

2013 LSBC 26

Report issued: September 6, 2013

Citation issued: September 26, 2012

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

STANLEY CHANG WOON FOO

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: June 27, 2013

Panel: Thomas P. Fellhauer, Chair, Gavin Hume, QC, Lawyer, Lance Ollenberger, Public representative

Counsel for the Law Society: Carolyn Gulabsingh

Counsel for the Respondent: Moses Kajoba

the citation

[1] The citation in this matter was authorized by the Discipline Committee on September 6, 2012 and issued on September 26, 2012. Stanley Chang Woon Foo (the “Respondent”) has admitted that he was properly served with the citation.

[2] The citation sets out the nature of the conduct to be inquired into:

On or about September 28, 2011, while at the courthouse in Quesnel, British Columbia, attending to client matters, you made discourteous or threatening remarks directed to a social worker employed by the Ministry of Children and Family Development.

This conduct constitutes professional misconduct, pursuant to section 38 of the Legal Professions Act.

BACKGROUND AND EVIDENCE

[3] The Law Society and the Respondent filed an Agreed Statement of Facts (“ASF”).

[4] The Panel accepts the whole of the ASF, including the tabbed attachments. For ease of reference in this hearing report, we are summarizing below some of the facts set out in the ASF.

1. Stanley Foo was called to the bar and admitted as a member of the Law Society of British Columbia on November 10, 1995. He was called to the bar in the province of Ontario and admitted as a member of the Law Society of Upper Canada on June 24, 1994, and was called to the New York State bar in June, 2010.
2. Mr. Foo has been employed as a sole practitioner since March 15, 2003.
3. On September 28, 2011, Mr. Foo attended at the Quesnel courthouse in respect of client-related

matters. The courthouse was busy as it was a “family list” day when many preliminary and administrative family law matters were scheduled to be before the court.

4. On September 28, 2011, AM, a social worker employed by the Ministry of Children and Family Development (the “Ministry”), was also in attendance at the Quesnel courthouse.

5. Outside of the courtroom, Mr. Foo approached AM while she was in the company of another social worker (“CB”). Mr. Foo asked AM if she was “[AM], the social worker.”

6. AM confirmed to Mr. Foo that she was [AM], the social worker. Mr. Foo said to AM that he “should shoot” her because she “takes away too many kids.”

7. Prior to September 28, 2011, Mr. Foo and AM did not know each other.

8. CB heard the comments Mr. Foo made to AM. When Mr. Foo made the comments to AM, the courthouse was busy and there were several people close enough in proximity to overhear the comments.

9. AM’s supervisor as employed by the Ministry (the “Supervisor”) witnessed Mr. Foo speaking with AM but did not hear what was said. AM reported the incident to the Supervisor immediately after it occurred.

10. After speaking with AM, the Supervisor spoke with a lawyer representing the Ministry at the Quesnel courthouse that day (the “Ministry Lawyer”). Together, the Ministry Lawyer and the Supervisor spoke with Mr. Foo about the incident for approximately 10 minutes. Mr. Foo asked the Supervisor and the Ministry Lawyer to refrain from reporting the incident to the Law Society.

11. The Supervisor reported the incident to Sherriff Services at the Quesnel courthouse. The Sheriff’s incident report stated that the Sheriff attempted to speak with AM multiple times without a return call and stated there were no further problems and no further action taken.

12. On October 5, 2011, AM reported the incident to the Quesnel Detachment of the RCMP. The RCMP did not press charges or interview Mr. Foo in respect of the incident.

[5] On March 7, 2012, the Supervisor made a complaint to the Law Society (the “Complaint”). A copy of the Complaint was admitted as proof that the statements were made by the complainant, but not as proof of the truth of those statements.

[6] In the course of the Law Society’s investigation of the Complaint, the Respondent provided his written answers to the Law Society. His letter to the Law Society dated March 28, 2012, which was written in reply to a letter dated March 16, 2012 from the Law Society, was admitted as proof that the statements were made by the Respondent, but not as proof of the truth of those statements.

[7] On June 29, 2012 the Respondent was interviewed by Law Society staff in relation to the Complaint, and a copy of the interview transcript was admitted as proof that the statements were made by the Respondent, but not as proof of the truth of those statements.

[8] A copy of a transcript of an interview of AM by the Law Society on May 24, 2012 was also entered into evidence. A portion of the transcript reads as follows:

AM: Okay, I was just walking down the stairs and I heard my name, [AM], and so I looked around 'cause there was a lots of people there, there was clients, there was lawyers, there were social workers, there was lots of people, it was a list day and list days are always really busy. So I looked and I heard my name repeated and I saw that it was Stanley Foo so I approached him and I said “yes?”

