2014 LSBC 30
Decision issued: July 7, 2014
Citation issued: December 3, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

THOMAS PAUL HARDING

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing date:	May 14, 2014
Panel:	Nancy Merrill, Chair Robert Smith, Public representative John Waddell, QC, Lawyer
Counsel for the Law Society:	Kieron Grady
Counsel for the Respondent:	Gerald Cuttler

INTRODUCTION

[1] On December 3, 2013 the Law Society of British Columbia issued a citation against the Respondent alleging that:

> On or about August 1, 2013, while at the Courthouse in New Westminster, BC in the course of representing his client RL, the Respondent made discourteous or offensive remarks to SX, counsel for the opposing party, contrary to Rule 2.1-3(d), Rule 2.1-4(a), Rule 2.2-1, Rule 7.2-1 or 7.2-4 of the *Code of Professional Conduct of British Columbia*.
>
> This conduct constitutes professional misconduct, pursuant to Section 38(4) of the *Legal Profession Act.*

[2] On January 7, 2014, the Law Society particularized the alleged discourteous oral offensive remarks as follows:

> alleged comments by the Respondent to SX that SX's client should be jailed and that he might learn his lesson after he's been "gang raped".

[3] The hearing proceeded on the basis of an Agreed Statement of Facts, which included this recitation of the facts:

1. Beginning in or around January 2013, the Respondent was retained by RL (the "Client") in a family law proceeding against her husband WZ. The issues in the proceeding included spousal and child support.

2. As of late June 2013, WZ was represented by SX (the "Complainant") and AC.

3. The Respondent had no prior dealings with the Complainant or AC.

4. On July 24, 2013, the Respondent mailed to the Complainant a Notice of Application ("the July 24 Application") seeking relief against WZ, which included jail for non-compliance with earlier orders.

5. Also on or about July 24, 2013, the Respondent scheduled a court appearance before Jenkins J. in New Westminster for August 1, 2013. The purpose of the attendance was to settle the terms, including arrears of an Order made by Jenkins J. in June 2013 ('the June Order"). The Respondent also sought to have the July 24 application heard on August 1, 2013.

6. The Respondent, the Complainant and AC attended court on August 1, 2013. Neither the client nor WZ was present.

7. Jenkins J. heard counsel on the matter of the June Order. However, due to a lack of time, Jenkins J. advised counsel he would not hear the July 24 application on that date.

8. Following the appearance before Jenkins J., the Respondent, the Complainant and AC had a conversation near the trial scheduling counter at the New Westminster courthouse. They discussed various matters relating to the case, such as dates and document disclosure (the "conversation").

9. The Law Society and the Respondent have not reached agreement concerning what was said during the conversation.

10. The Respondent was advised on August 8, 2013, that the Complainant and AC withdrew as counsel for WZ. Their decision to do so was not the result of any alleged conduct by the Respondent.

11. On August 14, 2013, the Complainant made a written complaint (the "complaint") to the Law Society.

EVIDENCE AT THE HEARING

[4] AC did not testify at the hearing. The explanation given to the Panel by both counsel was that AC had been interviewed and provided a statement and was available to attend the hearing. The explanation for AC's absence was found in the evidence of the Complainant that AC had advised her that she had not heard the Respondent make reference to WZ being "gang-raped" in jail.

The evidence of the Complainant

[5] The Complainant is 27 years old and was called to the Bar of British Columbia in 2012. In the summer of 2013 she had been at the Bar less than two years and was 26 years of age.

[6] The Complainant testified that AC was called to the Bar in 2013 and that she and AC served as co-counsel to WZ. The Complainant and AC had taken over representation of WZ in late June of 2013 after WZ's previous counsel, SF, had withdrawn.

[7] Prior to attending at the courthouse on August 1, 2013, the Complainant had not met with the Respondent and had only communicated with him by email, telephone and fax.

[8] After appearing before Mr. Justice Jenkins on August 1, 2013, the Complainant, AC and the Respondent spoke outside the courtroom to discuss dates for a Judicial Case Conference, Examinations for Discovery and trial. The Complainant testified that her hearing was normal and that the area outside the courtroom was quiet and there was no one else in the near vicinity.

[9] The three counsel then moved to an area outside of the trial scheduling counter. In this location, the Complainant testified that the Respondent was calm and neither angry nor agitated. He spoke in a neutral tone and said words to the effect that WZ was a bad person and that the Respondent wanted to send her client to jail so he could be gang-raped.

[10] After hearing this, the Complainant looked around to see if anyone else was in the vicinity to hear the Respondent's remark, but she saw no one around. Her evidence was that she had no response to the Respondent's comment because she felt it would not make the situation better.

