2013 LSBC 25
Report issued: August 30, 2013
Citations issued: October 18, 2010 and June 1, 2011

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

THOMAS PAUL HARDING

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: December 11-12, 2012 and April 29, 2013
Panel: Bruce LeRose, QC, Chair, William Everett, QC, Lawyer, June Preston, Public Representative

Counsel for the Law Society: Maureen Boyd and Jaia Rai
Counsel for the Respondent: Gerald Cuttler

Introduction

[1] This matter involves two citations, each of which alleges that the Respondent made rude and discourteous remarks to opposing counsel.

[2] Counsel advised that this is the first BC Law Society disciplinary hearing containing such allegations following the Supreme Court of Canada's decision in *Doré v. Barreau du Québec*, 2012 SCC 12. *Doré* considered and applied the *Charter* value of Freedom of Expression in the context of a lawyer's professional duties.

[3] The Respondent, relying on *Doré* and other authorities, submits that the citations should be dismissed on the basis that:

(a) they do not allege facts that constitute a discipline violation;

(b) the Respondent's remarks fall within the level of discordant expression that the Law Society must tolerate as directed in *Doré* and it cannot be reasonably concluded that they go beyond mere rudeness or discourtesy; and,

(c) on the facts, the citations are not a balanced and proportionate exercise of the Law Society's disciplinary powers.

[4] The Law Society submits that, with respect to each citation, the evidence demonstrates that the Respondent made the alleged remarks to opposing counsel, intended his remarks to bear the meaning they did, and that such remarks constitute professional misconduct.

[5] The hearing of both citations initially took place on December 11 and 12, 2012. In February 2013, the Respondent sought an order that the Panel hear further evidence of Mr. Shawn Bobb in respect of citation No. 1. The Panel granted the order and the evidence was heard on April 29, 2013.

Facts

Citation No. 1

[6] Citation No. 1 was issued on October 18, 2010 and alleges:

> In the course of representing your client, SR, in a family law matter, you wrote two letters dated March 15, 2010 to your client's former lawyer, Shawn P. Jodway, which contained rude and discourteous remarks directed to Mr. Jodway.

[7] Most of the facts are not in dispute and are set out in an Agreed Statement of Facts and Supplemental Agreed Statement of Facts (Exhibit 1-A and 1-B, respectively). In addition, the Panel heard the evidence of the complainant, Mr. Jodway, the Respondent, Mr. Harding, and Mr. Shawn Bobb.

[8] Mr. Harding was called and admitted as a member of the Law Society of British Columbia on August 21, 1990 and practises primarily in the areas of family law and plaintiff motor vehicle law.

[9] Mr. Harding became involved in the matter giving rise to Citation No. 1 on November 23, 2009, when he was retained to represent SR in a family law action in the Supreme Court of British Columbia.

[10] SR had previously been represented by Cascade Law Corporation ("CLC") and had entered into a retainer agreement with CLC on February 8, 2007. During the course of this retainer, the following lawyers at CLC were involved: Marco Cedrone, Marc Misner and Dale Strebchuck. Mr. Jodway, the complainant, was also involved but did not commence practising with CLC until June of 2008.

[11] By November 9, 2009, SR's relationship with CLC had come to an end, and Mr. Strebchuck filed a Notice of Intention to Withdraw as Solicitor. A previously scheduled trial was adjourned.

[12] At the time that SR retained Mr. Harding, she told him she was frustrated because, although she had paid money to CLC, she felt that CLC had not properly represented her.

[13] On November 23, 2009, Mr. Harding wrote to Mr. Jodway at CLC advising that he had been retained by SR and requesting Mr. Jodway to notify Mr. Harding's assistant when a copy of SR's file would be available for pick-up.

[14] CLC did not provide the file to Mr. Harding.

[15] On December 2, 2009, Mr. Jodway replied to Mr. Harding by letter, enclosing two accounts (totalling $3,072.56) and advising that the file would be provided once SR paid the accounts.

[16] Between December 8, 2009 and January 15, 2010, the written communications between Mr. Harding and Mr. Jodway focused on the appropriateness of CLC's accounts rather than on delivery of SR's file:

> (a) Mr. Harding requested details of the accounts and a copy of the retainer agreement by letters to Mr. Jodway dated December 8 and 17, 2009. On January 12, 2010, Mr. Jodway provided the account details and the retainer agreement; and,
>
> (b) on January 14, 2010, Mr. Harding requested names and positions of the people entering time on the account records. Mr. Jodway replied on January 15, 2010 advising that he, Mr. Strebchuck, Mr. Cedrone and Mr. Misner had worked and billed time on the account.

[17] Between January 23, 2010 and February 17, 2010 Mr. Harding's focus returned to seeking delivery of SR's file from CLC. He spoke with Mr. Cedrone (the lawyer named in the retainer agreement) and left

telephone messages at CLC seeking delivery of the file.

[18] On February 17, 2010, Mr. Jodway wrote to Mr. Harding enclosing SR's file on the following undertaking:

> This file is been provided to you on your undertaking to payout our outstanding accounts in the amount of $3,072.56, as solicitor of first charge, upon receipt of any future settlement paid to your client in this matter.
>
> If you are unwilling or unable to accept the said undertaking we ask that you return the aforementioned file to us, uncopied.

[19] On or about February 19, 2010 Mr. Harding, in a telephone call to Mr. Cedrone, said that he wanted to be released from the undertaking. During that discussion, Mr. Cedrone said words that were intended to commiserate with Mr. Harding's concern that the file belonged to SR and could not be held ransom.

[20] In cross-examination, Mr. Jodway stated that he became aware that Mr. Cedrone had spoken to Mr. Harding. However, he stated that he did not learn from Mr. Cedrone that he had commiserated with Mr. Harding, nor did Mr. Cedrone say to Mr. Jodway words to the effect that he should not be holding the file hostage. Mr. Jodway further stated that it was Mr. Cedrone who told him to tell Mr. Harding that Mr. Jodway had carriage of the file and to get CLC's accounts paid before delivering the file.

[21] On March 3, 2010, Mr. Harding wrote to Mr. Jodway. He referred to his telephone conversation with Mr. Cedrone and stated that he expected to be released from the undertaking.

