2007 LSBC 03
Report issued: January 10, 2007
Citation issued: March 7, 2006

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Sheldon Goldberg

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing dates: April 10, 11, 12, May 23, July 13, August 31 and September 12, 2006

Panel: G. Glen Ridgway, Q.C., Chair, Leon Getz, Q.C., Gavin Hume, Q.C.

Counsel for the Law Society: Herman Van Ommen, July Walker and Brian McKinley
Appearing on his own behalf: Sheldon Goldberg

Background

[1] On March 7, 2006, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation directed that this Panel inquire into the Respondent's conduct as follows:

(a) You made serious allegations in the BC Court of Appeal about the conduct of a former member, J.B., which allegations had no proper or insufficient evidentiary foundation.

(b) In preparing and submitting materials to the Court in your representation of clients A.D., D.P., J.L. and J.K. you failed to demonstrate adequate knowledge of the substantive law, practice and procedures to effectively apply that substantive law, and the skills to represent your clients' interests effectively, contrary to Chapter 3, Rule 1 of the *Professional Conduct Handbook*.

[2] The citation arose out of the conduct of the Respondent with respect to appeals from criminal convictions in *Regina* v. *Dunbar*, *Regina* v. *Pollard*, *Regina* v. *Leiding* and *Regina* v. *Kravit* (" *Dunbar* Appeals"), which appeals were heard together. The Respondent was of the view that the only potentially successful ground for appeal in the *Dunbar* Appeals was counsel inadequacy at trial. He indicated to the Panel that prior counsel was also of this view.

[3] The evidence of the Law Society consisted of the record that was before the Court of Appeal. The Respondent did not lead any evidence, and therefore the decision of the Panel is based entirely on the written record, including the six binders of materials provided to us.

[4] The matter was initially referred to the Law Society at the request of the Court of Appeal to Crown Counsel in *Regina* v. *Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667. At pp. 73 to 75 under the heading " Afterword" , commencing at paragraph [330], the Court commented on the obligation of counsel to represent clients or causes by all lawful means, including the presentation of novel or innovative arguments. The Court went on to state that in their view the Respondent's zeal blinded him to his professional responsibilities. They made reference to the inadequacy of the affidavit material filed by the Respondent, describing it as " unworthy of any lawyer" as, in their view, those affidavits were replete with " inadmissible hearsay opinions, speculations, argument" and other irrelevant material. They also commented that, in their view, the affidavits were " rambling, repetitive and disorganized" and contained " serious allegations of unprofessional conduct and substance abuse" by a former member, " J.B." , which allegations, in their view, were unfounded.

[5] The Court went on to comment on the Respondent's factums and other written submissions in the same vein, describing the factums and written argument as " among the poorest examples presented in this court in recent memory." The Court also commented on the Respondent's oral submissions as going beyond an acceptable limit of appellate advocacy.

[6] The Law Society restricted its case to the written material, as there was no transcript of the oral submissions made in the Court of Appeal.

[7] While the Reasons of the Court could be accepted as *prima facie* evidence of the facts stated, this Panel reviewed the evidence and argument to form its own conclusions (see *Re: Rosenbaum* v. *Law Society of Manitoba* (1982), 150 D.L.R. (3d) 352 (Man. Q.B.).

[8] In his opening, counsel for the Law Society provided the Panel and the Respondent with a detailed and lengthy list of the allegations, which the Law Society relied on to prove that the Respondent made serious allegations in the BC Court of Appeal about the conduct of J.B. without proper, or sufficient, evidentiary foundation. The Law Society also drew the Panel's attention to the same written record in support of the second count, which alleged that the Respondent failed to demonstrate adequate knowledge of the substantive law and practice and the appropriate procedures to represent his clients' interests. In that regard, the Law Society again provided the Panel with a detailed and lengthy list of the allegations that it relied on with respect to the second count.

[9] Counsel for the Law Society then presented its case by reviewing the written record in detail during the first day of the hearing.

[10] The Respondent, at the opening of his case, indicated that he wished to call J.B. and one of his clients, Mr. Dunbar, who was sequestered in Matsqui. Mr. Van Ommen objected to that on the basis that neither would provide any relevant evidence. He characterized the issue as whether or not the Respondent was justified in making the statements that he did in the written materials and whether or not the written materials demonstrated an adequate level of competence.

