Divorce was made on January 6, 2020 and entered on January 8, 2020. The Respondent sent a copy of the Final Order for Divorce to the Client on the same day.
- [29] The Respondent refunded the Client all of her fees and only billed her for disbursements.
- [30] It took the Respondent nearly four years to obtain the Client's divorce in circumstances where the process to do so was reasonably simple and straightforward.

Contested facts

[31] The following facts were not admitted by the Respondent:

- (a) The Respondent did not speak to the Client following the May 2016 filing of documents until she attended at his office in June 2019. The Respondent's response to the NTA states: "I did speak to [the Client] during that period."
- (b) The Respondent did not return calls noted in paragraphs 15 of the NTA (referring to messages left for the Respondent by the Client on at least five occasions from 2017 to 2019). The Respondent's response states: "I did speak to [the Client] during that period, thereby responding."
- (c) In approximately June 2019, [the Client] attended at the courthouse registry to find out that her divorce had not been finalized due to errors in the filing package. The Respondent's response states: "I have no knowledge of whether [the Client] actually attended at the registry."
- (d) The Respondent did not contact [the Client] between July 24, 2019 and September 12, 2019. The Respondent's response states: "The Respondent recalls attempting to contact [the Client] between July 24, 2019 and September 12, 2019, but has been unable to locate any written evidence of such attempted contact."

SUMMARY OF WITNESS EVIDENCE

Testimony of the Client

[32] The Client testified that she went to the courthouse in June 2019 and spoke to duty counsel who advised her to contact the Law Society. The Respondent claims no knowledge of this fact and did not cross-examine the Client on this point.

[33] The Client testified that during the period of May 2016 to June 2019 (the "Lost Years"), she "kept looking online to see if I was divorced and it – like, I wasn't. And I kept calling his office, he wouldn't return my calls ... I called his office numerous times."

[34] When asked if she recalled whether the Respondent spoke to her during the Lost Years, the Client said, "I don't think so. Like, no." She further testified: "I feel like he's never called me back. He – like, I left many, many, many messages. I don't

think he ever returned my call. I think he only called me when he needed me to sign something and that's after you guys [the Law Society] got involved.”

- [35] The Client was not aware of any times when the Respondent attempted (i.e. unsuccessfully) to contact her.
- [36] With respect to the impact that the Respondent's conduct of her file had on her, the Client testified:

“It was very stressful, very awkward. It's very embarrassing to, like – you know, I paid somebody to do something and I keep calling him and I feel like he was ignoring me. And to not know if you're divorced for, like – I think it was, like, three or four years from start to finish. I, like, would look on the online B.C. Court registry to see if I was divorced or not. I had no idea. So I don't know, it was, it was embarrassing.”

- [37] During her cross-examination by the Respondent, the Client testified that the telephone number she gave him in order to communicate with her was her cell phone number, and when asked by the Respondent whether she ever saw his telephone number show up on her cellphone as an unanswered call, she said no. The Client reiterated this in her re-direct examination by stating that she did not remember any missed calls from the Respondent.
- [38] The Client further testified: “I wanted the divorce. I paid for the divorce. I wouldn't avoid his phone call.” She stated that the one day the Respondent called her was on December 20, 2019 when he told her to come to his office and that “if he called me, I would have called him right back.”

Testimony of the Respondent

- [39] During his evidence in chief, the Respondent testified that at some point after the Client retained him, his one secretary (as he referred to her), who was trained to deal with uncontested divorces, left his employ, and that he was not able to replace her. The Respondent continued to do uncontested divorces nonetheless.
- [40] The Respondent stated that at the time in 2016 to 2019, he was “under the understanding that [the Client's] file was completed, had been submitted”, and that the file “didn't come back up to [him] after my, my family secretary left.” The first time he became aware that the divorce was still outstanding was when the Client attended his office in person in June 2019.

- [41] With respect to the five documented messages left by the Client, the Respondent testified: “I’m not sure if I returned them”. And in cross-examination, the Respondent admitted that he had no written evidence of attempts to contact the Client from 2016 to 2019. He stated that he was “sure I talked to her but I hadn’t made a note of it”, yet he also confirmed that there are no written notes despite his awareness of the importance of documenting client communications.
- [42] The Respondent testified that: “clearly I had several conversations with her on the phone during that period of time [March 2016 to February 2020] whether I took notes or not.” The Respondent stated that he was “assuming she came in because I phoned her to come in so I clearly had some conversations with her at various times but I’m – I don’t know that I have any – if I have any notes saying that’s the case.”
- [43] It is not specified in the Respondent’s testimony whether he spoke with the Client during March 2016 to June 2019, or whether his recollections about speaking to her to attend at his office pertain to the period after the Client had confronted the Respondent that the divorce was not finalized (June 2019 to February 2020) and he took steps to rectify it.

