2019 LSBC 33
Decision issued: September 6, 2019
Citation issued: June 7, 2018

CORRECTED DECISION: PARAGRAPHS [35] AND [84] OF THE DECISION WERE CORRECTED ON NOVEMBER 21, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DONALD ROY MCLEOD

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing date:	June 17 and 18, 2019
Panel:	Craig Ferris, QC, Chair Darlene Hammell, Public representative John Waddell, QC, Lawyer
Discipline Counsel:	Robin McFee, QC
Counsel for the Respondent:	Trudi Brown, QC

OVERVIEW

[1] On May 3, 2018, the Discipline Committee of the Law Society of British Columbia directed that a citation (the "Citation") be issued against Donald Roy McLeod (the "Respondent"). The Citation was issued on June 7, 2018.

[2] The Citation sets out two allegations against the Respondent:

1. Between September 2016 and January 2017, in the course of acting for your clients PF and WF, you obtained a committeeship order in relation to JS without providing notice of the committeeship application hearing to JS's counsel, when you knew or ought to have known that JS was

represented by counsel who intended to participate in the application. By doing so, you did one or more of the following:

a. failed to conduct yourself in a manner characterized by courtesy and good faith, contrary to rules 2.1-4(a) and 7.2-1 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*"), and

b. engaged in sharp practice, contrary to rules 2.1-4(c) and 7.2-2 of the *BC Code*.

[3] This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[4] The Respondent admits that, on June 7, 2018, he was served through his counsel with the Citation and waives the requirements of Rule 4-19 of the Rules.

[5] The Law Society of British Columbia (the "Law Society") asserts that the allegations in the Citation have been proven and that this conduct constitutes professional misconduct, being a marked departure from the standards expected of lawyers in British Columbia, pursuant to s. 38(4)(b)(i) of the *Act.*

DUTIES OF THE PANEL

[6] Section 38 of the *Act* sets out what a hearing panel must do after the conclusion of a hearing. Pursuant to s. 38(4), following a hearing, the panel must either dismiss the citation or make a determination about the respondent's conduct:

(4) After a hearing, a panel must do one of the following:
  (a) dismiss the citation;
  (b) determine that the respondent has committed one or more of the following:
    (i) professional misconduct;
    (ii) conduct unbecoming the profession;
    (iii) a breach of this Act or the rules;
    (iv) incompetent performance of duties undertaken in the capacity of a lawyer;
    (v) if the respondent is an individual who is not a member of the society, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming the profession, or a breach of this Act or the rules.

ONUS AND BURDEN OF PROOF

[7] The onus and burden of proof in Law Society discipline hearings is well known. It is the Law Society's burden to prove the facts necessary to support the finding of misconduct.

[8] The standard articulated by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193, has been adopted by Law Society hearing panels: *Law Society of BC v. Schauble*, 2009 LSBC 11, and *Law Society of BC v. Seifert*, 2009 LSBC 17.

[9] In *Seifert*, at para. 13, the hearing panel held as follows:

> … [T]he burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities.

EVIDENCE

[10] The evidence relied upon by the Law Society comprises the Notice to Admit and the attached documents, supplemented by the *viva voce* evidence of Jacqueline Horton. The Respondent accepted the facts set out in the Notice to Admit, with the exception of paragraphs 13, 15, 20, 21, 30, 32, 38 and 54, and did not testify or call any witnesses. A number of documentary exhibits, beyond the documents admitted in the Notice to Admit, were entered into evidence during the course of the Hearing.

[11] JS first consulted Ms. Horton, who is a lawyer, in August 2016 regarding the removal of personal property from JS's home by her daughter, PF. JS sought legal assistance to obtain the return of this property.

[12] Ms. Horton met with JS on several occasions during the period August 2016 to January 2017, including at JS's home. During their initial meetings, JS told Ms. Horton the same story every time. Based on these initial interactions, Ms. Horton determined that JS had the capacity to retain her. Ms. Horton testified that, throughout the relevant period, she determined that JS continued to have the capacity to retain and instruct her, based on her interactions with JS.

[13] Ms. Horton is familiar with the various considerations that arise when dealing with clients with diminished capacity. Ms. Horton testified that she was familiar with the article entitled "Acting for a client with dementia" written by Barbara Buchanan

and published in the Spring 2015 *Benchers' Bulletin*. She testified as to her knowledge that different considerations arise when determining whether a client with diminished capacity is able to retain and instruct counsel, depending on the particular matter.

[14] The Respondent was retained by JS's two adult children in August 2016 in relation to a proposed committeeship of JS. The children advised the Respondent that their mother was scheduled to meet with Ms. Horton on September 14, 2016.

[15] The Respondent first wrote to Ms. Horton on September 13, 2016 advising her of his view that, among other things, JS lacked capacity to make decisions concerning her affairs. He did so in the context of concerns that JS lacked capacity to make or revoke Powers of Attorney, make a Will, or to deal with her investments and with her real or personal property, and that JS was not capable of providing any sort of informed consent to changing the nature or ownership of her assets. The letter alluded to a possible committeeship, stating that the committeeship was not yet in place due to difficulties in ascertaining information about JS's affairs.

[16] JS did not consult Ms. Horton to revoke her Power of Attorney, Representation Agreement, or to change her will, nor has she ever asked Ms. Horton to do so.

[17] The Respondent's letter to Ms. Horton dated September 13, 2016 attached letters from Dr. M and Dr. T stating that JS was incapable of managing her financial affairs and decisions relating to aspects of her personal care. These letters do not specifically state that JS was incapable of retaining counsel, either for all purposes or for participating in a committeeship application.

[18] Ms. Horton reviewed the letters from Dr. M and Dr. T. She did not believe that these letters provided sufficient information or led her to believe that JS lacked capacity to retain and instruct her. These letters did not provide any basis for the opinions stated. For example, there was no mention of any cognitive testing used to assess JS's capacity. Ms. Horton was aware that Dr. T had last met with JS several months prior, after a period of hospitalization.

[19] On September 14, 2016, the Respondent and Ms. Horton had a phone call in which they discussed JS's capacity to retain counsel.

[20] During the September 14, 2016 phone call, Ms. Horton confirmed that she was retained by JS.

[21] Ms. Horton testified that, during the September 14, 2016 phone call, the Respondent was immediately extremely rude, very aggressive and "actually yelling

at me." She did not state to the Respondent that JS had full capacity nor did she suggest she, Ms. Horton, was qualified to assess capacity. During the phone call, Ms. Horton informed the Respondent of her opinion that committeeship was not necessary at that time given that JS had a Power of Attorney and a Representation Agreement in place.

[22] On September 29, 2016, Ms. Horton wrote to the Public Guardian and Trustee (the "PGT"). In this letter, she detailed her interactions with JS. Ms. Horton stated that she had determined that JS had the capacity to retain her, notwithstanding JS's diagnosis of dementia. Ms. Horton stated her view that the PGT needed to investigate the situation. She also asked that, should JS's daughter apply for committeeship, she, Ms. Horton, be provided with all the documents.

[23] On November 10, 2016, the Respondent filed a Petition in the Supreme Court of British Columbia (the "Petition") on behalf of PF and WF, JS's children, under the *Patients Property Act*, RSBC 1996, c. 349.

[24] Ms. Horton testified that, upon returning to her office from holidays on November 21, 2016, she left a voicemail message for the Respondent regarding JS's interest in moving to a retirement community.

[25] The Respondent wrote to Ms. Horton by email on November 24, 2016 asking if she had been formally retained and by whom.

[26] Ms. Horton wrote to the Respondent by email on November 24, 2016 confirming that she had been formally retained by JS and indicating that she had "no intention of taking any major steps now."

[27] The Respondent wrote to Ms. Horton by email on November 24 2016, again stating his view that JS lacked capacity to retain Ms. Horton. Ms. Horton testified that, at this stage in the proceedings, she did not believe that it was necessary for her to obtain a medical assessment to determine if JS had the capacity to retain and instruct her.

