2014 LSBC 16
Decision issued: April 9, 2014
Citation issued: August 19, 2013

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

DONALD ROY MCLEOD

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: February 18-19, 2014
Panel: Jan Lindsay, QC, Chair, Satwinder Bains, Public representative, Peter Warner, QC, Lawyer

Counsel for the Law Society: Susan Coristine
Counsel for the Respondent: William MacLeod

Background

[1] The Discipline Committee authorized the citation against Donald Roy McLeod (the "Respondent") on July 11, 2013 (the "Citation"), which alleged that, on or about November 21, 2012, the Respondent disclosed confidential client information concerning his clients CD and GW contrary to Chapter 5, Rule 1 of the *Professional Conduct Handbook* then in force, by doing one or more of the following:

> (a) preparing and filing a Notice of Application containing confidential client information, to be removed as his clients' solicitor of record in BCSC, Victoria Registry Action No. [number] (the "Action");
>
> (b) serving the Notice of Application on the defendant to the Action;
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> (c) preparing and filing an affidavit containing confidential client information in support of the application to be removed as his clients' solicitor of record;
>
> (d) serving the affidavit on the defendant to the Action.

The Citation alleges that the above conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[2] Chapter 5, Rule 1 of the *Professional Conduct Handbook* (the "Handbook") then in force states:

> A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly1 authorized by the client, or is required by law or by a court.

The first annotation to this rule on the Law Society website states:

> While there may be an implied waiver on the part of the client permitting disclosure of the client's name and address for the purpose of collection, where the client has failed to pay a bill, members may do only the minimum necessary to recover fees. As lawyers are bound by the ethical duty of confidentiality and the legal duty of solicitor/client privilege, lawyers are prohibited from reporting a client to a Credit Bureau.

AGREED STATEMENT OF FACTS

[3] The parties submitted an Agreed Statement of Facts and a Joint Book of Documents. A summary of this evidence is as follows.

[4] Donald McLeod was called and admitted as a member of the Law Society of British Columbia in July 1981. He is a sole practitioner and practises in the areas of personal injury, family law and mediation.

[5] Mr. McLeod represented CD and GW in two Supreme Court Actions:

> (a) *CD et al. v. JM et al*. ("the Personal Injury Action"), in which CD and GW sued the defendant for injuries arising out of a motor vehicle accident. CD alleged she suffered back, spine, head, shoulder, chest, hand and knee injuries resulting in pain, headaches, depression and other symptoms. GW alleged he suffered back, head, shoulder and chest injuries resulting in pain, headaches, depression and other symptoms; and
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> (b) *CD et al. v. CA et al*., ("the Misrepresentation Action"), in which CD and GW alleged that the defendant made misrepresentations to them concerning a house they purchased from her. The defendant had covenanted to remove and replace old electrical wiring and the contractor she hired had failed to do so.

[6] Mr. McLeod had acted for CD and GW a few years earlier, and they had signed a retainer agreement with very similar wording to that set out below. Mr. McLeod entered into written retainer agreements with CD and GW in the Personal Injury Action but did not have a written retainer agreement with them in the Misrepresentation Action. The relevant sections of these agreements are as follows:

> Some of the information which you will provide to us will be information given to us in confidence as your lawyers, which is subject to "solicitor and client privilege"; such information generally cannot be disclosed to anyone without your express consent. BY SIGNING THIS RETAINER LETTER YOU EXPRESSLY AGREE THAT IF A LAWYER IN OUR FIRM BELIEVES IT APPROPRIATE TO DO SO, WE MAY DISCLOSE ANY SUCH INFORMATION THAT WE BELIEVE MAY ASSIST IN FURTHERING YOUR CASE, WHETHER IT ACTUALLY DOES FURTHER YOUR CASE OR NOT. WE CAN DISCLOSE THIS INFORMATION BOTH IN THE REPRESENTATION WE ARE PROVIDING TO YOU AND IN ORDER TO HELP US COLLECT MONEY YOU OWE US.
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> The use which we may make of the information which we collect concerning you is:
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> (a) It may be disclosed to the Courts and opposing parties and their counsel in the course of the matter in which we represent you, under the following circumstances:
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> i. if a Statute or the Rules of Court require disclosure,
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> ii. if a Court orders disclosure,

iii. if in the opinion of a lawyer in our firm it should be disclosed in order to further your case,

(b) If you do not pay the accounts our firm sends you, we may disclose any of the information you have given to us to a Court and its personnel, including bailiffs and sheriffs, and to financial institutions and process servers, or any other person or company that, in the sole discretion of the personnel in our firm, may be of assistance in collecting amounts appearing due from our accounts.

