2021 LSBC 02
Decision issued: January 12, 2021
Citation issued: November 1, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

THOMAS PAUL HARDING

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	September 1 and 2, 2020
Panel:	Michael F. Welsh, QC, Chair Carol Gibson, Public representative Ardith Walkem, QC, Lawyer Ms. Walkem did not participate in the completion of the panel's written reasons
Discipline Counsel:	J. Kenneth McEwan, QC and Erin Kotz
Counsel for the Respondent:	William G. MacLeod, QC

CITATION AND PROCEDURAL BACKGROUND

[1] This is another in a line of decisions that addresses the question of when a lawyer's duty of advocacy for a client runs afoul of that lawyer's duty to communicate with and about opposing counsel in a courteous, civil and professional manner, and of how those two duties will be reconciled. For, as was stated in the Supreme Court of Canada decision of *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 3:

> A lawyer's duty to act with civility does not exist in a vacuum. Rather it exists in concert with a series of professional obligations that both

> constrain and compel a lawyer's behaviour. Care must be taken to ensure that free expression, resolute advocacy and the right of [the client] to make full answer and defence are not sacrificed at the altar of civility.

[2] The Respondent, Mr. Harding, has been cited as follows:

1. On or about March 1, 2019, in the course of representing a plaintiff in a personal injury matter, you made the following statements about opposing counsel in email correspondence to, or copied to, the ICBC adjuster managing the file, when you knew or ought to have known that the statements were untrue or unfounded and/or when the statements were discourteous or uncivil, contrary to one or more of rules 2.1-4(a), 2.2-1, 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*:

   (a) "[Opposing counsel] agreed to pay my bill of costs as presented. Then he broke his word. … If I cannot rely on [his] word as an officer of the court then I will do my best to make the registrar enforce it."

   (b) "[Opposing counsel] is walking into a buzz saw. Having given his word, he binds ICBC. Breach of his promise is a pretty serious matter."

   (c) "Really? [Opposing counsel's] 'clear recollection' is the reason my firm will not deal with [him] by telephone, or in person except in a courtroom with the DARS running."

   This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[3] No issues were raised before the Panel regarding service of the citation.

[4] The parties applied for an in-person hearing, and that application was granted by the President's Designate, subject to the emergency health conditions at the time of the hearing and the Panel's discretion. The hearing proceeded over two days and was held in-person, utilizing the Law Society's *COVID-19 Safety Guidelines for In-Person Hearing*.

RELEVANT FACTUAL FINDINGS

[5] The bulk of the facts are set out in the parties' Agreed Statement of Facts. With some minor editing they are as follows:

(a) Mr. Harding acted as counsel for the plaintiff MG in a personal injury action commenced on January 8, 2016 against individual defendants who were insured by ICBC.

(b) On October 25, 2018, in the course of settlement discussions, Mr. Harding sent CB, counsel for the defendant, a draft Bill of Costs. The Bill of Costs claimed a sum of $20,533.09, composed of $15,769.60 for tariff items and $4,763.49 for disbursements. Other further disbursements had also been agreed by CB.

(c) By telephone call dated October 26, 2018, Mr. Harding and CB settled the claim.

(d) During this telephone call, Mr. Harding and CB agreed upon the amount of settlement for damages and Part 7 claims for the plaintiff along with the amount of disbursements claimed by the plaintiff in the sum of approximately $7,900.

(e) By email dated October 26, 2018, Mr. Harding confirmed that the action had been settled "for $190,000 NEW MONEY plus costs, with all our disbursements as presented."

(f) By a letter dated October 29, 2018, CB confirmed the amount of settlement and the amount of disbursements agreed upon, and noted:

> Our legal assistant is reviewing the costs portion of the Bill of Costs and we will get instructions from our client and discuss resolution of the costs shortly.

(g) By letter dated November 5, 2018, CB confirmed that the settlement funds had been requisitioned and were in the process of being paid to Mr. Harding's firm in trust. CB then noted:

> We are still in the process of working out the numbers for your Bill of Costs, and we anticipate that should be done shortly.

