2020 LSBC 36
Decision issued: July 14, 2020
Citation issued: April 17, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

NATHAN SUTHA GANAPATHI

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	November 21 and 22, 2019
Panel:	Michelle D. Stanford, QC, Chair Donald Amos, Public representative John D. Waddell, QC, Lawyer
Discipline Counsel:	Peter Senkpiel and Julia Lockhart
Counsel for the Respondent:	Henry C. Wood, QC

BACKGROUND

[1] On April 17, 2018, the Law Society of British Columbia issued a Citation against Nathan Sutha Ganapathi (the "Respondent") alleging the following misconduct:

> 1. In approximately September 2016, in the course of representing your clients in a proceeding against the Director of Child, Family and Community Services (the "Director") in the Supreme Court of British Columbia, Docket [number], Vancouver Registry, you attempted to resolve litigation in favour of your clients through improper means by doing one or more of the following:
>
>> (a) permitting to be sent on behalf of your clients, in an attempt to obtain a benefit for your clients, a settlement offer made in a letter dated September 5, 2016 from counsel for your clients' co-

petitioners to counsel for the Director, in which counsel for the co-petitioners threatened to expose alleged perjury by representatives of the Director in related proceedings unless the Director agreed to settle the litigation as your clients proposed; and

(b) through the threat described in the preceding sub-paragraph, attempting to influence the Director to exercise her statutory decision-making authority for an improper purpose.

[2] It is alleged that the conduct underlying the stipulated allegations constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[3] The Respondent admitted service of the Citation. The parties filed a joint Notice to Admit (the "NTA") containing 22 tabs entered as Exhibit 2 in these proceedings.

STATEMENT OF FACTS

[4] The agreed facts are set out as follows.

[5] On or about May 2016, the Respondent was retained by JS and AS (together, the "Birth Parents"). The Birth Parents are the biological parents of SS, a girl born on October 21, 2013.

[6] A few days after SS was born, the Director of Child, Family and Community Services (the "Director") placed SS in the care of LM and RB (together, the "Foster Parents"), pursuant to the *Child, Family and Community Service Act*, RSBC 1996, c. 46.

[7] Shortly after SS was placed with them, the Foster Parents decided that they wished to adopt her. The Birth Parents were in favour of the adoption of SS by the Foster Parents.

[8] The Director would not consent to the adoption, taking the position that it was in the best interests of SS to be placed with parents in Ontario (the "Ontario Adults") who were already the adoptive parents of two older siblings of SS.

[9] The Foster Parents retained counsel, JH. From the fall of 2015 to March 2016, JH embarked on a series of protracted Supreme Court applications, including *Charter* claims ("Petitions No. 1 and No. 2") in an effort to secure the adoption of SS.

[10] Both petitions were either dismissed or struck in their entirety. JH appealed both decisions.

[11] The Respondent was retained by the Birth Parents on or about May 2016.

[12] A team, or "Team M", was created and included the Respondent, JH, the Foster Parents, the Birth Parents and Dr. M. It was Dr. M, who was the father of LM, one of the Foster Parents, who paid the Respondent's accounts.

[13] In addition to his clients, the Respondent provided legal advice to the Foster Parents and Dr. M, with the consent of JH, and admitted in evidence that the lines were "blurry" with respect to his clients and JH's clients.

[14] On May 30, 2016, the Respondent, on behalf of the Birth Parents, filed a third petition ("Petition No. 3") against the Director, seeking to overturn all of the steps taken to remove SS from the care and custody of the Birth Parents, with a view to enabling the Birth Parents to decide to place SS with the Foster Parents for adoption.

[15] On June 15, 2016, the appeals from Petitions No. 1 and 2 were heard by a five judge division, and judgment was reserved.

[16] On August 12, 2016, the Respondent and JH, on behalf of the Foster Parents, the Birth Parents and the BC Metis Federation, filed a petition ("Petition No. 4") against the Director seeking a declaration that SS had already been adopted by the Foster Parents by way of a Metis custom adoption.

[17] The Director applied to strike out Petitions No. 3 and 4 as abuses of process.

The audio recording

[18] On May 3, 2016, the Director arranged for SS to participate in a video conference with her sisters and the Ontario Adults (the "Video Conference"). The Foster Parents were not permitted to attend the Video Conference. SS was accompanied by various social workers.

[19] Unbeknownst to the social workers who participated in the Video Conference, an audio recording was made of the Video Conference.

[20] On or about August 6, 2016, the Respondent was advised by JH that an audio recording of the Video Conference had been made.