[28] Ms. Horton first became aware that the Respondent had filed a Petition through a phone call she received on December 1, 2016 from KM of the PGT office.

[29] On December 1, 2016, Ms. Horton wrote to the Respondent. She advised that she would accept service of the Petition and supporting materials on behalf of JS. She stated that she intended to have JS assessed by a geriatric psychiatrist and that, "with the holidays approaching [she did] not anticipate arranging that until the New

Year." Ms. Horton asked that the Respondent not set the matter down for hearing until she had the opportunity to review the materials and respond to the Petition.

[30] Ms. Horton testified that she did not immediately file a Response when she learned of the Petition as she was waiting for JS to be assessed by a medical professional. Subsequent to this, she contacted several geriatric psychiatrists, who were unable to assess JS before the upcoming holidays. She contacted Dr. N, a family physician with experience in geriatric medicine, and determined in consultation with him that JS should be assessed by an occupational therapist to determine her capacity to perform the activities of daily living and then be assessed by Dr. N.

[31] Ms. Horton testified as to her understanding that it is common practice for responding counsel to hold off filing a Response until they are ready to do so. It is common practice for lawyers to give each other the professional courtesy of not insisting on strict adherence to the Rules of Court and to inform opposing counsel if they require a filed Response by a specific date or according to the timelines set out in the Rules of Court.

[32] On December 2, 2016, the Respondent wrote to Ms. Horton in response to her correspondence of December 1, 2016. He stated that he had received instructions not to serve JS as to do so would be injurious to her health. The Respondent reiterated his view that Ms. Horton was not capable of determining that JS could retain her, and if she maintained her view that JS was capable of retaining counsel, Ms. Horton would turn herself into a witness. The Respondent advised that he would be seeking directions from the Court to proceed with the committeeship application without serving JS and that he would advise her of the directions of the Court in due course.

[33] The Respondent's December 2, 2016 letter to Ms. Horton attached a letter from Dr. T dated September 16, 2016 and a letter from Dr. M dated October 31, 2016. These letters opined that to serve JS with notice of the committeeship application would be injurious to her health. These letters did not specifically state that JS was incapable of retaining counsel, either for all purposes or for participating in a committeeship application.

[34] On December 8, 2016, the Respondent made a without notice application to dispense with service of the Petition on JS. The application was denied and the Court ordered that JS be personally served. The Respondent did not advise Ms. Horton, either formally or as a courtesy, of the scheduling of this application.

[35] During the December 8, 2016 chambers proceedings, the Respondent sought a declaration of the Court that JS was not capable of retaining and instructing Ms.

Horton. The Court expressly declined to make that determination. The Court made it clear that it was not appropriate at that time to determine whether JS had the capacity to retain counsel:

> The Court: It's not for the Court to determine on this type of evidence or summary application whether [JS] has the ability to instruct counsel. It may become perfectly clear on the application itself that there's no contrary opinion on her mental health or her mental status, that she ought to be declared incompetent, but that remains to be seen. What we need to do is protect this individual's autonomy until the Court decides otherwise.
>
> [emphasis added]

[36] Additionally, during these proceedings, the following interaction occurred:

> Mr. McLeod: You said that the patient should be served personally for very good reasons, so it's not filtered through Jacqueline Horton. I want direction on whether I should also serve Jacqueline Horton or leave it so the filter doesn't exist, and then should it be the standard 10 days?
>
> The Court: *It's a professional courtesy*; you can choose to – I'm not directing that service be on Ms. Horton. But yes, you can bring it back in the usual notice period after service on the patient.
>
> [emphasis added]

[37] On December 9, 2016, the Respondent filed a Requisition to set the hearing of the Petition for January 12, 2017.

[38] The same day, Ms. Horton emailed the Respondent. She restated that she would accept service on behalf of JS and asked that copies of the documents be provided to her. Ms. Horton sent this email as a reply to an earlier email from the Respondent. Ms. Horton testified that she received no error message upon sending this email to the Respondent and that she believed that the Respondent received this email.

[39] On December 9, 2016, Ms. Horton also wrote a letter to the Respondent regarding JS's interest in moving into a suite at a particular retirement residence. This letter was sent by email to the wrong email address. Ms. Horton resent her December 9, 2016 letter regarding JS's interest in the retirement residence to the Respondent on December 13, 2016.

[40] When she resent her December 9, 2016 letter on December 13, 2016, Ms. Horton also sent a separate letter dated December 13, 2016 to the Respondent stating that she had not heard from him and had not received the Petition and supporting materials although she had agreed to accept service on behalf of JS.

[41] Twice, on each of December 9, 2016 and December 15, 2016, a process server attempted usual service on JS without success. On December 15, 2016, the Respondent made a without notice application for substituted service on JS. The Respondent did not advise Ms. Horton, either formally or as a courtesy, of the scheduling of this application.

[42] As a consequence of this application, the Court ordered that JS be served by posting a copy of the Petition and supporting materials on the front door of her apartment.

[43] Later on December 15, 2016, JS was served with the application materials for the Petition and the Order made December 15, 2016. The documents were affixed to the entrance door of JS's apartment. The affidavit of service provides that the Requisition setting the hearing of the Petition for January 12, 2017 was included in the package of materials served on JS.

[44] Ms. Horton testified that she went to JS's apartment on December 16, 2016 to review the documents served on JS. Ms. Horton stated that she did not see the Requisition setting the date for the hearing of the Petition and she was unaware of the date. The Respondent did not provide Ms. Horton with a courtesy copy of the documents served on JS. Accordingly, there is no evidence that the Requisition was ever provided to or seen by Ms. Horton. At no time did the Respondent ever provide any notice of the January 12, 2017 hearing date for the Petition to Ms. Horton directly.

[45] On December 21, 2016, the Respondent wrote to Ms. Horton stating that he would not be serving her with the Petition and supporting documents based on his view that she was not entitled to them. He again stated his view that JS lacked capacity to retain and instruct counsel and that Ms. Horton could not represent her as she had placed herself in the position of a witness.

[46] On December 29, 2016, Ms. Horton wrote to the Respondent stating that she received a phone call on December 28, 2016 regarding service of the most recent letter from Dr. T, and JS's lack of funds for food and prescriptions. She informed the Respondent that she had called the PGT.

[47] On December 30, 2016, the Respondent wrote to Ms. Horton. The Respondent reiterated his view that Ms. Horton was substituting her judgment regarding JS's capacity to retain and instruct counsel and that JS lacked capacity to retain counsel. He also restated his position that she had placed herself in the position of a witness and could not act as counsel.

[48] On January 6, 2017, Ms. Horton received an email from KM, of the PGT, which was copied to the Respondent. In the email, KM confirmed his conversation with Ms. Horton that day that she was preparing response materials on behalf of JS, that she would deliver filed copies to the Respondent and to the PGT, and that she would notify the Respondent of this immediately so that the application did not proceed until those materials had been delivered.

[49] On January 6, 2017, Ms. Horton wrote to the Respondent stating that she had been retained to represent JS's interests in the committeeship application specifically, and advising that she was in the process of having her client medically assessed and would be filing a Response to the Petition and supporting affidavits shortly. She asked that the Respondent not take any further steps in the matter until she had filed her Response materials. She also requested that the Respondent confirm, in writing, that he acknowledged and agreed not to take any steps without informing her.

[50] On January 9, 2017, the Respondent wrote to Ms. Horton. He asked who JS had been referred to for an assessment and reiterated his view that Ms. Horton had disqualified herself from continuing to act as counsel. He did not respond to her request that he not take any steps without advising her.

[51] On January 10, 2017, Ms. Horton wrote to the Respondent advising that she had arranged for JS to have an occupational therapy assessment the following week. She noted that the Respondent had not yet confirmed that he would not take any further steps in the matter without advising her and asked that he confirm that day.

