2014 LSBC 06
Report issued: February 17, 2014
Citation issued: October 18, 2010

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 Disciplinary Action

Hearing date: December 19, 2013
Panel: Bruce LeRose, QC, Chair, William Everett, QC, Lawyer, June Preston, Public representative

Counsel for the Law Society: Kieron G. Grady
Counsel for the Respondent: Gerald Cuttler

introduction

[1] In its decision on Facts and Determination issued August 30, 2013, the Panel considered two citations, each of which alleged that the Respondent made rude and discourteous remarks to opposing counsel.

[2] In respect of citation No. 1, the Panel found that the Respondent's conduct in writing two letters to his client's former lawyer, Shawn P. Jodway, that contained rude and discourteous remarks directed to Mr. Jodway, constituted professional misconduct.

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

[4] The circumstances surrounding the Panel's findings are set out in detail in its decision on Facts and Determination, 2013 LSBC 25.

[5] The matter came before the Panel on December 19, 2013 for determination of the appropriate disciplinary action under section 38 of the Legal Profession Act (the "Act") in relation to citation No. 1.

POSITION OF THE PARTIES

[6] The Law Society submitted, having taken into consideration an undertaking the Respondent has provided to the Law Society in relation to ongoing counselling and treatment, that the appropriate disciplinary action in relation to citation No. 1 is a fine of $2,500 payable by March 31, 2014. The Law Society submitted that, but for the Respondent's undertaking, it would have sought a $5,000 fine.

[7] The Respondent supports the Law Society's submission regarding the appropriate disciplinary action.

[8] Counsel for each party made it clear that they were not making a joint submission on the appropriate disciplinary action. Rather, the proposed penalty is a Law Society submission that the Respondent supports.

FACTORS IN DETERMINING DISCIPLINARY ACTION

[9] The Law Society's mandate under section 3 of the Act is to protect the public interest in the administration of justice.

[10] Section 38 of the Act, particularly subsections (5) and (7), provides the statutory authority for a panel to impose disciplinary action where a finding of professional misconduct has been made against a respondent, *Law Society of BC v. Lessing*, 2013 LSBC 29.

[11] *Law Society of BC v. Ogilvie*, [1999] LSBC 17 at para. 10, sets out a number of factors available to be taken into consideration by a panel in determining the appropriate disciplinary action. The Review panel in Lessing has made it clear that all the factors listed in *Ogilvie* do not necessarily need to be considered by a panel in all cases and that the weight to be given to the factors may vary from case to case.

[12] Counsel for the Law Society (whose submissions are supported by counsel for the Respondent) submits that the public interest requires that the Panel give prominence to the following factors in the assessment of the appropriate disciplinary action in this matter:

The nature and gravity of the conduct proven

[13] The Respondent wrote two letters containing remarks regarding opposing counsel that were arrogant, unnecessary to advancing his client's cause, excessively abusive, condescending, disrespectful, and insulting. Despite knowing opposing counsel took offence to the remarks, the Respondent refused to retract them or apologize. The Law Society's *Code of Professional Conduct for British Columbia* at Chapter 2, and recent decisions of the Supreme Court of Canada and academic publications (see for example decision on Facts and Determination at paras. 81, 82, 104, and 105) make it clear that incivility in a lawyer's conduct toward another lawyer impedes the proper functioning of the administration of justice and undermines public confidence. In the circumstances, the Respondent's proven misconduct is serious and the Panel considers this an aggravating factor weighing in favour of a more severe disciplinary action.

The previous character of the Respondent, including details of prior discipline

Professional Conduct Record

[14] The Respondent's Professional Conduct Record includes a prior citation and two conduct reviews (Exhibit 1).

[15] The prior citation was issued in 2002. The facts of the prior citation are not dissimilar to this citation in that the Respondent was uncivil to his clients' former lawyer, MS, in the presence of other lawyers at a meeting of the Family Law Subsection in a Surrey hotel, where he said words to the effect that, at his examination for discovery, MS had admitted enough to have himself disbarred and that he was going to get MS disbarred. The Respondent subsequently wrote to MS to retract and apologize for the statements. The Respondent admitted that his statements constituted professional misconduct, and he was ordered to pay a fine of $1,000 and $3,500 in costs.