(h) On November 9, 2018, the plaintiff executed a full and final release of all claims, with Mr. Harding as the witness. The form of release confirmed the settlement amount of $190,000, and expressly noted "***costs & disbursements to be assessed/agreed***".

(i) In an exchange of emails dated November 20, 2018:

(i) Mr. Harding requested that payment of the costs be made by Friday or, alternatively, that CB provide his dates for a taxation.

(ii) CB responded with an offer to settle the costs globally for the sum of $15,000 inclusive of costs and disbursements.

(iii) In response to CB, Mr. Harding requested dates for a taxation during December 2018, noting that CB had previously "agreed in writing to pay our disbursements as presented," but the defendants were proposing to pay costs in a sum worth less than half the plaintiff's "claimed Tariff items."

(j) On November 30, 2018, CB wrote to Mr. Harding to propose settlement of the costs and disbursements at $16,500.

(k) Between November 20, 2018 and March 2019, Mr. Harding and CB and the adjuster at ICBC continued to exchange correspondence, including both letters and emails, regarding the matter of costs.

(l) On December 12, 2018, Registrar Neilson ordered the taxation hearing be scheduled for hearing on March 5, 2019.

(m) On December 19, 2018 the adjuster emailed to Mr. Harding an offer to settle the costs at $17,500.

(n) By an email dated January 2, 2019, Mr. Harding noted "[i]t would be an interesting exercise to subpoena both [the adjuster] and CB to the costs assessment, there to explain ICBC's practice."

(o) On January 7, 2019, CB emailed Mr. Harding an offer, expressed to be final to settle taxable costs and disbursements at $20, 215.

(p) On January 10, 2019, Mr. Harding served a subpoena to witness on CB, with conduct money and a box of chocolates. The subpoena required CB to bring documents related to certain policies of ICBC.

(q) By a letter dated January 15, 2019, CB advised that he was unavailable to testify as a witness on March 5, 2019 as he was scheduled to be in three other matters and that his associate, RM, was handling the matter. CB offered to adjourn the costs hearing or to allow Mr. Harding to attend at CB's law firm offices to do a video deposition of CB on a mutually convenient date.

(r) In a letter dated January 22, 2019, Mr. Harding responded to CB's letter indicating he intended to proceed on March 5, 2019.

(s) In an email dated February 25, 2019, Mr. Harding made a further offer in respect of the costs and advised CB again that he required CB to testify as a witness on March 5, 2019, failing which he would ask for a bench warrant.

(t) By an email dated February 27, 2019, CB delivered a formal offer to settle total costs and disbursements in the sum of $21,907.50, approximately $1,600 less than the amount claimed by the plaintiff.

(u) By email of March 1, 2019 at 1:40 pm the adjuster advised Mr. Harding, with copy to CB that "my experience has been that it is always preferred to find a solution that works for all parties involved rather than an all or nothing approach" and noted that the offer represented a halfway splitting of the difference between the last offers of the parties.

(v) In an email that same day at 1:45 pm, Mr. Harding replied to the adjuster, without a copy to CB, stating:

> ... CB agreed to pay my bill of costs as presented. Then he broke his word.
>
> I believe a promise is "all or nothing". If I cannot rely on CB's word as an officer of the court, then I will do my best to make the Registrar enforce it.

(w) In an email that same day at 1:50 p.m., copied to CB, the adjuster advised Mr. Harding:

> … the emails that I have on file clearly articulate that both L [*a manager at ICBC*] and CB agreed only to your disbursements "as is" with some allowance for cancellation fees, as this was your stipulation for accepting the offer to settle. The costs were not a part of this.

(x) In an email that same day at 2:02 pm, CB advised Mr. Harding "I have a clear recollection of our discussions when we settled this" and CB noted "at no time did I ever agree to pay your costs as presented ... ."

