FACTS

Thomas Paul Harding was retained by a plaintiff in a personal injury action arising out of a motor vehicle accident.

On June 25, 2013, the paralegal to counsel for the defendant sent a letter to Harding advising that defence counsel had scheduled an independent medical examination (IME) of his client with an orthopaedic surgeon. The letter further advised that the surgeon's cancellation policy was five working days or $800.

On June 27 Harding wrote to defence counsel advising that the orthopaedic surgeon had already examined his client and that the defence was not entitled to a second medical examination by the same medical specialist, except in very limited circumstances. He also asked to be informed of the facts that would entitle the defence to a re-examination of his client.

On July 2, the paralegal to defence counsel sent a letter to Harding advising that defence counsel had scheduled an additional IME of Harding's client with a psychiatrist. The letter also advised that the psychiatrist's cancellation policy was 10 working days or $950.

Also on July 2, the paralegal sent a letter to Harding in response to his June 27 letter to defence counsel. The paralegal set out the position of the defence on the IME by the orthopaedic surgeon and referenced case law in support of that position.

On July 3, Harding wrote two letters to counsel for the defence, one in response to the proposed IME by the orthopaedic surgeon and the second in response to the proposed IME by the psychiatrist. Both letters contained 15 pre-conditions that Harding required be addressed before he would consider any defence medical examination of his client.

In the letters, Harding also set out his views on the propriety of paralegals debating issues of law with opposing counsel. He referred to the paralegal as "an uneducated person" and indicated that only a lawyer should correspond with him in the future. He also used the word "hireling" with respect to the orthopaedic surgeon and the psychiatrist.

In July, 2013, defence counsel filed a complaint with the Law Society in respect of the two letters. On April 17, 2014, Harding wrote a letter of apology to defence counsel and the paralegal.

DETERMINATION

The question for determination was whether Harding's statements were a marked departure from the conduct expected of a lawyer and, therefore, professional misconduct. The panel noted the right of freedom of expression under the *Charter of Rights and Freedoms*.

Harding has strong views on the propriety of paralegals debating issues of law with opposing counsel. He testified that he was "vexed" when he wrote the letters and that he intended the final paragraphs to be a witty admonishment to defence counsel that paralegals should not be debating legal issues with counsel and that those types of discussions should be between counsel. The panel found that Harding's remarks fell short of the mark of "witty" and were open to misinterpretation. However, his words and the manner in which they were expressed were not a marked departure from the conduct expected of lawyers. If the panel had found otherwise, the fact that Harding was "vexed" and irritated would not justify misconduct.

Harding also had strong views on the impartiality and independence of the orthopaedic surgeon and the psychiatrist. He testified that his use of the term "hireling" was intended to be derogatory and that he has disdain for these practitioners. Harding's opinion was based, in part, on the billing information that he obtained from ICBC through freedom of information requests. The amount received by each doctor for the period 2009 to 2012 formed a significant part of their professional revenue.

Given Harding's views that the orthopaedic surgeon and the psychiatrist are neither independent nor impartial, and that the percentage of their medical billings paid by the defence is evidence of this lack of independence, the panel did not find that his use of the term "hireling" was necessarily inapt or offensive.

The panel found that Harding could have expressed his views more elegantly, less abrasively, and more persuasively. However, the panel did not find that the words he used or the manner in which he expressed his views on the two practitioners constituted professional misconduct.

DECISION

The panel dismissed the citation and the allegations against Harding.

MARTIN DREW JOHNSON

Kelowna, BC
Called to the bar: May 10, 1977
Discipline hearings: October 17, 2013 and June 16, 2014
Panel: majority decision (facts and determination): Tony Wilson, Chair and Dan Goodleaf; concurring decision: Dale G. Sanderson, QC
Decisions issued: February 24 (2014 LSBC 08) and November 3, 2014 (2014 LSBC 50)
Counsel: Larry R. Jackie, QC for the Law Society; Gregory P. Delbigio, QC for Martin Drew Johnson

FACTS

On March 9, 2011, in the course of representing his client at the courthouse, Martin Drew Johnson was involved in an altercation outside the courtroom with a police officer who was a potential witness.

The police officer had previously arrested Johnson's client for breach of recognizance when he went to his former matrimonial home at the request of his wife. Outside the courtroom, Johnson asked the police offer a question that was related to the breach of recognizance charge. The exchange between Johnson and the officer became heated and volatile, and they were reportedly "nose to nose." Johnson responded to some remarks made by the officer by saying "f*** you" to him.

