2014 LSBC 21
Decision issued: April 30, 2014
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 Disciplinary Action

Hearing date: January 31, 2014
Panel: Thomas P. Fellhauer, Chair, Gavin Hume, QC, Lawyer, Lance Ollenberger, Public representative

Counsel for the Law Society: Carolyn S. Gulabsingh
Counsel for the Respondent: Richard C. Gibbs, QC

BACKGROUND

[1] By decision dated July 4, 2013, the Hearing Panel found that the conduct of the Respondent set out in the citation issued September 26, 2012 (the "Citation") constituted professional misconduct. This finding was set out in a decision of the Hearing Panel on Facts and Determination reported at 2013 LSBC 26 (the "Decision on Facts and Determination").

[2] The finding of professional misconduct was made in respect of the Respondent making discourteous or threatening remarks directed to a social worker employed by the Ministry of Children and Family Development while at the courthouse in Quesnel, British Columbia, attending to client matters on or about September 28, 2011.

[3] The relevant facts are detailed in the Decision of the Hearing Panel on Facts and Determination.

[4] The Law Society has proposed a suspension from practice of one month and submitted a draft Bill of Costs.

[5] Counsel for the Respondent takes the position that a reprimand is more appropriate with additional time to pay the costs.

DISCUSSION

[6] It is for this Panel to determine the appropriate disciplinary action to be imposed in the circumstances of this Citation.

[7] The Panel considered the oral and written submissions of counsel for the Law Society and the oral submissions of counsel for the Respondent.

[8] The Panel was also provided with letters of reference by counsel for the Respondent. These letters of reference were very supportive of the Respondent.

[9] The Panel did not hear directly from the Respondent.

[10] The mandate of the Law Society is to protect the public interest in the administration of justice. The authority to discipline members for professional misconduct is set out in s. 38 of the *Legal Profession Act* and Rule 4-35(1)(b) of the Law Society Rules.

[11] The Panel was directed to the factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17 ("*Ogilvie*"), and the recent decision of the review panel in the *Law Society of BC v. Lessing*, 2013 LSBC 29 ("*Lessing*").

[12] The hearing panel in *Ogilvie* set out a number of appropriate factors to be taken into account that are worth repeating here (from paragraph 10 of *Ogilvie*). While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:

> (a) the nature and gravity of the conduct proven;
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> (b) the age and experience of the respondent;
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> (c) the previous character of the respondent, including details of prior discipline;
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> (d) the impact upon the victim;
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> (e) the advantage gained, or to be gained, by the respondent;
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> (f) the number of times the offending conduct occurred;
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> (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
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> (h) the possibility of remediating or rehabilitating the respondent;
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> (i) the impact upon the respondent of criminal or other sanctions or penalties;
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> (j) the impact of the proposed penalty on the respondent;
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> (k) the need for specific and general deterrence;
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> (l) the need to ensure the public's confidence in the integrity of the profession; and
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> (m) the range of penalties imposed in similar cases.

[13] The review panel in *Lessing* noted that not all the *Ogilvie* factors would come into play in all cases and the weight given to these factors would vary from case to case.

[14] In considering the *Ogilvie* factors, we note the following.

The nature and gravity of the conduct proven

[15] In the Decision on Facts and Determination, we found that the Respondent's comments to the social worker employed by the Ministry of Children and Family Development at the Quesnel courthouse on September 28, 2011, specifically the words that he "should shoot" her because she "takes away too many kids," constituted professional misconduct. In the Decision on Facts and Determination, we said that:

> 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.

[16] Counsel for the Respondent has submitted that this was really a “joke gone bad” and that these comments were the result of the Respondent’s awkward social skills.

[17] We reiterate that the context of the Respondent’s comments was the key factor. The Respondent made these comments outside of a courtroom where other persons were present, including other social workers. In the context, it was relatively clear that the Respondent was a lawyer and that he was directing his comments to a social worker from the Ministry of Children and Family Development. Comments like this in such an emotional and volatile environment are completely inappropriate for an officer of the court.

[18] We consider this to be an aggravating factor.

The age and experience of the Respondent

[19] The Respondent has been practising for over 18 years and is very experienced in child custody matters. We consider this to be an aggravating factor.

The previous character of the Respondent including details of prior discipline

[20] The Respondent’s Professional Conduct Record includes a prior citation and three conduct reviews.

[21] The prior citation was issued on March 26, 1997. The facts of the prior citation involved the Respondent taking false affidavits. During a divorce proceeding, the Respondent took an affidavit stating that the client’s wife had been served with the divorce petition, which was untrue. The date on the affidavit was actually six weeks later than the date that it was actually sworn. In a separate estate administration matter, the Respondent witnessed two affidavits, both of which stated that documents were annexed to the affidavit; however, no such documents were attached to the affidavits. On May 16, 1997, the Respondent was found to have committed professional misconduct and was ordered to pay a fine of $2,600 and costs of $1,200, to serve two years in a law firm and under the supervision of a lawyer of five years standing (upon his return to practice as he had not renewed his practising certificate at the time of the decision), and to complete four CLE courses, one of which must relate to loss prevention, within the first 24 months of a return to practice.

