

2014 LSBC 35  
Decision issued: August 25, 2014  
Citation issued: March 18, 2014

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**GEORGIALEE ALIDA LANG**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL  
ON  
FACTS AND DETERMINATION**

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Hearing date: June 25, 2014

Panel: Ken Walker, QC, Chair  
Dr. Gail Bellward, Public representative  
Peter Warner, QC, Lawyer

Counsel for the Law Society: Carolyn S. Gulabsingh  
Counsel for the Respondent: D. Geoffrey Cowper, QC

**INTRODUCTION**

- [1] An Agreed Statement of Facts was filed in this matter. We thank both counsel for their effort and work involved in creating the Agreed Statement of Facts.
- [2] On March 18, 2014 the Discipline Committee authorized the issuance of a citation against the Respondent alleging that “On May 31, 2013, in the course of representing yourself in a *Legal Professional Act* section 71 review of your bill before a Supreme Court Deputy Registrar, you had settlement discussions with the opposing party, AB, in the absence of his counsel, knowing that he was represented by counsel, and without his counsel’s consent, contrary to Rule 7.2-6 of the *Code of*

*Professional Conduct for British Columbia*. This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.”

- [3] The Respondent has, from the outset, acknowledged her mistake in having the settlement discussion with AB, but submits that, under all of the circumstances, her mistake does not amount to professional misconduct.
- [4] In consideration of all of the circumstances, does the Respondent’s conduct amount to professional misconduct? There is no allegation in the citation of an included offence of “breach of the Rules” because the alleged misconduct is not specifically prohibited by the Law Society Rules, only by the *Code of Professional Conduct for British Columbia* (herein the “Code”). Accordingly, the optional outcomes for this hearing are either a finding of professional misconduct or dismissal of the citation.
- [5] The Rule in questions states:

7.2-6 Subject to rule 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person’s lawyer:

- (a) approach, communicate or deal with the person on the matter; or
- (b) attempt to negotiate or compromise the matter directly with the person.

## **FACTS**

- [6] The facts or circumstances in this case are unusual. Ms. Lang acted for her client AB in what we refer to as estate litigation. AB was Ms. Lang’s friend for a long period of time. AB was married to a lawyer who was a close friend of Ms. Lang for many years. Ms. Lang had no retainer agreement with AB, but during the solicitor client relationship two sizeable accounts were sent to AB. The first account was paid. The second was disputed.
- [7] The dispute concerning the accounts resulted in a review of the accounts before a Deputy Registrar of the Supreme Court. During this proceeding Ms. Lang represented herself and AB was represented by a lawyer, Paul Jaffe. During the hearing Ms. Lang had given evidence on March 15, 2013 and cross-examination of her occurred on May 30, 2013 and was to continue on May 31, 2013. Ms. Lang had thus by then spent two days on the witness stand in her capacity as a “party”.

- [8] Prior to continuation of the hearing on May 31, 2013, the following events occurred:
- (a) On the way to court Ms. Lang commented to her assistant that Ms. Lang intended to discuss settlement with AB and his lawyer when they arrived at the courthouse.
  - (b) At court before 10:00 a.m., Ms. Lang saw AB's lawyer in the courtroom without AB. She noted to Mr. Jaffe that his client had not yet arrived, and then she and the assistant left the courtroom and waited out in the hall. Ms. Lang did not speak to Mr. Jaffe about settlement before leaving.
  - (c) When AB arrived, Ms. Lang greeted him and asked if she could speak to him.
  - (d) AB agreed and they went into a private interview room and shut the door. AB's lawyer was not present and was unaware of this.
  - (e) Ms. Lang had a very brief conversation, including an exchange of comments on the relative merits of each side's case, and she offered to settle the accounts at a discount.
  - (f) During the brief conversation, AB said he needed to speak to his lawyer concerning the offer before he would agree to settle.
  - (g) In response, Ms. Lang stated that she believed Mr. Jaffe would not agree to the proposed settlement.
  - (h) AB repeated his desire to speak to his lawyer, and at this point the conversation ended.
  - (i) The entire conversation lasted between three and ten minutes.
  - (j) AB and his lawyer spoke privately, and Ms. Lang met them both and asked if the settlement was acceptable. It was rejected.
  - (k) Ms. Lang then apologized for speaking to AB about the settlement without his lawyer being present.
  - (l) Ms. Lang told them she would self-report her conduct to the Law Society. She hand-wrote such a letter, which was typed and dated that day, disclosing and apologizing for her error.

- (m) Ms. Lang also disclosed and apologized to the Deputy Registrar conducting the hearing.
- (n) The matter was settled later that day.

## **POSITION OF THE PARTIES**

- [9] The Law Society asks us to find that the breach of the Code in these circumstances amounts to professional misconduct. The Law Society asks us to infer from the evidence that the contact with AB was of a planned and deliberate nature.
- [10] Counsel for the Respondent asks us first to look at the Respondent as a “party” to the proceeding and thus not acting as a lawyer in that proceeding. This argument could be described as the “professional misconduct versus conduct unbecoming” argument. His second argument asks us to dismiss the citation on the basis that the misconduct does not reach the threshold of professional misconduct required to be proven by the Law Society.

## **ISSUES**

- [11] Was the conduct of the Respondent in contacting and negotiating with a client represented by a lawyer, professional misconduct in these circumstances? Or was it conduct unbecoming a member of the profession?

## **ANALYSIS**

- [12] The Panel finds that the Respondent’s actions related directly to her practice as a lawyer, despite her role as a party in the review of her account, and accordingly a finding of “conduct unbecoming” is not an available option.
- [13] The oft quoted case of *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171, stated the test as “whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.” At para. 154 of that decision the panel stated:

... 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.

