2009 LSBC 18
Report issued: May 29, 2009
Citation issued: August 14, 2008

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 date: March 26 and 27, 2009

Panel: Bruce A. LeRose, QC, Chair, Dirk Sigalet, QC, Peter Warner, QC

Counsel for the Law Society: Jaia Rai
Appearing on his own behalf: Sheldon Goldberg

Background

[1] On August 14, 2008 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 on a direction from the Chair of the Discipline Committee. The citation, as amended, directed that this Panel inquire into the Respondent's conduct as follows:

> 1. Your conduct on July 20, 2007 in failing to attend the fix date appearance in *R. v. P*, Provincial Court Information No. X, Vancouver Registry, in which you were defence counsel, in circumstances requiring your attendance.
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> 2. Your failure to fully respond to communications from outside counsel on behalf of the Law Society in the course of its investigation of complaints from the Provincial Court judiciary, contrary to the *Professional Conduct Handbook*, Chapter 13, Rule 3, and in particular your failure to fully respond to:
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> (a) two letters from David Butcher dated November 6, 2007;
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> (b) two letters from David Butcher dated November 21, 2007; and
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> (c) a letter from David Butcher dated December 14, 2007.

[2] Courtroom 307 is one of many Courtrooms in the Provincial Courthouse building located in Vancouver's downtown eastside at 222 Main Street. This Courtroom is not used for the usual purpose of conducting trials. Instead, it processes 110 to 140 accused persons each day of the week, 52 weeks a year. The results of this process are determinations for each accused person as to: the accused's plea; trial at some future time; defence and Crown witness availability; the trial length; and, the actual trial date. The process is simply stated, but a moment's reflection reveals a daunting complexity. Despite the daily difficulties of coordinating Crown and defence counsel calendars, witness availability, multiple charges, a possible interpreter, in-custody status, etc., successful disposition of each accused is achieved daily. This success is

the result of the combined and respectful efforts between the Court's support staff, defence bar, Crown Counsel, and the administrative skills of the presiding judge.

[3] During each day in Courtroom 307 matters are often stood down or briefly adjourned to accommodate the immediate schedules of the various participants in this process, or to accommodate the negotiations required to determine trial length or possible admissions or guilty pleas. The Respondent characterizes this Courtroom as follows:

> (a) " ... a tool of the State to compel guilty pleas" [see Exhibit 1, attachment 6, Goldberg letter to Low, PCJ, page 3]; and
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> (b) having a fluid and accommodating process.

His characterization is not reconcilable. However, we reconcile by rejecting the former and accepting the latter. This is the context for allegation 1 of the citation.

Application to Film Proceedings

[4] Just before the hearing started, Ms. Paisley Woodward, a CBC television producer, made a respectful request on behalf of CBC Television to film the proceedings using a stationary camera. Ms. Woodward stated that only portions of the film would be used for news reporting purposes. Ms. Woodward referred to a 1994 hearing panel decision to permit filming of Law Society discipline hearing proceedings of a then member, Mr. Jack Cram. Ms. Woodward stated that the Respondent's situation was of public interest and that filming the hearing would provide more light on that matter than members of the public simply attending the hearing in the public gallery.

[5] More particularly, Ms. Woodward gave the following as reasons for the Panel to exercise its discretion to allow film recording: " that Sheldon is an unusual lawyer," " that it is not the first time he is in front of the Law Society" and " that judges have commented on Mr. Goldberg in the past."

[6] Law Society counsel took no position and the Respondent consented but stated his preference that the entire proceeding be recorded.

[7] Unless the Panel, in its discretion, gives permission, Rule 5-6(4) prohibits the operation of recording devices during a hearing. The majority of the Panel (Sigalet dissenting) elected to uphold the Rule and not exercise its discretion. The reasons given by Ms. Woodward on behalf of CBC were, to quote the majority of the Panel:

> ... not sufficient reasons to allow for the videotaping of the entire proceedings. However, the Panel does recognize that this is a public proceeding and wants to encourage that it be as open and transparent as is fair and possible, and under the circumstances we are going to grant the CBC the opportunity to video the hearing room with the Panel sitting and the members of the hearing present, and thereafter when they are completed their videoing, they can set up outside of the hearing room.

Facts

[8] The hearing formally began in the usual manner with the Panel determining, on the basis of Exhibits 1 to 4 inclusive that the citation, as amended, was served in accordance with the Rules. Paragraph 6 of Exhibit 4, the March 18, 2009 Agreed Statement of Facts conveniently summarizes the outcome of the service

process. Paragraphs 10 to 21 inclusive of Exhibit 4 are particularly relevant to allegation 1 and are set out below.