[11] In her examination-in-chief, the Complainant confirmed that the appearance in court on August 1, 2013 was her first Chambers appearance in B.C. Supreme Court. Further, she was one hundred percent sure that the Respondent had said what she quoted him as saying.

[12] The Complainant and AC withdrew as counsel for WZ eight days later.

[13] Under cross-examination, the Complainant said that she did not speak to AC about the Respondent's alleged reference to WZ being gang raped in prison (the "alleged comment") at the courthouse following the alleged comment. Moreover, she did not speak to AC about the alleged comment until a few days later, and it was at that point that AC said she had not heard the alleged comment.

[14] The Complainant agreed that she had not made any contemporaneous note of the conversation with the Respondent. She first rendered the conversation containing the alleged comment in writing on her complaint form to the Law Society of British Columbia.

[15] The Complainant confirmed that she had worked on her written complaint for several days. There were no hand drafts and she did not follow a rigid process. The final form of complaint that she submitted included all of her recollections. She had spoken with AC about her lack of recollection of the alleged comment before she completed and submitted her complaint. The Panel was not provided with a copy of the Complainant's complaint.

[16] Later in the afternoon of August 1, 2013, the Respondent sent the Complainant and AC an email that said, in part:

> This is to confirm our discussion at the New West Courthouse today wherein you agreed to provide me, by tomorrow:
>
> > dates for an examination for discovery of your client, here in Surrey/New West, at a time when he is local. That is, no conduct money will be required, and in turn, he will not have to miss work.
> >
> > dates when we will MUTUALLY complete document disclosure. While I can see RL has not provided a formal List of Documents,

> she has disclosed a vast number of documents. Meanwhile, your client actively conceals documents.
>
> dates for a JCC.
>
> dates for a CPC.
>
> dates for a trial ...
>
> I do require that your material truly address the issues I raise in mine and that you comply with the evidentiary requirements - in other words, NO HEARSAY. If you fail to comply with these (reasonable) requirements, I will seek a further penalty against your client.

[17] In her evidence, the Complainant testified that she had advised the Respondent that she and AC intended to withdraw as counsel for WZ as soon as they could find other counsel to represent WZ. Nevertheless, her evidence was that she did not respond to the Respondent's email of August 1, 2013 either to confirm that she and AC would be getting off the record, or to mention the alleged comment. Her evidence was that she had told the Respondent that she and AC might not be on the file much longer and there was no point setting a date if new counsel was going to take over.

The evidence of the Respondent

[18] The Respondent was called to the Bar of the Law Society of British Columbia in 1990. Since 1999 he has practised with the firm of Trial Advocacy Group in Surrey, B.C. His areas of practice are family law and plaintiff personal injury claims.

[19] WZ had been represented prior to the Respondent by two other counsel, one being the aforementioned SF. In the family law proceedings involving RL, WZ had previously been jailed twice for failing to comply with court orders. After obtaining the June Order from Mr. Justice Jenkins (the Jenkins Order), the Respondent was unable to get SF to approve the draft Jenkins Order. This led the Respondent to set down an application to settle the terms of the Jenkins Order. Concurrently, he filed the material for a further application seeking relief against WZ, which included jail for non compliance with earlier orders.

[20] In attempting to find a date for an appearance before Mr. Justice Jenkins to have the draft Order settled, the Respondent had spoken to someone at the trial scheduling office at the New Westminster courthouse and had been assured that Mr. Justice

Jenkins would be available all day on August 1, 2013 to hear the Respondent's application. The Respondent was, therefore, both surprised and frustrated to attend court on August 1, 2013 and realize that Mr. Justice Jenkins was in fact engaged in a trial and could not hear the July 24 Application.

[21] After exiting the courtroom, the Respondent spoke with the Complainant and AC, whom he referred to as "those two", which led to an agreement on a date for a hearing of the July 24 Application. According to the Respondent, "that was kind of it, and I left." When asked directly by his counsel, the Respondent denied making the alleged comment.

[22] The Respondent testified that he then sent the email of August 1, 2013 to the Complainant and AC but did not hear anything back from them until he received their Notice of Withdrawal.

[23] During his examination-in-chief, the Respondent identified a letter that he had sent to the Complainant dated April 11, 2014. The body of the letter says:

> I write to apologize to you for anything I said that may have offended you when we spoke at the New Westminster courthouse on 24, July 2013. Please understand that I have no recollection of saying that your client might learn his lesson after he has been "gang-raped" and I do not believe that I did so. I had no intention of offending or upsetting you and I am sorry if anything I said may have had such an effect.

[24] In his evidence, the Respondent indicated that reference to the date of "24, July, 2013" in his letter should have read "August 1, 2013".