[21] On September 1, 2016, the Respondent received, attached to an email from JH, an audio recording of the Video Conference, as well as an unofficial transcript of the same audio recording attached to an email from BW, JH's legal assistant.

[22] The Respondent formed the view that the audio recording contradicted sworn evidence of three social workers who had participated in the Video Conference.

The letter

[23] On September 5, 2016, at about 1:06 pm, JH sent the Respondent an email attaching a draft letter to counsel for the Director (the "1:06 pm Draft"). The parties disagree as to whether the draft form of this letter was attached to this particular email, but the Respondent agrees that he received and read an email from JH that contained the 1:06 pm Draft on September 5, 2016.

[24] In the 1:06 pm Draft, JH wrote:

> Given the foregoing evidence of perjury by at least 2 social workers, the Director is acting in bad faith. This is critical information which should be made available to Madam Justice Dickson, the panel hearing the appeal, and every subsequent Justice hearing any further matter in these and all related proceedings.
>
> I have instructions from my clients and counsel for the birth parents that if the Director is prepared to consent to my clients adopting SS **by 4:00 p.m. this Thursday, September 8, 2016**, they and the birth parents are prepared to discontinue all legal proceedings, with the exception, of course, of the finalization of the adoption, and will enter into comprehensive releases involving all of the parties with respect to any and all possible legal outstanding matters including claims for costs.
>
> Please review the foregoing and advise by no later than 4:00 p.m. Thursday, September 8, 2016. Please note that notwithstanding that this letter is written on a without prejudice basis we reserve the right to be able to use this letter at a later date to claim costs against the Director, in the event that there is no settlement and it is deemed necessary by us.
>
> [emphasis in the original]

[25] Following his review of the email and the 1:06 pm Draft, the Respondent spoke by telephone with JH on September 5, 2016.

[26] At about 7:15 pm on September 5, 2016, the Respondent received a second email from JH attaching a revised draft letter to counsel for the Director (the "7:15 pm Draft").

[27] Neither the Respondent nor JH are clear on the number and the nature of communications that occurred between them on September 5, 2016 and whether they occurred between the 1:06 pm Draft and the 7:15 pm Draft. However, it is agreed that the Respondent did not specifically object to the 1:06 pm Draft, which included the reference to JH having received instructions from "counsel for the birth parents." In fact, the Respondent had indicated in an email that it should be mentioned.

[28] At 7:15 pm, JH emailed the following draft (the "7:15 pm Draft"):

> Given the foregoing evidence of perjury by at least 2 social workers, the Director is acting in bad faith. This is critical information which should be made available to Madam Justice Dickson, the panel hearing the appeal, and every subsequent Justice hearing any further matter in these and all related proceedings.
>
> I have instructions from my clients, counsel for the birth parents and the President of the BC Metis Federation, that if the Director is prepared to consent to my clients adopting SS **by 10:00 a.m. this Wednesday, September 7, 2016**, my clients, the birth parents, and the BC Metis Federation are prepared to discontinue all legal proceedings, with the exception, of course, of the finalization of the adoption, and will enter into comprehensive releases involving all of the parties with respect to any and all possible legal outstanding matters.
>
> Please review the foregoing and advise by no later than 10:00 a.m. Wednesday, September 7, 2016. Please note that notwithstanding that this letter is written on a without prejudice basis we reserve the right to be able to use this letter at a later date to claim costs against the Director, in the event that there is no settlement and it is deemed necessary by us.
>
> [emphasis in the original]

[29] It is agreed that the Respondent received and read the above email and the 7:15 pm Draft on September 5, 2016.

[30] At 7:22 pm on September 5, 2016, the Respondent, the Foster Parents and Dr. M received a further email from JH. The email attached the following draft letter to counsel for the Director (the "7:22 pm Draft"):

> Given the foregoing evidence of perjury by at least 2 social workers, the Director is acting in bad faith. This is critical information which should be

> made available to Madam Justice Dickson, the panel hearing the appeal, and every subsequent Justice hearing any further matter in these and all related proceedings.
>
> I have instructions from my clients, counsel for the birth parents, and the President of the BC Metis Federation, that if the Director is prepared to consent to my clients adopting SS **by 10:00 a.m. this Wednesday, September 7, 2016**, my clients, the birth parents and the BC Metis Federation are prepared to discontinue all legal proceedings, with the exception, of course, of the finalization of the adoption, and will enter into comprehensive releases involving all of the parties with respect to any and all possible legal outstanding matters.
>
> Please review the foregoing and advise by no later than 10:00 a.m. Wednesday, September 7, 2016. Please note that notwithstanding that this letter is written on a without prejudice basis we reserve the right to be able to use this letter at a later date to claim costs against the Director, in the event that there is no settlement and it is deemed necessary by us.
>
> [emphasis in the original]

[31] In the email attaching the 7:22 pm Draft, JH wrote: "Nathan has approved."