[52] Ms. Horton testified that she recognized that the *Patients Property Act* required that JS be assessed by a physician. Ms. Horton testified that she was taking steps to have JS assessed. She had arranged an assessment with an occupational therapist. The purpose of the assessment was to provide information about the level of care and options available to JS. Ms. Horton intended to have JS assessed by a physician, in addition to an occupational therapist. She had arranged for JS to be assessed by Dr. N following the occupational therapist's assessment.

[53] On January 11, 2017, the Respondent wrote to Ms. Horton in response to her letter of January 10, 2017. The Respondent raised numerous questions and criticisms of

Ms. Horton's intention to have JS assessed by an occupational therapist. The Respondent did not acknowledge Ms. Horton's request that he confirm that he would not take any steps without advising her. In this letter, the Respondent indicated his clients' instructions that, *inter alia*, they were "not willing to hold off the process and [would] proceed for an application for an appointment of a Committee as it suits them." He did not provide any indication that the hearing of that Petition was set for the next day.

[54] On January 12, 2017, the Respondent appeared for the hearing of the Petition.

[55] Neither Ms. Horton nor JS was in attendance at the hearing of the Petition on January 12, 2017.

[56] On January 12, 2017, the Court ordered that PF and WF be appointed Committee of the Person and of the Estate of the Patient, JS (the "Committeeship Order").

[57] Ms. Horton testified that, had the Respondent insisted on a Response, or advised her that he was setting the matter down, she would have filed a Response immediately, notwithstanding that she did not have a medical assessment at that time. She could have then attended court to ask for an adjournment until the necessary medical opinion was available and filed an amended Response once this information was available.

[58] On January 13, 2017, the Respondent wrote to Ms. Horton enclosing a copy of the Committeeship Order and explaining that his clients had instructed that they did not want Ms. Horton to further contact their mother. Ms. Horton testified that this was the first time she learned of the January 12, 2017 date of the committeeship hearing.

[59] On January 13, 2017, Ms. Horton filed a Notice of Application on behalf of JS, without notice, seeking a stay of the Committeeship Order. The Court stayed the order on January 13, 2017 (the "Stay Order").

[60] On February 16, 2017, the Respondent filed a Notice of Application to have the Stay Order set aside. This application was on notice to JS and Ms. Horton. This was the first application in this proceeding that was brought on notice to Ms. Horton.

[61] Ms. Horton arranged for Dr. N to assess JS on February 10, 2017 to determine her level of cognition and to provide an opinion on the appropriate level of care currently required.

[62] Ms. Horton filed her initial Response to the Petition on February 20, 2017.

[63] On March 2, 2017, the Court set aside the Stay Order on the grounds that Ms. Horton had advised the Court on the stay application that neither she nor JS had been served with a notice of hearing of the Petition. Unknown to Ms. Horton at the time, this was factually incorrect given the evidence of the process server.

LEGAL TEST FOR PROFESSIONAL MISCONDUCT

[64] This matter raises allegations of professional misconduct.

[65] "Professional misconduct" is not defined in the *Act*, the Rules or the *BC Code*, but has been considered by hearing panels in several cases.

[66] The leading case is *Law Society of BC v. Martin*, 2005 LSBC 16 where the hearing panel concluded, at para. 171, that the test for professional misconduct is:

> …whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[67] In *Martin*, the hearing panel also commented at para. 154:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[68] The Review Board decision in *Re: Lawyer 12*, 2011 LSBC 35 is a more recent pronouncement concerning the test for professional misconduct, and also ties the concept back to the notion of a marked departure from usual or expected behaviour. In the Facts and Determination decision of *Re: Lawyer 12*, 2011 LSBC 11, a single bencher hearing panel reviewed prior decisions and concluded at para. 14:

> In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls *markedly below the standard expected of its members.*
>
> [emphasis added]

[69] Both the majority and the minority in the Review Board decision in *Lawyer 12* confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test (paras. 8, 42).

Professional misconduct analysis

Failure to act with courtesy and good faith – legal framework

[70] Chapter 2 of the *BC Code*, entitled "Standards of the Legal Profession", sets out the Canons of Legal Ethics and standard of conduct expected of lawyers in the performance of their professional obligations:

> **2.1 Canons of Legal Ethics**
>
> These Canons of Legal Ethics in rules 2.1-1 to 2.1-5 are a general guide and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned …
>
> A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.
>
> In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

[71] These canons were adopted by the Law Society of British Columbia in 1921 and have not been amended since 1993 and should be well known to all members of the profession. These canons have been endorsed by the Supreme Court of Canada in *Doré v. Barreau du Quebec*, 2012 SCC 12, at para. 62:

> As a result, rules similar to art. 2.03 are found in codes of ethics that govern the legal profession throughout Canada. The Canadian Bar Association's *Code of Professional Conduct* (2009), for example, states that a "lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding" (c. IX, at para. 16; see also Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2011), r. 6.03(5)).

[72] Chapter 2, rule 2.1-4 of the *BC Code*, entitled "To other lawyers", specifically requires that a lawyer's conduct toward other lawyers should be characterized by courtesy and good faith:

2.1-4 To other lawyers

(a) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers that cause delay and promote unseemly wrangling.

[73] Chapter 7 of the *BC Code*, entitled "Relationship to the Society and Other Lawyers", further sets out lawyers' responsibility to act with courtesy and good faith:

7.2 Responsibility to lawyers and others

Courtesy and good faith

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

[74] Prior disciplinary proceedings offer insight into the rationale underlying the requirement that lawyers must act towards each other and others with civility and good faith. In *Law Society of BC v. Greene*, 2003 LSBC 30, 2003 CanLII 52523, for example, a single-bencher disciplinary panel found that the lawyer committed professional misconduct when he wrote three letters that contained inappropriate criticism of members of the judiciary and contained inappropriate comments with respect to another lawyer. These statements included that the judge made a "ridiculous decision" and ignored the evidence, and that the other lawyer was a "liar". In its decision on disciplinary action, the hearing panel commented at paras. 33 to 35 on the nature of civility in the legal profession, stating:

> Many of our Canons relate to appropriate conduct in expressing the different aspects of professionalism. While it is clear that we, as a profession, place high value on honesty and integrity, it is also important that we express restraint and appropriateness in our commentary, both in the written and spoken word, as we carry out our profession.
>
> Our occupation is one where we often deal in difficult circumstances with difficult people, and emotions often run high. It is not in the best interests

> of the justice system, our clients, and ourselves to express ourselves in a fashion which promotes acrimony or intensifies the stressfulness or the difficulty of those already stressful and difficult circumstances.
>
> Public writings or comments which promote such acrimony or denigrate others in the justice system have a negative effect upon the system as a whole. This is particularly true where it appears that the comments are made for no purposeful reason.

[75] The Supreme Court of Canada recently stressed the importance of civility in the legal profession in *Groia v. Law Society of Upper Canada*, 2018 SCC 27. *Groia* considered whether a lawyer's conduct in the courtroom amounted to professional misconduct. While the misconduct in that case occurred in the courtroom and the location of the impugned behaviour is "unquestionably relevant to the misconduct analysis itself" (para. 56), Moldaver J. for the majority in *Groia* made comments applicable more broadly about the importance of civility at para. 63:

> The duty to practice with civility has long been embodied in the legal profession's collective conscience — and for good reason. Civility has been described as "the glue that holds the adversary system together, that keeps it from imploding": Morden ACJO, "Notes for Convocation Address — Law Society of Upper Canada, February 22, 2001", in Law Society of Upper Canada, ed., *Plea Negotiations: Achieving a "Win-Win" Result* (2003), at pp. 1-10 to 1-11. Practicing law with civility brings with it a host of benefits, both personal and to the profession as a whole. Conversely, incivility is damaging to trial fairness and the administration of justice in a number of ways.

[76] The duty to act with courtesy and civility and to act in good faith thus permeates all aspects of a lawyer's dealings with other lawyers and other individuals. It is not limited to a prohibition against offensive language in written and oral communications.