[25] In explaining why he sent the April 11, 2014 letter, the Respondent testified that it was clear to him that the Complainant's complaint was not accurate. He had nevertheless upset her somehow, and he intended to apologize for any upset he had given her. The Respondent indicated that "I may have that effect on people."

[26] The Respondent went on to testify that, in the previous six months, he has been trying to modify his anger behaviour and that sending this letter was part of that process. He added that he had been receiving anger management counselling since October of 2013. He had come to understand that responding to people in an angry manner was not helpful to anybody.

[27] Under cross-examination, the Respondent agreed with counsel for the Law Society that he had anger management issues in and around August of 2013.

[28] The Respondent said that he accepted the Complainant's subjective view that he had upset her. Accordingly, he thought it was appropriate to apologize by letter for having upset her.

[29] When questioned as to why his letter of April 11, 2014 did not categorically deny having used the phrase "gang-raped" in his conversation with the Complainant, the Respondent said that in an apology letter it is not appropriate to say something is not true. He denied sending the letter for tactical reasons.

[30] The Respondent acknowledged that in speaking to the Complainant and AC, he did make a comment that perhaps if WZ was sent to jail again he would comply with the court orders. The Respondent was not sure if he had used the phrase "he might learn his lesson."

ISSUES

[31] Counsel for both parties agreed that there are two issues before this Panel:

1. Whether the Respondent said to the Complainant and AC on August 1, 2013 at the New Westminster Courthouse that WZ should be put in prison and "maybe he will learn his lesson after he has been gang-raped" (the "alleged comment"); and

2. If the Respondent did make the alleged comment to the Complainant and AC, does the making of the alleged comment constitute professional misconduct, pursuant to Section 38(4) of the *Legal Profession Act*?

[32] It is common ground that, if the answer to issue 1 is "no", there is no need to determine issue 2.

[33] It is also clear from the submissions of both counsel that the phrase "after he has been gang-raped" is the portion of the alleged comment that is alleged to constitute professional misconduct.

ONUS AND STANDARD OF PROOF

[34] The onus of proving both that the alleged comment was made and that it constitutes professional misconduct is on the Law Society. The standard of proof is the civil standard of proof on a balance of probabilities, as set out by the Supreme Court of Canada in *FH* v. *McDougall*, 2008 SCC 53, and adopted by Law Society hearing

panels in *Law Society of BC* v. *Schauble*, 2009 LSBC 11, *Re: Lawyer 9,* 2009 LSBC 19, and *Law Society of BC* v. *McRoberts*, 2010 LSBC 17.

[35] In *FH* v. *McDougall*, the court concluded at para. 40 that:

> ... there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities where the seriousness of the allegations are consequences. However, these considerations do not change the standard of proof. ...

[36] In *Law Society of BC* v. *Schauble*, the hearing panel followed this standard, and summarized the onus and standard of proof as follows (at para. 43):

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

DETERMINATION

Issue 1

Whether the Respondent said to the Complainant and AC on August 1, 2013 at the New Westminster courthouse that WZ should be put in prison and "maybe he will learn his lesson after he has been gang-raped" (the "alleged comment")

[37] As there is no extrinsic evidence to support the allegation made by the Law Society, the determination of this matter relies, in part, on the credibility of the Complainant and the Respondent.

[38] If the Panel was presented strictly with the oral evidence given by the Complainant and the Respondent at the hearing, the evidence of the Complainant would be preferred. In giving her evidence, the Complainant was clear and direct. She did not waiver in her assertion of the alleged comment and the circumstances surrounding it. She maintained good eye contact and offered reasonable explanations for such things as her tendency to begin sentences with the words "I think". While she was challenged on the issue of whether or not AC was fully conversant in the English language, there was no reliable or admissible evidence on this issue and the Panel makes no finding about AC's capacity in the English

language, or the relationship of that ability to AC's apparent lack of recollection of the Respondent making the alleged comment.

[39] The Panel takes note that the alleged comment took place on the day of the Complainant's first appearance in Supreme Court Chambers. Further, the circumstances presented to both the Respondent and the Complainant were frustrating, and in flux. Looking at the circumstances as a whole, the Respondent's cumulative frustration could have led him to make the alleged comment.

[40] The Panel questions whether there was any discernible motive for the Complainant to have made a false complaint. She was junior counsel setting out on her career and had no previous dealings of any consequence with the Respondent that would have resulted in animosity or bad feelings.

[41] The Respondent, on the other hand, was a poor witness. He turned his body away from counsel for the Law Society during cross-examination. He made no eye contact with the Panel. His evidence was evasive at times. He shuffled paper, sipped water and was argumentative under cross-examination. At times he appeared to be deliberately obtuse when answering questions as simple as whether he would accept that he was experienced counsel.

