2014 LSBC 45
Decision issued: September 29, 2014
Citation issued: December 3, 2013

CORRECTED DECISION: PARAGRAPH [35] WAS AMENDED ON OCTOBER 6, 2014

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 15, 2014
Panel:	Elizabeth J. Rowbotham, Chair Karen Nordlinger, QC, Lawyer Thelma Siglos, Public representative
Counsel for the Law Society:	Kieron G. Grady
Counsel for the Respondent:	Gerald A. Cuttler

BACKGROUND

[1] The issue in this matter is whether the content of certain letters written by the Respondent constitutes professional misconduct. For ease of reference, the individuals related to this matter will be referred to as follows:

- The Respondent - Mr. Harding
- Mr. A - Plaintiff in a personal injury matter and the Respondent's client
- Ms. B - lawyer, complainant, and counsel for the defence
- Mr. C - lawyer and counsel for the defence

- Ms. D - paralegal of defence counsel
- Dr. 1 - orthopaedic surgeon
- Dr. 2 - psychiatrist

THE CITATION

[2] The citation, issued December 3, 2013 and amended on January 17, 2014 and April 25, 2014 alleges that:

> 1. In the course or representing your client, Mr. A, in a personal injury matter, you sent two letters dated July 3, 2013 to Ms. B, counsel for the opposing party, which contained remarks about a paralegal, Ms. D, Dr. 1, Dr. 2 and others, that were discourteous, uncivil, offensive or otherwise inconsistent with the proper tone of a professional communication contrary to either or both of Rules 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*.

[3] It is further alleged that this conduct constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act*. Rules 7.2-1 and 7.2-4 and the related commentary are appended as Appendix 1.

FACTS

[4] Counsel for the Law Society and counsel for the Respondent jointly submitted into evidence a volume of documents that contains an agreed statement of facts. The documents submitted include the correspondence from the Respondent that gave rise to the citation. The Respondent testified at the hearing on his own behalf. The Law Society did not call any witnesses.

[5] The Respondent was called and admitted to the Law Society of British Columbia in 1990 and practises primarily in the areas of family law and plaintiff personal injury law. The Respondent has an honours degree in English. In his spare time, the Respondent is an avid reader.

[6] The Respondent maintains a collection of reports done by independent medical examiners. He testified that he has approximately 5,000 – 6,000 such reports in his collection. The Respondent also tracks the amount paid to independent medical examiners by ICBC and judicial comments on evidence given by experts.

[7] The remarks giving rise to this hearing were made by the Respondent when the Respondent was acting for Mr. A, a plaintiff in a personal injury action arising out of a motor vehicle accident. Ms. B, the complainant, and Mr. C were counsel for the defendant in the action. Ms. D is a paralegal working for Ms. B and Mr. C.

[8] Between April 11, 2012 and June 27, 2013 correspondence was exchanged between the Respondent's office and the office of counsel for the defendants. The correspondence in evidence dealt with two issues in the action between the plaintiff and the defendants – document production and two proposed independent medical examinations ("IME") of the Respondent's client.

Document production correspondence

[9] The correspondence from the Respondent's office relating to document production was prepared by a paralegal in the Respondent's office, on his instructions, signed on his behalf as "*Respondent's Name*", and addressed to the attention of defence counsel, Ms. B or Mr. C. The correspondence from counsel for the defendant's office was authored and signed by paralegals in that office and addressed to the attention of the Respondent. No issue was taken with the contents of this correspondence by the Law Society or the Respondent.

Independent medical examination

[10] On June 25, 2013 Ms. D, paralegal to defence counsel, sent a letter to the attention of the Respondent advising that defence counsel had scheduled an IME of the Respondent's client in August, 2013 with Dr. 1, an orthopaedic surgeon. The letter further advised that Dr. 1's cancellation policy was five working days or $800 and that if the plaintiff was late or missed the appointment the plaintiff would be responsible for payment of the $800 cancellation fee.

[11] On June 27, 2013 the Respondent wrote to the attention of Mr. C, counsel for the defendants. This letter was written and signed by the Respondent. In this letter, the Respondent advised Mr. C that Dr. 1 had already examined the plaintiff and that the defence was not entitled to a second medical examination by the same medical specialist except in very limited circumstances. The Respondent also asked Mr. C to inform the Respondent of the facts that would entitle the defence to a re-examination of his client.

[12] On July 2, 2013 Ms. D, paralegal, sent a letter to the attention of the Respondent advising that defence counsel has scheduled an additional IME of the Respondent's client, again in August, 2013 with Dr. 2, a psychiatrist. The letter also advised that

Dr. 2's cancellation policy was 10 working days or $950 and that, if the plaintiff was late or missed the appointment, the plaintiff would be responsible for payment of the $950 cancellation fee.

