2011 LSBC 29
Report issued: September 21, 2011
Citation issued: December 21, 2010

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

Gerardus Martin Maria Laarakker

Respondent

Decision of the Hearing Panel
on Facts and Determination

Hearing date: July 14, 2011
Panel: Leon Getz, QC, Chair, Nancy Merrill, Alan Ross

Counsel for the Law Society: Carolyn Gulabsingh
Appearing on his own behalf: Garardus Laarakker

preliminary matters

[1] The Respondent admits service in accordance with the requirements of Rule 4-15 of the Law Society Rules.

[2] The Law Society and the Respondent have reached an Agreed Statement of Facts, which was admitted into evidence as Exhibit 2.

Background

[3] This matter arises out of allegedly discourteous and personal remarks made by the Respondent about a lawyer in Ontario (the "Ontario Lawyer").

[4] The citation alleges:

> (a) On or about November 20, 2009 the Respondent posted comments on the internet that contained discourteous and personal remarks about the Ontario Lawyer; and
>
> (b) In the course of representing a client, the Respondent sent a fax on or about November 22, 2009 to the Ontario Lawyer which contained discourteous and personal remarks about the Ontario Lawyer.

[5] The Respondent has admitted the evidence in the Agreed Statement of Facts. The Respondent's position is that his conduct in respect of the posting on the internet and the correspondence with the Ontario Lawyer was justified given the correspondence that the Respondent's client had received from the Ontario Lawyer.

ONUS AND STANDARD OF PROOF

[6] There is no issue regarding the onus or standard of proof in this case. As noted above, the Respondent admits all of the conduct alleged by the Law Society. He denies that the conduct should attract any sanction.

[7] Be that as it may, we note that the standard of proof is on a balance of probabilities. That standard is met.

Facts

[8] The Respondent is a sole-practitioner in Vernon, British Columbia. In or about November, 2009, a client approached the Respondent regarding a letter that she had received from the Ontario Lawyer (the "Demand Letter").

[9] The Demand Letter sought payment of $521.97 (the "Settlement Amount") as damages from the client. The client's teenage daughter had been caught shoplifting at a retail outlet. The Demand Letter stated that the retailer took the position that it had a right to claim damages against the parent or guardian of a young person who had been caught shoplifting on the basis that the parent had failed to provide reasonable supervision.

[10] The Demand Letter threatened that if the client did not pay the Settlement Amount, the Ontario Lawyer may receive instructions to file a civil suit against the client seeking an amount greater than the Settlement Amount.

[11] The Respondent, for personal reasons, felt strongly about the Demand Letter.

[12] After consulting with the client, the Respondent sent a one page fax letter to the Ontario Lawyer. The Respondent's letter read:

> I have been approached by [the client] with respect to your letter of October 30, 2009. Suffice it to say that I have instructed her not to pay a penny and to put your insulting and frankly stupid letter to the only use for which it might be suitable, however uncomfortably.
>
> It is disappointing when members of our profession lend themselves to this kind of thing. You must know that you are on the thinnest of legal grounds and would be highly unlikely to get a civil judgment against my client. That is aside from the logistics in bringing this matter to court in BC. I am also well aware that by preying on people's embarrassment and naiveté you will unfortunately be able to pry some money out of the pockets of some of the humiliated parents.
>
> I have notified the local paper of this scam. Save the postage in the future and become a real lawyer instead! You must have harboured dreams of being a good lawyer at one point. Surely bullying people into paying some small amount of money is not what you went into law for.
>
> But then again, someone has to be at the bottom of his class, practising with a restricted license as you appear to be.
>
> Good luck.

[13] Two days before sending the letter, on November 20, 2009, the Respondent posted a comment on the "Canadian Money Advisor" internet blog. The Respondent posted the comment in response to two postings made by an individual who had received a letter similar in nature to the Demand Letter. The Respondent posted on the blog as follows:

> I am a lawyer.
>
> This guy is the kind of lawyer that gives lawyers a bad name. He is relying on intimidation and

> blackmail to get the lousy $500. Don’t pay him. I hate these sleazy operators.
>
> Speaking as a lawyer, he would have little chance of collecting in court. He would have rto [sic] prove that a chiold [sic] was a habitual criminal. As far as an adult is concerned, he has to prove the loss.
>
> Also remember this, he has to bring the action in a court near to where the incident took place (at least in BC) Gueuss [sic] what – that ain’t going to happen.

[14] The Respondent identified himself as a lawyer on this posting. He testified that he later received telephone calls from potential clients who read the posting.

[15] The Ontario Lawyer made a complaint to the Law Society of British Columbia (the “Law Society”) about the Respondent’s remarks contained in the letter.

[16] It is unclear when, but the Ontario lawyer also made a complaint to the Law Society about the Respondent’s blog posting.