[22] The first of three conduct reviews involving the Respondent began in January of 2009 and completed in September of 2009. The facts of the conduct review are not dissimilar to the matters of this Citation in at least one respect. During the course of a child custody matter, the Respondent attempted to represent both the father and the children involved where legal interests of the children and the father were materially different. The Respondent also had the children interviewed and prepared Affidavits without the consent of the mother (who had joint custody and guardianship of the children). During the course of the matter, the Respondent *made highly inappropriate remarks to a social worker in the courthouse while in the presence of the children*. Rather than having other counsel speak to the matter, the Respondent continued to represent the father and continued to attempt to represent the children in a Conflict Application by the Ministry in which his removal as counsel was sought. (emphasis is ours)

[23] The conduct review subcommittee encouraged the Respondent to retain a senior member of the bar to mentor him, provide a letter on how he intends to improve his practice, and meet with a registered psychologist and provide any further details of counselling or treatment. The conduct review subcommittee recommended no further action against the Respondent but stated:

> If it were not for the fact that Mr. Foo has made efforts to follow the wishes of the Subcommittee, we would be strongly inclined to recommend that the Discipline Committee order a citation in this matter. We remain concerned about Mr. Foo’s personal and professional conduct, but believe his

intentions to improve his practice and his interpersonal relations are genuine.

[24] The second of three conduct reviews began in March 2009 and completed in September 2009 (at the same time as the first conduct review). The Respondent authored a blog containing entries that appeared to breach solicitor-client privilege, cast doubt on his integrity and/or competence, and reflected adversely on the legal profession. The conduct review subcommittee recommended no further action against the Respondent and stated:

> If it could be established that Mr. Foo relied on information gained from his relationship as counsel to [the clients], a citation might be warranted. However, the evidence is insufficient.

[25] As the second conduct review completed at the same time as the first conduct review, the conduct review subcommittee reiterated its encouragement to the Respondent to retain a senior member of the bar to mentor him, provide a letter on how he intended to improve his practice, meet with a registered psychologist and provide any further details of counselling or treatment. The conduct review subcommittee also reiterated its concern for the Respondent's personal and professional conduct and stated "if it were not for the fact that Mr. Foo has made efforts to follow the wishes of the Subcommittee, we would be strongly inclined to recommend that the Discipline Committee order a citation in this matter."

[26] The third conduct review took place in September of 2012 (three years after the second conduct review). The events under review took place during 2011, and the facts of the third conduct review are not dissimilar to this Citation. During the course of acting for his client in a family law matter, the Respondent *displayed incivility towards the unrepresented opposing party (the complainant), displayed behaviour that was construed as confrontational and aggressive* throughout the matter, and displayed a lack of judgment in bringing children into a highly charged, emotional courtroom as potential witnesses without direction from the court, resulting in a disturbance in the courthouse. (emphasis is ours)

[27] The conduct review subcommittee recommended no further disciplinary action on the basis that the Respondent "is receiving ongoing treatment by, and is under the care and guidance of, [Registered Psychologist] to try to effect a necessary change in his emotional behaviour." The conduct review subcommittee further noted the following:

> Mr. Foo was neither contrite nor accepting of his professional obligation to protect his client's interests with objectivity, professionalism and courtesy.
>
> The Subcommittee found Mr. Foo's explanations to be unsatisfactory. He had no appreciation that his conduct was contrary to the standard expected of lawyers, particularly in dealings with self-represented litigants. The Subcommittee warned Mr. Foo that his behaviour was unacceptable and that further such behaviour could lead to the application of progressive discipline by the Law Society and the possibility of the issuance of a citation in respect of future misconduct.
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> Due to the Subcommittee's concerns over lack of judgment, lack of insight, and lack of acceptance, the Subcommittee gave consideration to referring the matter back to the Discipline Committee with a recommendation for a citation.

[28] We consider the Respondent's previous conduct record to be a significant aggravating factor.

The impact upon the victim

[29] Notwithstanding that the Respondent viewed his comments as a joke, it was not perceived as such by the social worker. As was stated in the Decision on Facts and Determination, the social worker said that, while she does not think the Respondent will kill her, she prefers to avoid him. We consider the social

worker's response to be reasonable in the circumstances.

[30] We consider the impact of the Respondent's behaviour on the social worker to be a relatively minor aggravating factor.

The advantage gained or to be gained by the Respondent

[31] Again, notwithstanding that the Respondent has stated that his comments were intended to be a joke, we previously noted in the Decision on Facts and Determination the following comments of the social worker regarding the time that she previously met the Respondent in 2011:

> … 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].

[32] Although the Respondent has no recollection of previously meeting the social worker, the fact that the Respondent referred to her on September 28, 2011 by her name and identified her as a social worker suggests that he knew who she was. Since the Respondent acts for parents who have had their children removed by the Ministry of Children and Family Development, the Respondent may have been attempting to intimidate the social worker or other social workers present. However, in the absence of clear evidence, we attach no weight to this factor.