[42] His letter of apology of April 11, 2014 – while not constituting an admission of any sort – was equivocal in its language and leaves the impression of having been prepared for a strategic rather than a sincere purpose. The letter was prepared in close proximity to the hearing, and there was no satisfactory explanation for the timing of the letter.

[43] The Panel also notes that the Respondent relies on the *Law Society of Upper Canada* v. *Groia*, [2012] LSDD No. 92. The Respondent's counsel's written submissions contain this phrase drawn from the *Groia* case:

> A few ill-chosen, sarcastic, or even nasty comments directed at one's opponent will rarely constitute professional misconduct, particularly if they reflect a moment of ill-temper and an apology is made.

[44] However, there is other evidence the Panel must consider in determining whether the Law Society has met the onus of proof.

[45] The first is that AC did not testify. The Hearing Panel does not draw an adverse inference from the failure to call AC as a witness. Either party could have subpoenaed or required her to attend the hearing and give evidence. The Panel must proceed on the assumption that AC did not hear the Respondent make the

alleged comment. According to the Complainant's evidence, the alleged comment was clearly made in a quiet setting. As well, the Complainant did not speak to AC about the comment after they had parted from the Respondent's company at the courthouse. The Panel finds this odd, as one would expect that counsel faced with such an offensive remark would have had some discussion of it immediately afterwards. The Complainant does not appear to have discussed the comment with AC until a number of days afterwards and when she was in the process of preparing her complaint.

[46] In addition, the Complainant did not respond to the Respondent's email sent later in the afternoon of August 1, 2013. The Respondent begins that email by purporting to confirm the discussion in the New Westminster courthouse earlier in the day. He then goes on to talk about the need to settle dates for a JCC, a CPC and a trial. He further confirms that he has re-set by Requisition the hearing for Thursday, August 15. Perhaps because of her inexperience, the Complainant did not respond to this email either to contradict what the Respondent is confirming in the email, or to repeat her assertion that she and AC would be likely removing themselves from counsel of record for WZ. Further, by her silence, she misses an opportunity to confirm the alleged comment to the Respondent.

[47] Although the Respondent's evidence was unsatisfactory at the hearing, he has remained insistent that he did not make the reference to WZ being gang-raped in prison.

[48] The Panel is left with the need to consider the onus and standard of proof. In doing so, we must scrutinize the evidence with care and must be satisfied that the evidence is sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

[49] While the Panel prefers the evidence of the Complainant as presented at the hearing, a complete assessment of all of the circumstances and evidence – or lack of evidence, as described in paras. 44 – 47 above, leads us to the conclusion that the Law Society has not established that the Respondent made the alleged comment, on a balance of probabilities. It follows that he cannot be found to have engaged in conduct that constitutes professional misconduct under s. 34(4) of the *Legal Profession Act*.

Issue 2

If the Respondent did make the alleged comment to the Complainant and AC, does the making of the alleged comment constitute professional misconduct, pursuant to Section 38(4) of the *Legal Profession Act*?

[50] Given our finding under issue number 1, it is not necessary for us to make a determination under issue number 2.

[51] Nevertheless, were we required to make a finding in issue 2, we would have concluded that the alleged comment did not constitute professional misconduct. While the alleged comment was offensive, and ill-advised, there are a number of factors that prevent it from crossing the line to professional misconduct:

(a) the evidence at the hearing was that the alleged comment was not passed on to WZ by the Complainant or AC. Virtually all of the authorities placed before us involved counsel having made unprofessional comments directly to the target of the comments;

(b) while it was suggested by counsel for the Law Society that the alleged comment could have been intended to persuade or intimidate the Complainant into advising her client to comply with the court orders, there was no evidence that that was either the Respondent's intention, or the Complainant's interpretation of the alleged comment. Further, the background makes it sufficiently clear that WZ was not prepared to comply with court orders of his own accord;

(c) the comment was made only once, in a calm fashion and in circumstances outside the hearing of third parties. It has the ring of counsel making an ill-advised comment in understandably frustrating circumstances;

(d) The Panel would take note of the Supreme Court of Canada's decision in *Doré v. Barreau du Québec,* 2012, SCC 12, in which the court said at paragraph 61:

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

[52] In all of the circumstances, the alleged comment is closer to mere rudeness or discourtesy then it is to professional misconduct.

[53] In respect of the citation, this Panel dismisses the allegation that the Respondent's actions on August 1, 2013 at the courthouse in New Westminster, British Columbia, constitute professional misconduct.

[54] With regard to the issue of costs, the Panel will entertain submissions of counsel if they cannot agree on the matter of costs within 30 days from the date of the decision.