[11] The hearing was adjourned to the following day in order to permit an argument with respect to the Respondent's intention.

[12] After argument, the Panel ruled that, as the Law Society was only relying on the written record, the two witnesses that the Respondent intended to call would not provide assistance to the Panel. The Respondent elected to not call evidence but instead, to review the written record. The balance of the evidentiary part of the hearing occupied the next two days of the schedule and was resumed on May 23, 2006, at which point in time the Respondent, despite being encouraged by the Panel to retain counsel, advised that he had not done so. He then objected to Mr. Van Ommen acting as counsel because a partner

of Mr. Van Ommen, Len Doust, was a member of the Conduct Review Subcommittee that had met with Mr. Goldberg before the citation was issued. The Respondent also objected to the Panel proceeding, as a member of the public was not on the Panel. In addition, the Respondent sought to call one of the other accused, Mr. Kravit, as a witness.

[13] The Panel ruled that the fact that Mr. Doust was one of several eminent counsel that participated in a Conduct Review with the Respondent did not raise a conflict precluding Mr. Van Ommen from proceeding. The fact of the Conduct Review and the results of the Conduct Review were not evidence before the Panel.

[14] With respect to the assertion that the Panel should not proceed because a member of the public was not on the Panel, Mr. Van Ommen asserted that this would create prejudice in that it was raised on the fourth day of the hearing and not on the first. The Law Society does attempt to have a lay Bencher sit on hearing panels. However, given the schedules of the lay Benchers, that is not always possible. In fact, efforts were made to do so in this case. Given the delay in the raising of the issue, and that it is not mandatory that a lay Bencher sit on every hearing panel, the Panel rejected that argument.

[15] The Panel also rejected the argument that Mr. Kravit should be permitted to give evidence as, apparently, his evidence was going to go to the fitness of J.B.. The Law Society citation turned on the materials put before the Court of Appeal, and as a result, the evidence would not be of any assistance in dealing with the issues raised by the citation.

[16] The Respondent then proceeded to continue to review the record, though finding some difficulty in focusing on the matters identified by the Law Society in its opening and in its review of the evidence.

[17] The matter was scheduled for several days in July. However, in late June the Respondent indicated that, in his view, it was unnecessary to continue with the evidentiary portion of the hearing and that, as a result, the several days scheduled in July were not necessary.

[18] The matter proceeded with argument on July 13, 2006. The Law Society provided a detailed written submission of its argument and, as we understand it, that was provided to the Respondent ahead of the hearing. On July 13, the Law Society presented its argument in the morning. Commencing at approximately 11:20 a.m., the Respondent began his argument. The Respondent was unable to complete his argument that day, as a result of which, the hearing was adjourned to August 31, 2006.

[19] On the morning of August 31, 2006, the Respondent completed his argument and then, subsequent to an adjournment, raised a concern with respect to a telephone call he had received two days earlier. The call was from a former lawyer seeking reinstatement to the Law Society of British Columbia. Mr. Van Ommen was acting as counsel for the Law Society with respect to the reinstatement application. An issue was raised with respect to the appropriateness of Mr. Van Ommen continuing to act, as the former lawyer had apparently been a client of Mr. Van Ommen's firm. Mr. Van Ommen had resigned from the conduct of the reinstatement hearing. However, as a complaint had been laid by the former lawyer, the Law Society ultimately instructed Mr. Cuttler, a member of Mr. Getz's firm, to investigate the complaint.

[20] To the Panel, the issue appeared to raise two concerns: could this Panel proceed under the circumstances; and could Mr. Van Ommen continue as counsel. After raising the concern about the delay in raising the issue, the Panel, at the request of the Respondent, adjourned the hearing until September 12, 2006 in order to hear submissions with respect to the concerns raised by the Respondent and to give the Respondent an opportunity to consult counsel. However, the Panel asked the Respondent to set out his position in writing prior to September 12, 2006 for the benefit of the Law Society and the Panel.

