2018 LSBC 39
Decision issued: December 27, 2018
Citation issued: May 2, 2018

Corrected Decision: The decision has been corrected at paragraphs [60] and [64](a) on January 15, 2019.

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

WADE CAMERON MACGREGOR

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing date:	September 24, 2018
Panel:	Steven McKoen, QC, Chair John Lane, Public Representative Lindsay R. LeBlanc, Lawyer
Discipline Counsel:	Sarah Conroy
Appearing on his own behalf:	Wade C. MacGregor

BACKGROUND

[1] On May 2, 2018, a citation was issued against the Respondent (the "Citation") pursuant to the *Legal Profession Act* and Rule 4-17 of the Law Society Rules.

[2] The Citation directed that this Panel inquire into the Respondent's conduct as follows:

> In or about February 2017, in the course of representing your client [MB] in family law proceedings, you advised your client contrary to one or more of rule 2.1-1(a), 2.1-3(e), or 5.6-1 of the *Code of Professional Conduct for British Columbia* to withhold $200 from each spousal support payment, when you knew or ought to have known that

> if your client followed your advice, he would be in breach of his Separation Agreement dated March 15, 2016.

[3] The conduct alleged was stated to constitute professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

ISSUE

[4] The question before the Panel is whether it is professional misconduct for a lawyer to advise a client to breach a separation agreement that has been filed with the court.

FACTS

[5] The facts before the Panel were submitted by way of an Agreed Statement of Facts.

[6] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 18, 1990 and currently practises primarily at a family law firm in Terrace, BC.

[7] The matter that gave rise to the Citation was the separation of MB and AB. MB was the Respondent's client.

[8] MB and AB separated in February 2016 and, on March 15, 2016, entered into a separation agreement (the "Separation Agreement"). They lived in Kitimat, BC prior to their separation.

[9] AB was represented by counsel when the Separation Agreement was entered into. MB was not represented but was advised to seek independent legal advice.

[10] The Separation Agreement permitted AB to move from Kitimat to Gibsons, BC, with their two children, which she did. MB remained in Kitimat.

[11] The Separation Agreement was filed in the Sechelt Family Court Registry in Provincial Court on October 16, 2016.

[12] Clause 14 of the Separation Agreement states:

> After the Family Home is sold, [MB] will pay to [AB] for [AB's] support, $1,913 per month, payable in bi-weekly installments of $882.92.

[13] The Separation Agreement specifies the income of the parties. The amount of spousal support specified by Clause 14 exceeds the high end of the range recommended by the federal Spousal Support Advisory Guidelines.

[14] After entering into the Separation Agreement, MB commenced proceedings in both the Provincial and Supreme Courts. Ultimately, the Respondent became his counsel in both actions. AB had different counsel in each action.

[15] MB paid AB the spousal support specified by the Separation Agreement until late February 2017.

[16] On January 5, 2017, MB emailed the Respondent to state that, after paying the agreed child and spousal support, he was experiencing financial hardship. In a letter dated July 27, 2017 to the Law Society, the Respondent cited a paragraph from an affidavit of MB that showed by way of example that, for the pay period ending February 12, 2017, MB's take-home pay was $2,488.50, which after child and spousal support payments of $1,565.07 were made, left MB with $923.43 each pay period.

[17] On January 20, 2017, MB wrote to the Respondent again to state that he was in serious financial trouble and was having difficulty paying both his living expenses and travel expenses to visit his children in Gibsons. The Respondent replied that he would see if there was a case for reducing MB's maintenance payments.

[18] On February 3, 2017, the Respondent sent a letter to AB's Provincial Court counsel seeking to negotiate a reduction in MB's spousal support payments. The letter proposed that MB's spousal support payments be reduced by $200 a pay period and that AB pay MB $400 per month to contribute to the expenses MB was incurring to visit the children. The letter also asked if the matter could be dealt with by consent or if it would require an application.

[19] After trying to send the letter by fax, the Respondent discovered that the lawyer's office was closed from February 3 to February 14, 2017, which the Respondent communicated to MB.

[20] On February 14, 2017, AB's Provincial Court counsel informed the Respondent that, if MB wanted to vary the support provisions of the Separation Agreement, he would need to file an application to do so. No opportunity to negotiate was offered to the Respondent.

[21] On February 21, 2017, MB emailed the Respondent to express his frustration with the situation.

[22] On February 22, 2017, the Respondent emailed AB's Provincial Court counsel to express his disappointment over her refusal to negotiate and to inform her that he would seek an order to join the Provincial Court action to the Supreme Court action in hopes that he would be able to negotiate with AB's Supreme Court counsel.