Credibility of witnesses

- [44] Counsel for the Law Society referred the Panel to the Court of Appeal decision in *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), where the assessment of the credibility of witnesses in discipline proceedings is governed, at p. 357:
- ... In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions ...
- [45] The principles in *Faryna* were adopted by the panel in *Law Society of BC v. Schauble*, 2009 LSBC 11 at para. 57. In that case, in assessing credibility, the hearing panel considered whether the witness had an interest in the outcome in the proceeding.
- [46] In our view, the conflict in the witnesses’ testimony distills to this question:
- During the period from 2016 to 2019, did the Respondent respond to the five telephone messages left by the Client?
- [47] The Respondent’s evidence is that he claims to have spoken to the Client during the period from 2016 to 2019, but had no firm recollection, notes, or other

corroborative evidence to show that he responded the Client's five messages. Moreover, for phone calls after June 2019 to February 2020, the Respondent's evidence is that he "assumed" he telephoned the Client when the Client came in to swear amended documents in December 2019, but also admitted that it was possible, and even likely, that someone else at his office, such as a secretary, had been the one to set up the appointment.

- [48] The Client's evidence is that during 2016 to 2019, she did not get a call from the Respondent, never saw a missed call on her cell phone, and did not receive any voicemail from the Respondent. Ultimately, it was the Client who attended at the courthouse to find out that her divorce had not been finalized, and attended at the Respondent's office in person to tell the Respondent herself.
- [49] On a balance of probabilities, we find it logical that the Client would be highly motivated to take and return phone calls from the Respondent if they were made as alleged by the Respondent's ambiguous and uncorroborated evidence. The Client had called on at least five occasions over a two-year period, and left at least five messages for the Respondent. Above all, the Client wanted the divorce and had paid for the divorce, demonstrating her motivation to be in contact with the Respondent. The Client repeatedly attempted to check online as to the status of her divorce, leading her to visit the courthouse in person to check on the status of her divorce.
- [50] We reject the view that the Client would avoid the Respondent's phone calls or attempts to contact her. We find that the Respondent ought to have made notes of his attempts. Had the Respondent spoken to the Client during the period from 2016 to 2019, the Respondent would have discovered that the Client's divorce was not finalized either by responding to her inquiry with a courthouse search, or by reviewing the status of the file (being unbilled, containing the rejection notice, or lacking a closing letter over three years).
- [51] We find the Client's evidence that the Respondent did not contact her during the period from 2016 to 2019 to be in harmony with the preponderance of probabilities. We find that the Respondent's claim that he spoke to the Client during 2016 to 2019 to be vague, uncorroborated and not preferred to the Client's evidence.

LEGAL ANALYSIS

Codified standards expected of lawyers

[52] In addition to the case law, numerous provisions in the *BC Code* provide further guidance on the behaviours expected from a lawyer, failing which constitutes professional misconduct. These include:

Rule 3.1-2 – A lawyer must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer.

Rule 3.2-1 – 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.

Commentary to rule 3.2-1, provides in part:

[3] *A lawyer has a duty to communicate effectively with the client.* What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[4] *A lawyer should ensure that matters are attended to within a reasonable time frame.* If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about the client’s options, such as whether to retain new counsel.

[5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

- (a) keeping a client reasonably informed;
- (b) answering reasonable requests from a client for information;
- (c) responding to a client’s telephone calls;

- (d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;
 - (e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
 - (f) answering, within a reasonable time, any communication that requires a reply;
 - (g) ensuring that work is done in a timely manner so that its value to the client is maintained;
 - (h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
 - (i) maintaining office staff, facilities and equipment adequate to the lawyer's practice;
 - (j) informing a client of a proposal of settlement, and explaining the proposal properly;
 - (k) providing a client with complete and accurate relevant information about a matter;
- ...

[6] A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadlines applies, *a lawyer should be prompt in prosecuting a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.*

[emphasis added]

[53] We accept the ruling in *Law Society of BC v. Epstein*, 2011 LSBC 12, a case provided by the Law Society, and apply the codified standards to mean that it is of importance to the public interest that a failure to provide adequate quality of service

to the public is a marked departure of the standard that the Law Society expects of lawyers.

- [54] The Law Society referred the Panel to the case of *Law Society of BC v. Chiasson*, 2020 LSBC 32, where the lawyer failed to respond to his client for three years after she paid him a retainer to commence a civil claim. The client was only able to get in touch with the lawyer sporadically, while at other times he continued to not respond to her. When the client was able to connect with the lawyer, he promised to take action but ultimately did not. Following the client's complaint and issuance of the citation, the lawyer made a conditional admission of professional misconduct. The hearing panel accepted the lawyer's admission, finding that the conduct was a marked departure from the standard of conduct expected of lawyers, and constituted professional misconduct.
- [55] In *Law Society of BC v. Wesley*, 2015 LSBC 05, the lawyer failed to take steps in entering an order for approximately 20 months, and had failed to tell her client about the risks of not having an entered order or the costs involved to settle its terms. The panel noted the prejudice suffered by the client from the lack of an entered order (she was unable to enforce it), and the lawyer was fined \$3,000. The panel found it was significant that the lawyer could not, with the benefit of hindsight and opportunity to reflect, explain why she failed to take the appropriate steps that were available to her. The lawyer was found to have committed professional misconduct.
- [56] In *Law Society of BC v. Hart*, 2014 LSBC 17, the lawyer admitted to committing misconduct regarding his representation of a client in a relatively straightforward family matter that was delayed nearly three years when it could have been concluded within one. The panel noted that failing to provide a sufficient level of service to one's client is a serious matter and strikes at the heart of the public interest in the administration of justice and the trust the public will have in lawyers.