The officer then told Johnson that he was under arrest and very quickly grabbed his left arm and tried to spin him. Johnson had artificial hip replacement surgery done the previous year and, as a result, was unable to spin around. The officer was substantially larger and younger than Johnson and, after a struggle, Johnson ended up being pinned against a glass wall. A court sheriff's officer immediately intervened to assist in the

arrest. Johnson was placed in handcuffs and taken down the hallway in front of a number of people.

The officer sought to have charges laid against Johnson for assault; however, charges were ultimately not laid against Johnson for assault or any other offence.

DETERMINATION

Majority decision

In the majority's view, provocation is irrelevant to a finding of professional misconduct. The only issue to determine was whether or not Johnson's use of profanity as an insulting interjection, spoken in anger to a witness in a courthouse hallway, constituted professional misconduct.

The majority did not see the facts of this case as an over-aggressive police officer provoking a lawyer into uttering a verbal insult. Although the police officer might have taken more proactive steps to diffuse the situation, Johnson had a higher duty to avoid putting himself into the position where the police officer and Johnson were "nose to nose," leading to the expletive being angrily uttered by him.

The majority did not accept that there are any circumstances in which a lawyer in a courthouse could say "f*** you" in anger to a witness, to another lawyer or to any member of the public in a courthouse in an angry, insulting, hostile or belligerent manner. This type of behaviour was totally indefensible and was a marked departure from the standard of conduct that the Law Society expects of lawyers and, therefore, constituted professional misconduct.

Concurring decision

The concurring panel member took into consideration that Johnson's remark was overheard by Crown counsel, but no one else. The remark was made at the end of a quiet corridor. At issue was whether uttering an expletive to a witness in a proceeding within a courthouse corridor (whether that witness was a police officer or not) was excusable in the particular circumstances of provocation by the police officer.

In the view of the concurring panel member, the police officer's conduct was not so aggravating or severe to excuse Johnson's conduct. While Johnson's remarks were understandable, they were not excusable and were a marked departure from what the Law Society expects of lawyers. The concurring panel member found that Johnson's words constituted professional misconduct.

DISCIPLINARY ACTION

The panel found that Johnson's prior disciplinary record was a concern. This was the second time that Johnson had committed this type of breach. However, his previous misconduct and other infractions were, in part, fueled by substance abuse problems that had apparently been resolved.

The panel did not place significant weight on Johnson's letters of reference because some of the authors may not have been aware of all the factors of this case and may not represent a broad view of the profession.

Johnson testified that he immediately regretted his remark and recognized it was a mistake. He fully acknowledged and took responsibility for his inappropriate and unprofessional conduct.

The panel believed that the likelihood of Johnson repeating similar conduct was unlikely and that he had learned from this experience. Given the circumstances of his arrest by the officer, he had already paid a high price for his outburst.

The panel concluded that the breach was moderately serious because Johnson ought to have kept his temper despite the provocation. And it was serious because the incident occurred in a public area of the courthouse.

The panel ordered that Johnson:

1. be suspended for 30 days; and
2. pay $10,503.05 in costs.

VIVIAN CHIANG

Vancouver, BC
Called to the bar: May 17, 1996
Bencher review: September 12, 2014
Benchers: David Mossop, QC, Chair, Haydn Acheson, Thomas Fellhauer, Dean Lawton, Sharon Matthews, QC, Herman Van Ommen, QC and Tony Wilson
Decision issued: November 10, 2014 (2014 LSBC 55)
Counsel: Henry Wood, QC for the Law Society; Vivian Chiang on her own behalf

BACKGROUND

The Law Society issued a citation to Vivian Chiang alleging four counts of professional misconduct. One allegation was withdrawn, and the October 2008 hearing proceeded on three allegations of acting contrary to the duty of an officer of the court or misleading the court.

The hearing panel dismissed the remaining three allegations (2009 LSBC 19; discipline digest: 2009 No. 3 Fall). One member of the panel dissented with respect of one of the allegations and would have found that Chiang had committed professional misconduct.

A Bencher review panel agreed with the minority decision, found that one of the three allegations amounted to professional misconduct and referred the matter back to the hearing panel to consider appropriate sanctions (2010 LSBC 29; discipline digest: 2013 No. 2 Summer).

Chiang appealed to the Court of Appeal; the appeal was dismissed on January 15, 2013 (2013 BCCA 8).

Chiang applied to the Supreme Court of Canada for leave to appeal the decision of the Court of Appeal; the application was dismissed on June 13, 2013 (No. 35279).

A hearing panel issued a decision on disciplinary action on September 25, 2013 (2013 LSBC 28; discipline digest: 2013 No. 4 Winter). Chiang was ordered suspended for one month and assessed costs in the amount of $10,000.