[22] On March 10, 2010, Mr. Jodway wrote to Mr. Harding advising that he would not release him from the undertaking and requesting return of the file if he was not willing to comply with the undertaking. Mr. Jodway also asked whether Mr. Harding intended to tax CLC's accounts.

[23] On March 15, 2010, Mr. Harding spoke by telephone with Jack Olsen, a Practice Advisor employed by the Law Society, about the undertaking imposed by Mr. Jodway. Mr. Olsen advised Mr. Harding that all undertakings must be complied with, regardless of merit. Mr. Harding then asked Mr. Olsen whether this was the case even when a stupid or dishonest lawyer purports to impose a stupid, dishonest undertaking. Mr. Olsen replied affirmatively and told Mr. Harding that if he could not comply with the undertaking, his only option was to return the file and then sue.

[24] On March 15, 2010, Mr. Harding wrote the two letters that are the subject matter of citation No. 1.

[25] The first March 15, 2010 letter ("First March 15 Letter"), addressed to CLC to the attention of Messrs. Cedrone, Jodway, Strebchuck and Misner, was admitted as Exhibit 1-A, Tab 18. In the letter Mr. Harding referred to everyone either by their full name or by prefacing their surname with "Mr." with the exception of Mr. Jodway, to whom he referred only as "Jodway". This is the full text of the letter:

> I have Shawn Jodway's 10 March 2010 fax (copy attached).
>
> At no time did Mr. Cedrone say he did not have carriage of this file.
>
> [The client] retained Mr. Cedrone, not Jodway. It seems to me, Jodway's claim to have "carriage" of the file is a fundamental breach of the retainer.
>
> Jodway purports to impose an undertaking regarding material the client has already paid for. He also purports to negate the client's statutory right to tax the account.
>
> I did trouble to talk to Jack Olson [sic] about this matter. His advice unpleasant pill though it is is that any stupid, dishonest lawyer can purport to impose a stupid undertaking, and the receiving

lawyer is stuck with it. So I will have to return the file, unless the undertaking is released.

Please note that, unless Jodway releases this undertaking, I will be forced to reconstruct the file from the Registry, the court reporters and opposing counsel. I will then sue each lawyer who billed on this file, for negligence. Jodway I will sue in detinue and negligence. I will ask for special costs against each of you.

I suggest you each contact the insurer.

[26] Mr. Jodway replied to Mr. Harding by letter dated March 15, 2010, (Exhibit 1-A, Tab 14). Mr. Jodway objected to the tone of Mr. Harding's First March 15 Letter on the basis that it was damaging to his reputation and brought the practice of law into disrepute. He demanded an immediate retraction and apology.

[27] Mr. Harding's second March 15, 2010 letter ("Second March 15 Letter") to Mr. Jodway (Exhibit 1-A, Tab 15) is reproduced in full:

I have your fax of 14:35 this date.

I retract nothing set out in my fax earlier today. You should learn the correct usage of the third person pronoun. A brush-up on the use of the third-person possessive might also be of value to you. You would find, were you to look it up, that "Mr. [sic] is not part of your last name, but is in fact an "honorific" signifying respect. Since none applies, I did not use it. All that separates us from the great apes is the precise use of language. In your case, apparently, not.

I am available for a taxation of your account 30 April 2010. Has this been set for a full day? Is there a pre-taxation hearing?

Please be aware that I will insist on complete compliance with the *Rules* and with the *Legal Profession Act*. In particular I require evidence from you and your various CLC colleagues as to the "necessity" of having people other than Mr. Cedrone work on this file.

I confirm you have released me from the undertaking you purported to impose in your 17 February 2010.

[28] Mr. Jodway filed a written complaint with the Law Society dated March 16, 2010. He complained that the comments made by Mr. Harding in the First and Second March 15 Letters were malicious attacks on his integrity and reputation as a lawyer and were offensive and reprehensible. He stated that he had asked for an apology, which apology Mr. Harding refused to extend.

[29] Mr. Harding provided three written responses to the Law Society, dated April 16, 2010, May 7, 2010, and May 14, 2010.

[30] A taxation hearing of CLC's accounts commenced on April 30, 2010. It did not conclude, and the matter of CLC's accounts was ultimately settled.

[31] There is a dispute on the evidence between the Respondent and Mr. Jodway regarding whether the Respondent made an apology to Mr. Jodway at the time of the April 30, 2010 taxation of CLC's accounts. Regarding this issue, the Panel heard the evidence of Mr. Jodway, the Respondent and Mr. Bobb, in addition to the Agreed Statements of Facts and Supplemental Agreed Statement of Facts (Exhibits 1-A and 1-B).

(a) Mr. Jodway gave evidence that he attended the taxation of accounts on April 30, 2010. He said that, prior to the taxation hearing, he was waiting for another matter to finish when Mr. Harding came up to him

and asked if the complaint to the Law Society could just go away. Mr. Jodway replied that he could not do anything about it. It was out of his hands. Mr. Jodway stated that Mr. Harding did not apologize to him. On cross-examination, he denied that Mr. Harding used words to the effect that he was apologetic and, more particularly, to the effect that Mr. Harding's First and Second March 15, 2010 Letters had been intemperate and ought not to have been made.

(b) Mr. Harding gave evidence that he attended the taxation on April 30, 2010. He was on the second floor of the New Westminster Courthouse waiting for the taxation hearing, which was delayed. He stated that Mr. Jodway was there with Mr. Strebchuck and that he approached them and introduced himself, because they had never met. He asked if the taxation of the accounts could be settled. Mr. Jodway said no, and they all went into the taxation hearing. The hearing was not completed. When they were out of the hearing room, Mr. Harding again approached Messrs. Jodway and Strebchuck and suggested the accounts be settled. While he cannot recall if the accounts were settled at that time, Mr. Harding stated that, during the discussion, he said to Mr. Jodway that he wanted to apologize for his letter making fun of his English skills and put his hand out. Mr. Harding stated that Mr. Jodway just stared at him and said it wasn't up to him. Mr. Harding denied saying words to the effect of asking Mr. Jodway whether he could do something to make the complaint to the Law Society go away. Mr. Harding, in chief, stated that he wanted to apologize because what he had done was kind of stupid, that he was very annoyed at the time, that he had gone out of his way to make fun of Mr. Jodway, and that was beneath him. On cross-examination Mr. Harding said he wanted to apologize because he lost his temper and wrote rudely to Mr. Jodway.

