2011 LSBC 30
Report issued: September 21, 2011
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PURSUANT TO RULE 4-38.1(2), AS THE CITATION IN THIS MATTER WAS DISMISSED BY THE PANEL THE REPORT IS PUBLISHED ANONYMOUSLY

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

Re: Lawyer 13

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: July 21, 2011
Panel: Leon Getz, QC, Chair, Peter Lloyd, Lee Ongman

Counsel for the Law Society: Maureen Boyd
Counsel for the Respondent: Henry Wood, QC

introduction

[1] The Respondent in this case used the words “odalisque” and “courtesan” to refer to a lady, JD, who was alleged to be living in an adulterous relationship with the husband of his client, KB. He did so in a letter to the lawyer who represented the husband, SB. He thought those words were synonyms for “mistress” or “paramour” and that is the meaning he chose to give them, and intended. When SB’s lawyer received the letter, not surprisingly unfamiliar with the words, he looked up their meaning and was outraged, as was his client, SB.

[2] SB’s lawyer demanded an immediate apology. When he did not get it, both he and SB complained to the Law Society. Those complaints have landed the Respondent on the wrong end of a citation for professional misconduct in respect of his use of those words.

[3] “Odalisque” and “courtesan” are not in common use among lawyers or, it would seem, anyone else. They do not exactly trip off the tongue. Their immediate origin is apparently French.

[4] *The Canadian Oxford Dictionary* (1998) defines “odalisque” to mean:

> An Eastern female slave or concubine, esp. in the Turkish Sultan’s seraglio. [French from the Turkish odalik from oda chamber + lik function]

and “courtesan” to mean:

> 1. a prostitute, esp. one with wealthy or upper-class clients. 2. the mistress of a wealthy man. [French courtisane from Italian cortigliana, fem. of corligiano – courtier from corte COURT].

[5] Used as the Respondent used them, to refer to JD, both words are suggestive of scandalous or morally reprehensible conduct on her part. As counsel for the Law Society put it in her written submission, “both

these words import a sexual relationship between a man and a woman; however, both these words also carry the inference that the relationship has an economic basis rooted in either slavery or prostitution."

BACKGROUND

[6] KB had commenced a family law proceeding against her husband in the British Columbia Supreme Court in January 2010. Over the next few weeks the Respondent and SB's lawyer corresponded on a number of matters, including a proposal to resolve certain interim issues. While the correspondence does suggest some mild testiness on the part of the lawyers, there is nothing unexpected or out of the ordinary in the language that either of them used.

[7] This changed in a letter that the Respondent wrote to SB's lawyer on February 8, 2010. In it he said, among other things:

> I enclose my client's unfiled copy of the Amended Statement Of Claim. I have added your client's odalisque as a co-defendant for the purposes of your client's adultery and in order to claim costs for the divorce relief, if pushed to proceed on this claim. We will provide your offices with a filed copy in due course. Will your client execute the documents wherein he admits that during the marriage your client had sexual relations with JD so that we can proceed to immediately obtain a divorce? If your client refuses such, we will proceed to prove the facts necessary to show what has occurred with his courtesan.

[8] The next day SB's lawyer wrote to the Respondent to say that both he and his client were deeply offended by the characterization of SB's "friend" as an odalisque and a courtesan. He said that this was "unnecessarily inflammatory" and demanded an apology to SB by no later than 3:00 p.m. the next day.

[9] On February 16, 2010, no apology having been received, both SB and his lawyer lodged complaints with the Law Society.

[10] On February 23, 2010 the Respondent wrote to SB's lawyer in connection with the dispute between their respective clients. Far from apologizing, as had been demanded, he seemed to reject the demand as unwarranted, writing:

> That I referred to [Ms. D] as your client's paramour by the use of two alternate words that have this definition should be of no concern to anyone, as indeed [Ms. D] was such and, if she does not agree, we will prove so in this action. I suppose if I referred to [Ms. D] as your client's lover, which also has the same meaning as the above, what would have been the reaction?

[11] It was not until May 12, 2010 that, in a communication addressed not to SB or his lawyer but to Ruth Long at the Law Society, that the Respondent apologized. He wrote: "I had no intention to be rude or harsh by my words. As it appears it was taken this way, I do apologize. I did not mean to use the words in their sense as perceived. I was not receiving cooperation consistent with the circumstances and was frustrated."

[12] It is beyond debate that it was not necessary for the Respondent to resort to esoteric words to convey his intended meaning. No great feat of literary imagination is required to think of words in common usage that might have been used for the purpose, would have been immediately intelligible and that carried no risk of offending any but perhaps the most delicate of sensibilities.

[13] Why, then, did he choose "odalisque" and "courtesan"; and given their rarity, how did he find them? There is something vaguely comical about his explanation.

[14] The Respondent told us that he has had a long-standing interest in words and language. He subscribes,

for example, to a daily email newsletter containing information about the pronunciation, meaning, etymology and usage of one or more words that he receives from a website, Wordsmith.org.

[15] The Respondent composes his own letters directly and types them on his computer using a Word Perfect word processing program. When composing his letter of February 8, 2010 to SB's lawyer, his initial inclination was to use the word "mistress" or "paramour". On reflection, however, that struck him as boring, so he decided to look for some other, more original and interesting way of referring to her.