[32] At approximately 8:04 pm on September 5, 2016, JH sent an email to counsel for the Director, copying the Respondent, attaching a letter (the "Letter").

[33] In the Letter, JH wrote:

> Given the foregoing evidence of perjury by 3 social workers, the Director is certainly acting in bad faith. This is critical information which should be made available to Madam Justice Dickson, the panel hearing the appeal, and every subsequent Justice hearing any further matter in these and all related proceedings. Should the contested litigation continue, appropriate sanctions may be appropriate against the 3 social workers and the Director.
>
> I have instructions from my clients, counsel for the birth parents, and the President of the BC Metis Federation, that if the Director is prepared to consent to my clients adopting SS **by 10:00 a.m. this Wednesday, September 7, 2016**, my clients, the birth parents, and the BC Metis Federation are prepared to discontinue all legal proceedings, with the exception, of course, of the finalization of the adoption, and will enter into

> comprehensive releases involving all of the parties with respect to any and all possible legal outstanding matters.
>
> Please review the foregoing and advise by no later than 10:00 a.m. Wednesday, September 7, 2016. Please note that notwithstanding that this letter is written on a without prejudice basis we reserve the right to be able to use this letter at a later date to claim costs against the Director, in the event that there is no settlement and it is deemed necessary by us.
>
> [emphasis in the original]

[34] It is agreed that, following receipt of the Letter, the Respondent never communicated to any party that he had not approved the contents of the Letter.

[35] The settlement offer contained in the Letter was declined by counsel for the Director.

Outcome of the proceedings after the Letter

[36] On September 13, 2016, the Court of Appeal dismissed the appeal arising from Petitions No. 1 and 2.

[37] On September 28, 2016, Fisher J. struck Petitions No. 3 and 4 as abuses of process.

[38] On December 21, 2016, the Director applied for special costs against the Respondent and JH personally, arising from Petitions No. 3 and 4 and the Letter.

[39] On July 10, 2017, Fisher J. ordered that the Respondent and JH pay special costs of Petition No. 4. Fisher J. allocated 75 per cent of the costs to JH and 25 per cent to the Respondent.

Law Society investigation

[40] On July 17, 2017, the Respondent reported to the Law Society concerning the issues arising from the reasons of Fisher J. regarding special costs.

[41] The Law Society followed up with an investigation and on December 20, 2017, the Respondent was interviewed by a Law Society staff lawyer in which the Respondent stated the following:

> JF: . . . When you're referring to L, that's -- were you referring to LM?
>
> NSG: Yes

JF: The -- and she's the foster mother?

NSG: Yes.

JF: And she was JH's client?

NSG: Yes and no. At some stage the line became very blurry.

JF: Well, that's the thing I wanted to understand, is -- I've seen a number of emails back and forth and phone messages, et cetera, in which it appears that JH is talking directly to your clients or you're talking directly to his clients, that in effect you are -- although notionally you're representing them independently, as you say the lines were blurred. It was kind of a group --

NSG: Yes.

JF: -- effort? Okay.

THE LAW

Onus and standard of proof

[42] 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.

The test for professional misconduct

[43] The test for what constitutes professional misconduct is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members": *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171.

[44] In *Law Society of BC v. Harding*, 2014 LSBC 52, (*Harding* hearing) the panel referred to *Martin* and added the following at paras. 76 to 79:

> In our view, given all the cases and the guiding principles from *Stevens v. Law Society (Upper Canada)* (1979), 55 OR (2d) 405 (Div. Ct.), and the marked departure test from *Martin*, there must be culpability in the sense that the lawyer must be responsible for the conduct that is the marked departure. The words "marked departure" are where one finds the

requirement that the nature of the conduct must be aggravated or, to use the words of *Stevens*, outside the permissible bounds.

As *Stevens* and *Re: Lawyer 12* (both the single-bencher (2011 LSBC 11) and the review decision (2011 LSBC 35)) make clear the panel must look at all of the circumstances. In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel set out the following factors to consider in determining whether given conduct rises to the level of professional misconduct:

(a) the gravity of the misconduct;

(b) the duration of the misconduct;

(c) the number of breaches;

(d) the presence or absence of *mala fides*; and

(e) the harm caused.

The requirement that all the circumstances be considered and the factors set out in *Lyons* preclude an assertion that particular factors are determinative or trump factors.

Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds.