[23] On February 23, 2017, MB emailed the Respondent twice to express his frustration with having to "overpay" spousal support, which the Panel understands to be a reference to the amount of spousal support he was paying being higher than the high end of the range set by the federal Spousal Support Advisory Guidelines, and the difficulty of achieving a satisfactory and timely resolution of that matter.

[24] On February 23, 2017, the Respondent attempted to contact AB's Supreme Court counsel by email but received an out of office message in response that indicated counsel was away from his office without access to email from February 14 to March 1, 2017 and would not be accepting service of documents during that period.

[25] On the morning of February 24, 2017, the Respondent provided MB with a copy of that message and in the cover email stated:

> Given the delays caused by [AB]'s lawyers being away, I am advising you to withhold $200 from each spousal support payment you make from now until we get into court (don't spend the money; it is possible, though not likely, that the court will refuse to reduce the spousal support, in which case you should have the money available to pay up the arrears). Do let [AB] know what you are doing and why.

[26] The Respondent also noted to MB that the next dates on which he expected to be able to set the matter down for hearing were March 27 and April 3, 2017.

[27] Later on February 24, 2017, the Respondent informed AB's Supreme Court counsel that he had advised MB to reduce his spousal support payments on an interim basis until the matter of the appropriate amount of payments could be resolved.

[28] MB informed AB of the advice he had received from the Respondent and reduced his subsequent spousal support payments by $200 each.

[29] The Agreed Statement of Facts shows that the Respondent advised his client that a filed separation agreement could be enforced as if it were a court order, but the date of such advice was not provided.

[30] On the evening of February 24, 2017, AB made a complaint to the Law Society respecting the Respondent's advice to MB to reduce the spousal support payments.

[31] On April 25, 2017, cross-applications were heard in Supreme Court on the subject of the reduced spousal support, and Madam Justice Russell ordered that the spousal support payments should continue in the amount specified by the Separation Agreement and that arrears of spousal support, $800 at that point, be paid by MB to AB with interest.

THE CITATION

[32] The Citation was authorized on April 19, 2018, issued on May 2, 2018 and served on the Respondent in accordance with the requirements of the Law Society Rules on May 14, 2018.

[33] The rules of the *Code of Professional Conduct for British Columbia* (the "*Code*") referred to in the citation are as follows:

> *Rule 2.1-1(a)*: A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.
>
> *Rule 2.1-3(e)*: A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.
>
> *Rule 5.6(1)*: A lawyer must encourage public respect for and try to improve the administration of justice.

ONUS AND STANDARD OF PROOF

[34] The onus of proving the allegations in the Citation is on the Law Society and the standard of proof is the balance of probabilities; *Foo v. Law Society of BC*, 2017 BCCA 151, at para. 63.

ANALYSIS

[35] The Law Society argues that rules 2.1-1(a), 2.1-3(e) and 5.6-1 were breached because:

a. the Respondent advised his client to withhold $200 from each spousal support payment, and

b. the amount of the spousal support payment was fixed in a separation agreement that had been filed with the court and, thus, was enforceable as if it were a court order.

[36] The facts before us establish that the Respondent admitted that he advised MB to pay less than the amount required by the Separation Agreement and that the Separation Agreement had been filed with the court. .

[37] Therefore, we find that the Respondent advised MB to breach the Separation Agreement.

[38] We wish to note at the outset that there is no fraud or chicanery, which are referred to in rule 2.1-3(e), made out on the facts before us. The Respondent was forthright and direct at all times and did not try to hide the advice he had given to his client. The Respondent promptly informed AB's Supreme Court counsel of the advice he had given and advised MB to advise AB of the same, which he did.

[39] What must be determined, however, is whether the Respondent's advice constitutes counselling his client to act in a way that is contrary to rule 2.1-1(a), acting outside of the law as referenced in rule 2.1-3(e) or a violation of the Respondent's obligation to encourage respect for the administration of justice, as required by rule 5.6(1).

[40] Absent special circumstances, counselling a client to breach an agreement is not counselling a person to act contrary to or outside of the law. For example, a lawyer may advise a company that is in insolvent circumstances that a path forward may be to breach a contract that requires payment of more funds than are available and instead initiate insolvency proceedings so as to preserve the assets and business of the company. Alternately, a client can be advised not to comply with an agreement that requires actions to be taken that would violate laws respecting criminal rates of interest, money laundering or corruption of public officials, for example. Even in less dire circumstances, a client may be advised that the quantum of damages for breaching a contract will likely be less than the cost of performance. If nothing else, it is clear that counselling a breach of contract is not on its own necessarily a violation of the *Code*.