LEGAL ANALYSIS

- [57] The Panel adopts the legal framework presented by the Law Society (which was uncontroverted by the Respondent) as summarized above, to be the appropriate framework for our analysis.
- [58] If the alleged conduct in the Citation is proved in its totality, this would represent a marked departure from that conduct the Law Society expects of lawyers, thereby constituting professional misconduct. Accordingly, we review the alleged conduct and the evidence below.

- [59] We find that the Respondent failed to keep the Client reasonably informed about the status of her matter, including providing progress updates as to the status of her divorce. The Respondent failed to advise the Client when the original application for a desk order divorce was rejected on May 16, 2016, and even if we accept the Respondent's evidence that he was not aware of the rejection, we find that the Respondent failed to follow up on the submitted application and advise the Client of the progress, even if the application was not rejected.
- [60] We find that the Respondent failed to answer reasonable requests for information from the Client, including numerous telephone calls and messages during the period 2016 to 2019. We accept the Client's evidence that she attempted to contact the Respondent, and that the Respondent failed to respond to the Client during this time frame.
- [61] We find that the Respondent failed to take appropriate steps to finalize the Client's divorce in 2016, 2017 and 2018. If we accept the Respondent's evidence that he was under the impression the divorce application was accepted at the registry, we find that the Respondent took no steps to inquire, advise the Client, send a reporting or closing letter and/or bill the file. Indeed, the Respondent did nothing on this matter. He explained that he changed firms, lost key staff and several other reasons, but none of those reasons excuse the fact that he nonetheless failed to take appropriate steps to finalize the Client's divorce in 2016, 2017 and 2018.
- [62] While the Respondent provided explanations as to why he purportedly was not aware of the original rejection in 2016 due to other office complications, we find that it is very much expected of lawyers to overcome such issues, and when a lawyer expects that they cannot meet their professional obligations in a timely manner, they are to advise their client, seek assistance from other lawyers, refer the file to another lawyer or, at the very least, advise the client of such so that the client can make an informed choice on how to proceed.
- [63] We find that the Respondent's disregard for his practice management betrayed the trust placed in him by the Client to assist her with finalizing her divorce. The Client was left in the dark for almost three years, checking online herself, and finally attending at the courthouse to find out what was happening because her lawyer had failed to reply to her messages without reason. The Respondent did not appear to consider the embarrassment, stress and heavy emotional impact that ignoring the Client might have on her, particularly something as personal and important as a divorce.
- [64] Finally, in June 2019, when the Client confronted the Respondent that the divorce was not finalized, the Respondent drafted documents for the Client to sign, which

documents contained errors and omissions that lead to its rejection again in November 2019.

- [65] We find that the Respondent failed to give reasonable attention to the review of the desk order divorce documents that were filed at, and rejected by, the Chilliwack registry of the Supreme Court in May 2016. Moreover, the Respondent failed to ensure that the Client's matter was attended to in a timely manner when he failed in 2016 to supervise the divorce application after its submission, when he failed to respond to the Client's multiple telephone messages during this period and, finally, when he took an unduly long time from June to July 2019 to contact the Respondent as promised, and from June to December 2019 to submit a complete desk order divorce application.
- [66] Given the inexcusable delay in the handling of the file and the Respondent's own admissions, we find that the Respondent's lack of reasonable attention to the Client's matter and lack of communication was a marked departure from the standard that the Law Society expects from lawyers, and constitutes professional misconduct in relation to the allegations in the Citation.
- [67] Neither party made submissions on whether there were aggravating or mitigating factors in the Respondent's conduct. We do note that it was only after the Law Society became involved in July 2019 that the Respondent acted on this matter, and even so, with delays in promised communications and errors in a relatively straightforward application.
- [68] The presence or absence of *bona* or *mala fides* is unnecessary in determining whether the Respondent's conduct constitutes professional misconduct. While no *mala fides* were alleged or established, we note the harm to the Client is incontestable and the Respondent's conduct in this matter represents a marked departure from that conduct the Law Society expects of lawyers.

CONCLUSION

- [69] For the reasons set out in this decision, the Panel finds that the conduct alleged in the Citation has been established and is a marked departure from that standard the Law Society expects of lawyers. Accordingly, we find that the Respondent has committed professional misconduct.