[45] While the presence of *bona fides* will not excuse conduct that is otherwise professional misconduct, advertence or *mala fides* is not required to prove professional misconduct.

[46] The review panel in *Law Society of BC v. Foo*, 2015 LSBC 34, dealt with a factual situation in which the applicant, who normally represented parents of children who

had been apprehended by the Ministry of Children and Family Development, saw a Ministry social worker, AM, whom he had never met, in a hallway of the Quesnel courthouse and asked "Are you 'AM' … the social worker?" The social worker answered "maybe – who's asking?" The applicant then said "I should shoot you … you take away too many kids."

[47] The review panel found that the respondent did not have to intend that the statement be interpreted as a threat to prove professional misconduct, and said at paras. 16 and 17:

> [It is the Review Panel's decision that the hearing panel did not err on the issue of the comment being a threat and merely joke. Although "I should shoot you …. You take away too many kids" was not meant as a threat, in AM's interview with the Law Society, (admitted as evidence at the hearing on Fact and Determination) AM admitted taking Mr. Foo's comments as a threat, although she did not believe the Applicant would act on that threat. Said the panel:
>
> > Even if the Respondent did not intend to intimidate or threaten AM with his comments, the Panel finds that he was irresponsible and did not adequately consider the impact that his words (specifically, that he "should shoot" her and that she "takes away too many kids") would have in this emotionally charged situation where parents are in conflict with the Ministry and where others outside the courtroom would overhear his comments.
>
> We agree with the position of the Law Society, namely, that it is not necessary to prove that the words were intended to be threatening in order to prove professional misconduct.

[48] The review board in *Law Society of BC v Harding*, 2015 LSBC 45, added further support to this position at paras. 39 to 45:

> It is this Review Board's view that the hearing panel erred by reasoning that, since the crowbar comment was not a threat, its utterance was therefore not professional misconduct. One further step in the analysis was required. The words of the review panel in *Berge*, 2007 LSBC 07, are apt here:
>
> > [37] The Benchers specifically reject the Applicant's submission that only conduct that is criminal or overtly dishonest should

> warrant investigation as conduct unbecoming and potential sanction.
>
> [38] … Conduct unbecoming not only includes the obvious examples of criminal conduct and dishonesty, but it also includes "any act of any member that will seriously compromise the body of the profession in the public estimation." See *Hands v. Law Society of Upper Canada* (1889), 16 OR 625.

There is no misconduct in calling for the assistance of the police to deal with a dispute. However, the reason given to the police in order to encourage them to attend is another matter.

In *Law Society of BC v. Foo*, 2013 LSBC 26, at paragraph 49 the hearing panel held:

> Even *if the Respondent did not intend to intimidate or threaten* AM with his comments, the Panel finds that he was irresponsible and did not adequately consider the impact that his words (specifically, that he "should shoot" her and that she "takes away too many kids") would have in this emotionally charged situation where parents are in conflict with the Ministry and where others outside the courtroom would overhear his comments.
>
> [emphasis added (by *Harding* review board)]

The hearing panel should have asked: accepting the Respondent's explanation, and even if this comment was not intended as a threat, in the context in which these words were said was it *a marked departure from that conduct the Law Society expects of its members*?

[emphasis in original]

It is arguable that the hearing panel did implicitly make the above analysis. If so, this Review Board disagrees with their conclusion that this conduct, in context, is not professional misconduct.

As in *Foo* the words said by the Respondent were found by the hearing panel to be irresponsible. Unlike *Foo,* where the hearing panel in that decision found that Foo "*did not adequately consider the impact of his words*," the Respondent knew full well what the impact of his words would be – it would cause the police to attend when they otherwise may not have, or may have come at a later time. This is the problem with the

> Respondent's comment and the intention behind those words: one cannot say whatever one likes in order to motivate, or manipulate, a person or entity, such as a peace officer, to do something they may not have otherwise done. You cannot yell "fire" in a crowded theatre when there is no fire.
>
> [emphasis added (by *Harding* review board)]
>
> The Respondent knew full well that raising the possibility of violence, even if he did not actually intend any violence, would cause the police to attend. This is wrong, and it is difficult to see how this is not professional misconduct. A lawyer not getting his way and then behaving in a manner that is described as "aggressive and rude" and "aggressive and condescending," in and of itself, may or may not "cross the line." However, if in addition to that the lawyer then escalates the situation by raising the spectre of violence by saying something (the "crowbar" comment) that is "ill-considered," "ill-advised" and "should not have been made" with the intent of causing the police to attend, this is "a marked departure from that conduct the Law Society expects of its members."

