2013 LSBC 13
Report issued: May 30, 2013

DECISION SET ASIDE BY THE COURT OF APPEAL

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a referral to the Benchers under Rule 4-40 concerning

MALCOLM HASSAN ZORAIK

(A Non-practising member of the Law Society)

Decision of the Hearing Panel

Hearing date: January 25, 2013
Benchers: Leon Getz, QC, Chair, David Crossin, QC, Lynal Doerksen, Miriam Kresivo, QC, Benjimen Meisner, Nancy Merrill, Gregory Petrisor, David Renwick, QC, Tony Wilson

Counsel for the Law Society: Jaia Rai
Counsel for Mr. Zoraik: Russell Tretiak, QC

introduction and background

[1] On June 14, 2010 Mr. Zoraik was convicted in the Provincial Court of British Columbia on counts of public mischief contrary to section 140(2) of the *Criminal Code of Canada* (the "Code") and of fabricating evidence contrary to section 137 of the Code.[1] The actions that led to the charges against him were committed in relation to some litigation before the Supreme Court in which he appeared as counsel for one of the parties. In the course of his reasons for sentence, the Provincial Court Judge said, by way of a succinct summary of the circumstances: "In short, Mr. Zoraik manufactured a letter which he knew was likely to become evidence before a court, and indeed sought to have a court rely upon that manufactured evidence."

[2] Mr. Zoraik appealed against his convictions, but in June 2012 the British Columbia Court of Appeal dismissed[2] his appeal.

[3] Following this the Discipline Committee, acting under Law Society Rule 4-40(2), decided to refer the matter to the Benchers to decide whether, to quote Rule 4-40(3), we should "summarily suspend or disbar" Mr. Zoraik.

citations and their consequences

[4] In the ordinary course of events disciplinary proceedings against a lawyer are initiated by the issuance of a citation on the authority of the Discipline Committee. The contents of a citation are prescribed by the Law Society Rules. Simply put, it must give the respondent reasonable notice of what misconduct he or she is alleged to have committed in sufficient detail to understand the case that must be met. [3]

[5] The issuance of a citation is followed by a hearing at which both the lawyer and the Law Society have the opportunity to adduce evidence and make legal arguments. [4] The evidence may include oral testimony from the respondent and from others. Section 38(4) of the *Legal Profession Act* (the "Act") says that, on completion of the hearing, the panel must either dismiss the citation or decide that the respondent has committed one or more of several categories of conduct for which he or she may be disciplined. The citation will invariably include the Law Society's characterization of the respondent's misconduct as, for example, "professional misconduct", "conduct unbecoming a lawyer", or "incompetent performance of duties undertaken in the capacity of a lawyer".

[6] If the panel concludes that the respondent has done one or more of these things, it must hold a further hearing at which both the respondent and the Law Society are given an opportunity to tender evidence and make submissions, to decide which among a range of possible sanctions – such as a reprimand, a fine, a suspension or disbarment – specified in section 38(5) of the Act should be imposed.

references to the benchers under rule 4-40

[7] One might have expected that what we have described above as the "ordinary course of events" would be followed in this case. As we have pointed out, however, it was not. In this case the Discipline Committee, rather than authorizing the issuance of a citation alleging that Mr. Zoraik had engaged in one or more of the kinds of "offensive" conduct identified in section 38(4) of the Act , made a choice – it was not required to act in this way – to "refer" the matter to us under Law Society Rule 4-40(2), to decide whether, to quote Rule 4-40(3), we should "summarily suspend or disbar" Mr. Zoraik. We have no explanation of the reasons for the Committee's choice.[5]

[8] The choice that the Committee made is highly unusual. Although in one form or another Rule 4-40 has been part of the discipline regime for at least 25 years, neither counsel was able to point us to any other instance of its use.

[9] The statutory basis for Rule 4-40 and its related Rules 4-41 and 4-42 is section 36(h) of the Act. This authorizes the Benchers to make rules to permit them "to summarily suspend or disbar a lawyer convicted of an offence that was proceeded with by way of indictment . . . ."

[10] The material provisions of Rules 4-40 to 4-42 are as follows:

> 4-40 (1.1) In this Rule, "offence" means
>
> (a) an offence that was proceeded with by way of indictment, or
>
> (b) . . . .
>
> (2) If the Discipline Committee is satisfied that a lawyer or former lawyer has been convicted of an offence, the Committee may refer the matter to the Benchers under subrule (3).
>
> (3) Without following the procedure provided for in the Act or these Rules, the Benchers may summarily suspend or disbar a lawyer or former lawyer on proof that the lawyer or former lawyer has been convicted of an offence.
>
> 4-41 (1) Before the Benchers proceed under Rule 4-40, the Executive Director must notify the lawyer or former lawyer in writing that
>
> (a) proceedings will be taken under that Rule, and
>
> (b) the lawyer or former lawyer may, by a specified date, make written submissions to

the Benchers.