[77] The *BC Code* already expressly prohibits lawyers from communicating "in a manner that is abusive, offensive, or otherwise inconsistent with" a professional tone (rule 7.2-4). The Law Society argues that to limit the question of whether the Respondent breached the duty to act with civility and in good faith to the language used in his communications with Ms. Horton is an unduly restrictive interpretation of the scope of rules 2.1-4(a) and 7.2-1 that renders rule 7.2-4 superfluous. We are asked to avoid, as much as possible, adopting such an interpretation of the duty to act with civility and in good faith that would render rule 7.2-4 redundant.

[78] The Commentary to rule 7.2-1, which elaborates the content of the requirement of courtesy and good faith, makes clear that this duty stretches beyond the words used in written and oral communications with lawyers and others:

> Commentary
>
> [1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.
>
> [2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.
>
> [3] *A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers*, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.
>
> [4] A lawyer *should agree to reasonable requests* concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.
>
> [5] A lawyer who knows that another lawyer has been consulted in a matter *must not proceed by default* in the matter without inquiry and reasonable notice.
>
> [emphasis added]

[79] Determining whether a lawyer acted in contravention to the obligation to act with civility and in good faith requires a panel to look beyond isolated interactions that a lawyer has with another to consider the broader context of interactions between individuals and to apply an objective approach. This approach is consistent with the direction in *Groia* that there cannot be a rigid definition of when incivility

amounts to professional misconduct: the diverse situations in which lawyers operate mandate a context-specific inquiry into this question (see *Law Society of BC v. Lanning*, 2008 LSBC 31, at paras. 66, 69, and *Groia*, at para. 77).

[80] Prior Law Society of BC disciplinary decisions often address the requirement of civility and good faith in rules 2.1-4(a) and 7.2-1 in the context of oral or written communications with other lawyers or individuals. These have, for the most part, focused on the offensiveness of the particular words uttered by the respondent lawyer in the context of a specific interaction (see, for example, *Law Society of BC v. Johnson*, 2014 LSBC 8; *Law Society of BC v. Harding*, 2013 LSBC 25; *Law Society of BC v. Laaraker*, 2011 LSBC 29; and *Lanning*.

[81] Although these prior decisions concentrate primarily on specific interactions, primarily written, between the respondent lawyers and other individuals where there is offending language used, the question of whether a lawyer's behaviour contravenes the duty to act with civility and in good faith is not so limited.

Sharp practice – legal framework

[82] Chapter 2 of the *BC Code* makes clear lawyers' obligations towards other lawyers to not engage in sharp practice:

> **2.1-4** To other lawyers
>
> (c) A lawyer should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests that do not prejudice the rights of the client or the interests of justice.

[83] Chapter 7 of the *BC Code* further sets out lawyers' responsibilities to avoid sharp practice:

> **7.2-2** A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

[84] Prior Law Society disciplinary decisions offer some further guidance about the scope of the rule against sharp practice. In *Law Society of BC v. Taschuk*, 1999 LSBC 31, [2000] LSDD No. 21 and 2000 LSBC 22 [2001] LSDD No. 7 (additional reasons), the hearing panel determined that the respondent lawyer committed sharp

practice and professional misconduct. The lawyer did not respond to a letter from an unrepresented shareholder to advise him of non-confidential facts that the shareholder was entitled to know, even though the lawyer knew that the shareholder would be seriously prejudiced in exercising his legal rights because he had misunderstood certain crucial facts. The lawyer had a duty to draw the mistake to the unrepresented shareholder's attention and, in failing to do so, he breached his duty. This breach amounted to professional misconduct. In reaching this conclusion, the panel defined sharp practice as follows at para. 67:

> … Sharp practice includes a broad range of conduct but, as it relates to Mr. Taschuk's conduct in response to receipt of that letter, it is, simply stated, that a lawyer has an obligation to lawyers, and to certain other persons, to correct any mistaken belief they hold as to a relevant fact which is not at issue in the proceeding, provided that doing so will not breach their obligation to not disclose privileged communications or confidential information. Obvious examples include a mistake as to the date of a hearing or the deadline for some action being taken. Generally speaking, that obligation will extend to unrepresented persons with whom a lawyer deals if the lawyer would have had that obligation to their counsel, if they were represented.
>
> [emphasis added]

[85] In *Law Society of BC v. Barron*, [1997] LSDD No. 141, the hearing panel determined that the respondent lawyer had engaged in sharp practice in obtaining a divorce on the basis that proceedings were undefended when he knew that the opposing party was represented by counsel. The matrimonial proceedings had been commenced less than a year before he obtained the desk order, during which time the respondent lawyer had clear and regular communication with the opposing party's counsel. The panel found that there was significant prejudice in the order obtained, as it involved the continuation of a custody order of a child that the opposing party sought to vary, and the respondent lawyer refused to have the order immediately set aside when requested.

[86] The panel stressed in *Barron* that the respondent lawyer could have delivered a copy of all the supporting material that he anticipated filing in support of the undefended divorce action and advised the opposing counsel that he intended to proceed with filing this material if, within a reasonable period, no response was filed. The panel stressed that this method would not have increased the costs of litigation and would also have been in the best interests of his clients, because the respondent lawyer should have been concerned that further litigation could occur if

the opposing party felt that they were being taken advantage of or tricked in some way and applied to set aside the order, as they did in that case (para. 20).

[87] Similarly, in *Kara v. Sutherland*, [1996] Civ. L.D. 547 (BCSC), the court set aside a default judgment and the defendant was given leave to file a statement of defence when the plaintiff's lawyer took a default judgment without informing the defendant's lawyer that she intended to do so. In finding that the lawyer breached the *Professional Conduct Handbook* in effect at the time, the court found that, at no time prior to taking the default judgment did the plaintiff's lawyer request that opposing counsel file a statement of defence, advise opposing counsel of her intention to insist on strict observance of the time limits for filing a statement of defence, or give any notice to opposing counsel of her intention to apply for default judgment.

THE POSITION OF THE PARTIES

The Law Society

Duty to act with courtesy and good faith

[88] The Law Society alleges that the Respondent failed in his duty to act with courtesy and good faith, contrary to rules 2.4-1(a) and 7.2-1 of the *BC Code.* The Law Society argues that, cumulatively, the Respondent's behaviour towards Ms. Horton throughout their interactions crossed the line from bad manners to a level of incivility that amounts to professional misconduct, reflecting a "potent display of disrespect for the participants in the legal system" that amounts to professional misconduct.

Refusing to recognize Ms. Horton as counsel for JS

[89] The Law Society says that the Respondent refused to recognize Ms. Horton as counsel for JS from September 2016 onwards. The Respondent's persistent refusal to recognize Ms. Horton as JS's counsel resulted in a breakdown of communications between counsel about the substantive matters between their clients and significantly reduced or eliminated any prospect of resolving their dispute.

[90] The Law Society argues that the Respondent knew that Ms. Horton intended to file responsive pleadings. On December 1, 2016, she wrote to the Respondent signalling that she intended to respond to the Petition. On January 6, 2017, KM of the PGT copied the Respondent on an email to Ms. Horton confirming that she was

preparing response materials. On January 6, 2017, Ms. Horton wrote to the Respondent stating that she would file a Response shortly.

[91] It is the position of the Law Society that at no point did Ms. Horton indicate to the Respondent that it was her view that JS had no capacity issues whatsoever. In fact, Ms. Horton's letter to the PGT dated September 29, 2016 makes clear that Ms. Horton was cognizant of the concerns surrounding JS's situation, including her capacity issues.