Any of the inf

ormation provided to us and used in any of the ways set out above may become public knowledge, as proceedings in courtrooms and court files are, generally, open to the public.

[7] On August 3, 2012, CD and GW informed Mr. McLeod that they were replacing him as counsel in the Personal Injury Action.

[8] Based on communications he had with the complainants' new counsel in the Personal Injury Action, Mr. McLeod concluded, in the period leading up to November 2012, that CD and GW were not intending to compensate him in accordance with the retainer agreements in the Personal Injury Action and further concluded that there would be a dispute between him and them over his entitlement to compensation in that matter.

[9] In addition, CD and GW had not paid two accounts that Mr. McLeod had issued to them in respect to the Misrepresentation Action.

[10] Mr. McLeod concluded that he could not continue to represent CD and GW in the Misrepresentation Action when he was involved in a dispute with them over compensation in the Personal Injury Action, since it would place him in a conflict of interest.

[11] The Law Society does not dispute that Mr. McLeod was entitled to withdraw as counsel for CD and GW in the Misrepresentation Action.

[12] When Mr. McLeod informed CD and GW that he wished to withdraw as counsel in the Misrepresentation Action, they indicated that they wished him to continue to represent them.

[13] On or around November 6, 2012, Mr. McLeod sent CD and GW a Notice of Intention to Act in Person in respect to the Misrepresentation Action. In an email dated November 13, 2013, CD and GW informed Mr. McLeod that they would not sign the Notice of Intention to Act in Person and, further, that if he delivered a Notice of Intention to Withdraw (Form 112), they would file an objection.

[14] On November 21, 2012, Mr. McLeod filed a Notice of Application and affidavit in the Misrepresentation Action seeking a declaration that he and his corporation, Donald R. McLeod Law Corporation, had ceased to act for CD and GW in the Misrepresentation Action.

[15] Mr. McLeod acquired the information set out in the Notice of Application and affidavit in the course of his representation of CD and GW in the Misrepresentation Action and the Personal Injury Action.

[16] As of November 21, 2012, when Mr. McLeod filed the Notice of Application and affidavit, there was no trial date set in the Misrepresentation Action and no applications pending.

[17] Mr. McLeod served the application and affidavit on the solicitors for the defendant in the Misrepresentation Action.

[18] Soon after, CD and GW filed their application response, in which they consented to all of the relief Mr. McLeod claimed except the claim for costs. They alleged that Mr. McLeod had acted with reckless disregard

toward their interests in his manner of conducting the application and that he had breached client confidentiality in his affidavit by disclosing to a third party confidential and privileged information including financial and medical information regarding an unrelated litigation matter.

[19] On November 26, 2012, CD and GW filed a complaint with the Law Society alleging that Mr. McLeod had filed an affidavit that they claimed contained confidential and privileged material regarding the Personal Injury Action.

[20] On December 4, 2012, the application for removal proceeded in Supreme Court Chambers and Justice Ross granted Mr. McLeod the orders he sought.

[21] The information disclosed in Mr. McLeod's affidavit that is alleged by the Law Society (and by GW and CD) to be confidential client information can be summarized as follows:

> (a) details of a discussion between Mr. McLeod and CD about strategy and evidence needed in the Misrepresentation Action;
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> (b) the fact that they were paying him $350 per hour;
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> (c) the fact that he also acted for them in the Personal Injury Action and that CD had suffered a brain injury, plus details of delays and failures on the part of Mr. McLeod and CD to provide him with needed documentary evidence;
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> (d) details of his dispute with them and their new lawyer over his accounts, including attaching to his affidavit an email from them in which they dismiss him on the Personal Injury file and disclose to him that they are in dire financial shape and that they did not wish to sell their home to raise funds for needed medical and dental treatments;
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> (e) a list of the steps he had taken in the Personal Injury Action and the evidence he had obtained. This included mention of a neurologist's report showing that GW had probably not suffered any brain damage, and a statement by Mr. McLeod that GW had told him that he was retired, but had been offered some consulting positions,
>
> (all of which is herein referred to as the "Disclosed Information").