[17] There was a series of correspondence between the Law Society and the Respondent between February 1, 2010 and March 18, 2010. This Panel acknowledges that the Respondent was assiduous in his responses to the Law Society. When it was suggested that he should remove the blog posting, he immediately wrote to the operator of the blog and requested that the posting be removed.

[18] In his substantive response to the Law Society’s letter, the Respondent took the position that the real issue in this case was the conduct of the Ontario Lawyer. He raised several issues regarding the conduct of the Ontario Lawyer. The Respondent did concede that, if the Ontario Lawyer was found to have conducted himself professionally and ethically according to Law Society standards, then the Respondent’s actions in denouncing the Ontario Lawyer were wrong and, in that case, he advised that he regretted his remarks and apologized unequivocally.

[19] However, the entire tone of the Respondent’s substantive response to the Law Society was that his letter to the Ontario Lawyer and his blog-posting were justified because the actions of the Ontario lawyer were blameworthy.

[20] In his oral submissions before this Panel, the Respondent indicated that he believed that he was allowed to do what he did in the face of a “rogue lawyer”. He submits that none of his actions constitute professional misconduct or conduct unbecoming.

[21] The Respondent further submitted that, if he is found to be wrong, then he would apologize.

[22] Finally, the Respondent argued that if his conduct warranted sanction, then the Ontario Lawyer’s letter constituted provocation and should be a mitigating factor.

ADVERSE DETERMINATIONS PURSUANT TO SECTION 38(4) AND THE APPLICABLE TESTS

[23] This Panel must determine whether the Respondent’s actions warrant sanction. If his actions warrant sanction, one of four possible adverse determinations must be made:

> (a) professional misconduct;
>
> (b) conduct unbecoming a lawyer;
>
> (c) breach of the Act or Rules; or
>
> (d) incompetent performance of duties undertaken in the capacity of a lawyer.

[24] Only the first two of these options are available on the facts. The actions in this case cannot constitute a breach of the Act or Rules, or incompetence. If we find that the Respondent's actions warrant sanction then we must find that the actions constitute either professional misconduct or conduct unbecoming a lawyer.

[25] The allegation of the Law Society is that the Respondent's incivility constitutes professional misconduct and/or conduct unbecoming.

TEST FOR PROFESSIONAL MISCONDUCT

[26] "Professional misconduct" is not defined in the *Legal Profession Act*, the Law Society Rules or the *Professional Conduct Handbook*. We rely on the decisions of prior panels for the definition. In *Law Society of BC v. Martin*, 2005 LSBC 16, the panel considered the question of what constitutes professional misconduct and concluded that the test is as follows:

> Whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct. (para. [171])

[27] The reasoning in *Martin* was revised in *Re: Lawyer 10*, 2010 LSBC 02, in which the panel decided that, in addition to the test developed in *Martin*, the conduct of the respondent must also be "culpable or blameworthy". In our opinion, the reasoning in *Re: Lawyer 10* simply provides a category of conduct that may fit within the "marked departure test", but requires a degree of personal responsibility or culpability in order to reach a finding of professional misconduct.

TEST FOR CONDUCT UNBECOMING A LAWYER

[28] "Conduct unbecoming a lawyer" is defined in Section 1(1) of the *Legal Profession Act* LSBC 1998 c.9. That section defines "conduct unbecoming a lawyer" as conduct that is considered in the judgment of the benchers or a panel:

> (a) to be contrary to the best interest of the public or of the legal profession, or
>
> (b) to harm the standing of the legal profession.

[29] The Benchers adopted a "useful working distinction" between professional misconduct and conduct unbecoming a lawyer (see *Law Society of BC v. Berge*, 2005 LSBC 28 (upheld on Review, 2007 LSBC 07), *Law Society of BC v. Watt*, [2001] LSBC 16). In *Watt* the Benchers stated:

> In this case the Benchers are dealing with conduct unbecoming a Member of the Law Society of British Columbia. We adopt, as a useful working distinction, that professional misconduct refers to conduct occurring in the course of a lawyer's practice while conduct unbecoming refers to conduct in the lawyer's private life.

[30] Hence, on the facts of this case, we are of the opinion that the letter to the Ontario Lawyer cannot be considered to be conduct unbecoming a lawyer because it was undertaken within the Respondent's practice.

[31] The blog posting, however, could be considered a mixture of conduct in the Respondent's private life and in the course of the lawyer's practice. As noted above, the blog posting was made on November 20, 2009 before the letter was sent to the Ontario lawyer. The Respondent identified himself as a lawyer and received potential file referrals as a result of his blog posting.

[32] Therefore, in our opinion, if it warrants sanction, the blog posting must be considered either

professional misconduct or conduct unbecoming a lawyer. It was an action performed, at least in part, in the course of the lawyer's practice.