(y) In an email that same day at 2:04 pm, Mr. Harding forwarded to the adjuster, without copying CB, an email thread dated October 25, 2018 between Mr. Harding and CB in which Mr. Harding had sent the

plaintiff's Bill of Costs to CB. In his email to the adjuster Mr. Harding wrote:

> You should read these. I suspect you haven't seen them before.
>
> CB is walking into a buzz saw. Having given his word, he binds ICBC. Breach of his promise is a pretty serious matter.

(z) In an email that same day at 2:08 pm, Mr. Harding responded to CB, with copy to the adjuster:

> Really? Your "clear recollection" is the reason my firm will not deal with you by telephone, or in person except in a courtroom with the DARS running.

(aa) In an email from his client on March 5, 2019 at 9:01 am, Mr. Harding was instructed to accept the offer of settlement of February 25, 2019.

(bb) By an email dated March 5, 2019, at 9:04 am, Mr. Harding advised the adjuster and CB that his client accepted the Offer.

[6] In addition to those agreed facts, the Respondent testified at the hearing. In outlining that testimony, this decision sets out certain quotations from the Respondent that are based on the Panel's notes and are as accurate as possible absent a transcript. The significant portions of his testimony are these.

[7] The settlement occurred on the Thursday before trial was to commence. In accordance with his practice to try to resolve all matters as part of the settlement discussions, the Respondent sent opposing counsel, CB, the draft Bill of Costs before they talked. He testified that in their settlement discussions CB said that the Bill of Costs appeared reasonable, but that ICBC might "quibble about a point or two." The Respondent took this to mean that ICBC might have an issue with a unit or two claimed under Appendix B of the Rules. Each unit is $100, so the Respondent explained that he expected the Bill of Costs might be adjusted by "a couple of hundred dollars." Disbursements were agreed on as claimed, subject to providing a doctor's billing and discovery transcript billing.

[8] When asked in direct examination if his comment to the adjuster, "CB agreed to pay my bill of costs as presented" was correct, he replied that he was speaking to an adjuster and that CB "did not say 'pay as presented' but said they might quibble for point or two, a couple of hundred bucks. Close enough for government work."

[9] Asked about his claim that CB "broke his word," the Respondent affirmed he believed the comment to be correct, saying that CB had indicated that he might take

issue "with a point or two," but then sent a proposal that reduced the Bill of Costs by half. The Respondent said "That is not a point or two."

[10] He went on to say that, "We all as counsel have general vs. specific instructions. Some instructions have exceptions, and at other times you can tell counsel you have no instructions but you can get them. Good clients rely on the judgment of counsel. CB is senior to me, so if he tells me we may quibble about a point or two, I think I can take that to the bank."

[11] Asked in direct examination about his email comment to the adjuster that CB was "walking into a buzz saw," had given his word that bound ICBC and was in breach of his promise, the Respondent said that he did not know if the adjuster had seen the emails from the time of settlement showing that CB had the Bill of Costs three months earlier and had "given his word to pay minus a point or two. His word." He went on to say, "We are one of the few professions where a lawyer's word is part of the code of conduct. I have settled a case for $3 million on the phone. Lawyers can settle on their word, so when a lawyer breaks his word it's a big deal. What else have we got?"

[12] Asked what, if anything, he was thinking about civility when he sent the three emails of March 1, 2019, the Respondent stated that he did not look at each one specifically with a view of being civil. He said he was attempting "to be civil throughout and be clear."

[13] In cross-examination, the Respondent confirmed that, when he got the November 20, 2018, email from CB offering $15,000 in costs, he did not contact CB about their having an agreement to pay the costs minus a unit or two, and instead only emailed CB back reminding him that he had agreed to pay disbursements as presented. He explained that the offer was "quite significantly different" from the point or two he had anticipated.

[14] The Respondent justified not raising the issue of a prior agreement on costs by saying that, "Sometimes the deaf don't hear. Whatever happened on the other side, CB was not prepared to live up to his word. It is not my practice to engage people when they do not keep their word."