[21] The Respondent did so on September 6, 2006. The written submission indicated that the

Respondent wished to cross-examine Mr. Van Ommen with respect to the alleged conflict. In the alternative, the Respondent submitted that Mr. Van Ommen ought to be replaced and the proceedings begin again before a new Panel. The Respondent also sought costs.

[22] Mr. McKinley, on behalf of the Law Society, submitted that the application should be dismissed. After hearing from Mr. McKinley and the Respondent, the Panel dismissed the application as, in its view, there were no grounds for the order sought. While not expressly stated, it would appear that the Respondent sought his remedies on the basis of an apprehension of bias. Bearing in mind the authorities, in this Panel's view, having considered the facts, there was no reasonable apprehension of bias. The Panel therefore rejected the application. The Panel received the reply of the Law Society and reserved decision.

[23] While the standard of proof in discipline cases is proof on a balance of probability, the proof must be clear and convincing when the results of an adverse finding could be serious to a member (see *Law Society of BC* v. *Ewachniuk*, [2000] L.S.D.D. No. 32 and *Law Society of BC* v. *Hops*, [2000] L.S.D.D. No. 11 and *Jory* v. *College of Physicians and Surgeons of British Columbia*, [1985] B.C.J. No. 320 (S.C.)).

[24] During the course of the hearing, on many occasions, the Panel attempted to direct the Respondent to focus on the issues raised by the citation. In particular, the Panel requested that the Respondent address the detailed and lengthy list of allegations provided by the Law Society in its opening. The Respondent either refused or seemed incapable of focusing on the allegations identified. Despite that, and despite the Panel's concern that the Respondent was not addressing the issues in an appropriate manner, the Panel permitted the Respondent to take as much time as he needed to make his points.

[25] In particular, the Respondent, during the evidentiary phase of the hearing, as well as during argument, did not draw the Panel's attention to any admissible evidence that supported the assertions that he made in his written materials or the affidavits he filed in support of the appeals. Instead, his defence amounted to an allegation that there is, in effect, a conspiracy to protect lawyers between the Courts, the Law Society and the elite of the legal profession, whoever they may be. He asserted that there was a code of silence with respect to negligent and incompetent behaviour on the part of counsel. In the result, his review of the evidence, both during the evidentiary phase of the hearing and in argument, repeated many of the assertions made in the written submissions and affidavits.

[26] We have concluded, bearing in mind the onus of proof, that the Respondent professionally misconducted himself in making unfounded, but serious, allegations about the conduct of J.B. We have also concluded that he incompetently carried out the duties he undertook in the *Dunbar* Appeal, while acting in his capacity as a member of the Law Society of British Columbia. We reach this conclusion after reviewing his written materials, which demonstrated a serious lack of knowledge and skill.

[27] We reach those conclusions for the reasons set out in the balance of this decision.

Count 1 - Professional Misconduct

[28] The *Legal Profession Act*, S.B.C. 1998, c.9, does not define professional misconduct. In *Law Society of BC* v. *Martin*, 2005 LSBC 16, the Panel, in discussing the concept of professional misconduct, stated at para. 154:

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

[29] In determining that the Respondent professionally misconducted himself, we considered the

issues raised in the *Dunbar* Appeals. The allegation raised by the Respondent was that the counsel work of J.B., in representing the Appellants, was so ineffective as to justify a new trial. The Supreme Court of Canada in *R.* v. *G.D.B.*, [2000] 1 S.C.R. 520, held that, for an appeal to succeed on the grounds of the ineffective assistance of counsel, the Court must be satisfied that counsel's acts or omissions were incompetent and that, as a result, a miscarriage of justice occurred. The Courts have also indicated that, when an allegation of ineffective assistance of counsel is made, counsel raising that allegation must exercise a level of due diligence in order to satisfy himself or herself that a foundation for such an allegation exists.

[30] In *R.* v. *Elliott* (1975), 28 C.C.C. (2d) 546, the Ontario Court of Appeal found, at page 6, that evidence to support such an allegation must be admissible in that it complies with the generally accepted rules of evidence (*R*. v. *O'Brien*, [1978] 1 S.C.R. 591 and *R*. v. *Teneycke* (1996), 108 C.C.C. (3d) 53 (B.C.C.A.)).