[22] On hearing of Mr. McLeod's application to be removed as solicitor, GW and CD attended, and consented to the relief sought, but complained about the alleged breach of confidentiality and opposed the claim for costs. Presiding Justice Ross was told by Mr. McLeod that he had "a written consent to release any information that in my view is necessary for purposes such as this," and both parties submitted that further proceedings in the form of a complaint to the Law Society over the alleged breach of confidentiality would take place. In the end, Justice Ross granted Mr. McLeod his orders plus costs and said nothing about the alleged breach of confidentiality.

ISSUES

[23] The questions for this Panel to decide are as follows:

> (a) Did the Disclosed Information include confidential client information for the purposes of Chapter 5, Rule 1 of the Handbook?
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> (b) If so, did the Respondent breach Chapter 5, Rule 1, which in turn involves consideration of the following:
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> i. Was the Respondent legally entitled to disclose the confidential information in order to

withdraw as counsel?

ii. Did GW and CD authorize the Respondent to disclose the confidential client information?

(c) If the Respondent did breach Chapter 5, Rule 1, did his conduct in so doing constitute professional misconduct?

[24] The burden of proof is on the Law Society to prove the facts necessary to support a finding of professional misconduct with evidence that is sufficiently clear, convincing and cogent (*Law Society of BC v. Chiang*, 2009, LSBC 19, para. 37).

DISCUSSION AND FINDINGS

Procedure chosen for the application

[25] The Respondent chose the Supreme Court Rule 8 application procedure in applying to be removed as counsel, rather than the more specific procedure in Rule 22-6, which sets out a detailed procedure for such applications. Rule 8 applications must be served on all parties of record, while the Rule 22-6 procedure requires a Form 112 Notice of Intention to Withdraw to be served on the client and all parties of record. If no one files an objection, a Notice of Withdrawal can be filed and served, and if the client is the only objector, then only the client must be served with the application materials, not the opposing parties.

[26] The Respondent submits, and we accept, that he reasonably believed that his clients would object, and that he had a choice of procedures, and chose the Rule 8 procedure in order to proceed straight to the application stage. The Panel finds that there would have been less work involved in the Rule 22-6 procedure (i.e. no affidavit material) given that the clients did not oppose the relief in the end, but finds no fault with the Respondent in his choice of procedure. This case turns on the nature of the Disclosed Information, not the means or procedure through which it was disclosed.

Was disclosure authorized by the clients?

[27] The Respondent argued that the wording of the June 20, 2011 Personal Injury Action retainer agreement (see para. [6] above) specifically authorized him to disclose Personal Injury Action confidential information in the Misrepresentation Action application to be removed as counsel. He did not have a retainer agreement in the latter action.

[28] Turning to the wording of the retainer agreement, it is clear, and the Respondent admitted, that the only arguably applicable authorization lies in the words “in order to help us collect money you owe us.” The Respondent clarified in his evidence before us that his application was not a dual application to get off the record and assess, tax or collect his outstanding fees. The application was confined to being removed as solicitor.

[29] A waiver of a legal right, such as the right to confidentiality, must be clear and unequivocal *(British Columbia (Auditor General) v. Butler*, 2011 BCSC 1064 at para. 66). The Panel finds that GW and CD did not authorize the Respondent to disclose their confidential information in the application to be removed as counsel, because that application was not for the purpose of collecting money owed, and we find that it is unnecessary to decide whether a retainer agreement signed on one file for one action would be applicable to another file involving another quite separate action. Although the application also sought costs, those costs could not be categorized as “money owed,” they would be, at best, money that might be owed in future if the costs were awarded.

[30] It was argued by the Respondent's counsel that a distinction between a lawyer disclosing a client's confidential, as opposed to privileged, information ought to be made. The Panel disagrees. The prohibition in Chapter 5, Rule 1 makes no such distinction, and "confidential information" would include, by definition, "privileged information." If disclosed, one type cannot be said to be inherently more harmful to clients than another.

Was the disclosed information confidential?

[31] Turning to the issue of whether the Disclosed Information was confidential, it was argued by counsel for the Respondent that no client information of a truly confidential nature was disclosed, and if it was, it was not harmful to the clients.