[15] Discipline counsel queried whether the Respondent really believed he had an enforceable agreement with CB. The Respondent said that, while a specific number had not been agreed to, he believed he had an agreement "subject to a point or two or three." He asserted "I do not settle cases with costs in the air."

[16] Discipline counsel in cross-examination pointed out to the Respondent that, in his own affidavit prepared for the assessment of the Bill of Costs by the Registrar, he never alleged that there was agreement on costs and in fact reduced the Bill of Costs by eleven units. The Respondent agreed that he did not believe he had an enforceable agreement on costs, only on disbursements.

[17] That affidavit (Exhibit 11) states that the settlement was for "a specified amount of damages expressed as a global number, plus costs and disbursements as agreed or assessed," and that "[d]efence counsel has refused to pay the costs as set out in our Bill of Costs, but refuses to specify any particular Tariff item he refutes," and that "I will not address any disbursements, as he has already agreed to pay those in full."

[18] The March 5, 2019 costs assessment hearing would not have proceeded in any event, as the Respondent had inadvertently failed to file the Notice of Hearing. CB and another lawyer from his office attended the Registrar's office for the hearing and learned this. The Respondent did not attend.

LEGAL TESTS FOR PROFESSIONAL MISCONDUCT AND INCIVILITY

[19] The applicable sections of the *Code of Professional Conduct* cited by the parties are 2.1-4(a), 2.2-1, 7.2-1 and 7.2-4. We set them out in full.

> **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.
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> **2.2-1 Integrity**
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> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> **7.2 Responsibility to lawyers and others**
> **7-2.1 Courtesy and good faith**

> 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.

7.2-4 Communications

> A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

[20] The test for professional misconduct is outlined in *Law Society of BC v. Martin*, 2005 LSBC 16, as conduct that represents "a marked departure from that conduct the Law Society expects of its members" (*Martin* at para. 71). The *Code of Professional Conduct* is a general outline of the conduct that the Law Society expects of lawyers, but as *Martin* states at para. 44: "not every breach of the rules of professional conduct will necessarily amount to professional misconduct," and "not every act of professional misconduct will be specifically prohibited by the rules." Ultimately, our role as a hearing panel is to be "the guardians of the proper standards or professional and ethical conduct and the arbiters of what behaviour constitutes professional misconduct." (*Martin* at paras. 142-143)

[21] The Law Society counsel referred to the decision in *Law Society of BC v. Harding*, 2013 LSBC 25, but in doing so noted that this Panel should take no heed of the fact that a prior decision was rendered about the Respondent on a similar issue. The Panel agrees and emphasizes that our decision is founded solely on the facts of this case and the legal principles applicable to it. The 2013 *Harding* decision is only applicable insofar as it states legal principles that may apply before us.

[22] That decision considered the interplay between *Charter*-protected rights, principally the right of free expression, and the need to comply with the rules to be civil. The panel quoted from *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 at para. 66:

> We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

[23] In light of *Doré*, the panel at para. 80 of the 2013 *Harding* decision framed the test for professional misconduct as:

> The test is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members, *having properly balanced the relevant Charter value with the Law Society's public mandate and objectives*; if so, it is professional misconduct.
>
> [emphasis in original]

[24] The panel further analyzed that balancing act at paras. 98 to 100:

> The Panel recognizes the Respondent's expressive rights and duty to speak his mind freely and independently in representing his client and advancing her case, the public's interest in that *Charter* value, and that proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism that does not go beyond mere rudeness and discourtesy.
>
> It also recognizes that the Law Society's *Canons of Legal Ethics* requiring the Respondent, in his relations with other lawyers, to be candid, fair, courteous, and to refrain from all offensive personalities, may constitute a restriction on those expressive rights.
>
> In this matter, the Respondent was provoked by what he considered to be an improper undertaking imposed by Mr. Jodway. However, it is precisely in such circumstances that a lawyer, who potentially faces pressures on a daily basis, is "called upon to behave with transcendent civility." (See *Doré* at para. 68.)