[14] This statement of the test has been accepted and adopted in a number of decisions from the Law Society of BC since then, including *Re: Lawyer 12*, 2011 LSBC 35 (Benchers on Review), and in *Law Society of BC v. Gellert*, 2013 LSBC 22. In the *Gellert* decision, the panel adopted and applied the following analysis taken from the panel decision in *Law Society of BC v. Lyons*, 2008 LSBC 09, at para. 35:

... panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence of absence of *mala fides*, and the harm caused by the respondent's conduct.

Our application of that analysis to the facts in this case is as follows.

### **The gravity of the misconduct**

[15] We find that the circumstances were serious. The Respondent was a party to an action where her former client was represented. The Respondent had a personal financial interest in the outcome. It was her account that was being challenged, and she was certainly and acutely aware that her former client was represented by Mr. Jaffe. She could not have forgotten that her cross-examination was not complete and Mr. Jaffe was entitled to ask more questions.

### **Duration of the conduct**

[16] It lasted only three to ten minutes, and so we find this is not an aggravating factor.

### **The number of breaches**

[17] This is also not an aggravating factor as the conduct was a single occurrence not repeated.

### **The presence or absence of *mala fides***

[18] There is no direct evidence of intention in the Agreed Statement of Facts. Mr. Cowper argues that, because the Respondent was a "party", she had her "party" hat on and was not aware of her breach. Ms. Gulabsingh argues that the circumstances point to planned and deliberate conduct. We are unable to conclude that the Respondent intended to breach the rule. We do find that she ought to have known not to contact Mr. Jaffe's client without his consent.

[19] We do not find that the Respondent in those circumstances had *mala fides*. We do find that her conduct was intentional and that she did intend to speak directly to AB in the absence of Mr. Jaffe. We find that her conduct in not speaking to Mr. Jaffe

in court and then waiting outside to greet AB evidences her intention to resolve or settle the matter without Mr. Jaffe present. Her statement to AB to the effect that Mr. Jaffe would not support the settlement also evidences that intent.

- [20] We find that her immediate confession and apology to Mr. Jaffe and the self-report to the Law Society are commendable and to her credit, and evidence a quick realization on her part that she had done wrong. The fact that her transgression could not have long remained unknown to Mr. Jaffe supports our finding that she did not knowingly breach the rule, i.e. her breach was most likely not planned and deliberate.
- [21] Lawyers are not perfect and a standard of perfection is not required of them. We find that the Respondent focused on settlement and the rule she broke was not at the top of her mind during her breach of it. The Respondent's conduct in contacting and negotiating with the "client" of another lawyer was intentional. The *Martin* case, among many others, confirms that a finding of "intentional malfeasance" is not a prerequisite to a finding of professional misconduct.

### **Harm**

- [22] We find that no harm resulted to AB or anyone else, so this is not a factor of significance. Mr. Jaffe was close by, AB sought and obtained his advice, and later in the day the entire dispute was settled to AB's satisfaction.

### **Other factors**

- [23] Peculiar to this case is the fact that the Respondent and AB were friends for many years. AB was a sophisticated client (we note he was handling a complex estate). He had legal counsel and was also married to legal counsel. The Respondent was in a dual role here as "party" and counsel for herself. The Respondent had spent the day before being cross-examined on the witness stand, and it is understandable that she would be thinking and acting like a "party" and forgetful of her other role as counsel for herself. These factors, in our view, go some way to explaining the transgression, but do not, in our view, justify or excuse it.
- [24] The test is really about what is expected of a lawyer in these circumstances. Does the conduct amount to a marked departure from the conduct expected of lawyers? Here, the Respondent was a party and a lawyer. She was a party because of her professional status. It was her account that was being challenged. We expect that lawyers who are parties will not forget their professional obligations. The Respondent was acutely aware that AB was represented by a lawyer. The

Respondent's conduct fell markedly below the conduct expected and displayed a fundamental degree of fault. The Respondent ought to have remembered she could not discuss settlement without the consent or attendance of Mr. Jaffe.

[25] We find that her focus was to find a resolution of her dispute. We do not find that she was focused on breaching the rule.

[26] Accordingly, we find that the Respondent breached Rule 7.2-6 of the Code by contacting and negotiating with AB without the consent of his lawyer, and that, in all of the circumstances, this conduct constitutes professional misconduct.

### **SEALING ORDER**

[27] The Law Society sought a sealing order pursuant to Rule 5-6 and 5-7 of the Law Society Rules, an application supported by Mr. Cowper on behalf of the Respondent. The purpose of such an order is to protect the confidential material obtained during the investigation and filed with us. The Law Society sought to have the Agreed Statement of Facts, the exhibits and the transcript all sealed and not available to the public. It is important that the competing values of open, transparent hearings versus protection of client confidentiality be balanced. Any member of the public would have been able to attend this hearing and hear submissions and listen to the evidence. The usual procedure for protecting client confidences would have been followed by excluding members of the public from portions of the hearing where confidential client information was about to be revealed. While most of these hearings do not attract much public or media attention, the principle of hearings being "open" is important. We think that the right balance in this case is to seal the exhibits that contain client information, and we so order. The Agreed Statement of Facts will be redacted to use initials to protect the names and identity of clients and witnesses. The lawyers' names will not be redacted. If a transcript is ordered, we direct Law Society staff to redact the names of witnesses and clients by the use of initials.

[28] We do recommend that the Law Society review its policies and procedures concerning such confidentiality/sealing orders, in light of the original request for all of the material to be sealed.