(c) Mr. Bobb, a sole practitioner who has practised in the same office as Mr. Harding since 2004, also gave evidence. He recalled that in 2010 Mr. Harding brought to his attention a complaint letter to the Law Society about the Respondent. Mr. Bobb did not recall being particularly interested in the complaint. His interest arose out of his being an aboriginal lawyer and Mr. Jodway having referred to himself as an aboriginal lawyer in the complaint letter. Mr. Bobb said Mr. Harding brought the matter up again three years later, in January 2013 when they were sitting in Mr. Bobb's office discussing small talk, and Mr. Harding mentioned that in December he had attended the Law Society hearing regarding the complaint. Mr. Harding told Mr. Bobb that a factual dispute had arisen regarding Mr. Harding's exchange with Mr. Jodway at the New Westminster Courthouse in 2010. Mr. Bobb indicated to Mr. Harding that he recalled being present during the exchange. He said his testimony before the Panel was as a result of his January 2013 conversation with the Respondent that somewhat refreshed his memory of events surrounding the exchange. However, he had no independent recollection of when the exchange between Mr. Harding and Mr. Jodway took place. In his evidence, Mr. Bobb recalled seeing Mr. Harding on either the second or fourth floor of the New Westminster Courthouse near the elevators. Mr. Bobb walked up to Mr. Harding and began talking to him. While Mr. Bobb was talking to him, Mr. Harding turned away and quickly attempted to get the attention of an individual walking past them. The individual stopped and faced Mr. Harding. Mr. Bobb did not know that the individual was Mr. Jodway, at the time. He did not recall anyone being with Mr. Jodway, but did recall others walking by or standing around. He did not specifically recall any particular words that Mr. Harding said to the individual. Mr. Bobb said that the gist of the exchange was an apology and that he did hear the individual respond to the effect that it's with the Law Society and then walked away without shaking Mr. Harding's hand. He stated the exchange was very short and quick, and lasted maybe 30 seconds.

[32] The Panel accepts the evidence of Mr. Jodway and finds that the Respondent did not apologize to him during the exchange that took place between them on April 30, 2010. The Panel finds Mr. Jodway's evidence makes sense in all of the circumstances and is consistent with the surrounding conditions for the following reasons:

(a) The evidence makes it clear that there was a very brief exchange between the Respondent and Mr.

Jodway on April 30, 2010.

(b) Mr. Jodway was clear in his recollection that, while he was waiting for the taxation hearing to begin, the Respondent approached him and asked if the complaint could go away, to which Mr. Jodway said he could do nothing about it. He said the Respondent did not apologize. The Respondent's evidence was that he approached Mr. Jodway and Mr. Strebchuck during a break in the taxation hearing to suggest the accounts issue be settled and that, during that exchange, he said he wanted to apologize for making fun of Mr. Jodway's English skills and put his hand out. Mr. Jodway's evidence is consistent with the fact that he and the Respondent had never met prior to the taxation hearing, they were in the middle of an adversarial taxation process, and the exchange was very brief. Given those circumstances and surrounding conditions, the Panel finds that the Respondent would not have had time to formally apologize for what was a very serious matter to Mr. Jodway. The timing and surrounding conditions are more consistent with Mr. Jodway's evidence.

(c) Mr. Strebchuck did not give evidence at the hearing. Nor did the Respondent give any evidence that Mr. Bobb was present at the time. Mr. Bobb acknowledged that his recollection of the exchange came up three years after the event as a result of his conversation with the Respondent in January 2013, which he said somewhat refreshed his memory. Mr. Bobb's evidence is not consistent with that of Mr. Jodway and the Respondent, who both stated that the Respondent approached Mr. Jodway. Mr. Bobb recalled that he was speaking to the Respondent when Mr. Jodway approached them. Further, Mr. Bobb did not specifically recall any particular words that the Respondent said to Mr. Jodway. He only recalled the gist of the conversation was an apology and that the exchange was very quick, lasting maybe 30 seconds. Given the foregoing inconsistencies, the Panel finds that Mr. Bobb's evidence does not corroborate the Respondent's evidence regarding an apology.

(d) Finally, the Respondent wrote to the Law Society on May 7, 2010, in response to its letter of April 30, 2010 regarding Mr. Jodway's complaint (Exhibit 1-A, Tab 18). The Respondent's letter was written very shortly after the taxation of accounts on April 30, 2010. In that letter the Respondent stated at p. 5 that he "had thought the references to great apes to be amusing. It appears that [Mr. Jodway] does not share my sense of japery. For that I am sorry." However, he never mentioned in the letter that he had offered an apology to Mr. Jodway on the day of the taxation hearing. The letter needs to be read in its entirety, but continues in an arrogant manner to demean Mr. Jodway and to belittle his English skills, and its context and tone are not consistent with the Respondent having recently offered Mr. Jodway an apology.

Citation No. 2

[33] Citation No. 2 was issued on June 1, 2011 and alleges:

> In the course of representing your client DW in a family law matter you wrote an email dated September 9, 2010 to Mark Koochin, counsel for the opposing party, which contained rude and discourteous remarks directed to Mr. Koochin.
>
> This conduct constitutes professional misconduct.

[34] There was no oral testimony regarding citation No. 2. The facts are set out in an Agreed Statement of Facts and Supplemental Agreed Statement of Facts collectively marked Exhibit 2-A.

[35] Mr. Harding represented the Husband in a family law matter. The complainant, Mr. Koochin, a sole practitioner, represented the Wife. The main issue at trial was the location of the primary residence of the children and whether the Wife would be permitted to move to Kelowna, BC with the children. The Husband

wanted the children to continue to live with him in Langley, BC.

[36] On September 2, 2010 the Court issued a decision determining, inter alia, that the primary residence of the children was to be with the Husband in Langley.

