2021 LSBC 14
Decision issued: April 9, 2021
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 DISCIPLINARY ACTION

Hearing Date:	January 19, 2021
Panel:	Michelle D. Stanford, QC, Chair John D. Waddell, QC, Lawyer
Discipline Counsel:	Peter Senkpiel and Julia Lockhart
Counsel for the Respondent:	Henry C. Wood, QC

PART I: INTRODUCTION

[1] On July 14, 2020, a Hearing Panel consisting of Michelle D. Stanford, QC as Chair and John D. Waddell, QC and Donald Amos as panel members, found that the Respondent attempted to resolve litigation in favour of his clients through improper means, as alleged in the Citation issued on April 17, 2018, and that such conduct constituted professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*. That decision is indexed at 2020 LSBC 36 ("F&D Reasons").

[2] Following the issuance of the decision on July 14, 2020, Mr. Amos resigned as a member of the Law Society Hearing Tribunal roster with the result that this decision on Disciplinary Action is rendered by the two remaining panel members, pursuant to Rule 5-3(1).

[3] The hearing concerning disciplinary action took place virtually on January 19, 2021 (the "Hearing"). The Hearing was confined to oral submissions, and no further evidence was tendered by either party.

[4] The F&D Reasons set out the factual background and the manner in which the Respondent committed professional misconduct.

[5] In summary, the Panel found that, in the course of discussions with "Team M", which included the Respondent, on what to do with a false affidavit deposed by an employee of the Director of Child, Family and Community Services (the "Director"), a proposal to use the false affidavit 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 a threatening letter (the "Letter") to be sent to the Director in an effort to prevent the adoption.

PART II: THE POSITION OF THE PARTIES

The Law Society

[6] The Law Society asks the Panel to consider the disposition of separate disciplinary proceedings concerning JH, the Respondent's co-counsel in the subject matter.

[7] JH was sanctioned on June 8, 2020 in reasons indexed at 2020 LSBC 27 ("JH Disciplinary Action"). The panel in that matter held as follows:

> This is a case where the seriousness of the conduct emphasizes the need to ensure the public's confidence in the integrity of the profession. The overriding purpose of the discipline process is to ensure the protection of the public and to maintain public confidence. As in a case such as this where there is a conflict between this purpose and the second purpose of rehabilitation of the lawyer, the first purpose must prevail.
>
> We find that the appropriate penalty is a three-month suspension commencing the first day of the month following the release of these reasons.

[8] The Law Society submits that the Respondent is equally culpable for the implementation of the strategy pursued by JH and seeks the same sanction for the Respondent – a three-month suspension.

The Respondent

[9] The Respondent seeks to differentiate his conduct from that of JH as Justice Fisher considered and determined in her decision *A.S. v British Columbia (Director of Child, Family and Community Services)*, 2017 BCSC 1175, which relates to the same parties.

[10] He argues that Justice Fisher characterized JH as having primary responsibility for the sanctionable events, including the Letter. She then relied upon the notion of relative responsibility to apportion 25 per cent to the Respondent based on his level of responsibility of the impugned conduct for the assessment of special costs:

> [61] While [JH] and [the Respondent] were co-counsel in both petitions, there is evidence which shows that each had a different level of participation in respect of some of the impugned conduct. I have therefore assessed this conduct with particular consideration to the role played by each lawyer, which I address more particularly on the issue of joint or several liability.

[11] The Respondent suggests this is a logical and appropriate approach to the determination of penalty in this proceeding.

[12] The Respondent challenged the Law Society's suggestion that Justice Fisher's assessment of relative culpability would have been different if she had been privy to all of the materials and evidence presented to this Panel. The Respondent agreed that Justice Fisher did not have before her the final emails and telephone time sheets exchanged between the parties suggesting more involvement of the Respondent when she came to her conclusions; however, the Respondent argued, and we agree, that she acknowledged that the Respondent "consented" to the strategy carried out.

[13] The Respondent's position also highlighted that he had expressed concern that the Letter might be characterized as blackmail, that he had advocated for an alternate approach and that conclusions from JH's professional conduct history suggested a strong personality asserting " … knowing better than anyone else … ."