[49] Two provisions of the *Code of Professional Conduct for British Columbia* (the "*BC Code*") are relevant to this Citation. The first is rule 3.2-5 of the *BC Code***:**

> Threatening criminal or regulatory proceedings
>
> **3.2-5** A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:
>
> (a) to initiate or proceed with a criminal or quasi-criminal charge; or
>
> (b) to make a complaint to a regulatory authority.

[50] Commentary 1 to that rule indicates that:

> It is an abuse of the court or regulatory authority's process to threaten to make or advance a complaint in order to secure the satisfaction of a private grievance. …

[51] The second relevant *BC Code* provision is rule 2.1-5(d) under the Canons of Legal Ethics and duty to clients:

> (d) No client is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the state or disrespect for

> judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.

POSITIONS OF THE PARTIES

The Law Society

[52] In its closing submissions, counsel for the Law Society poses this question:

> To what extent was the Respondent involved in the "preparation and sending of the Letter" and does his involvement constitute professional misconduct?

[53] Counsel for the Law Society argues that the Respondent was a willing participant in the decision-making related to the Letter that was threatening in tone, that he permitted the Letter to be sent that included his instructions on behalf of his clients, the Birth Parents, and that he sought a settlement that would benefit the Birth Parents and his effective clients, the Foster Parents.

[54] The Law Society asserts that, at all material times, the Respondent understood what perjury, blackmail and extortion were and that they were contrary to the *Criminal Code.*

[55] The Law Society relies in part on the Respondent's evidence during the Law Society investigation and interview in which the Respondent indicated the following at tab 21, exhibit 2 of the NTA:

> Q: Okay. A bit indelicate, but I do have to press a bit on this point and say the concern – I'm going to suggest there'd be two obvious concerns. One is I think you're undoubtedly familiar with the provision in the *BC Code* of Conduct that suggests it's improper for a lawyer to threaten criminal or regulatory proceedings in an attempt to gain an advantage for their client.
>
> A: Yes.
>
> Q: And did you understand that letter to be inconsistent with that?
>
> A: Yes …
>
> Q: Okay. Well, that's – there's a second -- I mean arguably that letter constitutes a breach of section 342 [sic] of the *Criminal Code*. I mean it could be considered as an extortion attempt?

A: Yes.

[56] The Law Society submits that the Respondent exerted influence on the content of one of the drafts of the Letter to omit reference to the audio recording based on his concerns arising out of legal advice he received.

[57] The Law Society also relies on the Respondent's admission that, upon reading the draft emails of the intended letter on September 5, 2016, the Respondent and JH discussed the Respondent's concerns about using the audio recording as leverage in the adoption negotiations. While the Respondent was concerned it was "blackmail" and unacceptable, JH explained it was more truly "whitemail" and therefore acceptable. The Law Society argues that the Respondent accepted JH's explanation and ultimately acquiesced with the strategy to send such a letter to the Director.

[58] Additionally, the Law Society asserts that, even though the Respondent sought legal advice regarding the use of the audio recording as leverage for negotiations with the Director and was advised of its potential criminality, he failed to heed the advice to "stay away" from any strategy for such use of the Letter.

[59] And finally, counsel for the Law Society relies on the Respondent's evidence at the hearing that, while he found the first emailed draft "freakish," containing "veiled threats" and "tantamount to blackmail," the Respondent neither expressly objected to the Letter being sent nor distanced himself from the contents of the Letter once it was sent, allegedly, without his authorization.

[60] Counsel for the Law Society concludes from all of the above that the Respondent was participating as part of Team M in a collective strategy to leverage a settlement with the Director.

[61] In the end, counsel for the Law Society submits that the Respondent had a professional obligation not to participate in any attempt to "whitemail" or "blackmail" the Director to effect a settlement in his clients' favour, whether his clients instructed him to do so or not and whether or not he actively participated in the drafting and sending of the Letter.

[62] Counsel asserts that the Law Society's expectation is that, when a lawyer is confronted with a strategy that raises the spectre of blackmail or extortion, the lawyer's obligation is to do more than "express concerns" or simply acquiesce to the wishes of clients or other interested parties. Action or inaction under these circumstances is a marked departure and therefore meets the threshold of professional misconduct.

The Respondent

[63] The Respondent maintains that he opposed the strategy of sending a letter to the Director, preferring instead to cross-examine the social workers. Secondly, he objected to the threatening tenor of the Letter and to its reference to the audio recording. When it was clear a letter would be sent against his better judgment, he anticipated seeing a final draft of any letter before it was sent to the Director. While he reviewed early drafts of the Letter, and was successful in having the reference to the audio recording removed, he did not see the final draft that contained the threat of "sanctions."