[31] In addition, it is clear that counsel cannot use improper conduct in one case to support an allegation in another case (*Regina* v. *Hector* (2000), 146 C.C.C. (3d) 81 (Ont. C.A.)).

[32] Of interest to the Panel was the Respondent's involvement in cases involving the same allegation (*R*. v. *Napierala*, [1995] B.C.J. No. 1323 (C.A.) and *R*. v. *Sauve*, [1997] B.C.J. No. 2840 (C.A.)). During the course of the hearing, the Respondent confirmed that he had acted as counsel on appeals involving the same allegation. It appeared to the Panel that the Respondent is, or should be, familiar with the jurisprudence with respect to appeals based on the ineffectiveness of counsel at trial.

[33] The Respondent's conduct in a case involving this issue was the subject of critical comment by the Court of Appeal in *R. v. Dean* 1997 CanLII 2427 (BC C.A.). McEachern C.J.B.C. stated at paragraph 15 as follows:

> We wish to say at this early stage that we do not think Mr. Goldberg's factum on fresh evidence as presented meets any reasonable standard or threshold for consideration by the Court. It makes serious allegations but lacks legal analysis and sufficient particulars to permit those attacked to answer and would involve this Court embarking upon a general investigation of criminal law practice that cannot fairly be done in the context of this appeal. Moreover, the privilege of counsel for statements made and material filed in the course of proceedings cannot be used for personal attacks upon non parties unless relevant to the proceedings.

[34] In the ultimate decision in *R. v. Dean* (1997), 39 BCLR (3d) 287, Ryan J.A. commented in part as follows, with respect to the Respondent:

> However sincere Mr. Goldberg may be, this effort to discredit certain members of the bar was misguided, resting as it did on unfounded and rash speculation.

[35] It appeared to the Panel that the Respondent was taking a similar approach in the *R. v. Dean (supra)* appeal as he took in the *Dunbar* Appeals. In addition, it did not appear to the Panel that the Respondent took into account the critical comments in the *R. v. Dean* decisions.

[36] When considering the conduct of the Respondent, the Panel bore in mind the comments of the Court of Appeal in the *Dunbar* Appeal on the role of counsel in representing clients or causes. We also bore in mind similar statements in *Rondel* v. *Worsley*, [1967] 1 A.C. 191, at page 227. Counsel must be able to fearlessly and vigorously advocate on behalf of their clients. However, in *Rondel* v. *Worsley (supra)* and other decisions, the Courts have commented that counsel must not cast aspersions for which there is

no sufficient basis. As was stated by Rosenberg J.A. in *Regina v. Felderhof* (2003), 180 C.C.C. (3d) 498 (Ont. C.A.):

> The defence has the right to make allegations of abuse of process and prosecutorial misconduct, but only where those allegations have some foundation in the record, only where there is some possibility that the allegations will lead to a remedy and only at the appropriate time in the proceedings.

[37] In support of the count that the Respondent made unfounded, but serious allegations about the conduct of J.B., the Panel was directed to extensive materials separated into the following categories:

(a) allegations concerning alcohol and drug abuse and psychological problems;

(b) allegations relating to the illness of the parents of J.B. and its effect on his conduct;

(c) statements characterizing J.B. as a " rogue" ;

(d) statements characterizing J.B. as dishonest to the courts and to his clients;

(e) statements dealing with J.B.'s personal life that were completely irrelevant to the *Dunbar* Appeals; and

(f) allegations that J.B. failed to order preliminary transcripts.

[38] With respect to the allegation concerning alcohol and drug abuse and psychological problems, we have reviewed the affidavits that were filed in support of that assertion. We were unable to find any admissible evidence that supported that assertion, nor was the Respondent able to draw our attention to any. The affidavits were replete with inadmissible hearsay.

[39] One typical example will suffice to illustrate the inadequacy of the evidence. In an affidavit from the record, sworn on January 15, 2003, the Deponent and Appellant, Malcolm Kravit, at paragraph 4 stated as follows:

> That although I never noticed JB to be intoxicated in Court, he always carried a bottle of Aqua Velva in his briefcase, an item that so carried was in my experience certainly indicative of an abuse problem AND THAT I am informed by Sheldon Goldberg and verily believe that it is well known amongst the Bar that over the years that JB drank alcohol to excess such that one would conclude that he had an alcohol abuse problem.