[41] Separation agreements, however, have been granted a special characteristic. Section 163(3) of the *Family Law Act*, SBC 2011, c. 25 states:

> A written agreement respecting spousal support that is filed in the court is enforceable under this Act and the *Family Maintenance Enforcement Act* as if it were an order of the court.

[42] The Separation Agreement was filed in the Provincial Court and, as a result, was enforceable at all relevant times as if it were an order of that court.

[43] The Law Society noted that counselling a breach of a court order has been found to be professional misconduct in two Ontario cases: *Law Society of Upper Canada v. Sussman*,

1995 CanLII 537, [1995] LSDD No. 17, and *Law Society of Upper Canada v. Argiris*, 1996 CanLII 466, [1996] LSDD No. 88.

[44] In *Argiris*, the hearing panel commented:

> This is not the way lawyers in Ontario conduct themselves when they are facing a court order with which they do not agree. The proper course of conduct is to move to have it varied or to move for a stay of the order to reach an alternative arrangement. It is entirely improper to put in place arrangements which are contrary to the court order.

[45] In British Columbia, a lawyer who facilitated a breach of a spousal support order by his client was found to have engaged in professional misconduct: *Law Society of BC v. Kirkhope*, 2013 LSBC 18. At paragraph 43 the panel states:

> It is the view of this Panel that there is no circumstance in which a member of the Law Society can lawfully participate in a program that has an outcome of the intentional breach of a Court Order.

[46] All of those cases involve a lawyer who participated in the breach of a court order. The Respondent submits that the case before this Panel is distinguishable in a key respect: the Separation Agreement, while it is enforceable as if it were a court order, is not a court order. The Respondent states that counselling the breach of a separation agreement is akin to counselling the breach of any other agreement and should not be viewed as a breach of the *Code*.

[47] The Respondent correctly observes that there are differences between a court order and a separation agreement. Court orders can give rise to contempt proceedings, for example, which cannot be brought with respect to a separation agreement. Further, court orders are enforceable in their entirety, while only those portions of a separation agreement that are specifically made enforceable as if they were the subject of a court order, such as child and spousal support provisions, have that status.

[48] The Respondent also directed the Panel to the case of *Owen v. Owen*, 2011 BCSC 1284. In that case, one party breached a separation agreement and, applying the general principles of contract law, the court found that the other party was entitled to accept that breach as a repudiation of the agreement and treat the agreement as terminated. The Respondent correctly notes that it is not possible to accept the repudiation of a court order, which further underlines the differences between court orders and separation agreements.

[49] The Respondent also distinguishes the current matter from *Sussman*. In that matter, the subject counsel made no effort to bring the matter before a court. Here, the Respondent is correct in noting that he was making efforts to resolve the issue both through negotiation

and through having the matter heard in court, and his was one of the two applications that brought the matter before Madam Justice Russell for determination. Further, the Panel notes that the Respondent promptly brought notice of his advice to opposing counsel and required his client to give notice of this advice to AB, thus ensuring that there was immediate opportunity to seek judicial redress.

[50] While the Panel accepts all of those points, the Panel is of the opinion that those distinctions are not sufficient to draw a meaningful difference between this case and the cases where a lawyer advised breach of a court order or acquiesced to a breach.

[51] The specific section of the Separation Agreement that the Respondent advised his client to breach was one of those sections that the *Family Law Act* gives the special status of being enforceable as a court order. Whether or not the other parts of the Separation Agreement have that status is not relevant to the facts before us. We must consider the impact of the Respondent counselling the breach of a provision that was enforceable as if it were a court order.

[52] Whether or not a separation agreement can be repudiated is also of no import. While it is true that court orders cannot be repudiated, no repudiation occurred here. Even if it were open for MB to accept a repudiation of the Separation Agreement by AB, that is not what MB did, and it is not what the Respondent counselled his client to do. As a result, the Panel does not find *Owen* to be of assistance.

[53] The Respondent also directed the Panel to 15 other statutes that give enhanced enforcement regimes to contracts under them, such as the *Builders Lien Act*, the *Hotel Keepers Act*, and the *Repairers Lien Act*. While the Respondent is correct that there are multiple instances where similar regimes to that in the *Family Law Act* are in place, the Panel is not persuaded that whether or not such a regime is common is relevant to a determination of whether the Respondent engaged in professional misconduct. There are a vast number of laws that lawyers engage with on a daily basis. The large number of laws does not detract from the obligation not to counsel acting contrary to them.