[64] Counsel for the Respondent argues that the Respondent maintained two fundamental concerns to the end:

(i) the risk of criminal prosecution flowing from the disclosure of an unlawful covert recording; and

(ii) the notion that the proposed content could be viewed as blackmail.

[65] Counsel for the Respondent argues there was an abundance of evidence through various discussions and communications with Team M of the Respondent's grave concerns regarding the Letter that would have left no doubt about his opposition to the Letter being sent.

[66] Further, counsel for the Respondent asserts that the Respondent did not see the final draft of the Letter before it was sent and that it would be inconsistent if he had supported it, given that the addition of the words "appropriate sanctions" only served to exacerbate his concerns regarding the perception of blackmail.

[67] Additionally, the Respondent acknowledges that, whether he read the Letter at the time it was delivered, or the next day, he viewed it as a "*fait accompli*." Therefore, notwithstanding his opposition, he knew the perception of the recipients of the Letter would be that it had been sent with his approval.

[68] Following his receipt of the final draft of the Letter by email, counsel for the Respondent argues that the Respondent was faced, on a number of levels, with a "perplexing dilemma" that essentially paralyzed him. As a consequence, he chose to do and say nothing to dissociate himself from the Letter, either through further comments to Team M, or by reporting his situation to the Law Society. Nevertheless, counsel argues that the Citation does not accuse the Respondent with "failing to dissociate himself from the Letter after it was sent."

[69] Counsel for the Respondent argues that the use of the word "permitting" is undefined, vague and essentially overly broad as it can include "… express consent or authorization to the more expansive acquiescence through inaction or silence."

[70] Counsel for the Respondent submits that any ambiguity on these points should be decided in favour of the Respondent.

ANALYSIS

[71] To begin, any analysis of the Respondent's involvement in the events leading up to the sending of the Letter to the Director must focus on the identification of the Respondent's true clients.

Who did the Respondent represent?

[72] While the Respondent was in communication with at least the birth mother shortly after he became involved as counsel for the Birth Parents, the Respondent testified at the Hearing that he had not been in direct communication with either Birth Parent for the five months prior to and immediately surrounding the issuance of the Letter on September 5, 2016,.

[73] Accordingly, the Respondent conceded that he did not have any instructions about the Letter from the Birth Parents and that his bills were being paid by the Foster Parents or LM's father.

[74] The Respondent candidly admitted that he acted and was viewed as "co-counsel" with JH. As such, he provided legal advice to the Foster Parents, and he testified that the pursuit of adoption of SS by the Foster Parents was a "group effort."

[75] Counsel for the Respondent submitted that the Respondent was "… part of a coordinated team effort …" that "… included direct communications with the Foster Parents (with JH's consent)."

[76] Accordingly, based on this evidence, the Panel has no difficulty in finding that during the exchange of views and communications between the Respondent, JH and other members of Team M, the Respondent was acting as co-counsel (either informally or formally) for the Birth Parents, the Foster Parents and LM's father.

The Respondent's level of participation in the drafting of the Letter

[77] Having determined that the Respondent was co-counsel in relation to the Foster Parents' attempts to adopt SS, the Panel must consider the Respondent's level of

participation in the discussions on what to do with the false affidavit of the social worker.

[78] The Panel accepts the Respondent's evidence at the Hearing that it was JH's idea to send a letter.

[79] The Panel accepts further that the Respondent had concerns from the outset about the use of the audio recording and reference to it in any communications with the Director, and that he preferred the option of cross-examining the social workers. Nevertheless, he failed to convince the other members of Team M to pursue that strategy.

[80] It is of note that, on September 1, 2016, four days before the drafting of the Letter, the Respondent obtained legal advice from a friend and colleague who specialized in criminal law and who advised that:

(a) criminal charges for the creation of the recording contrary to section 183 of the *Criminal Code* were less likely if the Crown did not have access to the actual tape recording;

(b) using the social workers' perjury/tape recording as "leverage to effect a settlement" would constitute blackmail / extortion; and

(c) the Respondent should "stay away from the situation," meaning from any such "leverage" attempt.

[81] On the point of the advice to "stay away," the Respondent called lawyer JM who testified that that was part of his advice to the Respondent. The Respondent had no specific recollection of those words but agreed they were "probably" said. The Panel finds the Respondent was cautioned by JM to distance himself from any attempt to leverage a settlement.

[82] Accordingly, notwithstanding his concerns and the legal advice to "stay away from the situation," the Respondent continued to be engaged in drafts of the Letter on September 5, 2016. To that end, in his reply to the NTA, the Respondent acknowledges that he anticipated reaching an agreement on the Letter and that it would be appropriate to refer to the Respondent's instructions on behalf of his clients within that letter.