[37] On September 3, 2010 Mr. Harding emailed a letter to Mr. Koochin. He noted his understanding that the Wife had moved to Kelowna and sought confirmation regarding how the Wife intended to exercise her access week to the children (that began September 10, 2010) in Langley.

[38] Mr. Koochin's office replied by email the same day, advising that he was not in the office and that Mr. Harding's letter had been forwarded to the Wife.

[39] Between September 3 and September 8, 2010, Mr. Koochin did not reply to Mr. Harding's letter of September 3, 2010.

[40] On the morning of September 9, 2010 (the day before the Wife's access week was to commence) Mr. Koochin faxed a letter replying to Mr. Harding. Mr. Koochin advised that the Wife did not have accommodation in the Langley area, set out two specific times when she would take the children in September and October 2010 and that on each occasion she would return the children to the Husband's house. The letter did not specifically say whether the Wife's access to the children would be exercised in Langley or Kelowna.

[41] Later, on the morning of September 9, 2010 Mr. Harding faxed a letter back to Mr. Koochin. Mr. Harding noted that Mr. Koochin had not said where the Wife intended to exercise her access and pointed out that the Court order required that the Wife exercise her access to the children in Langley. He concluded his letter by saying he needed to speak to Mr. Koochin "today".

[42] Thereafter, Mr. Harding telephoned Mr. Koochin's office several times, leaving him messages to call back before 5:00 p.m. At 4:09 p.m. Mr. Koochin sent an email to Mr. Harding stating he would not be able to call back before 5:00 p.m., that he had not had a chance to discuss Mr. Harding's letter with the Wife, that he would email Mr. Harding later that day and that Mr. Harding could call him back the next day, if necessary.

[43] At 4:25 p.m. on September 9, 2010 Mr. Harding replied to Mr. Koochin by email which is the subject matter of citation No. 2. This is the text of that email:

> Gee, I would have thought you might discuss these issues with her – oh, maybe when she told you IN JUNE she'd abandoned her leased accommodation in Langley? Or, maybe between the trial completing and judgment being pronounced? Or, maybe, once it was pronounced and the necessity of local housing was clear even to her. Or, possibly, anytime in the period you represented her longer ago than one day before she is scheduled to have her week of custody IN LANGLEY?
>
> I can only guess at what Crawford's decision would have been, had she told him that she would abandon the children unless she got to take them to Kelowna.
>
> There's a nice little talk I gave as one of the CLE's lunchtime teleconference programs on the ethical duty of counsel in custody cases to represent the best interests of the children. I bet they could sell you a disk of it. You could listen during a visit to the hair salon. Or tanning spa. I'd even autograph it for you.
>
> I look forward to your next e-mail, and will give it the attention it deserves.

[44] On September 10, 2010 at 9:49 a.m., Mr. Koochin faxed a letter to Mr. Harding advising, amongst other

things, that the Wife would be spending the weekend with the children in Langley.

[45] On October 12, 2010 Mr. Koochin made a complaint to the Law Society enclosing an e-mail chain and requesting some feedback from the Law Society regarding the e-mail sent to him by Mr. Harding on September 9, 2010.

[46] Mr. Harding provided a response to the Law Society's investigation by letter dated December 16, 2010, to which Mr. Koochin further responded by letter dated January 17, 2011.

[47] Mr. Harding has not apologized to Mr. Koochin. In his letter to the Law Society dated December 16, 2010 he stated, in part:

> I did, I will confess, write to [Mr. Koochin] sharply. My letter was sarcastic.

ONUS AND STANDARD OF PROOF

[48] On this hearing the allegations are set out in citation No. 1 and citation No. 2. On each citation, this Panel must be satisfied that the conduct is proven and that the conduct constitutes professional misconduct under section 38(4) of the *Legal Profession Act*, SBC 1998, c. 9.

[49] The onus of proof in this hearing is on the Law Society. The standard of proof is a balance of probabilities: "… evidence must be scrutinized with care," and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. …"

F.H. v. McDougall, 2008 SCC 53, quoted in

Law Society of BC v. Schauble, 2009 LSBC 11 at para. 43.

DO CITATIONS NO. 1 AND NO. 2 ALLEGE FACTS THAT COULD CONSTITUTE A DISCIPLINE VIOLATION

[50] The Respondent submits that citations No. 1 and No. 2 should be dismissed on the grounds that, on their face, they fail to allege facts that could constitute a discipline violation.

[51] Citation No. 1 refers to the First and Second March 15, 2010 Letters, and citation No. 2 refers to an email dated September 9, 2010. Each citation alleges that the impugned correspondence "contained rude and discourteous remarks" directed to the respective complainants.

[52] The Respondent relies upon the decision of the Supreme Court of Canada in *Doré*, which addresses the issue of freedom of expression in the context of a lawyer's professional duties and in particular the Court's statement at para. 61:

> No party in this dispute challenges the importance of professional discipline to prevent incivility in the legal profession, namely "*potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy*" (Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim.* LR 97, at p. 101; see also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed. 2009), at p. 8-1).
>
> [emphasis added]

[53] The Respondent argues that the above passage from *Doré* makes it clear that remarks that are merely rude or discourteous should not attract professional discipline and, given that the allegations in the citations

are in respect of “rude and discourteous remarks”, they should on their face be dismissed.

[54] In the Panel’s view, the language of the Supreme Court at para. 61 of *Doré* is not as definitive as the Respondent suggests. Rather, there are degrees of rudeness and discourtesy.

[55] The Supreme Court has indicated that mere rudeness and discourtesy is not enough to support a disciplinary proceeding in respect of incivility in the legal profession.

[56] However, in the Panel’s view, the Supreme Court in *Doré* at para. 61 has made it clear that, at some point, the degree of rudeness and discourtesy may go “beyond mere rudeness or discourtesy,” and properly form the factual basis for allegations that could constitute a discipline violation.