[13] Also on July 2, 2013, Ms. D, paralegal, sent a letter to the attention of the Respondent in response to the Respondent's June 27, 2013 letter to Mr. C. In that letter, Ms. D set out the position of the defence on the IME by Dr. 1 and references case law said to be in support of that position.

[14] On July 3, 2013 the Respondent wrote two letters: Letter 1 and Letter 2 respectively. Both letters were addressed to the attention of Ms. B, counsel for the defence. Letter 1 responded to the proposed IME by the orthopaedic surgeon, Dr. 1. Letter 2 responded to the proposed IME by the psychiatrist, Dr. 2. Both letters contain 15 pre-conditions that the Respondent required be addressed before he would consider any defence medical examination of his client. The 15 pre-conditions are the same in both letters. No issue was raised regarding the content or tone of these pre-conditions.

[15] Letter 1 also contained the following:

> I have a letter dated 2 July 2013, apparently from a paralegal named [Ms. D]. [Ms. D] purports to have scheduled an "IME" for our client by [Dr. 1.] She says that she has "scheduled" this for 14 August 2013.
>
> ... [the 15 pre-conditions referred to above] ...
>
> I care not a whit about your hireling's cancellation policy. I do not know why ICBC lawyers keep telling me about the details of their contractual obligations with their hirelings.
>
> If you propose to bring an application seeking a defence medical of [Mr. A], I will hold you to all terms set out in the Rules, including time-limits. I will also hold you strictly to your evidentiary burden.
>
> One last issue:
>
> While it is delightful that you have an uneducated person striving to be what she is not, it is not my job to educate her. A child may dress in her mother's uniform, but it does not make her a general. Having your paralegal quote law at me reminds me of Dr. Johnson's comment about a woman preaching. Please do not have your paralegals, secretaries, or legal assistants write to

> me on any matter at all. If you think something merits my attention, it should merit yours. Please do not have them write to my office on any matter of legal interpretation, debate, etc. Routine requests for documents and similar matters within a lay person's grasp, they can send to my staff.

[16] The same statement was made in Letter 2. Letter 2 also contained two additional comments. In the introductory paragraph the Respondent made the following comment regarding Dr. 2:

> … late of the USSR, with its unique history of using psychiatry as a weapon of terror against its people.

and later in Letter 2:

> I will not send any client to Dr. 2 without a court order. It surprises me that ICBC uses him at all. Have you read *Moskaleva* (at trial and appeal)? Pick someone else.

[17] In July, 2013, Ms. B filed a complaint in respect of Letters 1 and 2.

[18] The Respondent testified that, in the fall of 2013, he began counselling for anger management, which he attends, more or less, on a weekly basis.

[19] On April 17, 2014 the Respondent wrote to each of Ms. B and Ms. D apologizing for the manner in which he referred to Ms. D and for any distress his words may have caused Ms. B or Ms. D.

[20] In that letter, and also at the hearing, the Respondent stated that it was, and is, his view that lawyers should not be placed in a position where they are expected to debate legal issues with non-lawyer staff on the opposing side of a case. The Respondent has strong views on this issue.

[21] With respect to the last paragraph of Letters 1 and 2, the Respondent testified that it was not fair on his part to put Ms. D "into the fray" on the issue of whether non-lawyers should be writing letters debating legal issues to opposing counsel. He said his comments were an "eruption of irritation", "wasn't fair", "wasn't helpful", and "wasn't nice". He said it caused her some personal hurt, and for that he was sorry.

[22] He testified that he was "vexed" when he wrote Letter 1 and Letter 2 to Ms. B and that he intended the final paragraphs to be a witty admonishment to Ms. B that

paralegals should not be debating legal issues with counsel and that those types of discussions should be between counsel.

[23] The Respondent also has strong views on the impartiality and independence of Dr. 1 and Dr. 2. He testified that his use of the term "hireling" was intended to be derogatory and that he has disdain for Dr. 1 and Dr. 2. In his opinion, Dr. 1 and Dr. 2 would follow ICBC instructions and do everything to defeat a claim. It was also his opinion that there was almost no chance that Dr. 1 or Dr. 2 would conduct the medical examination of his client in a compassionate and sensitive manner. The Respondent's opinion on the impartiality and independence of Dr. 1 and Dr. 2 is based, in part, on the billing information of Dr. 1 and Dr. 2 (which the Respondent obtained from ICBC through freedom of information requests). In the Agreed Statement of Facts, the amount received by each doctor for the period 2009 - 2012 is set out and forms a significant part of their professional revenue.