And he said, “[AM], the social worker?” And I said, “why?” I was kind of, ’cause there was lots of people around so I was, I’ve got a bit of a funny sense of humour, and then I said, “yes I am.” And he just looked at me and said, “I’m going to shoot you,” and I kind of looked at [CB], my colleague that was standing beside me, and I said “pardon me? What? What are you saying?” And he said, “you take away too many kids.” And I said, “Oh really?” And I walked away. And that was the end of the conversation.

Interviewer: Okay. And so [CB] was standing right, that’s [CB]?

AM: Yeah, [CB].

Interviewer: She was standing right beside you?

AM: Yeah, she was walking down the stairs with me.

Interviewer: Okay, and how close was Mr. Foo to you when he said this?

AM: Well, I was just about coming to the bottom of the stairs and he was standing right by where the list is so...

Interviewer: Okay.

AM: I don’t know, 20 feet, I don’t know. There was people everywhere.

Interviewer: But you could hear him clearly.

AM: Clearly.

Interviewer: Okay, all right.

AM: And I said to him yeah, you know and he was like are you [AM] the social worker and I was like why? So I knew it was, I mean we were making eye contact, it was definitely coming from him.

Interviewer: And when he said this, did you laugh at all or you were taking this seriously from the very beginning?

AM: No, I didn’t really find it very funny.

Interviewer: Yeah, okay.

AM: Yeah.

Interviewer: Did you, at any time, put your hands out like a policeman would handcuff you, sort of okay, you got me, take me away? Did you make any gesture like that with your hands?

AM: Not that I remember.

Interviewer: Okay, okay. And so it ended by you just walking away?

AM: Yes.

Interviewer: Okay.

AM: Yeah.

Interviewer: And is that part of your de-escalation training that you just...?

AM: Well I was kind of shocked. I’m not used to having to de-escalate lawyers. And it wasn’t like he was furiously mad or anything, it just kind of was something that came out of his mouth so...

Interviewer: And was he smiling or did you, you were looking at his face, what was his facial expression like?

AM: I don't know, just kind of normal.

Interviewer: Okay.

AM: He wasn't laughing, he wasn't looking really angry, it was just like he was saying, it was just like a comment and it was so bizarre.

Interviewer: Okay.

AM: And everybody else was, everybody else that was down there was just shocked.

Interviewer: And that's what my next question is, did you happen to notice the clients and how they saw this 'cause I'm assuming these clients were going to be going into Court at some point because of child protection issues.

AM: Yes, yeah.

Interviewer: And what did they think of this, that you could see?

AM: There was some laughing I heard, there was people looking at me, so I don't know, I don't like the thought of what might have been going through some of their minds but I don't know, I'm pretty good with my clients so I don't think too many of them want me shot or dead nowadays 'cause I've been doing this a long time so I've developed good skills to listen to people and help them you know come to terms with what's going on in their lives and help them move forward so but yeah people were reacting to it.

Interviewer: Okay. And [CB], she also reacted to it?

AM: Yeah, yes, she was shocked.

ISSUE

[9] Does the conduct of the Respondent on September 28, 2011, namely making the remarks to a social worker outside the courtroom in Quesnel, British Columbia that he "should shoot" her because she "takes away too many kids", constitute professional misconduct?

RESPONDENT'S POSITION

[10] In his response to the Law Society and his interview by the Law Society, the Respondent's recollection of the events differs somewhat from AM's version of events.

[11] The Respondent says he didn't know AM at all until the Complaint.

[12] The Respondent stated that he and AM were making light conversation and that she laughed.

[13] The Respondent stated that AM held out her hands and said, "Here, why don't you lock me up?"

[14] The Respondent concedes that he doesn't remember exactly what he said.

[15] The Respondent stated that he was joking.

[16] The Respondent stated that he had no intention to threaten or harm AM and that his comments did not

amount to uttering a threat under s. 264.1 of the Criminal Code, nor did his actions amount to a civil assault.

[17] The Respondent stated that AM was not afraid of him, and he did not have a gun or knife.

[18] The Respondent says that social workers have no reason to fear him and that he and the Supervisor are on good terms.

[19] The Respondent stated that he is a bombastic guy and he made a spontaneous statement to AM that was a joke and therefore not discourteous.

[20] The Respondent stated that making a joke, even in bad taste or poorly worded, is not behaviour that is a marked departure from the conduct that the Law Society expects of its members.

[21] The Respondent stated that a lawyer needs to be reasonably aware of any rule or enactment, the enactment or standard must be clear and, if it is vague, the lawyer's conduct cannot be professional misconduct.