[25] In reaching a conclusion that a line had been crossed, the panel concluded at para. 103 that the respondent's remarks were "arrogant, unnecessary and excessively abusive, condescending, disrespectful and insulting, and go beyond mere rudeness or discourtesy."

ANALYSIS

[26] The Law Society submits that the gravamen of the alleged infractions of the *Code of Professional Conduct* here is that the Respondent asserted to the ICBC adjuster, to whom CB reported, that CB could not be trusted as he had breached an alleged agreement that was never actually made.

[27] We note as a sidebar that the parties were agreed that there was nothing untoward about Mr. Harding dealing directly with the ICBC adjuster. That practice is common and accepted for plaintiffs' counsel where insurance adjusters are involved.

[28] The Law Society further submits that, as part of a set of negotiation tactics that included subpoenaing CB to the Registrar's hearing under threat of a bench warrant should he not attend, the Respondent attacked CB's integrity to CB's own client in a manner that was uncivil and that impugned CB as a member of the bar.

[29] Relying on *Groia*, the Respondent submits his comments arose from an honestly-held belief that CB had broken an agreement in principle on costs. As is stated in *Groia* at para. 88:

> [I]t is not professional misconduct to challenge opposing counsel's integrity based on a sincerely held but incorrect legal position so long as the challenge has a sufficient factual foundation, such that if the legal position were correct, the challenge would be warranted.

[30] The Respondent submits that the Panel must keep in mind the specific conduct on which it is being asked to adjudicate. The terms of this citation are confined to the contents of the three emails and do not encompass other matters such as the circumstances around the subpoena to CB. The Panel accepts this submission.

[31] If we follow the analysis set out in *Groia* at para. 79, the issue we must decide is whether, in the specific "factual matrix" of this case, the three email comments constitute a "marked departure" from the conduct the Law Society expects of lawyers under the *Martin* standard.

[32] In this case, the factual matrix includes whether there was an agreement on costs as alleged or, alternatively, there was no agreement. If the latter, then we must consider whether the Respondent knew there was no agreement when he made the impugned remarks to the adjuster and CB. The Respondent's honest belief as to the facts, along with whether there is a factual basis for that belief, are significant elements in how we reconcile his right to freedom of expression with his duties under the *Code*.

[33] The Law Society submits that the *Groia* test is limited to comments made in court, particularly in a criminal or quasi-criminal context, and is not applicable here where they are made out of court. This submission is supported by language in the hearing panel decision in *Law Society of BC v. Hittrich*, 2019 LSBC 24, at paras. 71-72. Counsel for the Respondent suggests that *Hittrich* is wrongly decided on

this point. While other hearing panel decisions are only persuasive and not binding on us, this Panel finds that it does not have to decide the correctness of either of these submissions, or of *Hittrich,* for the reasons that follow.

[34] The Panel finds as a matter of fact that the Respondent knew there was no agreement in any legally enforceable sense made between CB and himself on behalf of their respective clients. At best there was an understanding that the defendant would only seek relatively minor changes in the costs sought ("a point or two or three"). As noted earlier, the Respondent admitted this in his evidence. In light of his recollection of CB's comments when they discussed the Bill of Costs, the Panel accepts that it was reasonable for the Respondent to believe there was an understanding between counsel that no significant adjustments would be sought by the defendant in the Bill of Costs. The difficulty for the Respondent is that, as he frankly admitted, that understanding fell short of a legally enforceable agreement on costs.

[35] With this factual backdrop, we look at the Respondent's specific comments to the adjuster and to CB himself.

[36] In the first email he says CB. "agreed to pay my bill of costs *as presented*. Then he broke his word. … " [emphasis added]. This is not a correct statement of fact and the Respondent knew it.

[37] Instead, he engaged in a hyperbole in which he made a serious allegation of professional misconduct against CB.