[83] There was much argument regarding a teleconference on speaker phone related to one of the drafts of the Letter between the members of Team M and the Respondent. Counsel for the Law Society argued this call did not take place.

Counsel for the Respondent argued that it did and called the Respondent's assistant, AK, to testify to that effect.

[84] While AK was very earnest in her evidence; she did not shed any reliable evidence for the Panel to determine conclusively whether or not a call had indeed taken place at the critical time, nor to the content of the discussion.

[85] AK testified that the Respondent was diligent about recording time sheets; however, the Respondent did not produce a time sheet to support this particular call, while others surrounding the discussion of the content of the Letter were produced.

[86] At best, AK corroborated she overheard the Respondent expressing concern about potential criminal prosecution, the Letter being perceived as blackmail and his desire to cross-examine the social workers.

[87] Counsel for the Law Society submits, and the Panel agrees, that the more likely scenario is that the Respondent was engaged in calls with members of Team M and JH between 5:00 pm and 7:00 pm on September 5, 2016. Counsel goes further to suggest that, during one of those calls between JH and the Respondent, the Respondent gave his approval to Team M's plans as reflected in JH's email to the group at 7:22 pm with the words "Nathan approves."

[88] Accordingly, the Panel finds that the Respondent was a clear participant in the discussions on the strategy of how to leverage Team M's position using the false affidavit for the following reasons:

(a) he was included in all emails as a member of Team M;

(b) he recommended cross-examining the social workers due to concerns about blackmail arising from legal advice he received;

(c) his suggestion was rejected by Team M in favour of sending a letter;

(d) he then turned to participating by editing the letter to mitigate the risk it imposed;

(e) he reviewed all drafts, including the final draft, but did not express his objection to it being sent before or after the Letter was sent; and

(f) notwithstanding the serious cautions he received through legal advice to "stay away from the situation," the Respondent made a clear decision not to heed such advice and remained an active member of Team M.

Did the Respondent permit the Letter to be sent?

[89] Turning to whether the Respondent "permitted" the final form of the Letter to be sent, the Respondent testified that he did not see the final form of the Letter that was sent to the Director until the morning of September 6, 2016. This assertion was forcefully challenged by counsel for the Law Society.

[90] The Law Society relies on the Respondent's time sheet on September 5, 2020 at 7:48 pm, which refers to a conversation with JH suggesting changes to the Letter that were incorporated from the 7:22 pm Draft into the final 8:04 pm Draft. Counsel for the Law Society suggests that the changes could have included a reference to sanctions.

[91] Counsel for the Respondent denies the Respondent reviewed the last draft with the insertion of the words "appropriate sanctions," and was thus deprived of the opportunity to permit or object to the Letter before it was sent.

[92] In his evidence in chief, the Respondent acknowledged that he essentially gave up efforts to dissuade JH and Team M from sending the Letter. Further, he conceded in evidence that, after many discussions with Team M, particularly on the evening of September 5, 2016, it was "a waste of time to talk to them … they had made up their minds."

[93] The Respondent further admitted in chief that, when he did read the final Letter, he did not raise his concerns to JH, notwithstanding he was "quite disturbed" that it had been sent.

[94] JH testified that the Respondent never gave any indication to him that he should not send the final draft of the Letter, nor did he receive any objection from the Respondent after the Letter was sent.

[95] The Panel was greatly concerned with the Respondent's explanation as to why he did not declare an emphatic opposition to the sending of the Letter, either before or after it was transmitted. He testified that he felt that JH's mind was made up and that there was no longer any point in arguing further. Whether or not he approved of the final form of the Letter containing reference to "sanctions," he was aware that the Letter was going out. His emphatic condemnation of the content of the Letter expressed at the Hearing was not evident in any of his communications or actions in the aftermath of its delivery.

[96] In further communications with JH at 8:43 pm on September 5, 2016 regarding the ordering of transcripts of earlier related court proceedings – after the Letter had

been sent – the Respondent did not express any objections or denials of consent to send the Letter.

[97] Accordingly, the Panel finds that the Respondent made no decisive objection to the sending of the Letter before or after its transmission, nor did he deny permission for it to be sent. As a consequence, he "permitted" the Letter to be sent.

[98] The evidence demonstrates that, while the Respondent initially expressed opposition to the strategy of sending a letter to the Director, when his concerns were disregarded, he admitted it was "a waste of time" to continue to object when he perceived the minds of Team M were made up. The Panel finds that acquiescence in the face of a threat designed to influence a government official (the Director), is a clear marked departure from the conduct that the Law Society expects of lawyers.