[40] Except for the statement with respect to observing an Aqua Velva bottle in J.B.'s briefcase, this statement, like many others, is without factual foundation. As in the paragraph set out above, in none of the affidavits that we reviewed does the affiant identify any admissible evidence that would support the assertion that J.B. was an alcoholic, or suffered from drug or other substance abuse or had psychological problems. In addition, no person is identified who can say from personal observation that any symptoms with respect to any of those conditions were observed.

[41] At various points in time the Respondent made statements and had affidavits sworn with respect to J.B.'s parents' illness. The suggestion, put in a variety of ways, was that perhaps the illness of J.B.'s parents was a lie or that the suggestion of their illness was a manipulative tool or an excuse to avoid professional obligations and that it affected his ability to focus while in Court. These assertions are also

without factual foundation in any admissible affidavit evidence.

[42] The Respondent, in his written submissions and in the affidavits filed by him, made various assertions with respect to the failure of J.B. to renew his practising certificate at the end of December 2000. As a result of this failure he, of course, ceased to be a member of the Law Society effective January 1, 2001. This was characterized as J.B., in effect, being a rogue agent and potentially engaging in a criminal act. It was also suggested in the material that this amounted to fraud, false pretences, contempt of court and, perhaps, perjury. Only one of the trials being appealed from was conducted by J.B. while he was not a member. The Court of Appeal, in the *Dunbar* Appeals, concluded that whether the legal representative meets the qualifications set by governing bodies did not determine the question of whether or not the defence was effective, resulting in a fair trial. Instead, the Court held that a court must look at what the legal representative did or did not do. The admissible evidence was that the practising certificate was not renewed. The various characterizations with respect to this fact are clearly inappropriate and unnecessary as they did not deal with the issue before the Court.

[43] In various submissions the Respondent asserted in various ways that, in effect, J.B. was untruthful. Similarly, affidavit evidence was filed by the Respondent to the same effect. One allegation was that: " He is dishonest to all and sundry." Again, no admissible or relevant evidence was identified in the record to support those assertions. The Respondent appears to have ignored the warning of McEachern C.J.B.C. in *Regina* v. *Dean* (*supra*).

[44] At various points the written submissions and affidavits made statements that were irrelevant to the issues in the appeals. For example, one of the submissions asserted that the attendance of J.B.'s wife at the trial was inappropriate and, perhaps, unprofessional. In addition, there were comments about some misfortunes with respect to J.B.'s children. None of the statements were appropriate. The attendance of a wife at a trial and fortunes or problems of counsel's children are completely irrelevant.

[45] The material filed in the appeals contained several statements with respect to the alleged failure to order preliminary transcripts. The Respondent asserted that the alleged failure to order transcripts demonstrated erratic behaviour and a failure to adhere to professional standards. It was also asserted that these alleged failures were also consistent with drug and alcohol abuse, mental illness or a combination of all of those factors. In the first instance, there is insufficient evidence in the record in order to draw a definitive conclusion that the transcripts were not ordered or, perhaps more importantly, that transcripts of the preliminary hearings were not reviewed. During the course of the hearing, the Respondent agreed with the question from the Panel that he could not say with certainty that J.B. did not have copies of the preliminary transcripts of any of the trials that gave rise to the *Dunbar* Appeals.

[46] A similar pattern occurred during the argument phase of the hearing. The Law Society, as we have previously indicated, provided a detailed written argument prior to the commencement of the oral argument. Throughout the evidentiary and argument phase of the hearing, the Panel, on innumerable occasions, invited the Respondent to explain why, if the record showed that J.B. conducted himself incompetently, it was necessary in the appeals for the Respondent to advance any explanation or theory to explain the incompetence. He either did not seem to understand the point or failed to respond to it. In addition, despite the detailed written argument, the Respondent's argument was conducted in the same manner as his evidentiary review, despite the efforts of the Panel to encourage the Respondent to focus on the allegations made. This did not assist the Panel in reaching its conclusions. Having said that, we have reached a conclusion.

[47] In reaching our conclusion, the Panel considered the Respondent's assertion that the Law Society case was built on a series of isolated statements extracted from the materials before the Court of Appeal.