(2) …

(3) In extraordinary circumstances, the Benchers may proceed without notice to the lawyer or former lawyer under sub rule (1).

4-42 (1) This Rule applies to summary proceedings before the Benchers under Rule 4-40.

(2) The Benchers may, in their discretion, hear oral submissions from the lawyer or former lawyer.

(3) Subject to the Act and these Rules, the Benchers may determine practice and procedure.

the position of the Law Society

[11] It is common ground that the offences of which Mr. Zoraik was convicted fall within Rule 4-40(1.1), and there is proof of his conviction as required by Rule 4-40 (2) and (3).

[12] In the circumstances, the Law Society says that the Discipline Committee had the authority to refer the matter to the Benchers under Rule 4-40 (2); it is thus properly before this Panel of Benchers, and we have the jurisdiction, indeed the obligation, under Rule 4-40(3) to decide whether to summarily suspend or disbar Mr. Zoraik. It says that we should exercise that jurisdiction and that on the facts the only appropriate disciplinary response is to disbar Mr. Zoraik.

the position of Mr. Zoraik

[13] It is a little less easy to distill the position of Mr. Zoraik. He emphasizes that recourse to Rule 4-40 is unusual, notes that it permits us to select one of only two possible disciplinary responses – suspension or disbarment – rather than choose from the full range available to a panel under section 38(5) of the *Act* following a hearing on a citation,[6] and contends that, "because all that is before [the Benchers] is the power to suspend or disbar on proof of conviction of an offence,"[7] we are precluded from considering "mitigating circumstances" and "palliative conditions" that could be elicited directly from the lawyer and his supporting witnesses. In the circumstances, Mr. Zoraik says, for us to act under Rule 4-40(3) "to summarily strip" him of his licence to practise law would be "contrary to principles of fundamental justice enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*."[8]

[14] In the circumstances, one might have expected Mr. Zoraik to seek some remedy designed to prevent us from proceeding in a way that he considers violates his *Charter* rights. But he has not done so. That being the case, we do not think it is necessary to deal with any issues based on the possible application of the *Charter*. Instead, Mr. Zoraik asks us "to refer the matter back ... to the Discipline Committee, [for] a citation [to] be issued and the normal hearing set which will allow for a range of dispositions not provided by the Rule 4-40 process." [9]

[15] The relief that Mr. Zoraik seeks invites us, in effect, to revisit the choice that the Discipline Committee made; to conclude that it made the wrong choice; and to direct it to correct its error by authorizing the issuance of a citation. Mr. Zoraik offered us nothing, however, by way of support in the Rules for this course of action, and we have been unable to find any. Rule 4-42(3) does say, somewhat inscrutably to be sure, that "Subject to the Act and these Rules, the Benchers may determine practice and procedure." That language, whatever it means, does not in our opinion give us the jurisdiction to do what Mr. Zoraik wants us to do, and we accordingly decline to do so.

[16] We should add this. Mr. Zoraik did not ask us to hear any evidence, whether addressed to "mitigating circumstances" and "palliative conditions"[10] or otherwise, and we think that he was right in this, for there is nothing in Rule 4-40 or its related Rules that permits it.[11] We note, in this connection, that when it made the decision to refer the matter to us, the Discipline Committee, as recorded in its minutes, had before it and considered an extensive submission on behalf of Mr. Zoraik, including numerous testimonials to his character. We were provided with a copy of that submission, the essential thrust of which was that any sanction imposed upon him should be limited to "time served" under his undertaking.[12] His submission to us was to the same effect.[13] Moreover, as we understood his position, if we did decide that we can and should refer the matter back to the Discipline Committee to issue a citation, he did not intend to tender any new evidence at the ensuing hearing on the citation.

[17] It is worth noting, as well, that the submissions that Mr. Zoraik made to this Panel of Benchers dealt in some detail with the application of the factors identified in the leading decision in *Law Society of BC v. Ogilvie,* [1999] LSBC 17, as appropriate to be considered in relation to the choice of sanctions. They included submissions concerning "the mitigating circumstances" and "palliative conditions" that he had suggested the Rule 4-40 procedure precluded us from considering and hence gave rise to a claimed breach of his *Charter* rights.

[18] Having considered all of this, we are unpersuaded both that Mr. Zoraik has been exposed to any real prejudice as the result of the decision of the Discipline Committee to refer the matter to us under Rule 4-40(2) instead of authorizing the issuance of a citation and that he will be exposed to any such prejudice as the result of our exercising our jurisdiction under Rule 4-40(3).