[92] The Law Society points out that, despite Ms. Horton's repeated assertions that she had been retained by JS, the Respondent reiterated his refusal to recognize her as counsel. Over time, the Respondent adopted an increasingly critical tone, questioning Ms. Horton's determination that JS could retain her, stating:

i. in his email dated November 24, 2016, that "it is extremely unlikely that she [JS] has had a sudden recovery" and stating to Ms. Horton that "obviously, you are not competent to assess capacity";

ii. that, in determining that JS was capable of retaining counsel, she had "converted herself into a witness";

iii. in his letter dated December 21, 2016, that he would not be serving her with the Petition and supporting documents because she was "not entitled to them";

iv. in his letter dated December 30, 2016 to Ms. Horton, that her "continuing to advise [JS] is only harming her";

v. in his letter dated January 9, 2017 to Ms. Horton, that she had "disqualified yourself from continuing as counsel, if in fact JS is capable of retaining and instructing counsel"; and,

vi. in his letter dated January 11, 2017 to Ms. Horton, that "I have no idea why you are asking me to get those [medical] records when, if [JS] is competent as you have maintained (using your own judgment) … ."

[93] The Law Society acknowledges that the Respondent advised the Court on December 8, 2016 and January 12, 2017 of his view that Ms. Horton was not properly retained by JS as she lacked the capacity to retain counsel. At the December 8, 2016 hearing, the Respondent submitted that JS was incapable of retaining Ms. Horton. The Respondent relied on the letters from Dr. M and Dr. T, whose opinions he provided to Ms. Horton as the basis for refusing to recognize her as counsel. The Court declined to answer this question at this hearing.

[94] The Law Society submits that, even if the Respondent believed that the medical evidence supported his view that JS could not retain Ms. Horton before the December 8, 2016 appearance, he knew or ought to have known after this date that this evidence was insufficient to justify his refusal to recognize Ms. Horton as counsel for JS. Despite the Court having declined to make the determination that she could not retain counsel, the Respondent continued to assert his own personal opinion that JS was not capable of retaining and instructing Ms. Horton, and he refused to acknowledge her as counsel. He continued in his stalwart refusal to recognize her as such in the weeks following, up to and including the January 12, 2017 hearing of the committeeship application.

[95] The Law Society submits that it was at this point incumbent on the Respondent to recognize Ms. Horton as JS's counsel up to and during the committeeship application hearing.

[96] The Law Society argues that the Respondent's refusal to recognize Ms. Horton as JS's counsel is inconsistent with the *BC Code* and guidance regarding acting for clients with diminished capacity. These sources make clear that the question of whether a client has a capacity to retain counsel is a legal determination, not a medical one.

Failure to respond to Ms. Horton's requests that the Respondent not set the matter down for a hearing and not take further steps without informing her

[97] The Law Society suggests that the Respondent refused in his communications to Ms. Horton to grant her requests not to set the matter down for a hearing without notice or not to proceed with the hearing until she had time to obtain the necessary medical assessments and file a Response.

[98] As outlined above, Ms. Horton wrote to the Respondent on December 1, 2016, January 6, 2017 and January 10, 2017 requesting that he not set the matter down for hearing without notice and that he not take any further steps in the matter without informing her.

[99] The Law Society points out that the Respondent responded in part to each letter sent by Ms. Horton. However, he avoided acknowledging or responding at any time that he would not take any further steps without informing her, nor did he alert her to the fact that he had set the matter down for hearing. He did not at any time provide any indication to Ms. Horton that he would proceed with the hearing in default on the scheduled date if she failed to file a Response.

[100] Significantly, in the Law Society's view, the Respondent filed the Requisition to set the hearing of the Petition for January 12, 2017 on December 9, 2016, without consulting Ms. Horton and thereafter not advising her of the hearing date. This was eight days after Ms. Horton first requested that he not set the matter down for hearing until she had the opportunity to review the materials and to respond to the Petition.

[101] The Law Society points out that the Respondent's failure to even acknowledge Ms. Horton's request that he not proceed with the hearing is inconsistent with his suggestion to the Court during the January 12, 2017 proceedings in which he stated to the Court that he had, on January 11, 2017, "replied to all of the things that she [Ms. Horton] brought up" in her correspondence dated January 10, 2017. The Law Society says that the Respondent had not, in fact, responded to Ms. Horton's request in her January 10, 2017 letter that he would not take any further steps in the matter without advising her.

[102] Ultimately, says the Law Society, the Respondent's lack of civility and failure to respond to Ms. Horton's request that he allow her time to obtain the necessary medical assessments and file a Response resulted in greater prejudice to the parties. Ms. Horton stated early, in her correspondence dated December 1, 2016, her view that "[e]scalating this to what will now be a contested Committeeship is not in anyone's interest." Instead, the effect of the Respondent's conduct was to delay the process of the proceedings and the ultimate resolution of the committeeship application. His conduct resulted in increased legal costs for both sides, by forcing unnecessary court proceedings that could have been avoided if the Respondent acted in accordance with the *BC Code*.

Conclusion regarding failure to act with courtesy and good faith

[103] Based on the above assertions, the Law Society submits that the totality of the Respondent's conduct towards Ms. Horton throughout the course of their interactions demonstrated a failure to act with courtesy and good faith as required by the *BC Code* and represented a marked departure from the conduct the Law Society expects of lawyers. The Law Society says the Respondent's conduct towards Ms. Horton extended far beyond merely using an abrasive or resolute tone in his communications with her. It extended to refusing to recognize Ms. Horton as counsel for JS, despite her repeated assurances that she had been retained by JS to represent her in the committeeship application. He continued in his refusal to recognize Ms. Horton as JS's counsel in these proceedings up to and including the committeeship hearing itself. Further, it is submitted that the Respondent refused even to consider Ms. Horton's requests that he not set the matter down for a

hearing to allow her to obtain the necessary medical assessments of JS or to file a Response after doing so. In the face of Ms. Horton's request that he not set the committeeship Petition for hearing without consulting her, the Respondent proceeded to do just that, and thereafter did not inform her of the January 12, 2017 hearing date. Consequently, the Law Society argues, JS was unrepresented at the committeeship hearing.

Sharp practice

[104] The Law Society submits that the Respondent engaged in sharp practice in his dealings with Ms. Horton, contrary to rules 2.1-4(c) and 7.2-2 of the *BC Code*:

a. by obtaining the Committeeship Order without providing notice of the application hearing to JS's counsel, Ms. Horton; and

b. when he knew or ought to have known that JS was represented by Ms. Horton and that Ms. Horton intended to participate in the application.

[105] It is urged upon this Panel that this sharp practice manifested through:

a. the Respondent's failure to respond to or agree to Ms. Horton's requests that he not set the matter down for a hearing until she had the opportunity to review the materials and to file a Response and that he not take any further steps in the matter without informing her and his failure to inform her that he would proceed with the hearing regardless of whether she had filed a Response; and

b. his repeated failure to inform Ms. Horton of the date of the committeeship hearing.

Not set the matter down for hearing or take further steps without informing Ms. Horton

[106] The Law Society submits that the Respondent's failure to respond to Ms. Horton's requests that he not set the matter down for a hearing to permit her time to review the materials and file a Response and that he not take any further steps without informing her amounts to sharp practice.

[107] The Law Society argues that the Respondent did not expressly state to Ms. Horton that he intended to proceed with the hearing regardless of whether she had filed a Response. Ms. Horton testified that, had he done so, she would have filed a Response immediately. The Law Society submits that his failure to do so amounts

to sharp practice, even given his position that JS could not have retained Ms. Horton. In this regard, we were directed to the content of the rule against sharp practice as set out in the *British Columbia Civil Trial Handbook*:

> A fair rule of practice is this: if counsel believes a lawyer proposes to defend or plead, he or she should be informed in writing – even if there has been no appearance – that default judgment will be taken on a certain day if appropriate steps are not taken. *Counsel should not be concerned with whether the other lawyer has been formally retained or has entered an appearance. A belief that a lawyer may be acting is enough to put him or her on notice.* Even then, one should not be hasty to make default judgment – the lawyer probably intends to appear or plead but has neglected to do so. When taking default judgment counsel should remember that his or her turn may come. Do unto other lawyers as you would have them do unto you.
>
> [emphasis added]

[108] In *Re: Lawyer 16,* 2016 LSBC 47, the hearing panel dismissed a citation alleging that the respondent engaged in sharp practice and acted contrary to the *BC Code*, in proceeding by default without inquiry or reasonable notice to an unrepresented party when the lawyer knew that the party had consulted a lawyer and was participating in the process and defending the action. The hearing panel determined that the respondent was operating within the rules and that proceeding in default was not taking advantage of a slip, given that the unrepresented party was an "educated woman with employment" (para. 58) who had two years to file a Response and did not take the opportunity to do so, notwithstanding that she had consulted counsel at least twice.