[22] The Respondent also stated that his comments were not made in the course of a lawyer's work and that he was not involved in any matter in his professional capacity.

LAW SOCIETY'S POSITION

[23] Counsel for the Law Society stated that AM felt that the Respondent's comments were a threat, that AM did not consider the Respondent's comments to be a joke, and that AM did not laugh or hold her hands out in front of her.

[24] Counsel for the Law Society referred to the transcript of the interview of AM and, in particular, AM's recollection of the events.

[25] Counsel for the Law Society submitted that intention is not necessary to make a finding of professional misconduct and referred to *Law Society of BC v. Hill*, 2012 LSBC 20, *Law Society of BC v. Antle*, 2005 LSBC 45, and *Law Society of BC v. Hops*, [1999] LSBC 29.

[26] Counsel for the Law Society referred to a number of excerpts from the Canons of Legal Ethics contained in Chapter 1 of the *Professional Conduct Handbook* and, in particular, the following:

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.

5. To oneself

(6) All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

[27] Counsel for the Law Society also referred to Chapter 2, Rule 1 of the *Professional Conduct Handbook*, which addresses a lawyer's integrity as follows:

1. A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

[28] Counsel for the Law Society referred to the following three decisions of hearing panels where discourteous communications by a member were considered to constitute professional misconduct:

- (a) *Law Society of BC v. Lanning*, 2008 LSBC 31 ("Lanning"),
- (b) *Law Society of BC v. Greene*, [2003] LSBC 30 ("Greene"), and
- (c) *Law Society of BC v. Harding*, [2003] LSBC 20.

PROFESSIONAL MISCONDUCT

[29] The test for professional misconduct is the "marked departure" test set out in *Law Society of BC v. Martin*, 2005 LSBC 16 ("*Martin*"). In particular, the test as set out in *Martin* is as follows:

Whether the facts as made out disclose a marked departure from the conduct the Law Society expects from its members; if so, it is professional misconduct.

[30] The decision of the Benchers on Review in *Re: Lawyer 12*, 2011 LSBC 35 ("*Lawyer 12*") is the most recent statement by the Benchers of the test for professional misconduct.

[31] Both the majority and the dissent (on other grounds) of the Bencher Review Panel in *Lawyer 12* agreed that the *Martin* test of a marked departure from expected behaviour required, in addition, an element of culpable neglect.

[32] With this determination, both majority and dissenting decisions in *Lawyer 12* agreed that, if the "marked departure" alleged was the result of events beyond the lawyer's control or the result of an innocent mistake, it was likely not a marked departure after all. In that outcome, the culpable neglect component of the *Martin* test was affirmed.

[33] We adopt and reiterate the reasoning of the dissent decision in *Lawyer 12*. In this regard the dissenting Benchers were in accord with the majority - it was on the application of the test to the facts that the dissent was developed. The test (for professional misconduct) was articulated in *Lawyer 12* at paragraphs [50] and

[51] as follows:

Martin describes the threshold as gross culpable neglect. That is to say that the culpability is of an aggravated character and not a mere failure to exercise ordinary care.

If the conduct of the lawyer falls into the latter category then it is not a marked departure from the norm, and thus the lawyer cannot be found to have committed professional misconduct. If the conduct rises to the level of the former category, then there must be a finding of professional misconduct and there is no need to look any further.

DISCUSSION

[34] Both the Respondent and counsel for the Law Society indicated that the context is very important. The Panel agrees. The Panel is alive to the concept that spoken words, especially those that the speaker intends to be a joke, should not be considered in isolation without understanding the context.

[35] The Panel also considers that context requires that the ordinary expected effect of the words and the impact of those words on the recipient and others need to be considered.

[36] The Panel is of the view that there is a point where certain words, even if intended to be a joke, can constitute professional misconduct, and it is the Panel's duty to make such difficult determinations. As was stated in *Lanning*,

... it is for the Benchers, as the guardians of proper standards of ethical conduct, to determine what behaviour constitutes professional misconduct.

[37] The Panel is cognizant that there must be some latitude in reviewing conduct after the fact and we ought not approach comments made with any sort of scientific precision.

[38] The Panel is not prepared to make a finding of professional misconduct without carefully considering the context and how a reasonable person would understand the meaning of such words. We do not wish to inhibit common social interactions, nor do we want to discourage the practice of making jokes or light-hearted barbs or insults, which, in the proper context, can enhance camaraderie and diffuse tension in the day-to-day conditions that can arise in the practice of law.

CONTEXT

[39] Although the ASF provides a general understanding of the context, the additional documents submitted to the Panel assist in providing a fuller understanding of the context.