[14] The Respondent submits that, when these related processes and conclusions are taken into account, the appropriate sanction is a four-week suspension and payment of costs.

PART III: DISCIPLINARY ACTION

Object and purpose of the sanctioning process

[15] It is well established that the primary purpose of disciplinary proceedings is the fulfilment of the Law Society's mandate, as set out in section 3 of the *Legal Profession Act* ("*Act*"), to uphold and protect the public interest in the administration of justice.

[16] Section 3 of the *Act* states:

> *Object and duty of society*
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> 3 It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
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> (a) preserving and protecting the rights and freedoms of all persons,
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> (b) ensuring the independence, integrity, honour and competence of lawyers,
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> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
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> (d) regulating the practice of law, and
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> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[17] The sanction imposed at the Disciplinary Action phase of the hearing should be determined by reference to these purposes.

[18] In *Law Society of BC v. Hill*, 2011 LSBC 16 at para. 3, a hearing panel emphasized the following with respect to the purpose of a sanction imposed by a Law Society Tribunal:

> It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. *Our task is to decide upon a sanction or sanctions that, in our opinion, is best*

> *calculated to protect the public, maintain high professional standards and preserve the public confidence in the legal profession.*
>
> [emphasis added]

Principles and factors relevant to sanction

[19] The review panel in *Law Society of BC v. Lessing*, 2013 LSBC 29, confirmed that the object and duties set out in section 3 of the *Act* are reflected in the following non-exhaustive factors as set out in paras. 9 and 10 in *Law Society of BC v. Ogilvie*, 1999 LSBC 17 ("*Ogilvie* Factors"):

> Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct. Section 38 of the Act sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. *In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.*
>
> The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
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> (a) the nature and gravity of the conduct proven;
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> (b) the age and experience of the respondent;
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> (c) the previous character of the respondent, including details of prior discipline;
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> (d) the impact upon the victim;
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> (e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[emphasis added in *Lessing*]

[20] The *Lessing* review panel observed that not all of the *Ogilvie* Factors will come into play in all cases and the weight to be given to these factors will vary from case to case. However, the protection of the public (including public confidence in the disciplinary process and public confidence in lawyers generally) and the rehabilitation of the lawyer, are two factors that, in most cases, will play an important role. The review panel stressed that, where there is a conflict between these two factors, the protection of the public, including protection of the public confidence in lawyers generally, will prevail.

[21] A rigid application of each *Ogilvie* Factor is not necessarily required in every case. In recent years, hearing panels have focused their analysis and placed more weight on the factors that are truly relevant to the case at hand. For example, in *Law Society of BC v. Dent*, 2016 LSBC 05, a hearing panel considered the relevant *Ogilvie* Factors as part of four primary factors and concluded that it was only necessary to consider the factors considered relevant or determinative of the final outcome of the disciplinary action:

1. nature, gravity and consequences of conduct;

2. character and professional conduct record;

3. acknowledgement of the misconduct and remedial action; and

4. public confidence in the legal profession, including public confidence in the disciplinary process.

[22] The review panel in *Law Society of BC v. Martin*, 2007 LSBC 20, stated that the salient features, when considering a suspension, include the following:

1. elements of dishonesty;

2. repetitive acts of deceit or negligence; and

3. significant personal or professional conduct issues.

[23] In consideration of the *Ogilvie* Factors, we have found the following factors to be of significance in this case:

The nature and gravity of the conduct proven

[24] In our view, the seriousness of the misconduct is the prime determinant of the sanction imposed.

[25] In *Law Society of BC* v. *Gellert*, 2014 LSBC 05, the panel found at para. 39 that the nature and gravity of the misconduct will almost always be an important factor as:

> … it represents a principal benchmark against which to gauge how best to achieve the key objective of protecting the public and preserving confidence in the legal profession. Indeed, this key objective is the prism through which all of the *Ogilvie* factors must be applied …

[26] This Panel is of the view that the nature and gravity of the Respondent's proven misconduct is serious.