[109] The Law Society submits that *Lawyer 16* is distinguishable. Unlike in *Lawyer 16*, although Ms. Horton did not file a Response until February 20, 2017, she was clear in her communications to the Respondent, as outlined above, that she intended to file a Response after obtaining the necessary medical assessments of JS and supporting affidavits. In this regard, the Law Society submits that the Respondent did not provide the Court with a complete picture of his interactions with Ms. Horton during the proceedings on January 12, 2017. The Respondent informed the Court that Ms. Horton had written to him on January 10, 2017 and that she had arranged for an occupational therapist to assess JS. However, he did not inform the Court that Ms. Horton advised him previously in her December 1, 2016 letter that she intended to have JS assessed by a geriatric psychiatrist early in the New Year,

nor did he correct the Court's mistaken impression that the occupational therapist assessment was the only assessment that Ms. Horton was seeking.

Failure to inform Ms. Horton of the date of the committeeship hearing

[110] The Law Society submits that the Respondent's failure to provide Ms. Horton with notice of the date of the committeeship hearing, despite her repeated inquiries that made clear that she did not know the date of this hearing, also constitutes sharp practice.

[111] The Law Society acknowledges that the December 8, 2016 Order required personal service on JS, as well as the Court's finding that JS had been served in accordance with that Order on December 15, 2016.

[112] Nonetheless, the Law Society argues that the fact that JS was served with the Requisition does not excuse the Respondent's conduct in not providing Ms. Horton with the date of the committeeship hearing.

[113] The Court did not direct service on Ms. Horton during the proceedings on December 8, 2016. However, the Court expressly stated to the Respondent that service on Ms. Horton was a professional courtesy that the Respondent could choose to do.

[114] The Law Society says that Ms. Horton's lack of awareness about the Requisition and the hearing date should have been apparent to the Respondent from her communications with him on January 6, 2017 and January 10, 2017.

[115] According to the Law Society, even if the Respondent believed that JS was properly served with the Requisition setting the hearing date of the Petition, deliberately withholding the information about the hearing date from Ms. Horton as her counsel amounted to sharp practice as this term was defined in *Taschuk*. In *Law Society of BC v. Jeffery*, [1996] LSDD No. 250, the panel found that the respondent engaged in sharp practice and committed professional misconduct when he failed to inform opposing counsel promptly of the fact that the action had been removed from the trial list, despite having told the coordinator that he would do so, and then misled opposing counsel about when he found out about the removal of the matter from the trial list. The panel determined that the respondent deliberately withheld information concerning the adjournment to attempt to advance the probability of a settlement in a way that may not have been possible had he passed on the information (at p. 4).

[116] The Law Society submits that this case is distinguishable from *Law Society of BC v. Roberts*, 2012 LSBC 31. In *Roberts*, the hearing panel determined that the respondent committed professional misconduct when he obtained default judgment without providing reasonable notice of his intention to do so, when he knew the defendant was represented by another lawyer. However, the panel found that this misconduct did not rise to the level of sharp practice. It adopted the definition of sharp practice in *Black's Law Dictionary* as "unethical action and trickery." In this case, the hearing panel determined that the respondent's misconduct resulted from the choices he made, or failed to make, that led to his failure to respond to correspondence from opposing counsel and to seek to obtain default judgment without reasonable notice to the other side. The panel was satisfied that the respondent's conduct was not motivated by an intention to obtain an advantage for his client.

[117] In these proceedings, the Law Society argues that the Respondent provided no notice of his intention to proceed by way of default to Ms. Horton. Moreover, it is argued that, unlike in *Roberts*, the circumstances here are strongly suggestive of the fact that the Respondent engaged in calculated behaviour that sought to capitalize on Ms. Horton's ignorance of the hearing date.

The Respondent

[118] For the most part, the Respondent does not take issue with the factual background to this matter. Nevertheless, the Respondent submits that his conduct was not discourteous and did not demonstrate bad faith or constitute sharp practice.

[119] The Panel was directed to the wording of the Citation. Counsel did so to highlight that the Citation focused on the issue of notice of the application for the appointment of a committee. It was argued that the Citation does not extend to the content of correspondence between the Respondent and Ms. Horton, nor to any other matters raised in the Law Society's evidence and submissions.

[120] As noted above, the Respondent did not testify at the Hearing. Instead, he confirmed his admission of almost all of the facts set out in the Notice to Admit. The Respondent also drew the Panel's attention to correspondence from counsel for the Respondent to a staff lawyer with the Law Society. This correspondence, dated May 4 and December 6, 2017, was included in the joint book of documents tendered at the Hearing. On page 2 of the joint book of documents, it is acknowledged that the documents are admitted into evidence to prove that the statements were made and not for proof of the truth of the matters recorded in them.

Counsel for the Respondent acknowledged that it was for the Panel to accept the truth of the content of the correspondence or not.

[121] In the correspondence of May 4 and December 6, 2017, Respondent's counsel refers to the Respondent's understanding of case law and commentary pertaining to the determination of whether legal counsel has the authority to represent a client when that authority is disputed. Counsel made this reference as evidence that the Respondent's challenges to Ms. Horton's representations that she had instructions from JS to act on her behalf concerning personal property issues, and later with regard to the application for the appointment of a committee, were based on his understanding of the law.

[122] The Respondent noted that the Respondent represented two clients (JS's adult children) who had concerns about their mother, who had medical evidence to support their views, and who instructed the Respondent to proceed to get an order of committeeship to protect their mother. This concern was accentuated by JS's ongoing relationship with an individual about whom the children held suspicions.

[123] In this context, it was argued that the Respondent had an obligation to press forward with the committeeship application. This obligation was being obstructed by Ms. Horton's perceived failure to obtain proper instructions to act for JS and/or to have obtained evidence of a medical basis for challenging the need for the appointment of a committee.

[124] As a parallel concern, the Respondent asserted that the issues related to the appointment of a committee were distinct from the property concerns that JS had purportedly retained Ms. Horton to deal with. Therefore, it was appropriate for the Respondent to press ahead with the committee appointment process without having to consult Ms. Horton.

[125] The Petition seeking appointment of a committee was filed on November 10, 2016. On December 1, 2016, Ms. Horton sent a letter to the Respondent in which she confirmed her awareness of the filing of the Petition and indicated that she would accept service of the Petition and supporting materials. The Respondent suggests that the appropriate course of action for Ms. Horton at this stage was to file a Response to the Petition and formalize her position as counsel of record. Because she did not do so, she was either not entitled to notice of the scheduling of the hearing of the Petition or she should have been more proactive in confirming the Respondent's intentions for the hearing of the Petition.

[126] The Respondent suggests that he and Ms. Horton must share the blame for what followed.

[127] At the application on December 8, 2016, the Respondent advised the Court of Ms. Horton's involvement in the matter and expressed his concerns about her actions to date. Accordingly, on December 8, 2016, the Court ordered that JS be served personally with the Petition and supporting materials, rather than Ms. Horton.

[128] JS was substitutionally served with the Petition and materials on December 15, 2016. The Respondent then learned from Ms. Horton that she had seen the materials, and he assumed that she was thereby aware of the hearing date. The Respondent suggests that it was reasonable for him to have made that assumption. He also submits that it was reasonable for him to refuse to serve the materials upon Ms. Horton because JS did not have the capacity to retain and instruct counsel.