[32] It was argued that the disclosed discussion with CD on strategy and evidence concerned steps and evidence that would be obvious to opposing counsel whether disclosed or not, and that details about brain injury and poor financial condition were irrelevant and would not be harmful to the clients nor helpful to the opposing party in the Misrepresentation Action. He submitted that, because the clients' case was so strong, it could be resolved with a simple summary judgment application, and poverty on the Plaintiff's part would not bar a successful outcome.

[33] The Panel disagrees, and observes that, when a defendant learns that the plaintiffs are not on a contingency arrangement with their lawyer, are unable to pay their lawyer, and are on the brink of having to sell their home to pay medical bills, such information can be very useful to a defendant. Such a defendant might wish to stall proceedings or complicate them with expensive interlocutory applications in order to wear down the plaintiffs and perhaps gain a cheaper settlement.

[34] The Respondent disclosed that GW was retired despite his pleading in the Personal Injury Action that GW was "a communications specialist," a disclosure that, if it fell into the hands of the defendant in the Personal Injury Action, might cause GW some embarrassment or loss of credibility.

[35] The Respondent disclosed that CD had a brain injury, information that might be used by the defendant in the Misrepresentation Action to their benefit in the course of cross-examining the Respondent as to her credibility and memory, or in the course of negotiating with her.

[36] By attaching the email from his clients in which they detail their poor finances, poor health and despair and by criticizing their diligence in providing him with needed documents and evidence in the Personal Injury Action, the Respondent disclosed to the defendant in the Misrepresentation Action information about his clients' vulnerability, attitude, mood and resolve, all of which would be potentially harmful to his clients and helpful to that defendant.

[37] By detailing so much information about his clients' Personal Injury Action, the Respondent ran the risk that his affidavit might somehow fall into the hands of the Personal Injury Action defendant, even though the affidavit was only filed in the Misrepresentation Action.

[38] The scope of confidentiality was considered in *Law Society of BC v. Welder*, 2013 LSBC 24, in the context of conflict of interest. The hearing panel noted that the term does not just include information contained in documents, but it extends to less tangible information such as the client's attitude, approach to litigation and vulnerabilities.

[39] The Panel finds that the Disclosed Information was confidential client information.

Was the Respondent legally entitled to disclose?

[40] The leading case on this topic is the Supreme Court of Canada decision in *R. v. Cunningham*, 2010 SCC 10, [2010] 1 SCR 331, where, at para. 47, the court says

> If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.

[41] The court went on to say, at para. 50, that

> [i]f withdrawal is sought because of nonpayment of legal fees, the court may exercise its discretion to refuse counsel's request. The court's order refusing counsel's request to withdraw may be enforced by the court's contempt power. In exercising its discretion on the withdrawal request, the court should consider the following non-exhaustive list of factors:
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> whether it is feasible for the accused to represent himself or herself;
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> other means of obtaining representation;
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> impact on the accused from delay in proceedings, particularly if the accused is in custody;
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> conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
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> impact on the Crown and any co-accused;
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> impact on complainants, witnesses and jurors;
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> fairness to defense counsel, including consideration of the expected length and complexity of the proceedings;
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> the history of the proceedings, e.g., if the accused has changed lawyers repeatedly.
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> As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.

[42] The *Cunningham* case effectively overruled earlier decisions such as *Wilson v. Ina Insurance Co. of Canada*, (1994) BCJ No 829 (SC), *Ely and Rosen* (1963) 1 OR 47, and *Luchka v. Zens*, (1989), 37 BCLR (2d) 127 (CA), all of which prescribe a more proactive role for the court. At para. 8 of the *Luchka* decision, the permissive language of the then Rule 16(4) is noted ("the court may declare ...") and the court ruled that "… until an issue is raised between the retiring solicitor and one of the other parties or his own client, the court is not called upon to investigate the matter critically. There is no issue raised to be investigated." This language invites the court to explore the reasons for withdrawal when "an issue is raised," a principle rejected, or at least severely restricted, in the *Cunningham* decision.

[43] Although the Respondent testified before us that he read the *Cunningham* decision carefully before drafting his affidavit, in his letter to the Law Society dated March 6, 2013 in response to the complaint, he cites as his authority for the disclosures made in his affidavit the aforesaid overruled *Ely*, *Wilson* and *Luchka* decisions but does not mention the *Cunningham* decision.