[57] Citations No. 1 and No. 2 allege that certain correspondence contained rude and discourteous remarks. There is nothing fatal on the face of those allegations. It is for this Panel to hear the evidence and determine whether the impugned remarks go beyond mere rudeness and discourtesy, and constitute a discipline violation. This view appears to be supported by the Supreme Court in *Doré* as follows:

> [60] At the relevant time, art. 2.03 of the Code of ethics ... stated that “[t]he conduct of an advocate must bear the stamp of objectivity, moderation and dignity”. This provision, whose constitutionality is not impugned before us, sets out a series of broad standards that are open to a wide range of interpretations. The determination of whether the actions of a lawyer violate art. 2.03 in a given case is left entirely to the Disciplinary Council’s discretion.
>
> [61] … The duty to encourage civility, “both inside and outside the courtroom”, rests with the courts and with lawyers (*R. v. Felderhof* (2003), 68 OR (3d) 481 (CA), at para. 83).
>
> [62] As a result, rules similar to art. 2.03 are found in codes of ethics that govern the legal profession throughout Canada. The Canadian Bar Association’s *Code of Professional Conduct* (2009), for example, states that a “lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding” (c. IX, at para. 16; see also Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2011), r. 6.03(5)).

[58] In the result, the Panel finds that citations No. 1 and No. 2 should not be dismissed on the grounds that on their face they fail to allege facts that could constitute a discipline violation.

IS CITATION NO. 1 DEFECTIVE

[59] The Respondent further submits that citation No. 1 is defective because, unlike citation No. 2, it failed to specifically allege that the impugned conduct constituted professional misconduct.

[60] The purpose of a citation is to advise the Respondent with reasonable precision of the allegations he is facing. Citation No. 1 sets out that a Hearing Panel will enquire into his conduct or competence as a member of the Law Society in accordance with Section 38 of the *Legal Profession Act* and Parts 4 and 5 of the Law Society Rules.

[61] The applicable portion of section 38(4) of the *Legal Profession Act* directs that a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed …

(i) professional misconduct; …

[62] A hearing panel must consider all the evidence within the framework of what is alleged in the citation and not otherwise.

[63] Rule 4-14 of the Law Society Rules provides:

> 4-14 (1) A citation may contain one or more allegations;
>
> (2) Each allegation in a citation must
>
> (a) be clear and specific enough to give the respondent notice of the misconduct alleged, and
>
> (b) contain enough detail of the circumstances of the alleged misconduct to give the respondent reasonable information about the act or omission to be proved against the respondent and to identify the transaction referred to.

[64] In *Law Society of BC v. Rutley*, 2013 LSBC 16, the hearing panel considered the wording of a citation at para. 16 as follows:

> As counsel for the Law Society stated in supplementary submissions, hearing panels are not bound by the technical rules involved in the drafting of a criminal information or indictment. The purpose of the citation is to ensure that the respondent lawyer has knowledge of the case she has to meet. In this case, the Respondent had knowledge of what conduct was in issue and of the specific provisions that her conduct was alleged to violate. At no time did the Respondent ask for particulars of the specific portions of Chapter 2, Rule 1 that she was alleged to have violated. As James Casey states in *The Regulation of Professions in Canada*, p. 8-16, "If a charge is defective in that it does not contain sufficient information to enable the member to properly prepare a defence, then the remedy is to ask for particulars."

[65] In *Novak v. Law Society of British Columbia*, [1972] 6 WWR 274 (BCSC), the Court stated at para. 11:

> I am not, however, dealing with a criminal or quasi-criminal charge but rather with a disciplinary hearing before an administrative tribunal. In *Re: Legal Professions Act and The Benchers of Law Society of British Columbia*, (1945) 4 DLR 702, Farris CJSC in delivering the judgment of a special visitorial tribunal of five Judges of the Supreme Court of British Columbia, sitting in appeal from a decision of the Benchers of the Law Society suspending a solicitor from practice, said [p. 703]:
>
> > Administrative tribunals performing judicial functions are required to act judicially but are not required to follow Court procedure.
>
> … I think it can also be said that such administrative tribunals performing judicial functions are not bound by the technical rule; involved in the drafting of indictments and informations, provided always that the provisions of the statute involved are carried out and the proceedings are conducted within the bounds of "natural justice".

[66] The essence of a discipline hearing is to determine whether there has been professional misconduct or incompetence. Citation No. 1 provided the Respondent with clear notice that the misconduct alleged concerned rude and discourteous remarks directed to the complainant in the First and Second March 15 Letters.

[67] Upon receiving notice of the complaint from the Law Society, the Respondent wrote back on March 29, 2010 (Exhibit 1-A - Tab 17) essentially requesting particulars of the complainant's allegations.

[68] The Law Society replied to the Respondent by letter dated April 30, 2010 (Exhibit 1-A - Tab 18) providing particulars of what the complainant alleged to be unprofessional conduct and also referring the

Respondent to particular Law Society rules dealing with the conduct of lawyers and their interaction with each other, and their comments about each other.

[69] In the circumstances, the Panel finds that the Respondent had clear and specific notice of the misconduct alleged together with sufficient particulars to give him reasonable information about the alleged misconduct to be proved against him.

[70] In addition, there was no suggestion during the hearing that the Respondent did not understand what was being alleged or that he had not had an opportunity to be fully heard and to present a full response to the allegations in citation No. 1.

[71] The Panel therefore finds that citation No. 1 was not defective by reason of its failure to allege that the impugned conduct constituted professional misconduct.

THE EFFECT OF THE CHARTER RIGHT OF FREEDOM OF EXPRESSION ON THIS HEARING PANEL'S ADMINISTRATIVE DECISION-MAKING MANDATE

[72] Section 2(b) of the *Canadian Charter of Rights and Freedoms* protects the freedom of expression.

[73] The issue of how the *Charter* rights of expression are protected in the context of a hearing panel's administrative decision-making mandate was addressed by the Supreme Court in *Doré*.

[74] *Doré* concerned a decision of a disciplinary body to reprimand Mr. Doré, a lawyer, for the content of a letter he wrote to a judge after that judge had criticized him in court and in his written decision. (The Supreme Court found the letter was excessively vituperative in its context and tone, and its wording can be found in *Doré* at para. 10). The disciplinary body had found that the letter was a breach of the applicable *Code of ethics of advocates*. In doing so, the disciplinary body concluded that the letter was not private because it was written by Mr. Doré as a lawyer, and it also concluded that the judge's conduct could not be relied upon as justification for the letter.