[16] The first of the two conduct reviews involving the Respondent took place in 2004. The facts of the 2004 conduct review are also not dissimilar to this citation in that the Respondent alleged that opposing counsel had refused to comply with the rules of court, offered false evidence or misstated the facts or law, asserted untruths, and failed to conduct himself as a reasonable trial lawyer. The matters were aired in court and the presiding Judge found there was no basis for any of the allegations of misconduct. The Respondent

subsequently wrote to opposing counsel apologizing for the allegations and also apologized to the court. At the conclusion of the trial, the Respondent made further uncivil and personal remarks regarding opposing counsel in connection with response submissions on costs. The Respondent acknowledged on reflection that he was injudicious in the wording of his response and would avoid such conduct in the future. The conduct review subcommittee recommended no further action against the Respondent on the basis that "a matter of this nature is unlikely to happen again," and the Respondent "accepts that his conduct could have been better, and has taken steps to avoid a like matter recurring."

[17] The second conduct review involving the Respondent took place in 2005. Again the facts of the 2005 conduct review are not dissimilar to this citation in that the Respondent wrote letters to other counsel that, in effect, suggested that another lawyer had counselled perjury, and that other counsel had exerted some pressure on a witness to give untruthful evidence at an examination for discovery. In addition, in an account presented to his client concerning independent legal advice, the Respondent's time entry indicated that, in a discussion with other counsel, the other counsel "admits telling C to say 'don't know' w/r seatbelt - just doesn't get it (perjury)".

[18] The conduct review subcommittee made it clear to the Respondent that he was obliged to obey the rules of professional conduct. The Respondent indicated that he understood and that, at times, he goes too far. The Respondent advised the subcommittee that he had an associate who would review his potentially "flammable" letters and that he was trying to take more time with issues that enrage him, in order to ensure that his communications were appropriate and not subject to criticism. The conduct review subcommittee recommended no further action against the Respondent, but stated:

> The Subcommittee was ultimately satisfied that [the Respondent] is a lawyer who is dedicated to his clients and to their causes. For this he is to be commended. Concerning the behaviour that brought this matter to the Law Society's attention, the Subcommittee was satisfied that he has systems in place that will assist in avoiding a recurrence, and that he has taken steps personally to assist in controlling emotional outbursts which transgress the rules. *He also understands that there is a limit to the patience of the Law Society concerning a potential future occurrence of similar conduct*, and that both his interests and his clients' are ultimately best served by reflecting more carefully before transmitting his views.
>
> [emphasis added]

[19] The Panel is particularly concerned that the prior citation and two conduct reviews all involve the Respondent conducting himself in an uncivil manner in his dealings with other counsel. Despite the conduct review subcommittee's optimism that the Respondent had taken steps to avoid such conduct recurring, had systems in place to assist in avoiding a recurrence, and had taken steps personally to assist in controlling emotional outbursts which transgress the rules, the Respondent has nevertheless found himself subsequently cited for and to have committed professional misconduct of a similar nature. The Respondent finds himself in this position despite his understanding (as recorded by the second conduct review subcommittee) that there is a limit to the patience of the Law Society concerning a potential future occurrence of a similar nature. The Respondent appears to have learned little from his prior disciplinary history. The Panel considers this to be a serious aggravating factor.

Reference letters

[20] The Respondent put in evidence a booklet (Exhibit 3) containing a number of reference letters from lawyers and non-lawyers, some of which were unsolicited. Counsel for the Respondent submits that his client is an "open book" and the part of his personality that brought him before this Panel is his passion. He

submits that the Respondent's passion is a personal attribute, but that it is also his downfall. Those submissions are supported in part by the following excerpts from some of the reference letters in Exhibit 3:

> A litigator must recognize that our justice system is made up [of] a large disparate community of perspectives and ideas. An individual's perceptions of their opponent's behavior and motivation are often wildly inconsistent with reality. I do believe that [the Respondent] recognizes this but he simply has difficulty self-regulating a strong personality that is passionately motivated to do the best for his clients. As a result, he engages issues that many others would let pass and he engages them with such intensity that his behavior comes across as falling outside of what is considered by many to be common or courteous practice. The irony is that this behavior is inconsistent with what [the Respondent] is really all about - a passionate litigator who cares deeply for his clients; loves the adversarial system of law; and recognizes that it is an honour to be able to serve his clients as a lawyer.
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> Exhibit 3, p. 16
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> I know that [the Respondent] at times can be rude to colleagues. I do not condone the behavior at all. And, frankly it is very difficult for me to reconcile those occasional bursts of rudeness with the brilliance of mind, generosity of spirit and basic good heartedness that I know [the Respondent] to have and that he has demonstrated to me over the years. Perhaps the disconnect is reconciled to some extent in [the Respondent's] inherent honesty. That honesty can lead to being too blunt. Similarly, perhaps as a result of that honesty, I have observed that when he has shown to be in error he has admitted it and accepted the full consequences for his error.
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> Exhibit 3, p. 19
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> [The Respondent's] passion must not go unchecked. It is important that the citations came before the Law Society and that the determination of misconduct was made. I trust that [the Respondent] will learn from the judgment of his peers and channel his passion in ways that best pursue justice without being offensive. I hope that my input will help those determining the consequences of his misconduct to appreciate a more complete picture of who [the Respondent] is and how important he is to our profession.
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> Exhibit 3, p. 23

[21] Counsel for the Respondent made it clear that he was not suggesting the Respondent's passion was a justification for his actions. Rather, the letters provide a broader perspective of the Respondent's character and indicate that he does not make a practice of being uncivil to opposing counsel every day and that he does have other very positive aspects to his character.

[22] The Panel accepts that the Respondent has a positive side to his character, is held in regard by certain lawyers and non-lawyers for his friendship, assistance and good deeds. However, some evidence of good character in the reference letters does not justify the Respondent's uncivil conduct. Rather, civility is a component of good character. Despite the reference letters, the Respondent has a history of finding himself in situations where he considers it necessary to resort to uncivil conduct toward other lawyers, and he appears to feel justified in doing so. The Panel finds the reference letters to be of little assistance in determining the appropriate disciplinary action.

The possibility of remediating or rehabilitating the Respondent

[23] The Respondent has indicated that he is currently undergoing psychological counselling in an attempt to change his imputed behaviour. The psychologist prepared a written report dated November 22, 2013

(Exhibit 2) outlining the counselling that has taken place and attaching a treatment plan.

[24] Since October 22, 2013, the Respondent has seen the psychologist for weekly counselling sessions on five occasions in connection with anger management. The plan is for the Respondent and the psychologist to work together for an indefinite period of time in order to complete the proposed treatment.

[25] In addition, the Respondent has provided a written undertaking to the Law Society (Exhibit 4) that he will:

> (a) follow the psychologist's treatment plan, subject to any modifications or continuation of the treatment plan recommended by the psychologist;
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> (b) request in writing that the psychologist provide a written report by April 15, 2014 confirming that the Respondent has followed the treatment plan recommended by the psychologist;
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> (c) request in writing that the psychologist provide a written report by July 31, 2014 confirming that the Respondent has followed the treatment plan, whether the plan of treatment has been concluded and whether, in the psychologist's opinion, continued treatment is recommended; and
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> (d) in the absence of a written report provided pursuant to paragraph (c), provide the Respondent's consent to the psychologist to provide a written report to the Law Society, at its request, addressing the matters referred to in paragraph (c).

[26] The Panel recognizes that the Respondent appears to be earnest in his attempt to change his behaviour. However, it cannot be said with any certainty that the counselling and treatment will be successful in modifying his behaviour. It is, nevertheless, a positive step for which he is to be commended. The Panel considers this to be a mitigating factor.

The need for specific and general deterrence

[27] Given the Respondent's Professional Conduct Record, as noted above, the events that gave rise to this citation cannot be viewed as an isolated incident. It appears that the previous finding of professional misconduct and the two conduct reviews have not been effective. Notwithstanding that the Respondent is currently undergoing psychological counselling and treatment, he had opportunities to change his behaviour in the past and chose not to. Only recently (October 2013) has he started receiving counselling and treatment. As such, it is important that the Respondent be specifically deterred from similar behaviour in the future. With respect to general deterrence, it is the Panel's view that it is very important to underscore the importance of civility between lawyers. The Panel considers this to be an aggravating factor.