> 10. On July 17, 2007, the accused appeared with the Respondent in Court before the Honourable Judge Senniw for an arraignment hearing and to fix a date for trial. The arraignment hearing was held and the Respondent advised the Court that his time estimate for trial was two days. Crown Counsel's time estimate was three days. Judge Senniw directed the Respondent to the Case Managers to fix a three day trial. The Respondent then requested that the matter be put over to July 18, 2007 for the accused to appear on his own to confirm the trial date which he would try to pre-arrange. A copy of the Transcript of Proceedings before Judge Senniw was attached as Attachment 3 and admitted.
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> 11. No date was fixed by the July 18, 2007 appearance in *R. v. P*. The accused attended that appearance, which was before the Honourable Judge Rideout, without the Respondent. Crown Counsel advised the Court that she had a note from the Respondent requesting the matter be put over to Friday, July 20, 2007 for arraignment hearing. As a result, the matter was adjourned to July 20, 2007 at 9:30 a.m.
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> 12. No date was fixed by the July 20, 2007 appearance in *R. v. P* which was before the Honourable Judge Low in Courtroom 307. The Respondent was aware of the appearance but did not attend. He did not speak to his client about his non-attendance or explain to him why a date had not been set.
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> 13. Jeremy Hermanson was Crown Counsel in Courtroom 307 on July 20, 2007. He had no prior dealings with the Respondent on the *R. v. P* file.
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> 14. *R. v. P* was called in Courtroom 307 at 2:49:25 p.m.
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> 15. Just prior to it being called, Mr. Hermanson saw the Respondent just outside or inside Courtroom 307 and spoke with him.
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> 16. Mr. Hermanson reported his conversation with the Respondent to Judge Low when *R. v. P* was called at 2:49:25 p.m. Mr. Hermanson reported that the Respondent attended very briefly this afternoon and advised him he could not get a three day trial until January so he had not set the trial date. Mr. Hermanson reported that he advised the Respondent to re-attend and address this on the record but the Respondent told him he wanted the matter to go over to Monday, July 23, 2007 when he can, hopefully, attend and explain what's gone on. Judge Low canvassed this with the accused who stated, " I'd rather just get it all done with" and later stated, " This really sucks coming back here every couple of days." Judge Low asked Mr. Hermanson if the Respondent told him where he was going today to which Mr. Hermanson responded, " He - he just indicated that he wasn't available. He's in another Court." The Sheriff then informed the Court that the Respondent was in Courtroom 303.
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> 17. At this time, Mr. Hermanson understood that the Respondent was in another Courtroom in the Vancouver Courthouse. He does not recall the Respondent advising him that he had an appearance at the Surrey Courthouse.
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> 18. Judge Low stood *R. v. P* down and requested that a message be delivered to the

Respondent that when a break occurs in Courtroom 303, he is ordered to appear in Courtroom 307.

19. Crown Counsel Peter Stabler, who was present in Courtroom 307 subsequently spoke with the Respondent and relayed Judge Low's order. Mr. Stabler spoke to the Respondent in the hallway less than 15 metres away from Courtroom 307. He told the Respondent that he has to appear in Courtroom 307 and Judge Low has ordered him to appear. The Respondent simply responded, " No" and stated that he had to go to Surrey and then ran down the stairs. This was the only communication Mr. Stabler had with the Respondent concerning the *R. v. P* matter.

20. *R. v. P* was recalled at 3:15:53 p.m. at which time Mr. Stabler reported his conversation with the Respondent to Judge Low:

> He said he was not coming. I said you should go to this courtroom. Judge Low has ordered you here. He said I'm not going, I'm going to Surrey. He said he refused to come.

21. *R. v. P* was stood down and recalled at 3:34:12 at which time Judge Low seized himself of the matter, adjourned it to July 23, 2007 at 9:30 a.m. and directed that the Respondent appear before him on that date to explain his failure to comply with his order.

Discussion

[9] The Respondent seeks to excuse his behaviour by submitting the following argument:

(a) Courtroom 307's fluid process can accommodate his calendar;

(b) he had, in effect, a higher purpose, that of postponing the *R. v. P* matter until a Crown Counsel had a further review of that file and then perhaps be persuaded to reduce Judge Senniw's three day trial order for *R. v. P* to two days and thereby achieve an earlier trial date for Mr. P, his in-custody client; and

(c) circumstances beyond his control created a dilemma wherein the least disrespectful choice was to go to the Surrey Courthouse and continue with a trial (*R. v. R*) in that Courthouse.

