2015 LSBC 41
Decision issued: September 3, 2015
Citation issued: May 27, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

RICHARD CRAIG NIELSEN

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing date:	April 16, 2015
Panel:	W. Martin Finch, QC, Chair Ralston S. Alexander, QC, Lawyer Jory C. Faibish, Public representative
Discipline Counsel:	Carolyn Gulabsingh
Appearing on his own behalf:	Richard C. Nielsen

INTRODUCTION

[1] Richard Craig Nielsen has been cited by the Law Society of British Columbia for professional misconduct as follows:

1. On or about December 2009 to January 2010, you disclosed confidential information concerning your client, JP, to the Vancouver Police Department, contrary to one or both Chapter 5, Rule 1 and Chapter 5, Rule 4 of the *Professional Conduct Handbook* then in force, by doing one or more of the following:

(a) on December 16, 2009, you spoke with Detective Rowley and stated words to the effect that your client "goes off on tangents, loses focus" and was in general "very frustrating to deal with";

(b) on December 16, 2009, you spoke with Detective Rowley and stated words to the effect that your client had not produced a written statement to the Vancouver Police Department, despite you having encouraged her to do so;

(c) on December 17, 2009, you spoke with Sergeant Pollard and stated words to the effect that there was a concern that your client may counsel the children regarding what to say; and

(d) on January 4, 2010, you spoke with Detective Rowley and disclosed legal advice you provided to your client.

This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[2] Mr. Nielsen acknowledges that he was served with the citation and waives the requirements of Rule 4-15 of the Law Society Rules.

[3] The Law Society served upon Mr. Nielsen a Notice to Admit pursuant to Rule 4-20.1. Mr. Nielsen did not respond to the Notice to Admit and is deemed by the Law Society Rules to have accepted as true the factual matters described in the Notice to Admit.

[4] The Panel will have more to say about the Notice to Admit later in this decision.

[5] With the exception of the final telephone discussion with Detective Rowley, the events in issue in this citation occurred over a very compressed time frame. The Legal Services Society appointed Mr. Nielsen as counsel for JP on or about December 15, 2009. That retainer was terminated by JP first on December 17, 2009 and then again, for good, on December 21, 2009.

[6] Mr. Nielsen spoke to Detective Rowley again on January 4, 2010 when Detective Rowley called him to ask some questions regarding her investigation.

[7] Mr. Nielsen was appointed on the eve of a family law Chambers application dealing with access to JP's children, brought on by the father of the children, her estranged husband. The access issues were troubled by allegations against the father of sexual impropriety with the infant children.

[8] The application was scheduled to proceed on December 17, 2009, and Mr. Nielsen devoted considerable efforts in the available time to prepare properly for the hearing.

[9] Mr. Nielsen had several lengthy telephone discussions with JP on December 15 and prepared materials for the scheduled Chambers hearing. At the same time, he was seeking to facilitate his client's desire to have the criminal prosecution of her husband proceed and to that end contacted the investigating police officer, Detective Rowley.

[10] The conversation with Detective Rowley lasted for approximately 15 minutes. It was described in evidence before us by both Mr. Nielsen and Detective Rowley as a co-operative and helpful discussion conducted with a view to making the most of a pending interview of JP by Detective Rowley. That interview was scheduled for December 23, 2009.

[11] In the course of that discussion with Detective Rowley, Mr. Nielsen made the remarks described in allegation 1(a) and 1(b) of the citation. Detective Rowley's notes of the call are brief and do not fully capture the essence of the 15 minute telephone discussion.

[12] Mr. Nielsen explained that, while he had no specific recollection of the comments attributed to him, he did acknowledge that they were an accurate representation of his experience with JP to that time. He explained that the comments were offered with a view to assisting Detective Rowley with her scheduled meeting on December 23, 2009.

[13] It was Mr. Nielsen's opinion that this was a very important meeting, and given the nature of his client, he felt that Detective Rowley should know, in advance of the meeting, the potential pitfalls that could negatively affect the outcome of the interview. Detective Rowley testified that the comments of Mr. Nielsen verified her own experience with JP to that time.

[14] During the hearing on December 17, 2009, JP's husband or his counsel suggested that JP was counselling the children on their testimony. This suggestion was a matter of considerable concern to both JP and Mr. Nielsen. During a break in the hearing, Mr. Nielsen called Detective Rowley's supervisor to advise of this allegation. Mr. Nielsen also encouraged Sergeant Pollard to initiate contact with the Ministry of Children and Family Services.