[19] We proceed, accordingly, to consider the question referred to us by the Discipline Committee, as to whether Mr. Zoraik should be suspended or disbarred.

SUSPENSION OR DISBARMENT

The Facts[14]

[20] The circumstances giving rise to Mr. Zoraik's convictions can be briefly described. In April 2009 he acted as counsel for the plaintiff in an action for damages arising from an automobile accident. The case was heard by a judge and jury. After deliberating for a mere 20 minutes the jury delivered a verdict of no liability on the part of the defendant. Immediately thereafter, Mr. Zoraik applied to the judge to decline to enter judgment because of the brevity of the jury's deliberations. That application was adjourned to May 13, 2009, with submissions to be filed by May 11, 2009.

[21] On May 6, 2009, before that application was heard, an envelope containing a letter was found on a counter in a small publicly accessible alcove, used for searching court files, located beside the Court Registry. The letter purported to be from the husband of an unidentified juror in a civil action and alleged that his wife had been "offered money for her vote in the court." The case described in the letter matched that on which Mr. Zoraik had acted as plaintiff's counsel. The allegation was in fact untrue, but the existence of the letter gave rise to an investigation, as the result of which he was charged with and subsequently convicted of creating and depositing the letter in the courthouse in a way that contravened the sections of the *Criminal Code* referred to. It is worth repeating here the observation, already quoted, of the Provincial Court judge who presided at Mr. Zoraik's trial that Mr. Zoraik "manufactured a letter which he knew was likely to become evidence before a court, and indeed sought to have a court rely upon that manufactured evidence."

Discussion

[22] The touchstone for the exercise of functions of the Law Society, not least its disciplinary function, is the Society's obligation and duty, expressed in section 3(b) of the Act, to "uphold and protect the public interest in the administration of justice" by, among other things, "ensuring the independence, integrity, honour and competence of lawyers." Virtually all of these elements are engaged in this case.

[23] We have little hesitation in concluding that Mr. Zoraik should be disbarred. In coming to this conclusion we have attempted to take account of the following considerations.[15]

The Seriousness of Mr. Zoraik's Conduct and its Significance for Public Confidence in the Administration of Justice and the Legal Profession

[24] The two offences of which Mr. Zoraik was convicted appear in the *Criminal Code* under the heading "Offences Against the Administration of Law and Justice" and the subheading "misleading justice". The conduct embraced by them is proscribed because it is considered to constitute an attack on the integrity of our system of justice. The proper administration of justice depends upon courts being able not merely to accept those who appear as counsel as honourable people of integrity but also to rely upon those qualities being reflected in their conduct. Judges are not in a position to undertake independent enquiries into the facts and issues of cases that require judicial determination. They lack the staff, the financial resources, the knowledge or the skills to make or to order their own enquiries about the matters they need to decide cases. It is neither efficient nor, having regard to the principles of the adversary system, proper for them to perform such tasks for themselves.

[25] Lawyers are of course in a position of trust in relation to their clients. Of necessity they are also, and for the reasons indicated, in a position of trust in relation to the court and to the administration of justice as a whole. Judges need to be confident about what they are told by lawyers on behalf of their clients. For such a system to work, and for the public to have confidence that it is working properly, lawyers must uphold the law and its proper administration. Failure to do so subverts public confidence in the judicial system. [16]

[26] It is not surprising that these ideas and concerns are reflected in the codes of conduct that the Law Society has adopted as the framework within which lawyers not merely do but are expected to do their work. For example, as if it were necessary, Rule 2.1-2(c) of the *Code of Professional Conduct for British Columbia* says, among other things, that "a lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law,"[17] and Rule 2.1-3(e), while affirming that "[a] lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law," specifically emphasizes that "this great trust is to be performed within and not without the bounds of the law." That is central to the lawyer's role in the system for the administration of justice and, we do not think it extravagant to assert, to the public's confidence in that system and the integrity of the legal profession. To perform that role corruptly, as Mr. Zoraik did in this case, is subversive.