[75] Mr. Doré's appeal to the Supreme Court rested on his assertion that the finding of a breach of the *Code of ethics* was a violation of his expressive rights under the *Charter*. The constitutionality of the *Code of ethics* was not challenged. Nor did any party in *Doré* challenge the importance of professional discipline to prevent incivility in the legal profession.

[76] In *Doré*, the Supreme Court set out how an administrative decision-maker applies *Charter* values in the exercise of its statutory discretion as follows:

> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the prima facie infringement of mobility rights under s. 6(1) (para. 27). In *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, the "twin goals of public safety and fair treatment" grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one

> applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).
>
> …
>
> [58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.
>
> …
>
> [66] We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

[77] In applying the foregoing approach, the Supreme Court dismissed Mr. Doré's appeal and upheld the original disciplinary body's decision as follows:

> [71] In the circumstances, the Disciplinary Council found that Mr. Doré's letter warranted a reprimand. In light of the excessive degree of vituperation in the letter's context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives.

[78] It is established that it is for the Law Society to determine what constitutes professional misconduct. In *Pearlman v. Law Society (Manitoba)*, [1991] 2 SCR 869 at p. 880:

> No one is better qualified to say what constitutes professional misconduct than a group of practising barristers who are themselves subject to the rules established by their governing body.

See also *Doré* at para. 60:

> … The determination of whether the actions of a lawyer violate art. 2.03 [Code of ethics] in a given case is left entirely to the Disciplinary Council's discretion.

[79] The test for what constitutes professional misconduct was articulated by a Bencher Review Panel in *Re: Lawyer 12*, 2011 LSBC 35 at para. 8 as follows:

> … 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.

[80] In light of *Doré*, in discipline proceedings in which a *Charter* value is raised, the above test for professional misconduct must now be broadened to read:

> The test is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members, having properly balanced the relevant *Charter* value with the Law Society's public mandate and objectives; if so, it is professional misconduct.

PUBLIC MANDATE AND OBJECTIVES

[81] The Law Society relies upon the "Canons of Legal Ethics", which were at the relevant time Chapter 1 of the *Professional Conduct Handbook* (now Chapter 2 of the *Code of Professional Conduct for British Columbia*), as setting the standard of conduct regarding a lawyer's professional obligations in communicating with other lawyers, as follows:

> Preamble
>
> 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 the lawyer's duty to … be candid and courteous in relations with other lawyers … .
>
> To the client
>
> A lawyer should treat adverse … counsel with fairness and courtesy, refraining from all offensive personalities. …
>
> To other lawyers
>
> 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 that cause delay and promote unseemly wrangling.

[82] These Canons were adopted by the Law Society in 1921, have not been amended since 1993, and are well known by the profession. They have also been referred to in pre-*Doré* Law Society discipline hearings. See *Law Society of BC v Lanning*, 2008 LSBC 31 at para. 41 and *Law Society of BC v Greene*, [2003] LSBC 30 (quoted in *Law Society of BC v Laarakker*, 2011 LSBC 29 at paras. 33 - 35. They are also endorsed in general terms by the Supreme Court in *Doré* at para. 62:

> [62] As a result, rules similar to art. 2.03 are found in codes of ethics that govern the legal profession throughout Canada. The Canadian Bar Association's *Code of Professional Conduct* (2009), for example, states that a "lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding" (c. IX, at para. 16; see also Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2011), r. 6.03(5)).

[83] As in *Doré*, the Respondent has not challenged the constitutionality of the Canons of Legal Ethics. Nor has he challenged the importance of professional discipline to prevent incivility in the legal profession.

[84] The Respondent relies on the language of the Supreme Court in *Doré* that a proper respect for his expressive rights "may involve disciplinary bodies tolerating a degree of discordant criticism" and that professional discipline should only be applied in cases where incivility amounts to "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy."

APPLICATION TO CITATION NO. 1

[85] The evidence shows that the Respondent was annoyed with Mr. Jodway's letter of February 17, 2010, in which he provided SR's file on an undertaking to pay CLC's outstanding accounts upon receipt of any

future settlement paid to SR in the matter.

[86] He wrote to Mr. Jodway on March 3, 2010 saying he expected to receive a letter releasing him from the undertaking forthwith. Mr. Jodway responded on March 10, 2010 advising that he would not release the Respondent from the undertaking.

[87] This caused the Respondent to speak to Jack Olsen, a Law Society Practice Advisor, on March 15, 2010 about the undertaking and to ask whether all undertakings must be complied with, even in cases when a "stupid or dishonest lawyer purports to impose a stupid, dishonest undertaking." Mr. Olsen replied affirmatively.

[88] As a result, the Respondent wrote the First March 15 Letter, copying all CLC's lawyers for the primary purpose of obtaining a release from the undertaking. In the letter, he referred to everyone either by their full name or by prefacing their surname with "Mr.", with the exception of Mr. Jodway to whom he referred only as "Jodway". He also referenced his call to Jack Olsen and his advice; that any stupid, dishonest lawyer can purport to impose a stupid undertaking, and the receiving lawyer is stuck with it. He concluded by saying he would have to return the file.

[89] Viewed objectively, the Respondent's letter showed disrespect by referring to Mr. Jodway as only "Jodway" and by implying that Mr. Olsen had stated that, in imposing the undertaking, Mr. Jodway was a stupid, dishonest lawyer. The Respondent's letter is phrased to attribute the expression "stupid, dishonest lawyer" to Mr. Olsen. However, that was clearly not the case. In the Agreed Statement of Facts (Exhibit 1-A, para. 29) Mr. Olsen's advice to the Respondent is recounted as neutral on its face as it does not refer to any particular lawyer and in response to a question by the Respondent as to whether all undertakings had to be complied with, even when a stupid, dishonest lawyer purports to impose a stupid, dishonest undertaking. This is confirmed in Mr. Jodway's response to the Respondent's First March 15 Letter, where Mr. Jodway advised that he had spoken with Jack Olsen and been advised that at no time had he referred to Mr. Jodway as being a stupid, dishonest lawyer.