[15] The evidence is unclear if Mr. Nielsen called Sergeant Pollard because Detective Rowley was not available at the time of the call. Sergeant Pollard's notes of the

telephone call suggest that it was Mr. Nielsen who was advancing the allegation about JP counselling the children. Mr. Nielsen testified that he did not use the word "counselling" in that context and stated that, if he had those concerns about JP, he would have described her to Sergeant Pollard as "coaching" the children. He confirmed that he had no such concerns about JP at any time during his involvement.

[16] He also testified that he would not have made the suggestion of coaching to Sergeant Pollard as he did not believe that JP was in fact coaching the children. He believed her explanation of their evidence to him and as reproduced in materials provided to the Panel.

[17] The access hearing was adjourned to December 21, 2009 with an interim order of supervised access imposed upon JP to permit her husband to see the children, with supervision, over the weekend.

[18] JP was extraordinarily distressed with the outcome of the hearing. She reacted badly to the unwanted access order and made a number of very derogatory remarks directed to Mr. Nielsen. She questioned his ability generally and his conduct of the matter specifically. It was Mr. Nielsen's belief that JP had her own ideas as to how the matter should be managed and she was not interested in his advice or directions on the proper handling of the matters before the court when those views differed from hers.

[19] At the conclusion of the December 17, 2009 hearing JP terminated Mr. Nielsen as counsel for the first time.

[20] During the day following the conclusion of the December 17, 2009 hearing, JP's sister contacted Mr. Nielsen. She was very apologetic about the behaviour of her sister (JP) and requested that Mr. Nielsen return to the representation of JP. He agreed, despite plans to travel to the interior of the Province for a break over the ensuing weekend.

[21] On Friday, and over the weekend while in Kelowna, Mr. Nielsen prepared materials for the continuation of the access hearing on Monday December 21. JP provided him with extensive materials, and he attempted to bring some order to them in the form of draft affidavits, which were exchanged with JP throughout the weekend.

[22] The Panel's review of the materials prepared by Mr. Nielsen suggest that he did a considerable amount of work on the file during his break in Kelowna. The

materials also disclose the very difficult nature of the behaviour exhibited by JP as a client.

[23] Mr. Nielsen prepared affidavit material in response and provided it to JP for her review. JP provided response materials to Mr. Nielsen in a format that was not acceptable for use in court. As one example, each paragraph of JP's response materials took up virtually an entire page of single spaced 12 point font.

[24] It appears that Mr. Nielsen's efforts over the weekend were provided in vain as it was JP's position on Monday, December 21, 2009, that he was no longer to represent her in the access hearing.

[25] Mr. Nielsen testified that they parted amicably and that, when they met the next day so that he could return file materials to her, there was no evident acrimony in the termination of the relationship. He testified that JP had her own ideas as to how the file should be conducted and she had determined that Mr. Nielsen was not the appropriate counsel for the job.

[26] On January 4, 2010, Detective Rowley contacted Mr. Nielsen to discuss events that had transpired in her investigation of the sexual abuse allegations against JP's estranged husband. Detective Rowley was specifically looking to confirm advice provided to her by JP that Mr. Nielsen had counseled JP to videotape her children's stories in respect of the sexual abuse by their father. In that conversation with Detective Rowley, Mr. Nielsen denied that he had ever counselled JP to use videotape technology to capture the children's evidence.

[27] Mr. Nielsen testified that he does not ever use or counsel the use of videotaped evidence where children are involved. It was his evidence that, in his experience, the courts do not appreciate videotape evidence from children and there are other issues with respect to it that render it undesirable as an evidentiary aid. Mr. Nielsen's alternate suggestion in circumstances such as these was to have the children talk to JP's sister, who was a friendly ear not directly involved in the family law dispute. Mr. Nielsen provided his view of this alternate approach to gathering evidence in his interview with Kieron Grady of the Law Society.

NOTICE TO ADMIT

[28] Mr. Nielsen was served with a Notice to Admit pursuant to Rule 4-20.1 of the Law Society Rules.

[29] Mr. Nielsen did not respond to the Notice to Admit and, by the operation of the Rule, is deemed to have accepted, as proven, the facts asserted therein. Several of

the statements that Mr. Nielsen is deemed to have accepted as true were specifically contradicted in his testimony before the Panel.

[30] An example of such a contradiction is provided where the Notice to Admit says:

> ... when the respondent spoke with Sergeant Pollard on December 17, 2009, he expressed concern that JP may counsel the children about what to say about the allegations of sexual abuse.

[31] In his testimony before the Panel, Mr. Nielsen reported the context of the telephone call to Sergeant Pollard on December 17, 2009. His version of the event is reported in the introductory narrative to these reasons. The Panel finds Mr. Nielsen's version of the event to be true and accepts the explanation that Sergeant Pollard was mistaken in his record of the conversation.