Chiang sought a review of the decision on disciplinary action. A stay of proceedings was issued on November 4, 2013 (2013 LSBC 30; discipline digest: 2013 No. 4 Winter).

On April 25, 2014, Chiang submitted an application that the record before the review panel must include the transcripts and submissions of every proceeding in prior hearings. Her application was denied (2014 LSBC 26). The facts that caused the finding of professional misconduct were no longer available for review as a higher court had already determined that issue. The transcript and submissions of the first review hearing were not relevant to the matter before the current review panel.

The review hearing on disciplinary action was set three times on March 31, July 21, and September 12, 2014. Prior to each review hearing, Chiang made an application for adjournment that was denied (2014 LSBC 10, 2014 LSBC 28 and 2014 LSBC 43).

Subsequent to each decision and on the eve of each review hearing, Chiang renewed her application for an adjournment on the basis that she was seeking the assistance of counsel, she had recently retained counsel who needed more time to prepare for the hearing and, lastly, she had parted ways with her counsel and was without counsel to represent her at the review hearing.

Chiang was granted the adjournment on the first two occasions. The Benchers decided that the September 12 review hearing would proceed with or without Chiang having counsel. The lengthy history of adjournments and missed deadlines emphasized the need for this matter to be heard. Chiang was capable of representing herself as she had previously done so in all of the Law Society proceedings as well as in the Court of Appeal and in the Application for Leave to the Supreme Court of Canada.

DECISION OF THE BENCHERS ON REVIEW

The Benchers rejected Chiang's request to review all decisions relating to the citation. This review was limited to the decision of the hearing panel issued September 25, 2013.

The panel had ordered a suspension of one month plus costs of $10,000. Chiang submitted that the disciplinary action was too harsh.

Chiang asserted that no one had been harmed by her actions. In the Benchers' view, the panel correctly found that the parties in the litigation were negatively affected. They faced additional unjustified costs due, in part, to Chiang's misleading behaviour.

Chiang took the position that she had suffered enough. She stated she was ordered to pay costs in the court proceeding, her company went into bankruptcy, and she was humiliated by publication of the reasons concerning this matter. The Benchers found nothing in the record verifying that Chiang was held personally liable for costs. Although publication by the Law Society that a lawyer has committed professional misconduct is painful and humiliating, it is a normal incident of the disciplinary process and not a basis for determining that the disciplinary action imposed was inappropriate.

Chiang claimed that other lawyers found to have committed similar acts had received less severe sanctions. She was found to have intentionally misled the Court while motivated by her financial interest. In the Benchers' view, when one considers the proper characterization of her misconduct, it was clear that she was not treated differently from other lawyers who have committed similar misconduct.

Chiang suggested that a less punitive approach ought to have been taken by the Law Society. She said that a conduct review would have been more helpful and more appropriate. The panel did not have the jurisdiction to consider such an approach nor do the Benchers on review.

In considering the appropriateness of the disciplinary action imposed in this case, the Benchers considered these primary factors:

(a) the misleading conduct was intentional;

(b) the conduct was motivated by financial interests;

(c) Chiang still failed to recognize the extent of her misconduct.

The Benchers agreed that the disciplinary action imposed was appropriate and dismissed this application for review with costs.

Chiang has filed a Notice of Appeal in the BC Court of Appeal.❖

Conduct reviews ... from page 17

digital signature. During a compliance audit of the lawyer's practice, it was discovered that he had shared the password to his digital signature with his conveyancing assistants and that his digital signature had been applied to documents submitted to the Land Title & Survey Authority. The lawyer permitted his staff to apply his digital signature in his absence from the office for one or two years. He amended his practice immediately when his misconduct was brought to his attention. A conduct review subcommittee accepted the lawyer's explanation that he had not remembered the requirements for electronic filing and had not read the Law Society communications that would have refreshed his memory. The subcommittee emphasized the role that lawyers play in preserving the integrity of the electronic filing of land title documents. (CR 2014-19)

ACTIVITY THAT ASSISTS DISHONEST, FRAUDULENT OR CRIMINAL CONDUCT BY CLIENT

A lawyer prepared documents that allowed his client to acquire shares from the client's son when the son was restrained from disposing of those shares pursuant to a court order in a family law proceeding. The lawyer failed to conduct sufficient due diligence to satisfy himself that his conduct was not contrary to Chapter 4, Rule 6 of the *Professional Conduct Handbook* then in force. The lawyer acknowledged his failures, including the failure to recognize a possible fraudulent conveyance. He now maintains office procedures to avoid similar incidents in the future. (CR 2014-20)❖

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