[90] In his March 15, 2010 response to the Respondent's First March 15 Letter, Mr. Jodway took exception to the use only of his surname as unprofessional and unacceptable. He also took exception to the implication that he was a stupid, dishonest lawyer as it not only damaged his reputation, but also brought the practice of law into disrepute, and demanded an immediate retraction and apology. He also agreed to release the Respondent from the undertaking on the condition that he consented to attend a taxation of CLC's accounts on April 30, 2010.

[91] The Respondent wrote the Second March 15 Letter approximately one hour later, stating in part:

> I retract nothing set out in my fax earlier today. You should learn the correct usage of the third person pronoun. A brush-up on the use of the third-person possessive might also be of value to you. You would find, were you to look it up, that "Mr. is not part of your last name, but is in fact an "honorific" signifying respect. Since none applies, I did not use it. All that separates us from the great apes is the precise use of language. In your case, apparently, not.

The Respondent also confirmed his availability for the taxation of accounts and that he was released from the undertaking.

[92] The Respondent, nevertheless, wrote his Second March 15 Letter which, viewed objectively, continued to be abusive, condescending, rude, disrespectful, and discourteous in its tone and content. In particular:

(a) the Respondent did not apologize. Rather, he stated "I retract nothing …" from his First March 15 Letter;

(b) he commented on Mr. Jodway's grammar and suggested a brush-up on the use of the third-person pronoun might be of value;

(c) he asserted that he did not use "Mr." because it was not part of Mr. Jodway's last name, but rather an "honorific" signifying respect and that "since none applies" he did not use it; and,

(d) he suggested that Mr. Jodway was not separated from the great apes because of his lack of precise language skills.

[93] The Respondent wrote his Second March 15 Letter despite the fact that he had achieved his primary purpose of obtaining a release from the undertaking. His remarks about Mr. Jodway served no purpose in his representation of SR or in advancing her cause. They were completely gratuitous and intended to offend.

[94] Following Mr. Jodway's complaint to the Law Society, the Respondent wrote three letters to the Law Society. Two of those letters, viewed objectively, demonstrate that the Respondent intended his First and Second March 15 Letters to be abusive, condescending, rude, disrespectful, and discourteous regarding Mr. Jodway.

[95] In his letter to the Law Society dated March 29, 2010 (Exhibit 1-A, Tab 17) the Respondent wrote, in part:

> He [Mr. Jodway] alleges that he has "never been subjected to such hurtful, **meanful** [sic] and degrading remarks". How could I respond to that? I do not even know what he means by "meanful" - a word, I confess, which seems to have eluded the ken of the editors of the **Oxford English Dictionary**.
>
> [emphasis in original]

[96] The Respondent's letter to the Law Society dated May 7, 2010 (Exhibit 1-A, Tab 18) should be read in its entirety. Some examples of what the Respondent wrote include:

> (a) … Of course, "Mr." is NOT part of his [Mr. Jodway's] surname. It is an honorific, signifying he is not entitled to be called by either a hereditary or granted title.
>
> The Complainant's demand that I call him "Mr." seemed to me to defeat the entire point of an honorific. Respect must be earned not demanded. ... (Exhibit 1-A, Tab 18, p. 5); [emphasis in original]
>
> (b) The Complainant's 15 March 2010 letter is riddled with illiteracies. I have enclosed a copy of it, with some of his grammatical, vocabulary and spelling blunders marked. I confess, I gave up. I am sure you, as I, agree with Horace: *indignor quandoque bonus dormitat Homerus*. So much more so, I suggest when the nod becomes a coma. (Exhibit 1-A, Tab 18, at p. 5 and enclosure).

[97] The Respondent's letter in its context and tone is also consistent with his testimony in chief when he said he was very annoyed at the time and went out of his way in his Second March 15 Letter to Mr. Jodway, the letter paraphrasing Jane Goodall (referring to the great apes), to make fun of Mr. Jodway.

[98] The Panel recognizes the Respondent's expressive rights and duty to speak his mind freely and independently in representing his client and advancing her case, the public's interest in that *Charter* value, and that proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism that does not go beyond mere rudeness and discourtesy.

[99] It also recognizes that the Law Society's Canons of Legal Ethics requiring the Respondent, in his relations with other lawyers, to be candid, fair, courteous, and to refrain from all offensive personalities, may

constitute a restriction on those expressive rights.

[100] In this matter, the Respondent was provoked by what he considered to be an improper undertaking imposed by Mr. Jodway. However, it is precisely in such circumstances that a lawyer, who potentially faces pressures on a daily basis, is "called upon to behave with transcendent civility." (See *Doré* at para. 68.)

[101] Despite having achieved his primary purpose of being released from the undertaking and, therefore, in circumstances that did nothing to advance his client's cause, the Respondent remained annoyed with Mr. Jodway.

[102] Despite knowing that Mr. Jodway had taken offence to the First March 15 Letter, the Respondent refused to retract his remarks or, as the Panel found earlier, to apologize to Mr. Jodway. Rather, he continued with his gratuitous and personal insults against Mr. Jodway in his Second March 15 Letter.

[103] In the Panel's view, the Respondent's remarks regarding Mr. Jodway are not the degree of discordant criticism that must be tolerated by disciplinary bodies in the balancing between his expressive rights and the Law Society's public mandate and objective. They were arrogant, unnecessary and excessively abusive, condescending, disrespectful, and insulting, and go beyond mere rudeness or discourtesy.

[104] The purpose of the Canons of Legal Ethics requiring lawyers to communicate civilly is identified in *Law Society of BC v. Laarakker*, 2011 LSBC 29, at para. 35 as follows:

> [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.

[105] Further, in *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94, the hearing panel stated at paras. 63 and 65:

> [63] The requirement of civility is more than good manners in the courtroom and practice. Rather, the rationale underlying the requirement of civility reflects a concern with the effect of incivility on the proper functioning of the administration of justice and public perception of the legal profession.
>
> …
>
> [65] Our system of justice is based on the premise that legal disputes should be resolved rationally in an environment of calm and measured deliberation, free from hostility, emotion, and other irrational or disruptive influences. Incivility and discourteous conduct detracts from this environment, undermines public confidence and impedes the administration of justice and the application of the rule of law.