[54] Finally, the Panel notes that the transparency with which the Respondent conducted himself, while it may be relevant to the question of the ultimate disposition of this matter, is not relevant to the question of whether or not the Respondent acted contrary to the *Code*.

[55] By giving elements of separation agreements the status of being enforceable as if they were court orders, the legislature has communicated to the public that they should be given the same deference and authority as determinations of the courts. This Panel finds that it is not open to lawyers to treat those portions of separation agreements with any less deference or authority than court orders.

[56] Rule 2.1-1(a) forbids lawyers from counselling their clients to act in ways that are contrary to the law. Counselling breach of a separation agreement, to the extent the breached provision is enforceable as if it were a court order, is no different from counselling breach of a court order and is a breach of rule 2.1-1(a). When the Respondent counselled MB to breach the spousal support section of the Separation Agreement, he breached rule 2.1-1(a).

[57] The Respondent also breached rule 2.1-3(e) when he counselled the breach of the Separation Agreement. Withholding payment under the Separation Agreement pending a court hearing was not a remedy available to MB within the bounds of the law. That rule does not require a lawyer never to be incorrect about where the bounds of the law lie. The law is complex and lawyers can and do interpret the law incorrectly. What that rule prohibits, however, is identifying an action to be outside the bounds of the law and nonetheless counselling a client to take the action. Here, the Panel finds that the Respondent had determined that the action of withholding spousal support payments was a breach of the Separation Agreement and advised his client that the Separation Agreement was enforceable as if it were a court order and, nonetheless, advised him to breach the Separation Agreement, all of which is a breach of rule 2.1-3(e).

[58] The Panel does not find, however, that rule 5.6(1) was breached by the Respondent. The Respondent's actions throughout were characterized by an attempt to accomplish his client's goals while respecting the administration of justice. The Panel finds that immediately advising opposing counsel of the advice he had given MB respecting the breach of the Separation Agreement, and requiring MB to give that same message to AB, is inconsistent with an allegation that the Respondent failed to encourage public respect for the administration of justice.

PROFESSIONAL MISCONDUCT

[59] The test for professional misconduct is set out in *Law Society of BC v. Martin*, 2005 LSBC 16, and cited in *Kirkhope*. To commit professional misconduct, as opposed to mere rules breach, a lawyer must engage in conduct that is "a marked departure from the conduct the Law Society expects from its members." Also, as noted in *Kirkhope*, there has to be an element of advertence to the wrongdoing.

[60] Here, the Respondent, knowing that the spousal support provisions of the Separation Agreement were enforceable as if they were a court order, and having advised MB of the same, nonetheless counselled MB to violate those terms. The Panel finds that to be a marked departure from the behaviour the Law Society expects of lawyers. In *Kirkhope*, the hearing panel found that there is no circumstance where a member of the Law Society can participate in an intentional breach of a court order. The Panel is of the view that, similarly, there is no circumstance where a lawyer can counsel a client to intentionally

breach a provision of an agreement that the legislature has stated is enforceable as if it were a court order.

[61] Therefore, we find that the Respondent's conduct in violating rules 2.1-1(a) and 2.1-3(e) constitutes professional misconduct.

NON-DISCLOSURE ORDER

[62] Discipline counsel applied for a sealing order in these proceedings to protect confidential information about the clients from being disclosed. The Respondent consented to this application.

[63] Rule 5-8(2) of the Law Society Rules provides that, upon application or on its own motion, a panel may order that specific information not be disclosed to protect the interests of any person. Rule 5-8(5) requires that, if the panel makes such an order, it must give its written reasons for doing so. In the absence of such an order, Rule 5-9(2) of the Law Society Rules permits a person to obtain a copy of an exhibit entered into evidence when a hearing is open to the public.

[64] We find that the citation, the Agreed Statement of Facts and the other Exhibits filed in this hearing as well as any transcript of the hearing contain confidential and privileged information of the clients that should not be disclosed. We therefore make the following order:

a. if any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, client names, identifying information, and any information protected by solicitor-client privilege shall be redacted from the exhibit before it is disclosed to that person; and

b. if any person, other than a party, applies for a copy of the transcript of these proceedings, client names, identifying information, and any information protected by solicitor-client privilege shall be redacted from the transcript before it is disclosed to that person.