The need to ensure the public's confidence in the integrity of the profession

[28] 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.
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> …
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> [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.

[29] The sentiment expressed above is codified in the Law Society's rules and has been the subject of recent decisions of the Supreme Court of Canada. The issue of civility amongst lawyers has also been the subject matter in publications and addresses by senior members of the profession. The Respondent's imputed conduct undermines the public's confidence in the integrity of the profession. The Panel considers this to be an aggravating factor.

[30] In addition to the *Ogilvie* factors to which counsel for each of the parties submitted the Panel should give prominence in its assessment of the appropriate disciplinary action, the Panel also took into consideration the factors in the following several paragraphs.

Age and experience of the Respondent

[31] The Respondent's age is not in evidence. He was called to the bar in 1990 and practises primarily in the areas of family law and plaintiff motor vehicle law. He had been practising for approximately 20 years at the time of this citation and is very experienced in family law matters, personal injury matters, and civil litigation generally. The Panel considers this to be an aggravating factor.

Whether the Respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong

[32] The Respondent did not acknowledge his misconduct. Nor did he retract his remarks or apologize to the complainant. The Panel considers this an aggravating factor.

[33] The Respondent defended the citation through a full hearing. Counsel for the Respondent argued that this citation is the first BC Law Society disciplinary hearing, following *Doré v. Barreau du Quebec*, 2012 SCC 12, containing allegations of rude and discourteous remarks to opposing counsel. *Doré* considered and applied the *Charter* value of freedom of expression in the context of a lawyer's professional duties. He argued that the Respondent had the right to test the law in the context of *Doré*, that the Respondent accepts the Panel's decision on Facts and Determination, and that he is now addressing the problem as set out in paras. [23] to [26] above. The Panel considers this to be a mitigating factor.

Range of penalties imposed in other cases

[34] Counsel for the Law Society provided the Panel with the following similar cases in British Columbia, in which the sanctions ranged from a reprimand to a fine of $3,000:

(a) *Law Society of BC v. Barker*, [1993] LSDD No. 189, in which the respondent used foul and abusive language with an adjuster. The respondent subsequently apologized to the adjuster by phone and in writing. The respondent had a similar prior complaint. The respondent was reprimanded, fined $400 and ordered to pay costs of $500.

(b) *Law Society of BC v. Greene*, [2003] LSBC 30, in which the respondent made inappropriate comments about another lawyer and members of the judiciary in three letters. The respondent expressed remorse, albeit belatedly. The respondent had three previous conduct reviews for unrelated matters. The respondent was fined $3,000 and ordered to pay costs of $3,500.

(c) *Law Society of BC v. Lanning*, 2008 LSBC 31 (F&D), and 2009 LSBC 02 (Penalty), in which the respondent committed professional misconduct when he sent letters with rude, offensive and

condescending language to a self-represented litigant in a matrimonial matter. The respondent's behaviour spanned a five-month period, during which time he sent 12 letters to the opposing party. The respondent's professional conduct record consisted of two unrelated conduct reviews. However, the Panel accepted the submissions of the Law Society counsel that the respondent's response to one of the earlier complaints showed the same sort of "dogged confrontational behaviour" that the respondent displayed in his dealings with the complainant in the present case. The respondent was reprimanded, fined $2,500 and ordered to pay costs of $6,600.

(d) *Law Society of BC v. Laarakker*, 2012 LSBC 02, in which the respondent posted personal and discourteous comments about another lawyer on an internet blog and subsequently, in the course of representing a client, sent the same lawyer a fax that also contained discourteous and personal remarks. It was noted by the panel that the respondent's professional conduct record was neither an aggravating nor a mitigating factor. The respondent was fined $1,500 and ordered to pay costs of $3,000.

