

Surrey, B.C.

Called to the Bar: January 9, 1987

**Discipline hearing panel:** April 16, 17, June 26, September 10 and December 12, 1998  
Richard Gibbs, Chair, Gerald Kambeitz, Q.C. and William Everett, Q.C.

Kathryn Neilson, Q.C., for the Law Society  
Thomas Davies, for Mr. McNabb

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### **Summary**

Mr. McNabb misrepresented to opposing counsel in a custody dispute that the Ministry of Social Services was threatening to apprehend his client's children and was suggesting that the children stay with Mr. McNabb's client as an alternative to apprehension. In a second matter, Mr. McNabb made baseless allegations to the Legal Services Society that opposing counsel had encouraged an expert to deliberately improperly prepare a psychologist's report. In a third matter, Mr. McNabb prepared and had his client swear an affidavit containing a false statement about information that Mr. McNabb had fabricated. In a fourth matter, Mr. McNabb sought to exploit a complaint against opposing counsel to the Law Society in order to obtain a benefit for his client. The discipline hearing panel found Mr. McNabb guilty of professional misconduct in all four matters and ordered that he be disbarred and pay costs of the discipline hearing.

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### **Facts**

#### **Misrepresentation to opposing counsel**

While acting for Mr. F in a custody dispute, Mr. McNabb told counsel for Mrs. F that "there was a threat" that the Ministry of Social Services was going to apprehend the children of Mr. and Mrs. F and place them in foster care. Opposing counsel understood this to mean that the Ministry was threatening such apprehension. Mr. McNabb also claimed that the Ministry was suggesting that the children stay with Mr. F as an alternative to apprehension, and he proposed that Mrs. F agree to this.

In fact, the Ministry had made no threat to apprehend the children, and a Ministry representative had told Mr. McNabb that there was no intention to do so. Once opposing counsel learned of the Ministry's position, Mr. McNabb falsely claimed that the Ministry representative had changed her mind. He subsequently claimed that he had simply meant to convey that a threat of apprehension was a general possibility in the circumstances and not that the Ministry had made such a threat.

### **Unfounded allegations of misconduct**

In correspondence to the Legal Services Society requesting funding for representing Mr. L in matrimonial proceedings, Mr. McNabb alleged that there was “an exceedingly strong possibility” that a psychologist had deliberately improperly prepared a report, and had been encouraged to do so by Mrs. L and her counsel. The report in question evaluated both spouses and their child and was intended for use before the court. The accusation was false and Mr. McNabb had no basis for making it.

### **Preparing a false affidavit**

In another matrimonial matter, Mr. McNabb drafted and had his client, Mr. D, swear an affidavit containing a false statement that was based on facts fabricated by Mr. McNabb. The affidavit stated that opposing counsel had told Mr. McNabb that Mr. D’s spouse was residing with her boyfriend. Opposing counsel had in fact made no such statement to Mr. McNabb.

### **Using a complaint to the Law Society to gain a benefit for client**

In another matter, opposing counsel, Ms. B, had purported to issue a “subpoena” requiring a witness in a custody dispute to attend at her office for examination. Mr. McNabb subsequently met with this witness, and assisted her in drafting a letter to the Law Society complaining about Ms. B’s conduct in purporting to issue the subpoena and alleging that Ms. B had tried to influence the witness to give false testimony. He then sent a copy of the complaint to Ms. B and told her that the witness was sending it to the Law Society.

Ms. B advised Mr. McNabb that she would have to withdraw from representing her client in light of the complaint and her resulting conflict of interest, and that her client would need an adjournment of an imminent application in order to instruct new counsel. Mr. McNabb sought to obtain an agreement by Ms. B’s client to unsupervised access in favour of Mr. McNabb’s client as a term of such an adjournment. He also told Ms. B that she need not withdraw and suggested that the complaint to the Law Society would go away if Ms. B’s client would consent to unsupervised access.

### **Decision**

The hearing panel found that Mr. McNabb was guilty of professional misconduct in lying to opposing counsel about the Ministry of Social Services’s position regarding apprehension of his client’s children, and in making baseless allegations of serious misconduct against opposing counsel to the Legal Services Society. On the latter point, the panel found that the defence of qualified privilege is inapplicable to professional disciplinary proceedings and that, in any event, Mr. McNabb had no honest belief in the truth of the allegations. Mr. McNabb was also guilty of professional misconduct in deliberately preparing a false affidavit, and in seeking to exploit a complaint to the Law

Society and opposing counsel's resulting conflict of interest, in order to obtain a benefit for his client.

## **Penalty**

The hearing panel found in Mr. McNabb's conduct a pattern of conscious dishonesty and dishonourable tactics in his professional dealings. In addition, the panel found Mr. McNabb's testimony throughout the hearing was frequently evasive and completely lacking in credibility. In the circumstances, protection of the public calls for suspension or disbarment. The panel concluded that Mr. McNabb was and remained fundamentally dishonest and completely unrepentant, such that there was no reason to conclude that he could or would mend his conduct in the future if a suspension from practice were imposed. The panel therefore directed that Mr. McNabb:

1. be disbarred; and
2. pay costs of the discipline hearing.

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Mr. McNabb is appealing the hearing panel decision to the Benchers on May 13, 1999.

*Discipline Case Digest — 1999: No. 13 April (McNabb)*