We do not agree with that assertion. For example, the record contained approximately 13 assertions that J.B. suffered from alcohol and drug abuse or psychological problems. As previously stated, we could not find any admissible evidence to support these assertions, nor did the Respondent draw our attention to any such evidence. While there were not as many examples with respect to the other allegations made against " J.B." , there were many extracts from the materials filed that were inappropriate for the reasons we set out. Again, and as previously stated, the Respondent was not able to draw our attention to any evidence to support to those allegations.

[48] For the foregoing reasons, this Panel concluded that Mr. Goldberg professionally misconducted himself in making unfounded, but serious, allegations about the conduct of J.B.

Count 2 - Competence

[49] The *Legal Profession Act* does not define " competence" . In *Law Society of BC* v. *Eisbrenner*, [2003] LSBC 03, the Panel defined " competence" . It held that a lawyer should:

a) have the intellectual, emotional and physical capacity to carry out the practice of law;

b) demonstrate professional responsibility and ethics;

c) set up, maintain office systems and file organization corresponding to the current or anticipated practice of the lawyer;

d) communicate in a timely and appropriate manner with clients, counsel and others and document those communications in an appropriate manner;

e) have an adequate knowledge of substantive and procedural law in the areas practiced, be able to relate the law to a client's affairs and determine when the problems exceed the lawyer's ability; and

f) develop and apply technical skills such as drafting, negotiation, advocacy, research and problem solving to appropriately carry out a client's instructions.

[50] A useful discussion of competence can be found in *The Regulation of Professions in Canada* by James T. Casey, commencing at page 13 through to page 14. In summary, the question is whether or not a mistake or mistakes made by a professional will be of such significance so as to demonstrate incompetence. Assessing incompetence is a function of looking at the nature and extent of the mistake or mistakes and the circumstances giving rise to it or them. It may be self-inflicted or the result of negligence or ignorance. In considering this issue we bore in mind that we are not dealing with an allegation that the Respondent was incompetent generally. Instead, the issue before us was the handling of the *Dunbar* Appeals and whether or not they were handled competently.

[51] Again, we turn to the record before the Court of Appeal in the *Dunbar* Appeals. Counsel for the Law Society drew the Panel's attention in his argument to the following matters:

(a) inclusion of hearsay statements in the affidavits;

(b) inclusion in the affidavits of statements made on information and belief from the Respondent;

(c) inclusion of impermissible lay opinions;

(d) statements in the affidavits that are speculation, insinuation and rumour;

(e) inclusion of irrelevant evidence;

(f) writing in the Factums and Arguments that is rambling and disorganized;

(g) lack of proper legal authorities to support the positions advanced in the Factums and Arguments; and

(h) failure to set out in a clear fashion the substantive law relevant to the appeals in the Factums and Arguments.

[52] The rule against hearsay requires that a statement being tendered as proof of the truthfulness of the statement must be direct evidence. The same rule applies to evidence in affidavits. The Courts have expanded the exception, based on the principles of necessity and reliability (see *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.)). In addition, the *Canon of Legal Ethics*, Canon 3(11) provides that a lawyer who appears as an advocate should not submit the lawyer's own affidavit or testify before a Court. The Courts have also commented on the inappropriateness of lawyers entering their own affidavit evidence (*Lex Tex Canada Ltd. v. Duratex Inc.* (1979), 13 C.P.C. 153 (F.C.T.D.)). In addition, if hearsay evidence is tendered in the affidavits, the source of the hearsay upon which the affiant relies must be identified.

[53] In the material, there are many examples of the affiant relying upon, in whole or in part, information provided to the affiant by the Respondent. At the same time, many of those examples are similar to the example set out in paragraph [38] above and consist simply of hearsay, innuendo or rumour.

[54] There are many examples of hearsay provided by the Respondent to the affiants. There are also examples of double hearsay and hearsay in which no source was provided. Essentially, all of the hearsay evidence was inadmissible or, alternatively, it involved the Respondent giving evidence in a case in which he was counsel.