[106] Finally, in the article by the late Richard Sugden, QC, "Civility in the Legal Profession" in *The Splendour of the Law*, ed. Jack Giles (Toronto: Dundern Press, 2001) he stated at p. 93:

> Other scholars have considered incivility as conduct that would undermine professional collegiality

> and the notion that in the adversarial arena, lawyers should "strive mightily but eat and drink as friends." In Lord Hailsham's view, for example, tactics tending to demean or degrade one's opponent are the hallmark of incivility and should be scrupulously avoided:
>
> [Inadvertent errors by one's opponent] should be remedied with the greatest delicacy and above all one should never seek to humiliate an honourable opponent. This I believe to be part of one's moral duty both to the opponent himself and to the tradition of general decency in which controversy should be conducted whether in litigation or across the floor of the House of Commons.

[107] The Panel finds, having balanced the Respondent's expressive rights with the Law Society's public mandate and objectives, that the Respondent's conduct as alleged in citation #1 is a marked departure from the conduct expected of lawyers and constitutes professional misconduct.

APPLICATION TO CITATION NO. 2

[108] At the time the Respondent sent his email on September 9, 2010 to Mr. Koochin, he believed that Mr. Koochin was not fulfilling his ethical duty as counsel to represent the best interests of the children, that Mr. Koochin had delayed unduly in replying to the Respondent's inquiry about the location of the Wife's access visit with the children on the weekend of September 10, 2010, and that the children might be prejudiced (Supplementary Agreed Statement of Facts, Exhibit 2-A at para. 3).

[109] The impugned remarks in the third paragraph of the Respondent's September 9, 2010 email imply that Mr. Koochin was not meeting his ethical duty to the children and appear to tie that alleged failure to his grooming habits.

[110] The Panel is not required to make any finding about whether Mr. Koochin fulfilled his duty as counsel to represent the best interest of the children, the scope of such duty, whether Mr. Koochin had delayed unduly or at all in responding to the Respondent, or whether any prejudice may have been caused to the children. Nor is the Panel required to make any finding about what, if anything, Mr. Koochin said about personal grooming during the trial (Supplementary Agreed Statement of Facts, Exhibit 2-A, paras. 2 and 4).

[111] In his letter to the Law Society of December 16, 2010 the Respondent wrote in part:

> I did, I will confess write to [Mr. Koochin] sharply. My letter was sarcastic.

[112] The Respondent's remarks to Mr. Koochin that he considered his conduct to be unethical were made because of the Respondent's concern for the best interests of the children and where they would be located during the Wife's access to them. Further, the remarks were made after several attempts to get an answer from Mr. Koochin and on the eve of the Wife's access. His letter achieved its purpose and advanced his client's case as Mr. Koochin provided a substantive response by letter the next morning advising that the Wife would be spending access time with the children in Langley. The remarks, as the Respondent has acknowledged, are sharp and sarcastic. However, in the Panel's view, they fall short of being considered discordant communication or, if they are, they certainly do not go beyond mere rudeness and discourtesy.

[113] The Respondent's impugned remarks regarding personal grooming were made in the same email to Mr. Koochin and were not republished to anyone. They were also sharp and sarcastic. They did not impair or delay the progress of the action. They were, however, unnecessary in that they did nothing to advance the client's case. However, in the particular circumstances, the Panel is of the view that the remarks are the degree of discordant communication that does not go beyond mere rudeness and discourtesy.

[114] For the foregoing reasons the Panel finds the Respondent's impugned remarks in the email dated

September 9, 2010 are not a marked departure from the conduct expected of lawyers and do not constitute professional misconduct.

ARE CITATIONS NO. 1 AND NO. 2 A BALANCED AND PROPORTIONATE EXERCISE OF THE LAW SOCIETY'S DISCIPLINARY POWERS?

[115] The Respondent argues that the allegations in citations No. 1 and No. 2 are of such a nature that the Discipline Committee's decision to direct that a citation be issued in each case failed to reflect a proportionate balancing of the Discipline Committee's public mandate and objective to ensure that lawyers behave with civility with the Respondent's expressive rights. The Respondent argues that, if the Discipline Committee had exercised a balanced approach, it should not have issued citations No. 1 and No. 2. Rather, a balanced approach should have resulted in the Discipline Committee making one of a number of alternative orders available to it, ranging from taking no action, to a letter, a Conduct Meeting, or a Conduct Review.

[116] Section 38(1) to 38(4) of the *Legal Profession Act* sets out the parameters of a panel's jurisdiction on the hearing of a citation. The applicable portion thereof is set out at para. 61, (supra).

[117] The Respondent in his written arguments acknowledges that this Panel does not have jurisdiction under section 38 to review the Discipline Committee's decisions to direct the issuance of citations No. 1 and No. 2, or to substitute those decisions by imposing any of the alternative orders that the Discipline Committee could have chosen, even though such alternatives (he argues) may have resulted in an outcome that reflected a proportionate balancing of the Respondent's expressive rights with the Law Society's public mandate and objective. In the circumstances, the Respondent argues this Panel's only alternative is that it must dismiss both citations.

[118] In the Panel's view the Respondent's arguments do not lead anywhere. On one hand, the Panel has no jurisdiction to review the Discipline Committee's decisions to direct the issuance of citations No. 1 and No. 2 (the Panel does not comment on whether the Respondent could have challenged those decisions at the time in another forum). On the other hand, given the Panel's decision finding professional misconduct in respect of citation No. 1, it cannot logically be argued that the Discipline Committee's direction to cite was improper. Further, the Panel's decision to dismiss citation No. 2 makes the argument irrelevant.

Determination

[119] In respect of citation No. 1, the Panel finds that the Respondent's conduct in writing the First and Second March 15 Letters to his client's former lawyer, Shawn P. Jodway, which contained rude and discourteous remarks directed to Mr. Jodway, constitutes professional misconduct.

[120] In respect of citation No. 2, this Panel dismisses the allegation that the Respondent's conduct in writing an email dated September 9, 2010 to Mr. Koochin, counsel for the opposing party, constitutes professional misconduct.

[123] This matter will now be set down for a hearing on the appropriate disciplinary action under section 38(5) of the *Legal Profession Act* in relation to citation No. 1 only.