[32] In our view, Sergeant Pollard's version of the story appears to be simply an error in his recording of the source of the expressed concern – namely attributing the concern to Mr. Nielsen when in fact the concern was expressed in court by JP's estranged husband or his counsel.

[33] Where a respondent in a hearing where the Notice to Admit process is used provides contradictory *viva voce* testimony, panels are placed in an awkward position. If the panel is bound by the Notice to Admit, there is no virtue in hearing live testimony from the respondent on the issues addressed in the Notice to Admit. On the other hand, if the testimony contradicts the Notice to Admit and is credible, a panel that disregards the contradiction may perpetrate an injustice.

[34] It is the Panel's view that that is the case on these facts. The Panel has explained the frailty of Sergeant Pollard's notes and has determined that Mr. Nielsen's explanation is an accurate representation of the facts. The Panel does so in the face of the requirements of the rules respecting Notices to Admit but with regard to our need to establish a defensible outcome consistent with the facts as determined by the Panel.

[35] The obvious value of the Notice to Admit process is that it will provide evidence in circumstances where a respondent member has not engaged with the Law Society and there is a need to provide evidence of the non-responsive member's position. That is not the circumstance of this case, and where conflict exists with the Notice to Admit and credible testimony, the Panel has proceeded as indicated herein.

THE ISSUES

[36] The Panel has identified the following issues for our determination:

1. Did Mr. Nielsen make the comments about his client on December 16, 2009 as attributed to him by Detective Rowley?

2. Did Mr. Nielsen make the comments about his client on December 17, 2009 as attributed to him by Sergeant Pollard?

3. If Mr. Nielsen made the comments on December 16, 2009 as attributed to him to Detective Rowley, was he disclosing confidential information contrary to the provisions of the *Professional Conduct Handbook*?

4. If Mr. Nielsen made the comments on December 17, 2009 as attributed to him by Sergeant Pollard, was he disclosing confidential information contrary to the provisions of the *Professional Conduct Handbook*?

5. Did Mr. Nielsen disclose confidential information in his conversation with Detective Rowley on January 4, 2010?

6. If Mr. Nielsen did disclose confidential information in his conversation with Detective Rowley on January 4, 2010, was that disclosure contrary to the provisions of the *Professional Conduct Handbook*?

THE PROFESSIONAL CONDUCT HANDBOOK

[37] At the material time, the provisions of the *Professional Conduct Handbook* that bear on the issues before us provided as follows:

> Chapter 5, Rule 1
>
> **Duty of confidentiality**
>
> 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 impliedly[1] authorized by the client, or is required by law or by a court.

Chapter 5, Rule 5

Confidential information not to be used

A lawyer shall not use any confidential information respecting a client for the benefit of the lawyer or another person, or to the disadvantage of the client. When engaging in a business transaction with a client or former client in the limited circumstances permitted by Chapter 7, the lawyer shall not use for personal benefit any confidential information acquired in the course of acting for the client.

Footnote 1 to Chapter 5, Rule 1.

A client who voluntarily discloses or authorizes disclosure of a privileged communication, who makes legal advice an issue in proceedings, who commences a malpractice action against a lawyer or who instigates a disciplinary proceeding manifests an intention to waive privilege, at least to the extent necessary for the lawyer to mount a defence: see *CED* (Western 3rd) Vol. 12 "Evidence," Section 1054, p. 733, and cases cited, including *R. v. Dunbar and Logan* (1982), 68 CCC (2d) 13 (Ont. CA).

[38] The application of Chapter 5, Rule 5 in the circumstances before us is not clear. The Panel has considered the behaviour described in the Citation and has determined that no contravention of Chapter 5, Rule 5 is made out.

DISCUSSION

[39] We will respond to the identified issues in the order in which they are presented.

[40] Issue 1 — The Panel has determined that Mr. Nielsen did make the comments attributed to him by Detective Rowley on December 16, 2009.

[41] Issue 2 — The Panel has determined that Mr. Nielsen's comments to Sergeant Pollard on December 17 were misunderstood by Sergeant Pollard, and though the gist of the comment is correctly recorded, the party expressing the concern is incorrectly identified. Sergeant Pollard's note suggests that it was Mr. Nielsen who was concerned that JP was "counselling" the children to give particular testimony. The Panel has determined that it was JP's husband or his counsel who had expressed that concern in the court proceeding on the morning of December 17, 2009.