The number of times the offending conduct occurred

[33] The Respondent's behaviour occurred once. We consider this to be a mitigating factor.

Whether the Respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances

[34] The Respondent has acknowledged his conduct but, as stated above, continues to view this as a "joke gone bad." We are concerned that this demonstrates the Respondent's continued lack of insight as to the impact of his words but we do believe that the Respondent regrets what occurred. As such we consider this to be neither an aggravating nor a mitigating factor.

The possibility of remediating or rehabilitating the Respondent

[35] Counsel for the Respondent has indicated that the Respondent has taken steps to address his behaviour. The Panel acknowledges that the Respondent appears to be sincere in his commitment to taking steps to change his behaviour; however, we note that the Respondent has had one prior finding of professional misconduct and has been the subject of three prior conduct reviews, two of which involved inappropriate or discourteous behaviour towards non-lawyers (a social worker and an unrepresented opposing party). Notwithstanding that the Respondent has provided statements to the Panel that he will change, we recognize that the Respondent had an opportunity to change prior to September, 2011 and chose not to. We consider this to be an aggravating factor.

The impact on the Respondent of criminal or other sanctions or penalties

[36] This factor is not applicable.

The impact of the proposed penalty on the Respondent

[37] The Respondent has indicated that financial considerations require him to delay the time required to pay costs. Although no submission was made about the potential impact of a fine, we can infer that a fine on top of costs would impose a financial hardship on the Respondent. The Respondent does legal aid work according to one of the reference letters provided to the Panel. There are few lawyers who take on the files that the Respondent does, and a suspension would have a negative impact in terms of access to justice. We consider this to be a mitigating factor.

The need for specific and general deterrence

[38] With respect to specific deterrence, as we noted above, previous disciplinary action has not had the desired impact on the Respondent's behaviour. Under the principle of progressive discipline, it appears that previous orders and recommendations in the nature of a mentorship program, psychological counselling and treatment, and a fine have not been effective. We consider this to be an aggravating factor.

[39] With respect to general deterrence, it is the view of this Panel that we must communicate to the profession that this type of behaviour in dealing with non-lawyers who are involved in the legal system is not acceptable. We consider this to be a neutral factor.

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

[40] As mentioned above, the public needs to have confidence in lawyers, as officers of the court. The Respondent's conduct undermines the public's confidence in the integrity of the profession. We consider this to be an aggravating factor.

The range of penalties imposed in similar cases

[41] Counsel for the Law Society provided a case summary that outlined the penalties in other decisions involving discourteous or threatening remarks made by a lawyer. The penalties ranged from reprimands to fines ($500 to $3,000) to suspensions (1 week to 6 months).

[42] The Panel finds that the consideration of the *Ogilvie* factors is helpful, but ultimately it is the weighting of each factor that is important, as well as the Panel's general assessment of what is appropriate in these circumstances.

[43] In our view, the overall consideration of the aggravating factors and the mitigating factors suggest that a reprimand only is not appropriate. Counsel for the Respondent argued that the negative publicity from the Decision on Facts and Determination was a sufficient penalty. We disagree. While it may be that no one was harmed by the words of the Respondent, his behaviour did undermine the public's confidence in the legal profession.

[44] We are very concerned about the Respondent's previous conduct record. His behaviour demonstrates a history of failing to control his conduct. We have heard that the Respondent is very intelligent and has a passion for the practice of law. He needs to take corrective action with respect to his behaviour. He has given assurances a number of times before, but has failed to carry through with his commitments. As a result, we have reached the conclusion that a suspension is the appropriate disciplinary action. We do hope that a suspension will give the Respondent an opportunity to critically examine his behaviour and to commit to a course of action to change his behaviour.

ORDER

[45] We order that the Respondent:

(a) be suspended for a period of 2 weeks commencing on June 1, 2014; and

(b) pay costs of $8,840 as set out in the Law Society's proposed Bill of Costs.

[46] Recognizing the Respondent's financial situation, we order that costs be payable on or before October 31, 2014.

CONFIDENTIAL INFORMATION

[47] In the course of this hearing, information about the complainant and witnesses and other information was provided to the Panel. Counsel for the Law Society and counsel for the Respondent both asked for a sealing order under Rule 5-6(2) of the Law Society Rules that the Citation, the Agreed Statement of Facts, and the transcript of the proceedings be sealed and not be available to the public.

[48] Hearings of the Law Society are generally public proceedings, and the need for openness and transparency in the disciplinary process of the Law Society is critical to maintaining the public's confidence in the ability of the Law Society to adequately regulate the legal profession.

[49] However, we are of the view that, beyond the facts that are set out in the Decision of Facts and Determination and this Decision on Disciplinary Action, the need to provide the details of the Citation and the hearing does not override the privacy considerations of private individuals such as the complainant and witnesses. Therefore, pursuant to Rule 5-6(2)(a), we order that Exhibits 1, 2, 3, 4, 5, 6, 7, and 8 be sealed and references to privileged personal information regarding private individuals in the Citation, the Agreed Statement of Facts, and the transcript of the proceedings must not be disclosed or published.