[38] With his second set of emailed comments, the Respondent made similar allegations of professional impropriety by CB, stating "[h]aving given his word, he binds ICBC" and "[b]reach of his promise is a pretty serious matter." Put in the very best light for the Respondent, these statements again stretch the truth as, on his own evidence, CB and he had discussed a "ballpark" in which costs might be adjusted downward, not an amount that the defence was bound to pay. At worst it is an untrue allegation of misconduct by CB.

[39] In the final set of emailed comments, the Respondent attacks CB's honesty and professional integrity when he says to CB and the adjuster that CB's "'clear recollection' is the reason my firm will not deal with you by telephone, or in person except in a courtroom with the DARS running." This statement was patently untrue. No evidence was led that the Respondent or his firm had ever dealt with CB in this fashion. It was a gratuitous insult with no factual foundation.

[40] For the Respondent to be able to rely on the *Groia* test he must honestly believe in the truth of his comments, based on a sufficient factual foundation that would, if true, support those comments. While the Panel is prepared to accept that the Respondent honestly believed that an understanding had been reached under which no substantial reductions would be sought in the Bill of Costs, he also knew that this was not enforceable. Dealing with the first two email comments, he knew there was no agreement to pay them "as presented", and that ICBC was not "bound" by any agreement. The third email comment, as noted, was not true and simply an insult of CB, copied to his own client. Thus, even if *Groia* does apply in this case, it is clear that the Respondent had neither an honest belief in the truth of his comments nor the factual foundation to assert an honest but mistaken belief. As a result, the Panel finds that the Respondent is in breach of rule 2.2-1 of the *Code*, as his conduct toward another lawyer was not characterized by courtesy and good faith.

[41] He also is in breach of rule 7.2-1 by being discourteous and uncivil and by not acting in good faith with the other lawyer or the adjuster with whom he had dealings in the course of his practice on this file, and in breach of rule 7.2-4 by sending correspondence or otherwise communicating to another lawyer and that lawyer's client in a manner that was abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

[42] As found by a number of hearing panels and review boards, this type of behaviour and communication in breach of these provisions of the *Code* constitutes professional misconduct under the *Martin* test. Examples include: *Law Society of BC v. Harding*, 2003 LSBC 20; *Law Society of BC v. Greene*, 2003 LSBC 30; *Law Society of BC v. Barker*, 1993 LSDD No. 189; *Law Society of BC v. Laarakker*, 2011 LSBC 29; *Law Society of BC v. Harding*, 2013 LSBC 25, *Law Society of BC v. Johnson*, 2014 LSBC 8 (affd. 2016 LSBC 20.)

NON-DISCLOSURE ORDER

[43] The Law Society requests an order under Rule 5-8(2) that portions of the transcript and exhibits that contain confidential client information or privileged information not be disclosed to members of the public. The Respondent does not oppose this request.

[44] Rule 5-9(1) allows any person to obtain a transcript of a hearing. Rule 5-9(2) allows any person to obtain a copy of an exhibit that was tendered in a Law Society hearing that was open to the public, subject to solicitor-client privilege. Rule 5-9 is subject to any orders made under Rule 5-8(2), which provides that a panel may

order that specific information not be disclosed to protect the interests of any person.

[45] To prevent disclosure to the public of confidential or privileged information relating to the Respondent's client, opposing counsel and the adjuster, as permitted by Rule 5-8(2) we order that no copies of the exhibits, transcripts or any other documents filed in this matter are to be released to the public unless they have been redacted for confidential or privileged information.

CONCLUSION AND ORDERS

[46] The Panel finds, on the balance of probabilities, that by sending the emails noted in the citation, the conduct of the Respondent constitutes a marked departure from the conduct expected of lawyers and that, as a result, he has committed professional misconduct as alleged in allegations 1(a), (b) and (c) of the citation.

[47] We order that no copies of the exhibits, transcripts or any other documents filed in this matter are to be released to the public unless they have been redacted for confidential or privileged information.