[129] The Respondent argues that he was supported in his approach by the comments of the Court at the December 8, 2016 hearing in which the Court noted that the correspondence from Ms. Horton did not constitute a proper Response to the Petition.

[130] Counsel for the Respondent submits that the ensuing applications were simply concerned with whether or not JS was properly served with the Petition. Therefore, they are not events of any materiality in this matter.

[131] The Respondent also notes that Ms. Horton did not ask about the date for the hearing of the Petition at any time.

[132] Counsel for the Respondent referred to various decisions dealing with the principles applicable to the capacity to retain and instruct counsel (*Forestreet Warehouse Company v. Van de Linder*, 1919 CarswellAlta 65; and *Berman (Litigation Guardian of) v. Schwartz*, 2012 ONSC 6851); the obligations and duties of a solicitor of record (*Logan v. Logan*, 1993 CarswellOnt 1074; and *Sharma v. Giffen LLP*, 2012 CarswellOnt 15430); erroneous allegations against the Crown made in good faith (*Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772); and the principles of sharp practice (*Lawyer 16*).

[133] From these cases, counsel for the Respondent argues that:

a. A lawyer must prove his or her authority to act when that authority is questioned;

b. If a client lacks the mental capacity to instruct counsel, the client no doubt lacks the capacity to choose one;

c. Where a party is served with process, that party is considered to be representing themselves until such time as a notice is delivered to the contrary;

d. When a lawyer is retained only for a part of a proceeding, no such notice is required in law precisely because the retainer is a limited one;

e. Erroneous allegations made against the Crown and mistakes in the understanding of the law that are made in good faith do not constitute professional misconduct;

f. Where the Supreme Court Rules permit default proceedings when a Response has not been filed, it is not taking paltry advantage of a slip or sharp practice to proceed to default proceedings without notice when a Response has not been filed after a period of two years.

[134] The Respondent submits that, in all the circumstances, the Respondent has not failed to conduct himself in a manner characterized by courtesy and good faith nor engaged in sharp practice.

DECISION

Discussion

[135] This Panel accepts that the scope of this hearing is confined by the Citation to the period between September 2016 and January 2017 and allegations that pertain specifically to the obtaining of the Committeeship Order by the Respondent without notice of the application to Ms. Horton when he knew that she intended to participate in the application.

[136] Nevertheless, it is impossible to assess the conduct of the Respondent without some awareness of the circumstances that led to his decision making.

[137] It is fair to conclude from the evidence that the Respondent was retained by his clients at a time when they were concerned about the ongoing security of their mother and her assets. Their instructions to the Respondent were to move expeditiously to obtain medical evidence concerning their mother's cognitive functioning and decision-making and to apply for relief that would allow them to protect their mother and her assets.

[138] Ms. Horton was initially contacted by JS by phone with concerns about the removal of her belongings from her residence by her daughter. JS wanted those belongings

returned. After meeting with JS, Ms. Horton satisfied herself that, while JS had demonstrable memory issues, she also had the capacity to retain and instruct counsel concerning the return of her assets. In coming to this conclusion, Ms. Horton relied on her own experience as a nurse and legal practitioner and the content of an article in the Spring 2015 *Benchers' Bulletin* entitled "Acting for a client with dementia." She also belonged to a number of elder law organizations and was well trained and knowledgeable in the subject.

[139] On September 14, 2016, Ms. Horton attempted to engage with the Respondent by phone. According to her uncontested evidence, she was rebuffed by the Respondent in an angry and aggressive manner.

[140] On November 24, 2016, Ms. Horton sent an email to the Respondent advising that she had been formally retained by JS "who I have determined does have the capacity to retain me."

[141] From this point forward, the majority of the remaining communications between the Respondent and Ms. Horton was by letter. The letters authored by the Respondent to Ms. Horton often contained accusatory language and the repeated assertion by the Respondent that JS lacked the capacity to retain and instruct counsel. Ms. Horton's insistence that her own professional assessment proved otherwise was met by suggestions from the Respondent that Ms. Horton was now disqualified to act as counsel as she had become a witness as to her assessment of JS's capacities.

[142] When the subject of service of the Petition and materials arose, the Respondent was clear that he would not serve those materials on Ms. Horton for the reasons stated in the preceding paragraph. When he first appeared in Court on this matter, he sought an Order dispensing with service of the materials upon JS because his instructions, and the opinion of at least one of his medical witnesses, suggested that personal service would cause stress to her. The Court declined to dispense with service, or to allow service upon Ms. Horton. Instead, the Court directed that JS be served personally in the usual manner. When this process was unsuccessful, an order for substituted service was made allowing the materials to be served by affixing the materials to the door of JS's residence.

[143] Ms. Horton's evidence at the hearing was that she met with her client shortly after service of the application materials. She did not recall seeing the Requisition setting the hearing of the application during her review of those materials.

[144] Service of the application materials led Ms. Horton to advise the Respondent, by way of a letter dated January 6, 2017, of her expanded retainer to represent JS in

the committeeship matter. She asked that the Respondent not take any further steps in the matter until she had filed her response materials and that the Respondent confirm his acknowledgement and agreement not to take further steps without informing her in writing, or at all.

[145] Counsel for the Respondent submits that the Respondent was entitled to assume that Ms. Horton was aware of the hearing date as she acknowledged having reviewed the application materials. Based on an objective review of the evidence, we disagree. A reasonable person reviewing the correspondence is compelled to conclude that Ms. Horton clearly was unaware of the hearing date. In Ms. Horton's letter of January 6, 2017, she made it clear that she was not aware that a hearing date had been set. Further, her letter of January 10, 2017 ends with this paragraph:

> You have not confirmed that you will not take any further steps in this matter without advising me. I require that from you today. Kindly acknowledge receipt of this letter by return email or fax.

[146] Of further importance is the wording of the Respondent's letter of January 11, 2017 which responded to Ms. Horton's letter of January 10, 2017. Under paragraph 7, entitled "Conclusion", he wrote:

> Their instructions to me are that … my clients are not willing to hold off on the process and will proceed for an application for an appointment of a Committee *as it suits them.*
>
> [emphasis added]

[147] While counsel for the Respondent argued that Ms. Horton's use of the phrase "I require that from you today" suggests that Ms. Horton is concerned about the application proceeding the next day, the totality of the communication evidence is more consistent with Ms. Horton not having any knowledge of the specific date set for the hearing.

[148] At no point during the hearing of January 12, 2017 was the Court advised by the Respondent that, in letters dated January 6 and 10, 2017 to him from Ms. Horton she had asked him to confirm, in writing, that he acknowledged and agreed not to take any steps without informing her.

The allegations in the Citation

Failure to act with courtesy and good faith

[149] Perhaps the most revealing comment made by the Respondent to Ms. Horton can be found in his email to her of December 21, 2016. In that email, the Respondent suggested that Ms. Horton had become a potential "officious intermeddler." This perception of Ms. Horton's role and conduct permeates his treatment of her. He did not perceive her as counsel but more an interference in his attempts to meet the expectations of his clients.

[150] Did the conduct of the Respondent in his dealings with Ms. Horton concerning the scheduling of the hearing of the Committeeship Petition disclose a marked departure from that conduct the Law Society expects of lawyers? Does that conduct fall markedly below the standard expected of lawyers? This Panel accepts that it does.

[151] The Respondent's counsel submits that the Respondent proceeded on a reasonable understanding of the law in deciding that JS did not have the mental capacity to retain and instruct counsel. Counsel suggests that, having been challenged on this issue by the Respondent, it was incumbent upon Ms. Horton to prove that she was competently retained.

[152] The *Code*, in rule 3.2-9 and the associated Commentary, sets out lawyers' responsibilities when assisting a person with diminished capacity. Commentary 1 stipulates that the key is determining whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.