[44] The Respondent testified before us that he then believed that one of the "timing issues" referred to in *Cunningham* would be his own need to get off the record and collect his fees, and that is why he interpreted

Cunningham as obliging him to go into factual detail about why he ought to be removed as counsel.

[45] The Panel rejects this as a competent or reasonable interpretation of *Cunningham* and finds that the Respondent ought to have concluded that the exceptions noted in *Cunningham* all have to do with the administration of justice, and not with his own fee collecting process. There were no pressing circumstances in the Misrepresentation Action, no impending applications, no trial date set, no urgency, none of the factors cited in *Cunningham* that would impact the administration of justice and require him to provide reasons, facts and documentary evidence supporting his application to be removed for non-payment of fees. The Respondent did not understand, did not read or ignored *Cunningham* when he drafted his affidavit.

[46] If the Panel is wrong and the Respondent did reasonably interpret *Cunningham* as authority for the need to disclose details and evidence on his application, the Panel finds that the extent and nature of the Disclosed Information went far beyond what would have been required if an "administration of justice" issue in fact existed. Why did he not simply state that he had been terminated as solicitor on one file, was unpaid on both files, and wished to proceed with collection procedures, which would put him in conflict if he continued to act on the other file? Why did he disclose medical conditions, strategy discussions, work he had done in the actions, a revealing letter from his clients, and the current employment status of his client? None of that was necessary by any reading of any of the above cases, either before or after *Cunningham*.

[47] Counsel for the Law Society put to the Panel cases on the distinction between applying to be removed as counsel because of unpaid fees and applying because of ethical issues, cases that establish that, once counsel advises the court that an ethical problem exists, the court must grant the order, and supporting material is never required. Law Society counsel argued that the facts of this case indicate an ethical justification for being removed, because the unpaid fees and the Respondent's wish to pursue collection would put him in conflict if he still acted on the Misrepresentation Action. It was argued that this made his reason "ethics based" and he ought not to have adduced any evidence on his application. The Panel does not accept that argument, and agrees with Respondent's counsel that a lawyer ought not to try to dress up a fee dispute as an ethical issue. While the fee dispute would lead to a conflict of interest if the Respondent was not allowed off the record, the core reason for getting off record was always the fee dispute.

[48] The decision in *Sandhu v. Household Realty Corp.,* 2013 BCSC 192, was decided after the Respondent made his application. In that case Mr. Justice Burnyeat clearly adopted the reasoning in *Cunningham* quoted in para. [41] above and noted that "… the requirement that the court inquire is restricted to where timing is tight and adjournment might result." To his credit, the Respondent told us during the hearing that, if the Sandhu case had been reported before he drafted his affidavit, he would have drafted it differently.

[49] The Respondent told us that, despite his client's accusations that he had breached solicitor/client confidentiality during the hearing of his application, Justice Ross had agreed with him, approved his application procedure, not censured him and awarded him costs against his clients. It was argued on his behalf that some deference ought to be paid by this Panel to this decision of Justice Ross on the issue of the propriety of the Respondent's affidavit.

[50] On reviewing the transcript of that hearing and the Order entered, and for the reasons set out in paragraph [22] above, the Panel finds it probable that Justice Ross made no comment or ruling on the alleged breach of confidentiality because she was told that it was to be dealt with in a proceeding at the Law Society.

[51] The Panel thus finds that the Respondent was not legally entitled to disclose the confidential client information that he disclosed, and that this disclosure constitutes a breach on his part of Chapter 5, Rule 1 of the Handbook.

[52] If the Panel is wrong in finding that the retainer agreement was not a binding contractual authorization by CD and GW for the disclosure of the Disclosed Information, then the Panel finds that the provisions of any such retainer agreement must be read in the light of and subject to applicable law and ethical obligations, and we find that the disclosure in this case was made in breach of both (Chapter 5, Rule 1 of the Handbook).

Does this breach constitute professional misconduct?

[53] Nowhere in the *Legal Profession Act*, Law Society Rules or the *Professional Conduct Handbook* is there any definition of or test for professional misconduct. The leading case is *Law Society of BC v. Martin*, 2005 LSBC 16, where the test is said to be "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members." The panel in that case stated the question as being, "The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer."