[27] The efforts of counsel in this case have yielded but a handful of cases[18] in Canada involving lawyers who attempted to pervert the administration of justice in ways even remotely comparable to what Mr. Zoraik did here. The fact that there are so few cases is eloquent testimony to the widespread recognition among lawyers of the critical role that they play in the administration of justice, the acceptance by the legal profession of the principles involved, the importance in the public interest of observing them and the consequences to public confidence in the system and the legal profession of a failure to do so. Had these proceedings been initiated by the issuance of a citation we have little doubt that it would have alleged "professional misconduct", i.e. conduct that represents "a marked departure from that which the Law Society

expects of its members" [19] or that, on the undisputed facts, a finding to that effect would be warranted. [20]

Sanctions Imposed in Other Similar Cases

[28] In three of the small number of similar cases to which we were referred,[21] the lawyer was disbarred; in two[22] of them the lawyer was suspended for a period in view of certain mitigating considerations, and in one of them, *Cruikshank*, the lawyer, who stood by while his client made a statement to the police that the lawyer knew to be untrue but which he quickly took steps to repair, was fined.[23]

Mitigating Circumstances

[29] The precedents, such as they are, provide authority for either a suspension or a disbarment in circumstances such as these. Weighing the varied considerations that led hearing panels to choose one form of sanction rather than another, is difficult. Mr. Zoraik has drawn to our attention several factors described as having a mitigating or "palliative" significance. They include such matters as that Mr. Zoraik had practised for a mere seven years when he committed the offences; that, aside from the convictions, he has an unblemished record; that his misconduct was an isolated act; that he and his family have suffered sustained humiliation and economic "devastation"; that the criminal penalty imposed upon him – a jail sentence of 18 months, during the first six of which he was under house arrest and for the remainder of which he was subject to a curfew – has achieved all that is required in terms of specific and general deterrence.

[30] Many of these factors were addressed by the Provincial Court judge in his reasons for sentence. What is conspicuously absent from the list, however, is anything that explains or justifies the misconduct itself and we can think of none. In *MacIver, (supra),* the Panel said[24]: "[T]here is no acknowledgment of wrongdoing or repentance by the Member. The Member's submission before this Panel of Benchers was devoid of any explanation, mitigating circumstances or remorse" regarding the commission of the offences and [25] that the member's plea of mitigation "rests upon factors that are either incidental, [e.g. age, infirmity and reputation] or consequential [e.g. financial distress, embarrassment]" to the offences. Those observations are apposite here.

[31] The *MacIver* Panel concluded, as we do here, that "disbarment under these circumstances is neither harsh nor excessive."[26] All of the considerations that should guide us lead us to order that Mr. Zoraik be disbarred, and we so order.

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[1] On June 16, 2010, two days after being convicted, the Respondent gave a written undertaking to the Law Society that he would not engage in the practice of law until released from that undertaking by the Discipline Committee. That undertaking continues in force.

[2] See 2012 BCCA 283.

[3] Law Society Rules 4-13 and 4-14.

[4] See generally Law Society Rules 4-34 and 4-35.

[5] The minute of the Committee's decision is quite unrevealing.

[6] See paragraph [5] above.

[7] Written submission, paragraphs 19 to 22. On one view the language of Rule 4-40(3) – "the Benchers *may* summarily suspend or disbar" – does not preclude the imposition of some other sanction such as a fine. In view of our conclusions as to the merits, however, it is not necessary for us to decide whether the Respondent's contention is correct.

[8] Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[9] Written submission, paragraph 53.

[10] See above, paragraph [13].

[11] Rules 4-41(1)(b) and 4-42(2) contemplate written and oral "submissions" only.

[12] See note 1, above.

[13] Written submission, paragraph 52.

[14] What follows is adapted from paragraphs [2] and [3] of the reasons for judgment of Saunders, JA for the Court of Appeal - 2012 BCCA 283.

[15] See generally, *Law Society of BC v. Ogilvie,* [1999] LSBC 17.

[16] A lawyer is an officer of the court. Act, section 14(2).

[17] Although the *Code of Professional Conduct for British Columbia* only came into force in January, 2013, the substance of Rule 2.1-2(c) is not new.

[18] See *Law Society of Manitoba v. MacIver,* [2003] LSDD No. 29*; Law Society of Upper Canada v. Colman,* [1988] LSDD No. 103; *Law Society of Upper Canada v. Wijesinka,* [1988] LSDD No. 89. And cf. *Law Society of BC v. Djorgee*, 2008 LSBC 27; *Law Society of Upper Canada v. Maroon*, 2005 ONLSHP 21; and *Law Society of BC v. Cruikshank,* [1998] LSDD No. 11.

[19] *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [171]. See also *Re: Lawyer 12*, 2011 LSBC 35. And cf. *Law Society of BC v. Djorgee,* above note 17.

[20] We are apparently relieved from the necessity to characterize the member's conduct. This seems to flow from the fact that section 38(4) of the Act, which requires a finding of this nature, is only inapplicable to a hearing following a citation – see section 38(1) of the Act – and from the fact that Rule 4-40(3) permits us to act "summarily" and "without following the procedure provided for in the Act or these Rules".

[21] *MacIver, Colman* and *Wijesinka.*

[22] *Djorgee* and *Maroon.*

[23] *Cruikshank*.

[24] At paragraph [29].

[25] At paragraph [31]

[26] Ibid.