DECISION

[24] The onus rests on the Law Society to demonstrate, on a balance of probabilities, that the conduct complained of constitutes professional misconduct.

[25] "Professional misconduct" is not defined in the *Legal Profession Act*, the Law Society Rules or the *Code of Professional Conduct*. In *Law Society of BC v Martin*, 2005 LSBC 16 the panel concluded, at paragraph 171, that the test for professional misconduct is:

> Whether the facts as made out disclose a marked departure from the conduct the Law Society expects of its members; if so, it is professional misconduct.

[26] This test has been adopted in subsequent disciplinary cases and we adopt it here as well.

[27] There is no question that the Respondent wrote the letters complained of. The issue before this Panel is whether the statements in Letters 1 and 2 are a marked departure from the conduct expected of a member so that they rise to the level of professional misconduct. For the reasons set out below, the Panel finds that they do not.

[28] In determining whether the remarks complained of constitute professional misconduct we must give due consideration to the Respondent's right to freedom of expression under the *Charter of Rights and Freedoms* as well as the objectives of

the *Legal Profession Act*, SBC 1998, c. 9 and the *Code of Professional Conduct for British Columbia*. (*Doré v. Barreau du Québec*, 2012 SCC 12, paragraph 55).

[29] The Supreme Court of Canada stated in *Doré*:

> 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 of 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). …
>
> ...
>
> 63. But in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular (MacKenzie, at p. 26-1 ...).
>
> ...
>
> 65. Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. …
>
> ...
>
> 68. Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

[30] As mentioned above, the Respondent has strong views on the propriety of paralegals debating issues of law with opposing counsel. The Panel makes no comment on whether or not the Respondent's views are accurate. That issue is not before us. What is before us is whether the Respondent's expression of his views constitutes professional misconduct.

[31] The Respondent admits it would have been sufficient for him to simply say to Ms. B "please don't have your paralegal correspond with me on matters of legal debate or interpretation." Alternatively, he could have asked Ms. B to engage with him directly on matters of legal debate or interpretation. In other words, his views could easily have been more elegantly and concisely presented. While the Panel accepts the Respondent's testimony that he was trying to be witty, we find, as presumably did Ms. B and Ms. D, that the Respondent's attempt at a "witty admonishment" fell short of the mark. His comments were open to misinterpretation, and they were so misinterpreted. In the circumstances, however, we do not find that the manner in which he expressed his views, or the words he used, was a marked departure from the conduct expected from members.

[32] If we had found the conduct unprofessional, which we do not, the fact that the Respondent was "vexed" and irritated would not justify misconduct. To paraphrase the Supreme Court in *Doré*, it is especially when a lawyer's temper is tested that a lawyer is called upon to respond with dignified restraint.

[33] With respect to the Respondent's comments regarding Dr. 1 and Dr. 2, the Agreed Statement of Facts contains definitions of the word "hireling". Hireling is defined in the on-line version of the *Oxford English Dictionary*[1] as:

> 1. a. One who serves for hire or wages; a hired servant, a mercenary (soldier). (Now usually somewhat contemptuous …)
>
> ...
>
> 2. One who makes reward or material remuneration the motive of his actions; a mercenary. (Opprobrious.)

[34] Given the Respondent's views that Dr. 1 and Dr. 2 are neither independent nor impartial and that, in his view, the percentage of their medical billings paid by the defence is evidence of this lack of independence we do not find that his use of the term "hireling" was necessarily inapt or offensive. Again, we find that he could have expressed his views in Letters 1 and 2 more elegantly, less abrasively, and

[1] www.oed.com/view/Entry/87214?redirectedfrom=hireling.

more persuasively. However, we do not find that the words he used or the manner in which he expressed his views on those two practitioners constitutes professional misconduct.

[35] We also do not find that the tone of Letters 1 and 2 were improper. As set out earlier in this decision, we find that the Respondent was trying to be witty when he set out his views on the propriety of paralegals debating issues of law with opposing counsel and that his use of the word “hireling” with respect to Dr. 1 and Dr. 2 was not inapt or offensive.

[36] The citation is dismissed, and the parties are at liberty to make submissions respecting costs within 30 days of the issuance of this decision.

Appendix 1

Courtesy and good faith

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

[1] **The public interest demands that matters entrusted to a lawyer be dealt with** effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

[2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

[4] A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

[5] A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

Communications

7.2-4 A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.