[35] Counsel for the Law Society also provided the Panel with the following similar cases in Ontario, in which the sanctions included suspensions:

(a) *Law Society of Upper Canada v. Carter*, 2005 ONLSHP 24 – The respondent, who did not appear at the hearing, was found to have committed professional misconduct by sending letters with offensive language to counsel who previously acted for his client, and to two individuals at Legal Aid Ontario. In total, the respondent sent seven letters that were offensive. The respondent had no disciplinary history. The respondent was suspended for three months, and the panel ordered further conditions and restrictions before the respondent could return to practice, including providing medical evidence that he was fit to practise, and sending apology letters to the recipients of his letters.

(b) *Law Society of Upper Canada v. Kay*, 2006 ONLSHP 31 (F&V), 2006 ONLSHP 58 (Penalty), 2008 ONLSAP 2 (Appeal) The respondent was cited for offensive comments he made to opposing counsel and to a client and for failing to cooperate with counsel who succeeded him on the file. There was no mention of the respondent having a professional conduct record. The respondent was suspended for 30 days. The panel further accepted the joint recommendations of the respondent and the Law Society that the respondent engage in a counselling program, undergo a practice review and pay costs of $10,000. An appeal by the respondent of the finding of professional misconduct was dismissed.

(c) *Law Society of Upper Canada v. Wagman*, 2008 ONLSAP 14 – The respondent sent an email to opposing counsel that was sarcastic, threatening, harsh and condescending. The respondent had a disciplinary history of "significant relevance" that included at least two instances of unprofessional communications. The respondent was suspended for 15 days and ordered to pay costs of $1,500. The respondent's appeal of the finding of professional misconduct was dismissed.

(d) *Law Society of Upper Canada v. Marshall*, [2010] LSDD No. 102 – The respondent confronted a fellow lawyer in her office and conducted himself in a manner that was uncivil and abusive. The panel noted that there was a "quasi physical" element in the conduct of the respondent. The respondent had no disciplinary history, and his immediate response was to take anger management counselling. He was suspended for one week and ordered to pay costs of $2,000.

CONCLUSION AND ORDER

[36] In weighing the overall aggravating and mitigating factors, the Panel is of the view that a short

suspension together with the Respondent's undertaking regarding ongoing counselling and treatment would be an appropriate disciplinary action in this matter. It takes into account the Respondent's Professional Conduct Record, is sufficient to achieve the objectives of specific and general deterrence and maintenance of the public confidence in the Law Society's regulation of its members. It is also within the range of penalties imposed in the Ontario cases (particularly *Wagman*), and it takes into account the comment of the subcommittee on the Respondent's second conduct review that there is a limit to the Law Society's patience concerning any future occurrence of similar conduct.

[37] However, the Law Society submits that, on a proportionate balancing of the *Ogilvie* factors, a fine of $2,500 is the appropriate disciplinary action in circumstances where the Respondent has provided an undertaking to the Law Society that he will continue counselling and treatment with a psychologist as set out in Exhibit 4. The Respondent supports the Law Society's submission.

[38] In light of the Law Society's submissions on disciplinary action and the Respondent's support thereof, the Panel, with reservation, accepts the submission and orders that the appropriate disciplinary action in this matter is a fine of $2,500 payable by March 31, 2014, together with the Respondent's undertaking to the Law Society regarding counselling and treatment as set out in Exhibit 4.

COSTS

[39] The Law Society is not seeking any costs from the Respondent on the basis that the hearing involved issues being raised before a hearing panel for the first time (paras. [31] and [32] above) and on the further basis that success on the hearing was divided as there were two citations before the Panel and one was dismissed.

[40] The Panel therefore orders that there be no costs awarded in respect of this matter.

CONFIDENTIAL INFORMATION

[41] Counsel for the Respondent sought an order that the name of the Respondent's psychologist that is set out in the undertaking provided by the Respondent to the Law Society (Exhibit 4) be kept confidential by creating a copy of the undertaking (Exhibit 4(a)) which redacts the psychologist's name and that would not be subject to a confidentiality order.

[42] The Law Society's hearings are generally open to the public. Such openness is critical to maintaining the public's confidence in the Law Society's regulatory process.

[43] However, the Panel is of the view that the name of the psychologist does not need to be disclosed to the public in these circumstances. We therefore order, pursuant to Rule 5-6(2)(a), that Exhibit 4 not be disclosed or published, but that its redacted version, Exhibit 4(a) is available for disclosure and publication.