[27] We agree with the nature and gravity of the conduct proven as stated in part by the JH panel in its decision on Facts and Determination, 2019 LSBC 24, at para. 86:

(a) … the Letter was a threat to take a course of action to induce the holder of an office with a statutory duty to act contrary to that duty. This is magnified by the fact that the duty sought to be breached was to act in the best interests of SS. This is misconduct that is serious;

(b) The sending of the Letter was one act, but it was an act that was deliberate. … The Letter was drafted to be "minimalistic for tactical reasons." The Letter was not drafted in the heat of the moment but was thought out;

…

(e) … The harm done was to the reputation of the profession resulting in a lawyer using the tactics as set out in the Letter to induce a statutory officer to act contrary to her duty. The harm to the reputation of the profession is great.

[28] This Panel agrees that this proven conduct is equally applicable to the Respondent and that the harm done to the profession is great.

[29] As this Panel found at para. 76 in the F&D Reasons, the Respondent and JH were co-counsel. As co-counsel, they are both responsible for the decisions made on behalf of their joint clients.

[30] The Respondent tried to distinguish his role in the blackmail attempt by testifying that he objected to the Letter being sent. This too was rejected by this Panel in the F&D Reasons, in which we stated at para. 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*.

[31] Justice Fisher, in her reasons awarding special costs against JH, stated the following at paras. 38 and 39:

> It is true that unless the solicitor-client privilege is waived, the court cannot know what the client told the lawyer or what the lawyer advised the client before receiving instructions. Clearly, I must be careful in assessing the conduct of lawyers who are in this position. However, it does not necessarily follow that I will not be able to ascertain the lawyers' responsibility for their impugned conduct. *This is because lawyers owe duties not only to their clients but also to the court.* As Lord Reid stated in *Rondel v. Worsley*, [1967] 3 All ER 993 at 998:
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> > Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. *As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his*

> *profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.* Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce.

In *Ridehalgh v. Horsefield*, [1994] 3 All ER 848, Sir Thomas Bingham, in addressing the challenges for lawyers who pursue hopeless cases, provided these apt comments at 863:

> It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. *Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest,* nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents. It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it.

[emphasis added]

[32] As this Panel noted at para. 110 in the F&D Reasons, the Respondent "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.

The previous character of the respondent, including details of prior discipline

[33] The Respondent does have a prior Professional Conduct Record ("PCR"). The Respondent had four previous conduct reviews between 2002 and 2007. This is his first citation.

[34] This Panel finds two aspects of the Respondent's PCR which are relevant to this matter.

[35] First, the February 11, 2003 conduct review subcommittee report states:

> The Subcommittee holds the view that Mr. Ganapathi understands the wisdom of not allowing himself to accept instructions of this sort in the future. It might give one the mistaken impression that he is facilitating his client's concealment of some form of transaction. (p. 15, para. 7)

[36] Second, the July 3, 2007 conduct review subcommittee report states:

> The panel also briefly reviewed Mr. Ganapathi's record with the Law Society and encouraged him to ensure that he would not engage in any activity which would cause a further appearance before the Law Society. (p. 19)

Whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of mitigating circumstances

[37] The Respondent offered "belated but sincere apologies to the Law Society, the profession and the public" in a letter filed on the date of this Hearing. The Respondent "accepted" the Panel's assessment "of his failure to sustain a more vocal opposition," but also stated it "remains my view" that the Director's decision "did not serve the best interest of SS."

[38] The Panel was made aware that the Respondent filed an application in the British Columbia Court of Appeal for a stay of disciplinary proceedings of the Law Society pending the outcome of the Respondent's appeal. He withdrew his Notice of Appeal prior to the Hearing on Disciplinary Action. We take nothing from the filing and withdrawal of the Notice of Appeal. It is the Respondent's right to file an appeal pursuant to section 48 of the *Act*.

[39] In the context of mitigation, the Panel accepts the following:

(i) the singularity of the incident;

(ii) the sincerity of the Respondent's belief that the best interests of SS would be better served through an adoption by the Foster parents;

(iii) with its reference to "blackmail", the Justice Fisher's decision attracted considerable negative media attention at the time; and

(iv) the absence of personal advantage or financial gain.

[40] Additionally, this Panel accepts that JH proposed and implemented the blackmail/whitemail strategy and was single-minded in its pursuit. We find the Respondent's essential culpability arises from his failure to take more purposeful steps to disassociate himself from that strategy once it was clear that JH could not be dissuaded from it.