[40] We note the following details regarding the context in which the Respondent's comments were made:

- (a) The Respondent regularly acts for parents whose children have been apprehended by the Ministry.
- (b) The Respondent works from offices located in Burnaby and Richmond. He travels to Quesnel on occasion to represent clients.
- (c) Quesnel is a relatively small community.
- (d) AM is a Child Protection Social Work Practitioner with the Ministry of Children and Family Development Office in Quesnel. She has a Bachelor's Degree in social work and has had this job since 1998.
- (e) AM works in Quesnel.

(f) AM's position requires her to appear in court on behalf of the Ministry where the parents are opposing the actions of the Ministry.

(g) AM is not a lawyer.

[41] In her interview by the Law Society, AM described her job as follows:

AM: Difficult, busy, often people are not in agreement with our plans, contentious, you do, you have to develop a lot of skills to de-escalate situations, Court is always busy, people are not usually terribly happy with you in that kind of situation.

Interviewer: And the reason they're not terribly happy is because sometimes you have to put their children into government protection?

AM: Yeah, we either have to remove them from their care or get various Court orders to help protect kids like supervision orders and protective intervention orders and those kinds of things, yeah.

Interviewer: And ultimately, my understanding is that it's the Ministry's aim to get the family back together at some point as there's you know counselling or to get rid of the issues that caused the child to have to go into protection in the first place.

AM: Yes, oh yes, that's our goal.

[42] AM says that she was not involved in any files with the Respondent. AM says that she did not expect the Respondent to talk to her on September 28, 2011.

[43] AM indicated in her interview by the Law Society that, at some point in 2011 prior to this event, the Respondent had briefly introduced himself to AM. An excerpt from the transcript of the interview of AM by the Law Society on May 24, 2012 reads as follows:

... he introduced himself to me and said that the social workers down at the coast where he works always ask their clients not to have him as a lawyer. And I said why's that? And he said because I'm intimidating to their, I intimidate their lawyers. And I said well you're going to meet [Ministry Lawyer], you won't intimidate [Ministry Lawyer].

[44] AM says that there was some laughter in the waiting area after the Respondent made his comments, so it is apparent that the Respondent's comments were loud enough to be heard by other persons present. The Respondent guessed that there were six to ten people in the waiting area and stated that it was a crowded and small area. The Respondent believes that most of the persons present were social workers but acknowledged that some might not be.

[45] AM says she took the Respondent's comments as a threat.

[46] AM says that she has seen the Respondent since September 28, 2011. She says that she prefers to stay away from him but that she does not feel that the Respondent will kill her.

Decision

[47] The Respondent says his comments were spontaneous and a joke. However, the Respondent must take responsibility for his words and exercise more restraint in situations such as these. Even though his honest belief was that social workers take too many children, he expressed his views inappropriately considering the context.

[48] The Respondent does not seem to understand that, in the context of a waiting area outside of a courtroom on a busy day, when speaking to a person he believed he had no prior or current dealings with, it was inappropriate to identify her by name and occupation in such a crowded area and to say he “should shoot” her and that she “takes away too many kids”.

[49] Even if the Respondent did not intend to intimidate or threaten AM with his comments, the Panel finds that he was irresponsible and did not adequately consider the impact that his words (specifically, that he “should shoot” her and that she “takes away too many kids”) would have in this emotionally charged situation where parents are in conflict with the Ministry and where others outside the courtroom would overhear his comments.

[50] The Panel finds that AM’s belief that the Respondent’s comments were not a joke is reasonable in this context.

[51] The Panel agrees with the following comments of the panel in *Greene*:

[33] Many of our Canons relate to appropriate conduct in expressing the different aspects of professionalism. While it is clear that we, as a profession, place high value on honesty and integrity, it is also important that we express restraint and appropriateness in our commentary, both in the written and spoken word, as we carry out our profession.

[34] 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.

[35] 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.

[52] The Canons of Legal Ethics in the *Professional Conduct Handbook* express broad principles and cannot proscribe every type of behaviour that would be inappropriate. The Panel finds that a member of the legal profession would appreciate that such words spoken in this context would be considered to be inappropriate. The Panel does not believe that the rules are too vague.

[53] The Panel finds that making these comments outside a courtroom during recess is related to the Respondent’s professional practice.

[54] The Panel finds that the Respondent’s conduct was more than just a mere failure to exercise ordinary care. His conduct was a marked departure from what the Law Society expects of its members. The Panel finds that the Respondent has committed professional misconduct.

[55] This matter will now be set down for a hearing to determine the appropriate disciplinary action under section 38(5) of the *Legal Profession Act*.