[10] These excuses are not acceptable. The Respondent is the author of his own misfortune. He knowingly created the following schedule for Friday July 20, 2008:

(a) attend in Vancouver at 9:30 a.m. for three matters (*R. v. P*, *R. v. H* and *R. v. G*) in Courtroom 307;

(b) attend in Surrey at 9:30 a.m. for the continuation of the *R. v. R* trial; and

(c) attend in Vancouver at 2:00 p.m. for the continuation of the *R. v. T* trial.

[11] To fulfill this schedule, he ignored (a) above and attended to (b), the *R. v. R* trial. However, by the lunch break at 12:15 p.m., it was apparent that the estimated time for the *R. v. R* trial was not sufficient and the matter would have to be later continued. The Respondent, despite having the *R. v. T* trial in Vancouver, Courtroom 303 that afternoon at 2:00 p.m., (not to mention *R. v. P*, *R. v H* and *R. v. G* still somewhere in the fluid process of Vancouver Courtroom 307) impossibly set *R. v. R* for continuation in Surrey at 3:15 p.m.

Travel time of at least 40 minutes between the Surrey and Vancouver Courthouses, especially during the Friday afternoon rush hour, made the impossible impossible.

[12] At 3:15 p.m. approximately, a Crown Counsel, Mr. Peter Stabler emerged from Courtroom 307 and, in the hallway of the Vancouver Courthouse, just a few feet from the door of Courtroom 307, told the Respondent that Judge Low had ordered that he, the Respondent, appear now in Courtroom 307. Instead of walking the few feet into that Courtroom, the Respondent said: " No. I am going to Surrey." He ran down the stairs. This is not honourable conduct.

[13] The Respondent said in cross-examination that his attempt to deal with five matters in one day and in two different cities was, perhaps, overly ambitious and also that his scheduling was overly optimistic. This is disingenuous and ignores the fact that the criminal trial process has numerous unpredictable delays, which counsel must accommodate when scheduling matters. The Respondent has distorted the importance and relevance of his excuses. His behaviour and his excuses collectively trivialize the duty of a lawyer to his client and the Courts. His excuses are without merit, and they are disrespectful of the staff who administer the justice system. The Respondent's behaviour is deliberately disruptive and results, amongst other unacceptable results, in dissatisfied clients. To use the words of one of his client's, Mr. P: " ... this really sucks coming back here every couple of days."

[14] We accept that the Supreme Court of Canada decision *F.H. v McDougall*, 2008 SCC 53, 297 DLR (4th) 193 can be applied to clarify the law in *Law Society of BC v. Martin* 2005 LSB C 16. Previously, the evidentiary test for determining if the evidence established the allegations was a " shifting standard depending on the gravity of the allegations" in civil cases and in discipline matters arising from self-regulating bodies. Although the *F.H. v. McDougall* decision did not explicitly refer to self-regulating bodies, it is reasonable to find that this resolution means that now there is no " shifting standard" of probability test for these discipline matters. Now the standard of proof in self-regulating professional disciplinary proceedings is the test of the evidence on a balance of probabilities. The evidence in this matter is uncontroverted. We find that the facts show, on a balance of probabilities, that the Respondent's conduct demonstrates gross culpable neglect of his duties as a lawyer. This is not the conduct that the Law Society expects of its members.

[15] We have considered the following cases referred to by Law Society counsel, Ms. Rai:

1. *Law Society of BC v. Layne*, 1985 Decision of Hearing Panel.
2. *Law Society of Manitoba* v. *Walsh*, [1997] LSDD No. 96.
3. *Law Society of Manitoba v. Nadeau,* [2005] LSDD No. 35.
4. *Law Society of Alberta v. Rothecker*, [2006] LSDD No. 137.

[16] The Respondent did not refer to any cases nor did he distinguish these authorities. These cases show that a lawyer has an absolute obligation [*see Law Society of Manitoba v. Nadeau,* at paragraph 6] to ensure that, as an officer of the Court, she or he attends Court, whether for trial or for adjournment purposes, to: serve the client; respect the Court; and respect the administration of justice. Failure to fulfill that obligation is conduct deserving of sanction.

[17] The Respondent created a situation in which, because of his inexcusable, dishonourable conduct, he did not fulfill his obligations to his clients and to the Court. He has professionally misconducted himself.