[54] In *Martin v. MacDonald Estate (Gray),* [1990] 3 SCR 1235, the importance of preserving client confidentiality was discussed as follows:

> Lawyers are an integral and vitally important part of our system of justice. It is they who prepare and put their clients' cases before courts and tribunals. In preparing for the hearing of a contentious matter, a client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears, will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations. (para. 61)
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> Our judicial system could not operate if this were not the case. It cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed. (para. 62)

[55] In *Law Society of BC v. Bjurman*, 2009 LSBC 5, the lawyer had filed a caveat containing confidential client information against his own client's property. He did so because of an earlier court order that allowed his client's opposing party to file a certificate of pending litigation, and directed that any sale proceeds be paid to the lawyer's trust account. The opposing party neglected to file a certificate, the lawyer learned his client was about to sell the property, and he was himself applying to be removed from the record as his fees were unpaid. The lawyer felt torn between his duties to his client to preserve confidentiality, his duty to the court to prevent a fraudulent sale of the property where the proceeds would not be paid into his trust account contrary to the order, and his wish to secure his unpaid fees. Although the lawyer admitted to professional misconduct, and it was not an adjudicated finding, that panel did note that "to disclose a client's privileged or confidential information without consent is subversive to the privileged position of members of the legal profession ...".

[56] In our case, the Respondent does not claim there were any such competing duties that led him astray. Nor is this a case where a lawyer accidentally disclosed a client confidence in the course of advancing the client's interests in an action or transaction. The Respondent's sole motivation in drafting his affidavit was to help himself be removed as counsel so that he could then start collection proceedings to collect his fees.

[57] A lawyer who sits down to draft an affidavit designed to advance his own interests, rather than his clients', must take the utmost care to ensure that he is not breaching his duty of confidentiality to his client. The Respondent failed to do this, and the extent of the failure is considerable, given the amount and range of

confidential information he disclosed, and given that much of it was both irrelevant and unnecessary to his application.

[58] Counsel for the Respondent advanced the argument that there was no evidence adduced of any harm to the Respondent's clients as a result of the disclosure, but the Panel finds that his clients complained strenuously in their filed response to his affidavit, and in their oral submission to Justice Ross at the hearing. They thought his disclosure of their confidential information from an unrelated case was "highly improper" and that "he was operating quite outside what we would view as any type of established legal ethics." The Panel agrees.

[59] The Respondent's counsel submitted that we ought to consider the Respondent's conduct as being a mistake, and referred us to the case of *Re: Lawyer 12*, 2011 LSBC 35, where there is a reference to the earlier decision of *Re: Lawyer 10*, 2010 LSBC 02, where it is said that, "It may not be professional misconduct if one's conduct falls below the norm in a marked way if that occurs because of … b) an innocent mistake." The panel in *Re: Lawyer 12*, however, went on to disapprove of that analysis in para. 8.

[60] Can the Respondent's conduct be reasonably categorized as a mistake? With respect, the Panel disagrees and finds that, for the reasons set out above, and in particular in paragraphs [56] and [57], the degree of blameworthy fault and gross culpable neglect of the Respondent's duties as a lawyer necessary to establish the conduct as professional misconduct has been proven by the Law Society, and we so find.

[61] Leaving aside any harm that his clients may or may not have suffered, the harm in this breach lies in the perception that GW and CD now have of the ethical standards of the Respondent, and possibly lawyers generally, and in the perceptions of those other members of the public who may hear their story.

[62] The Law Society of Upper Canada ruled in *Law Society of Upper Canada v. A Member*, 2005 CanLII 16408 (ON LST), that client harm or prejudice following a breach of client confidentiality is irrelevant to a determination of professional misconduct, and we agree. The harm is to the reputation of lawyers generally and to the public's faith in the solicitor/client relationship, a relationship steeped in trust. In this case the Ontario member sent a letter to his clients explaining in detail why he would no longer act for them, which letter contained confidential client information, and he copied in the opposing lawyer, and that was found to constitute professional misconduct.

[63] The Panel does not say that every breach of confidentiality will necessarily lead to a finding of professional misconduct, but based on the facts found and the reasoning set out above, the Panel finds that the Respondent breached Chapter 5, Rule 1 of the *Professional Conduct Handbook* and that the breaches set out in allegations 1(a), (b), (c) and (d) of the Citation constitute professional misconduct.