> **Clients with diminished capacity**
>
> **3.2-9** When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.
>
> Commentary
>
> [1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions

> depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

[153] The *Benchers' Bulletin*, Spring 2015, states:

> A person with dementia may be mentally capable of making some decisions about his or her legal affairs, but not others. Accordingly, capacity should be assessed in the context of a particular decision to be made. While a letter from the person's doctor and the insight of family members or close friends may be of assistance, it is up to the lawyer to assess if the impairment prevents the person from giving instructions for the particular matter or entering into binding legal relationships.

[154] The Summer 2016 *Benchers' Bulletin* article "Top 10 questions asked of practice advisors" again addressed the question of client capacity. This publication again stressed that, although a doctor's assessment may assist in determining capacity, ultimately it is a legal test, and *it is the lawyer who must make the decision whether the client has capacity.*

[155] Where the capacity of an individual to retain and instruct counsel is at issue, the person alleging incapacity bears the onus of proving that the individual fails to meet the test of capacity to retain and instruct legal counsel. (See British Columbia Law Institute, Report on Common-Law Tests of Capacity, BCLI Report No. 73, September 2013, p. 162.)

[156] The *Patients Property Act* does not include language that recognizes the right of patients to be represented in contested committeeship applications and to express their views as to who should be a committee. However, courts regularly recognize that the adult's wishes should be presented to the court for consideration.

[157] The uncontroverted evidence of Ms. Horton was that she informed herself of her obligations, carried them out and determined that JS had the legal capacity to instruct her about legal issues pertaining to JS's personal property and, eventually, to the issues related to the appointment of a committee. It was not for the Respondent to reject Ms. Horton's determination.

[158] At the very least, the Respondent should have given Ms. Horton the benefit of the doubt to the extent that he provide her with the Petition and supporting materials for the committeeship application and to satisfy himself that Ms. Horton was clearly aware of the date of the hearing of the Petition.

[159] It is important to remember this exchange between the Court and the Respondent at the conclusion of the hearing of December 8, 2016:

> Mr. McLeod: You said that the patient should be served personally for very good reasons, so it's not filtered through Jacqueline Horton. I want direction on whether I should also serve Jacqueline Horton or leave it so the filter doesn't exist, and then should it be the standard 10 days?
>
> The Court: It's a professional courtesy; you can choose to – I'm not directing that service be on Ms. Horton. But yes, you can bring it back in the usual notice period after service on the patient.

[160] The Respondent could not have had a clearer indication of his professional responsibilities than that. He chose to ignore it.

[161] It is the finding of this Panel that the Respondent obtained the Committeeship Order in relation to JS without providing notice of the application hearing to her counsel when he knew, or ought to have known, that she was represented by counsel who intended to participate in the application. By doing so, he failed to conduct himself in a manner characterized by courtesy and good faith, contrary to rules 2.1-4(a) and 7.2-1 of the *BC Code.*

Sharp practice

[162] The Law Society has the onus to establish, on the balance of probabilities, that the Respondent engaged in sharp practice within the meaning of rules 2.1-4(c) and 7.2-2 of the *BC Code.*

[163] The Law Society relies on the same allegations of the Respondent's conduct regarding the duty of courtesy and good faith in alleging that the Respondent engaged in sharp practice.

[164] While the Panel did not have the advantage of hearing from the Respondent directly, the content of his written communications with Ms. Horton offer an unpleasantly clear expression of his views, and his conduct in relation to Ms. Horton. Nevertheless, the focus of the Citation is on his alleged failure to give Ms. Horton notice of the committeeship application and not on the tenor of his treatment of her in the months preceding the application.

[165] Given that we have no evidence from the Respondent, the Panel is left with the need to review the documentary evidence objectively to determine whether the Law Society has met its onus of proving that the Respondent engaged in sharp practice. A review of the Respondent's correspondence suggests that the Respondent was of the view that JS did not have the capacity to retain and instruct counsel. The thread running through *Taschuk*, *Jeffery* and *Roberts* is that a finding of sharp practice is dependent upon a panel concluding that there was a deliberate element to the conduct. By this we mean that the conduct was intentionally designed.

[166] In this proceeding, the Panel has no direct evidence that the Respondent did not honestly believe that his understanding of the law related to what evidence was required to establish capacity to retain and instruct counsel, was correct. Objectively viewed and considering the legal authorities cited to us by the Respondent, we cannot conclude that this view was the result of deliberate attempt to circumvent JS's counsel. Rather, we find that the sharp practice test is not met when counsel, even when he is acting with a lack of civility, courtesy and good faith, does so based upon a misplaced and erroneous reliance on inapplicable legal authorities. In this circumstance, the requisite intentional element of sharp practice is not present.

[167] JS's reaction to her daughter's removal of her personal property from her residence and the evolving medical opinions of JS's mental capacity to make decisions concerning her person and property that were offered later, placed both the Respondent and Ms. Horton in difficult positions. The Respondent appears to have been under pressure to move quickly to obtain an order that placed control of JS and her property in the hands of her children. Ms. Horton was faced with the need for her to make a personal assessment as legal counsel as to what kind of instructions she could accept from JS. Medical opinions were used by the Respondent to supplant the obligation of Ms. Horton to determine whether she could accept instructions from JS. The involvement of the PGT complicated the

situation further. The Christmas season of 2016 interrupted the work and enquiries that both counsel needed to carry out.

[168] The Respondent ought to have worked with Ms. Horton to have the interests of all parties canvassed before the Court. The Respondent should have taken a far less adversarial approach in his dealings with Ms. Horton. He should have shown her the professional courtesy of providing her with pleadings and materials that were already a matter of public record. He should have satisfied himself that Ms. Horton was aware of the hearing date of the committeeship application. All of these factors have been considered in the earlier discussion about the Respondent's failure to deal with Ms. Horton with courtesy and good faith.

[169] Nevertheless, the Respondent had an erroneous belief that Ms. Horton had no legal right to appear, and he did serve the committeeship application materials upon JS as directed by the Court. He was advised by Ms. Horton that she was aware of the service of the materials upon her client. She did not ask the Respondent directly as to when he expected to have the Petition heard.

[170] The Respondent and Ms. Horton exchanged written communications in the days immediately prior to the application heard on January 12, 2017. While he ignored Ms. Horton's request to confirm in writing that he would not proceed with the hearing of the Petition without notice to her, the Respondent had made it clear that he did not consider Ms. Horton capable of acting as counsel and, in any event, he would expect her to file a Response in order to be treated as such.

[171] The Panel cannot, on a balance of probabilities, conclude that the Respondent intentionally took advantage of an opposing colleague who had made a slip, mistake or who had overlooked some technical matter. His conduct and communications make it clear that his instructions from his clients were to proceed with the hearing of the Petition "as it suits them" and he was acting under an erroneous view of the law concerning Ms. Horton's role in the proceeding.

[172] Were the Law Society not burdened by the onus of establishing on the balance of probabilities that the Respondent had acted in violation of rules 2.1-4 and 7.2-2, the Panel may well have found that the Respondent's failure, in all of the circumstances, to ensure that Ms. Horton was aware of the hearing date for the Petition, constituted sharp practice. Nevertheless, in this circumstance and given an objective view of the evidence, we find that the Law Society has failed to meet its burden with respect to the allegation of sharp practice, contrary to rules 2.1-4(c) and 7.2-2 of the *BC Code*. .

SUMMARY

[173] In summary, we find that:

1. Between September 2016 and January 2017, in the course of acting for his clients PF and WF, the Respondent obtained a committeeship order in relation to JS without providing notice of the committeeship application hearing to JS's counsel, when he knew or ought to have known that JS was represented by counsel who intended to participate in the application. By doing so, he failed to conduct himself in a manner characterized by courtesy and good faith, contrary to rules 2.1-4(a) and 7.2-1 of the *BC Code*, and this conduct constitutes professional misconduct pursuant to s. 38(4) of the *Act*; and

2. This same conduct does not constitute sharp practice, contrary to rules 2.1-4(c) and 7.2-2 of the *BC Code*.