[55] With some exceptions, such as questions concerning age, speed, weather and identity, the Courts have not allowed opinion evidence to be tendered except by a person qualified as an expert (*Chamberlain* v. *School District #36 (Surrey)* (1998), 168 D.L.R. (4th) 222 (B.C.S.C) [in Chambers] and J. Sopinka, S. Lederman & A. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999).

[56] There are a number of examples in the affidavits that we reviewed that contained inappropriate and impermissible lay opinion. In some instances, what might be characterized as opinion was, in fact, simply argument on the part of the affiant.

[57] It is equally clear that evidence that is merely speculation, insinuation and rumour is inappropriate (see *Cara* v. *QTRADE Canada Inc.*, [2003] B.C.J. No. 383 (S.C.); *Cohen* v. *HSBC Bank of Canada*, [2001] B.C.J. No. 324 (S.C.); Mr. Justice John E. Spencer, Affidavits, Continuing Legal Education (December 1992)). An example is the affidavit of Allan Dunbar sworn on December 16, 2002, which, in paragraph 10, stated as follows:

> 10. THAT JB gave evidence in USA v. R that it was the death of Jan Thurmeir that caused him to pare down his practice and to quit Law as one would suppose BUT THAT I am sceptical of this evidence in view of Darren Pollard's Affidavit wherein JB told him that he would not act on his Appeal since he was quitting law AND THAT it would appear that JB was using the compassion that would arise from a colleague's death as an excuse and/or diversion or crutch for his failure to

comply with professional standards I am informed by Sheldon Goldberg and verily believe.

This paragraph, amongst other things, contains an inadmissible opinion and speculates or, alternatively, is an argument that relies on rumour in an inappropriate manner.

[58] Clearly, irrelevant evidence is not inadmissible. We have already referred to the assertion that J.B.'s wife was at the trial, which was completely irrelevant to the issues at the trial.

[59] We have reviewed the Factums and arguments. In our view they are rambling and disorganized. They do not provide the appropriate legal authority to support the positions advanced and they do not set out in a clear fashion much or any substantive law relevant to the issues in the appeal.

[60] Rule 22 of the *Court of Appeal Rules* sets out the bare minimum for the technical requirements of a factum. The evidentiary portion of the Respondent's Factums appears to be, in effect, a stream of consciousness rendition of the evidence. They do not provide an effective introduction to any of the appeals. There is no concise outline of the arguments setting out the points of law to be discussed and the authorities in support of each point. The Respondent does not attempt to grapple with the existing law with respect to appeals of this sort. If his objective was to attempt to convince the Court of Appeal to take a new or different approach, he did not make that clear or even attempt to appropriately set that out.

[61] The Respondent is familiar with the issue raised in the *Dunbar* Appeals. He has been counsel in several appeals involving the same issue (see *Regina* v. *Napierala*, *(supra)* and *Regina* v. *Sauve (supra)*. As we have also indicated, he was counsel in *Regina* v. *Dean* (*supra*) where it appears he engaged in the same conduct.

[62] Despite his involvement in cases involving the same issues, and despite the comments in *Regina* v. *Dean* (*supra*) the Respondent, in both his written submissions and the affidavits filed in support of the appeals, spent a great deal of time attempting to show that by reason of J.B.'s personal life, he was incompetent and unfit. He did not show that he was incompetent and unfit at the trials that were the subject matter of the appeals. Nor was he able to demonstrate that this resulted in prejudice to the appellants as required by the authorities. Instead, he engaged in a review of irrelevant and inappropriate evidence in an attempt to prove that J.B. was incompetent. On the authorities, this was not a matter that the Court was interested in. Nor did he in fact prove, in a general sense, that J.B. was incompetent. In addition, the Respondent did not attempt to argue, in any logical or meaningful way, that the law should be reviewed and a new approach taken.

[63] In this Panel's opinion, the affidavits drawn by the Respondent demonstrate a complete lack of knowledge of the law of evidence. The Respondent's written material demonstrated a serious lack of knowledge and skill for the reasons set out above. The Factums do not, in our view, meet an appropriate standard. As a result, we have concluded that the Respondent did not competently carry out his duties as counsel. We have determined, pursuant to Section 38(4)(b)(iv) of the *Legal Profession Act*, that the Respondent was incompetent in the performance of his duties undertaken in the capacity of a lawyer.