Richmond, B.C.
Called to the Bar: May 12, 1967

Discipline hearing:
Dates: December 12, 1996, April 6 and June 3, 1998 (pre-hearing conference), February 1 and 4 and December 13 to 19, 1999 and March 24 and October 26, 2000
Panel: Richard S. Margetts, Q.C., Chair, Gerald J. Lecovin, Q.C. and William M. Trotter, Q.C.
Reports: July 19, 2000 (facts and verdict) and December 29, 2000, issued January 3, 2001 (penalty)
Indexed as [2000] LSBC 18

Counsel:
Herman Van Ommen, for the Law Society
Richard Sugden, Q.C., for AE

Summary

While representing the plaintiffs in a civil litigation, AE attempted to intimidate, and actually did intimidate, two witnesses from giving evidence that was contrary to the interests of AE's clients. AE also asked Crown Counsel to lay charges against the two witnesses, which was for the purpose of preventing them from coming to Canada from the United States to give evidence in court. AE's conduct constitutes professional misconduct, and the hearing panel ordered that he be disbarred.

Facts

In 1986 and 1987 three Vancouver stock promoters (the plaintiffs) entered into an agreement with an American company, O Ltd. Under the agreement, the plaintiffs were to float a public company on the Vancouver Stock Exchange and the two companies were to later merge.

The plaintiffs retained an accounting firm (the defendant) to do an independent audit of O Ltd. as required prior to the public offering. After visiting the American company, the accounting firm submitted a positive report. The Canadian company was listed on the VSE and, by August 31, 1987, the Canadian company had paid over $1.7 million to the American company.

Within months, trading in the shares of the Canadian company was halted following revelations that documents and statements provided to the accounting firm by O Ltd. and certain of its principals were false. The revelations were made by Mr. PS, the chief

operating officer of the American company, and Mr. PL who also worked for the company, and encouraged investment. The two had known about the deception and while they said they disapproved, they did not advise the accounting firm that conducted the audit. Mr. PS and Mr. PL made the revelations on their resignation. Law suits ensued.

After an investigation and hearing, the B.C. Securities Commission prohibited the plaintiffs from dealing on the Vancouver Stock Exchange for 12 years.

The plaintiffs commenced a law suit against the accounting firm, alleging negligence. The action was bifurcated to deal separately with issues of liability and damages. The plaintiffs retained AE as counsel**.** At the end of the first trial, the defendant was found negligent.

The position of the plaintiffs in the trial on damages was that they had no inkling of the sorry state of the American company until after they had given the company $1.7 million. Mr. PS and Mr. PL gave affidavits contradictory to the plaintiffs' position, stating that they had warned the plaintiffs at various times of problems at the American company. They also swore they had warned the plaintiffs prior to payment of the $1.7 million that there would be resignations of key members of the company. They said they had warned the plaintiffs not to pay over money.

Mr. PS and Mr. PL were to come to Vancouver to give *vive voce* evidence on behalf of the defendant accounting firm in the action. Their evidence was crucial in the litigation.

In July, 1991, AE met with Mr. PL seeking to review his diaries relating to the business of the American company. He sent a letter to Mr. PL's lawyer seeking a statement from Mr. PL and access to the diaries and warning of adverse consequences in costs for failure to cooperate.

AE retained an American paralegal to do work for him on behalf of the plaintiffs. He sent the paralegal a letter dated August 15, 1991. He wrote that he would prefer his letter be kept confidential *"in that the writer with my Canadian clients have had discussions with the RCMP Officer in charge of Commercial Crimes as well as a meeting with the head Prosecutor of Commercial Crimes for the Province of British Columbia."* AE in fact instructed the American paralegal to convey that same letter to Mr. PS and Mr. PL for the purpose of intimidating them from coming to Canada to give evidence.

On August 23, 1991 AE wrote to the two witnesses to state that, if and when they ever appeared in Vancouver to give evidence, he would require their diaries in advance of them giving evidence, and he threatened that he would ask the court to assess costs against them personally if the documents were not produced.

After receiving these letters, the witnesses refused to travel to Canada. The trial judge in the Supreme Court of B.C. granted the request of the defendant that the court travel to the United States in order to hear the evidence of those witnesses.

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The hearing panel rejected AE's submissions that the time elapsed between issuance of the citation in 1995 and conclusion of the hearing amounted to unreasonable delay. Delays following issuance of the citation were inherent in such a case since the panel was prevented from hearing certain oral evidence resulting from AE's intimidation of two witnesses. The panel was accordingly required to consider alternative methods of receiving the evidence and decided to convene a hearing in the United States. AE challenged the panel decision in court, with the Supreme Court confirming the decision and the B.C. Court of Appeal ultimately ruling against it. These court proceedings accounted for 14 months of the delay. There were several further months of delay because of adjournments, most at AE's request.

AE then opposed the panel receiving deposition evidence from the American witnesses, which resulted in a further 5-1/2 months delay to await the outcome of a case before the B.C. Court of Appeal that would be determinative of the issue. AE had formally waived the right to raise the issue of delay while awaiting this decision. The Court of Appeal decision permitted the panel to receive such deposition evidence of the witnesses, and the hearing proceeded.

Decision

The panel found AE guilty of professional misconduct in:

- attempting to intimidate, and in actually intimidating, two witnesses from giving evidence at trial; and

- requesting Crown Counsel to lay charges against the two witnesses for the purpose of preventing them from coming to Canada to give evidence in court.

Penalty

The hearing panel considered the range of factors relevant to a determination of penalty.

The panel noted that AE's misconduct was serious. Acting in a fashion that amounts to the suppression of evidence, or otherwise attempting to suppress evidence, constitutes a serious interference in the administration of justice. It is wrongful conduct that strikes at the heart of a barrister's duty to the court and responsibility to the administration of justice.

The panel noted that positive character references were provided in support of AE by senior and respected lawyers who portrayed him as compassionate, caring of his family and a tough but fair competitor. They described him as a man whose word was his bond, who was generous to his friends and family and who has supported indigent clients whom he felt had a good case at law. In these references, AE was referred to as innovative, feisty, a character, and in general a lawyer who has served his clients well.

The panel considered the need for specific and general deterrence. It considered the

impact of other sanctions, noting that in the litigation between the Canadian company and the accounting firm, the court had ordered AE to pay $25,000 for costs arising from the court travelling to the United States to take evidence. While a factor, that order on costs was not determinative of the issue of penalty in the discipline hearing. The panel had to consider the ethical standards the profession imposes to ensure public protection and public confidence. The panel also noted there was public knowledge of these incidents, which required the meting out of punishment that would re-establish public confidence in the profession.

The panel reviewed AE's discipline record, noting that his misconduct over the years amounted to more than individual mistakes and indicated a general disregard for the system. There appeared to be no possibility of rehabilitation.

AE had not acknowledged his misconduct in this case and any remorse he felt appeared to pertain to his behaviour in interviewing the witnesses, not to the import or effect of his actions.

The panel noted that disbarment is frequently the penalty for the theft of trust funds, but was not limited to such misconduct. AE attempted to subvert the course of justice. That behaviour goes against the very fundamental duties of a lawyer and beyond what is acceptable for a lawyer in putting forward a client's case. It cannot be excused by saying it was a lapse in judgement. It was too egregious in that it represented a pattern of conduct that, had it been successful, would have brought the administration of justice into great disrepute.

The panel concluded that AE had shown by his behaviour that he was unfit to practise law and accordingly ordered that he:

1. be disbarred; and

2. pay costs of the discipline hearing.

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AE has filed a notice of appeal of the decision in the B.C. Court of Appeal.