Attempt to obtain a benefit

[99] In cross-examination, the Respondent agreed that the Letter would be sent by JH to effect an end and that "end" was a settlement. The Respondent agreed he understood that settlement meant the adoption of SS by the Foster Parents.

[100] The evidence supports, and the Panel finds, that there is no doubt that the tone in the first draft, and the threatening words added in the final form of the Letter, were designed to influence the Director to exercise her statutory decision-making authority to an improper purpose, a clear benefit to his clients.

Conclusion

[101] Counsel for the Respondent vigorously argued that the Respondent's opposition to the Letter being sent remained evident throughout his involvement with Team M. The Panel disagrees. The evidence is clear that the Respondent was aware a letter using threats to effect a settlement would be sent. His complicity, even if passive, is contrary to section 3.2 of the *BC Code*.

[102] At minimum, the first draft of the Letter crossed that threshold. By the Respondent's own evidence, he viewed the first draft as "freakish," containing a "number of veiled threats." Subsequent edits failed to remove the tone and spectre of a threat. The breach was only aggravated by adding the words "appropriate sanctions" to the existing threat of exposing the perjury of the social workers.

[103] Both parties strongly disagreed on the Respondent's failure to distance himself either before or after the sending of the Letter and the reasons why he did not emphatically oppose the drafting or sending of the Letter.

[104] The Panel adopts the submissions of counsel for the Respondent that it is " … his subjective state of mind *prior* to the sending of the letter that is engaged by the citation, not a prescriptive formula for how he ought to have expressed that state of mind to others." [emphasis added]

[105] The Panel finds there was an abundance of documentary and oral evidence from the Respondent that he subjectively understood a threatening letter would be sent. He expressed concern with how it was framed, yet he permitted the Letter to be sent. The Panel finds that the Respondent's informed acquiescence to sending a letter containing a threat of exposing perjury for the benefit of his clients constitutes a marked departure and therefore professional misconduct.

[106] The Law Society imparts a positive obligation on every lawyer to comply with the *BC Code*. Where the *Code* is clearly about to be breached, or has been breached, the lawyer then must withdraw when all else fails, as in these circumstances.

[107] The Respondent confirmed in his evidence that he did not seek instructions from his clients, the Birth Parents, about any aspect of the plan proposed for dealing with the conduct of either the Director's staff, nor the concept of threatening sanctions against those same staff persons. Counsel for the Law Society argued that, in failing to do so, the Respondent impaired the likelihood of the clients' express wishes for the care of their child and exposed them to sanctions themselves. As concerning as this is to the Panel, this conduct is outside of the scope of this Citation, and we are unable to address this issue.

[108] In short, the oral evidence of the witnesses, together with the documentary evidence of emails and telephone time sheets, suggests that the Respondent was deeply embedded in an unusual legal relationship with multiple clients and that both he and JH lost their objectivity.

[109] In summary, the Panel finds that the evidence supports that, in the course of discussions with Team M on what to do with the false affidavit, a proposal to use it as leverage was advanced. Notwithstanding that the Respondent expressed his misgivings at the outset and offered a viable alternative, he essentially was "out voted" by Team M. Instead of withdrawing, he acquiesced and permitted the Letter to be sent to the Director.

[110] The Panel accepts that the evidence supports that the Respondent had the clients' best interests at heart, however misguided. Nevertheless, he did not listen to his own warning flags that he knew he was getting into something nefarious, nor did he heed trusted legal advice to stay away from this business.

[111] As the panel in *Harding* hearing found at para. 79, " … absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm." Taking into consideration the circumstances as a whole, the Panel finds that the impugned conduct does "cross the permissible bounds," as stated in *Harding* hearing at para. 79.

DECISION

[112] Accordingly, after considering all of the evidence, we are satisfied that the Respondent attempted to resolve litigation in favour of his clients through improper means as alleged in the Citation and that such conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

NON-DISCLOSURE ORDER

[113] The exhibits in this proceeding, as well as the transcript, contain the names of the Birth Parents, the Foster Parents and SS These names must be protected under the *Child, Family and Community Service Act*. The Panel grants the Law Society's request for an order under Rule 5-8(2) that:

> if any person, other than a party, seeks to obtain a copy of any exhibit filed or related transcript in these proceedings, the names of the Birth Parents, the Foster Parents and SS, identifying information concerning the Birth Parents, the Foster Parents and SS, and any information protected by solicitor-client privilege, must be redacted from the exhibit before it is disclosed to that person.