[16] To do this, he used the thesaurus tool of his word processing system to search for a synonym for "mistress". "Concubine", "courtesan", "doxy", "odalisque" and "paramour" were generated. Aside from the general wish to add some literary flair to his correspondence that led him to search for synonyms, the Respondent did not offer any explanation of his particular choice of "odalisque" and "courtesan" rather than, say, "concubine", "doxy" or "paramour".

[17] As we understand it, the Respondent assumed that, since "odalisque" and "courtesan" were identified as synonyms for "mistress", the three words were perfectly exchangeable since they each bore the identical meaning. But that is of course only rarely the case. To select an appropriate synonym, it is important to understand its meaning – both what it denotes and what it connotes – and to compare that with the meaning of the word for which it is to be substituted. Failure to do this – by consulting a dictionary – may carry the risk of provoking either outrage – as in this case – or derision.

[18] The Respondent freely conceded that he did not consult a dictionary. He assumed the words meant "mistress" or "paramour", and that is the meaning he intended to convey by their use – neither more nor less.

SOME PRINCIPLES AND A DISCUSSION

[19] The citation alleges that the Respondent's letter of February 8 addressed to SB's lawyer contained "rude, unprofessional and disrespectful characterizations of a person associated with the opposing party" and this conduct constituted professional misconduct.

[20] There is no significant disagreement as to the applicable principles. They are set out in the reasons in Law Society of BC v. Martin, 2005 LSBC 16 where the panel pronounced the following propositions, by now well known, as relevant to an allegation of professional misconduct:

a. 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.

> Paragraph [154]
>
> b. … the real issue is not whether the behaviour complained of can be described as a single act, or a series of acts, and whether it is labelled as gross negligence or not.
>
> Paragraph [170]
>
> c. The test ... is 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.
>
> Paragraph [171]

[21] The question, then, is whether the Respondent's choice of words constituted, in the circumstances, "gross culpable neglect of his duties as a lawyer" and "a marked departure from that conduct the Law

Society expects of its members."

[22] Counsel for the Law Society, Ms. Boyd, in her characteristically fair and careful submission, referred us to several propositions set out in the Canons of Legal Ethics that, she contended "clearly articulate the standard expected of lawyers in their communications":

> 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.

[23] By way of illustration, as we understood her, of the application of "the standard expected of lawyers in their communications," Ms. Boyd referred us to several earlier decisions, among them those in *Law Society of BC v. Barker*, [1993] LSDD No. 189, *Law Society of BC v. Greene*, [2003] LSBC 30, and *Law Society of BC v. Lanning*, 2008 LSBC 31.

[24] We have not found these cases particularly useful. In each of them the lawyer used language that, on its face, was fairly characterized as foul and abusive (*Barker*), intemperate and contemptuous (*Greene*) and insulting and degrading (*Lanning*). In each case the lawyer's use of the impugned language was entirely gratuitous, serving no relevant purpose , and in each case, the manifest intention and purpose of the lawyer in using those words was to abuse, show contempt, insult and degrade. Of this there was not, nor could there be, any doubt.

[25] In the present case there are two possibilities. One is that the Respondent used "odalisque" and "courtesan" with the intention of abusing, insulting and degrading JD and SB by suggesting that their relationship, in Ms. Boyd's words, "had an economic basis rooted in either slavery or prostitution." If that is how the evidence must be understood, it would be a proper and defensible basis for us to find that he has been guilty of professional misconduct. The other possibility is that he had no such intention and his use of those words amounted to no more than, to paraphrase the words of his counsel, Mr. Wood, a naïve reliance on an online thesaurus to substitute little used but acceptable synonyms to break the tedium of too familiar language. In that event, a finding of professional misconduct would be an exercise in prissy censoriousness. We do not think that the disciplinary powers of the Law Society have been conferred upon it for that purpose.

[26] Ms. Boyd indeed argued that the evidence justifies a finding that the Respondent intended to offend and

so must be found to have professionally misconducted himself. She relied on the facts that:

> (a) prior to the letter of February 8, the Respondent sent SB's lawyer an email that "contained a sharp edge by using inflammatory language." The language in question was the sentence, "Pontifications are highly misplaced." We are hard pressed to see this as evidence of an intention to offend.
>
> (b) on February 23, after he had been told that he had caused offence and an apology demanded, he did not immediately apologize but, instead, sought to justify his choice of words and, in essence, repeated the "insult". See above, paragraph [10].
>
> (c) when he finally did apologize, in an email to Ruth Long at the Law Society (above, paragraph [11]), he noted that he "was not receiving cooperation consistent with the circumstances and was frustrated." Ms. Boyd described this explanation as "curious, because if his choice of words was truly unintentional, presumably his personal frustration would have played no role in their selection."

[27] We have considered these points in the light of well-established law concerning the onus and burden of proof (see *Law Society of BC v. Schauble*, 2009 LSBC 11 and *Law Society of BC v. Strandberg*, 2007 LSBC 19). We have reached the conclusion that, overall, they do not provide a basis for rejecting the Respondent's contention that he intended no disparagement of SB or JD.

[28] The Respondent has been practising law for more than 20 years. He is a self-proclaimed lover of words and language. A lawyer, more than anyone, should be aware of the importance of using words carefully, alive to their nuances. Whether his failure to do so is the product of naïveté, as suggested by his counsel, stupidity or lack of care, it is at least unintelligent and certainly inexcusable. In one sense it might be considered incompetent, even if not, perhaps, a form of incompetence that warrants the imposition of discipline.

[29] It is not, however, professional misconduct. The citation must accordingly be dismissed.