[18] Mr. Butcher testified concerning the second allegation on the Schedule to the citation. He had been retained by the Law Society to investigate the situation that eventually formed the basis of allegation 1.

However, during the course of his investigation, the Respondent did not respond appropriately to Mr. Butcher's inquiries, and this created the basis for allegation 2. Paragraph 50 of Exhibit 1 shows that it took the Respondent six weeks to reply to the first of Mr. Butcher's five letters.

[19] The Respondent's reply in his January 2, 2008 letter, (see Exhibit 4, paragraph 26 and attachment 36) was, amongst other matters in that letter, to allege that Mr. Butcher was biased. That allegation demonstrates the Respondent's misunderstanding of Mr. Butcher's role. Mr. Butcher, a lawyer, was hired by the Law Society to investigate not adjudicate. Bias, and the lack thereof, is a quality that is more closely associated with the role of an adjudicator. If bias is associated with the role of an investigator, as the Respondent mistakenly alleges, then that quality is more properly expressed in terms of an inappropriate investigation by arguing such improper investigative methods as: ignoring favourable evidence, suppressing evidence, deceptive questioning, etc. Then the adjudicator, when confronted with such investigative evidence must asses that evidence in terms of weight, credibility and admissibility. Mr. Butcher's investigative efforts were beyond reproach. His credible evidence was admitted and given full weight. The Respondent's allegation has no application to Mr. Butcher's role.

[20] If we are not correct in finding that Mr. Butcher's role was investigative and therefore not subject to a bias allegation, then we must, in the alternative, consider bias. To consider bias we have to accept the implication of the Respondent's allegation that Mr. Butcher, at some level not articulated by the Respondent, is also an adjudicator. Assuming, for purposes only to consider this alternative approach, that Mr. Butcher, also had an adjudicative role to some degree, the standard for determining if the Respondent's allegation of Mr. Butcher's bias was a reasonable apprehension of bias is at the high threshold context given in *Law Society of BC v. Kierans*, [2001] LSDD No. 22. Paragraphs 17 and 18 of that decision say that, regardless of the descriptive phrases used to characterize the likelihood of bias, the " ... threshold for a finding of real or perceived bias is high ... ."

[21] We, as decision makers, in the course of our determining if a bias allegation achieves this high threshold must answer this standard question:

> would a reasonable person apprised of all the relevant facts and viewing the matter realistically conclude that, more likely than not, the person would not be able to decide fairly?

[22] The answer to this standard question is that the Respondent's allegation of bias does not meet the high threshold. The Respondent did not raise the bias issue in a timely manner and then, when he finally did, the Respondent not only declined the opportunity to deal with another Law Society investigator, but also went on to give answers, albeit incomplete and selective, to Mr. Butcher's letters. These continued dealings with Mr. Butcher show that the Respondent's perception of bias was low and well below the required threshold. If Mr. Butcher's investigative role actually had some aspect of adjudication, which, to repeat, the Panel does not accept, then a reasonable person would, in all likelihood, conclude that Mr. Butcher decided to conduct, and did conduct, his investigation fairly.

[23] The course of conduct in response to the letters particularized in allegation 2 as evidenced by the Respondent's letters does not amount to a prompt, candid and complete response as required by the following authorities referred to by Law Society counsel:

1. *Law Society of BC v. Dobbin*, [1999] LSBC 27.
2. *Law Society of BC v. Cunningham*, 2007 LSBC 17.
3. *Law Society of BC v. Braker*, 2006 LSBC 02.

[24] The Respondent did not cite any cases nor did he distinguish these authorities. These authorities do establish the importance of a prompt response to Law Society inquiries. More particularly, the Review Panel decision in *Dobbin* emphasized that Chapter 13, Rule 3 of the *Professional Conduct Handbook* is a rule that is " ... not created equal ... ." The *Braker* decision was, to a certain degree, more useful because the facts in that case dealt with a member who gave initial proper responses but then stopped due to serious personal difficulties. We were not referred to any cases where a member responded but did so in a manner that was not candid or not complete.

[25] In any event, the Respondent's response can be characterized as delayed then clever, selective and incomplete. Accordingly, we find that the Respondent's responses are a breach of Chapter 13, Rule 3 of the *Professional Conduct Handbook* and are therefore conduct that is professional misconduct.

Conclusion

[26] We find that the Respondent has committed professional misconduct with respect to the allegations 1 and 2 set out in the Schedule to citation. We direct that the penalty phase of this matter be set over to a date set by the Law Society's Hearing Administrator.