The possibility of remediating or rehabilitating the respondent

[41] The Respondent has had a lengthy career of 45 years. This is his first citation.

[42] The Panel acknowledges that the Respondent did not initiate the course of action and did recommend an appropriate alternate course of action.

[43] The Respondent sought legal advice, suggesting insight into the wrongfulness of the path he was on; however, he did not follow this advice.

[44] However, given the negative public attention to the previous decision of Justice Fisher related to the same parties and the unique set of circumstances here, the Panel accepts the Respondent's submission that he is "unlikely to reoffend in any remotely similar manner" and this is likely a "lesson learned".

The impact of the proposed penalty on the respondent

[45] The Respondent expressed concern that a three-month suspension will make it difficult for his small firm practice and its clients. The fact that a suspension may create a greater hardship for a lawyer who practises in a small firm than it would for a lawyer who practises in a larger firm is not a basis for not suspending a lawyer when a suspension is required to protect the public interest and maintain public confidence in the legal profession: *Law Society of BC v Bauder*, 2013 LSBC 07; *Law Society of BC v Siebenga*, 2015 LSBC 44.

The need to ensure the public's confidence in the integrity of the profession

[46] The panel in JH Disciplinary Action states at para. 29(g):

> In this case, this factor is interwoven with the "nature and gravity of the conduct proven" referred to earlier. This was serious misconduct that was planned and deliberate. It was intended to improperly induce the holder of a public office to breach their statutory duty to act in the best interest of a foster child. The harm to the integrity of the profession is great in having

> a member of the profession make a concerted effort to induce a public official to act contrary to their duty. The public is entitled to expect members of the legal profession will not behave in the manner that the Respondent did. The maintenance in the public's confidence in the integrity of the legal profession requires that a sanction imposed on the Respondent reflect this;

This Panel adopts the same principles and reasoning as it applies to the Respondent.

PART IV: CONCLUSION

[47] In our view, the seriousness of the misconduct remains a prime determinant of the sanction imposed and the harm to the public's confidence in the integrity of the profession a serious factor.

[48] The Panel adopts Justice Fisher's insightful summary of the Respondent's and JH's conduct at para. 82:

> They were acting zealously in their efforts to secure a result that their clients felt was in the best interests of the child S.S. But in doing so, they overstepped their proper role as counsel and pushed the limits of the litigation process beyond what is acceptable and for that, the Court must respond.

[49] So too must this Panel. For reasons stated above, we agree that the several liability approach Justice Fisher adopted in assessing liability for special costs applies in determining the appropriate sanction for this Respondent.

[50] In consideration of all of the circumstances, this Panel finds that an appropriate, and proportionate, penalty is a two-month suspension commencing on May 1, 2021 or another date agreed to by the parties.

PART V: COSTS

[51] The Law Society requests an order for costs in the amount of $13,624.33, which have been calculated in accordance with Schedule 4 – Tariff for Discipline Hearing and Review Costs.

[52] Panels derive their authority to order costs from section 46 of the *Act* and Rule 5-11 of the Rules. Under Rule 5-11, a hearing panel must have regard to the tariff when

calculating costs. The costs under the tariff are to be awarded unless, under Rule 5-11(4), the panel determines it is reasonable and appropriate to award no costs or costs in an amount other than that permitted by the tariff.

[53] In this case, there is no reason to deviate from the application of the tariff. The Respondent has not provided any evidence with respect to his current financial circumstances, including any information about his assets, net worth, or ability to pay costs. The total effect of the order of costs and a suspension is not inordinate or out of proportion to the misconduct.

[54] The Respondent asks for a reasonable time to pay in light of the financial consequences of a suspension.

PART VI: CONCLUSION

[55] This Hearing Panel makes the following orders:

(i) pursuant to section 38(5)(d) of the *Act*, the Respondent is suspended from the practice of law for a period of two months, commencing May 1, 2021 or another date agreed to by the parties; and

(ii) pursuant to Rule 5-11 of the Rules, the Respondent must pay costs of $13,624.33 payable on or before September 30, 2021.