INCIVILITY

[33] The Canons of Legal Ethics, *Professional Conduct Handbook* Chapter 1, provide the following instruction regarding a lawyer's obligations in communicating with other parties:

> A lawyer is a minister of justice, an officer of the courts, a client's advocate, and a member of an ancient, honourable and learned profession.
>
> In these several capacities it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.
>
> …
>
> 3. To the client
>
> (4) A lawyer should treat adverse witnesses, litigants, and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public unpopularity.
>
> …
>
> 4. To other lawyers
>
> (1) 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 which cause delay and promote unseemly wrangling.

[34] In prior decisions, the Law Society has enforced the Canons with respect to correspondence. In *Law Society of BC v. Lanning*, 2008 LSBC 31, it was held:

> A lawyer's communications must be courteous, fair, and respectful. A lawyer is to refrain from personal remarks or references, and to maintain objectivity and dignity. The purpose of a lawyer's communication is to properly advance the client's matter to a conclusion.

[35] Further, in *Law Society of BC v. Greene* [2003] LSBC 30, the Respondent had made comments about another lawyer and members of the judiciary. The panel held (at paras. 34 and 35):

> Our occupation is one where we often deal in difficult circumstances with difficult people, and emotions often run high. It is not in the best interests of the justice system, our clients, and ourselves to express ourselves in a fashion which promotes acrimony or intensifies the stressfulness or the difficulty of those already stressful and difficult circumstances.
>
> Public writings or comments which promote such acrimony or denigrate others in the justice system have a negative effect upon the system as a whole. This is particularly true where it appears that the comments are made for no purposeful reason.

[36] In both the *Lanning* and *Greene* cases, the respondent's uncivil conduct was found to be professional misconduct.

POSITION OF THE PARTIES

[37] The Law Society submits that portions of the Respondent's letter to the Ontario Lawyer were disrespectful, did not promote the resolution of the matter, promoted acrimony and fall below the standard expected of the profession. In particular, the Law Society points to the following excerpts:

> "… Suffice it to say that I have instructed her not to pay a penny and to put your insulting and frankly stupid letter to the only use for which it might be suitable, however uncomfortably.
>
> …
>
> … Save the postage in the future and become a real lawyer instead! You must have harboured dreams of being a good lawyer at one point. Surely bullying people into paying some small amount of money is not what you went into law for.
>
> But then again, someone has to be at the bottom of his class, practising with a restricted license as you appear to be.

[38] In addition, the Law Society contends that the Respondent's blog posting served no useful purpose and raised animosity between the parties.

[39] In particular, the Law Society referenced the comments on the blog stating:

> This guy is the kind of lawyer that gives lawyers a bad name. … I hate these sleazy operators.

[40] The Law Society further submits that the fact that the Respondent posted his comments on a blog on the internet heightens the significance and the consequences of his actions. Obviously, the publication of such a blog would be available to all members of the public with access to the internet.

[41] The Law Society submits that the Respondent's remarks regarding the Ontario Lawyer are further exacerbated by his attempts to justify them on the basis that the Ontario Lawyer's conduct was in fact blameworthy.

[42] As noted, the Respondent admits that he wrote the words, but justifies those words on the basis that he was dealing with a rogue lawyer.

DISCUSSION

[43] We set out earlier in these reasons the portions of the Canons of Legal Ethics dealing with civility. The duties described in those Canons are not restricted to situations where the lawyer agrees with the position, or the practice style, of the opposing lawyer or party. The duty of courtesy and good faith applies to all counsel, regardless of one's feelings about them. The Canons specifically note that "personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers which cause delay and promote unseemly wrangling."

[44] We accept that the Respondent may have been upset by the legal position and the allegations set out in the Ontario lawyer's Demand Letter. However, those feelings do not justify the correspondence and blog posting drafted by the Respondent.

[45] As noted above, the Respondent takes the position that he was allowed, perhaps even compelled, to do what he did in the face of a "rogue lawyer". Even if the Ontario Lawyer can be considered to be a "rogue", it

is not the Respondent's place to pursue some form of vigilante justice against that lawyer by posting intemperate personal remarks or by writing letters that do not promote any possibility of resolution of the client's legal dispute.

[46] Clearly, the appropriate avenue for the Respondent to take would have been to file a complaint either with the Law Society of Upper Canada or the Law Society of British Columbia. Obviously, the Respondent did not take those steps. Thus, by taking actions that he felt were protecting the integrity of the profession, he was achieving the opposite result.

[47] The Respondent's actions were a marked departure from the conduct the Law Society expects of its members. The Respondent's belief in the correctness of his position does not relieve him of culpability.

Determination

[48] On the basis of the reasoning set out above, we find that the Respondent's letter to the Ontario Lawyer and the blog posting constitute professional misconduct in respect of the allegations in the citation.