[42] Issue 3 — The Panel has determined that, even though Mr. Nielsen did make the comments attributed to him to Detective Rowley on December 16, 2009, he was

not, in that conversation, disclosing confidential information contrary to the prohibition in Chapter 5, Rule 1.

[43] It is acknowledged that the protection of "confidential information" extends beyond that included in documents to include less tangible information such as the "client's attitude, approach to litigation and vulnerabilities." *Law Society of BC v Welder*, 2013 LSBC 24. In the circumstances of some retainers, there will be a need to share these less tangible incidents of confidential information, and the Rule is crafted to recognize that reality.

[44] Mr. Nielsen had been retained by JP to advance her family law file. JP's involvement with the Vancouver Police Department (VPD) was an integral component of the retainer. She was seeking to have criminal charges laid against her husband, and if she was successful in that regard, there would be a consequential benefit to the civil custody and access issues that were pressing upon her at the time that Mr. Nielsen was retained. Specifically, Mr. Nielsen was dealing with a Supreme Court Chambers application where JP's husband was seeking unsupervised access to the children, and JP was categorically opposed to that outcome.

[45] We find that Mr. Nielsen was entitled to use his professional judgment in determining the best method to achieve the goals of his client. Mr. Nielsen had determined that an important step in the criminal investigation was the interview scheduled between the VPD and JP. He felt, properly in the view of the Panel, that in order for the interview to produce the best possible result, some preparation of the investigating police officer was appropriate. We find that the comments made were within the implied consent provided by JP to do all that is necessary to advance her cause.

[46] While the counsel of caution would suggest that no comments as to the nature of one's client's personality should be made, in the circumstances facing Mr. Nielsen in his representation of JP, the Panel finds that Mr. Nielsen made a determination that his client's best interests would be best served by the disclosure he provided to Detective Rowley. He was not providing gossip, salacious observations or private information provided confidentially by his client. Instead, he was pursuing the representation of his client by attempting to smooth an upcoming important interview with the Vancouver Police Department by explaining his client's likely presentation in the best possible light. He was doing this in circumstances where his client had demonstrated the characteristics that he attributed to her and that he had determined could be counter-productive and potentially harmful to her interests in the pending police interview.

[47] Mr. Nielsen's discussion with Detective Rowley, in the view of this Panel, was more in the nature of seeking to establish a partnership arrangement between JP and her lawyer on the one hand and the Vancouver Police Department on the other, with a view to producing a successful prosecution for the sexual misconduct of JP's estranged husband. We can find no fault with Mr. Nielsen's behaviour in this regard.

[48] Issue 4 — As the Panel has determined that Mr. Nielsen's comments to Sergeant Pollard were misconstrued by Sergeant Pollard, the Panel is satisfied that there was nothing improper about that conversation. Both JP and Mr. Nielsen were of the view that the Vancouver Police Department should be made aware that JP's husband was making allegations that JP was counselling her children on their testimony. Since it was the evidence of the children that would ultimately determine the outcome of the sexual abuse allegations, it is obvious that any suggestion of coaching the children's testimony should be addressed promptly and with rigour. That was the purpose of the telephone call to Sergeant Pollard on the morning of December 17, 2009. This again is a disclosure of information within the implied consent that is described in Chapter 5, Rule 1.

[49] Issues 5 and 6 — The Panel finds that, in his conversation with Detective Rowley on January 4, 2010, Mr. Nielsen did disclose legal advice that he had provided to JP during the course of his retainer. In particular, he advised Detective Rowley that he had not counselled JP to video the evidence of her children. The Panel finds that Mr. Nielsen did not breach his duty of confidentiality to JP because she had put the matter of the legal advice she had received into the public domain by telling Detective Rowley that that was the advice that had been provided to her by Mr. Nielsen.

[50] The parallels between solicitor-client privilege and confidential information learned in the course of a retainer are sometimes difficult to distinguish. The footnote to the confidentiality rule (Chapter 5, Rule 1) refers to the privilege of solicitor-client communications and talks of the waiver of that privilege. The footnote reference appears in that section of Rule 1 that deals with implied waiver, presumably of the solicitor-client privilege, though it must be presumed to have identical application to the waiver of confidential information, or else the placement in the handbook footnote becomes less helpful.

[51] The Panel has determined that the distinction between confidential communications and privileged communications is not helpful when the context identifies legal advice as the offending communication. To give appropriate meaning to the Chapter 5, Rule 1 footnote, we regard the disclosure by Mr. Nielsen of the legal

advice given as a permitted disclosure of either confidential or privileged information due to the prior disclosure by JP of the information to Detective Rowley.

[52] The law on implied waiver of solicitor-client privilege appears to be reasonably settled. Where a privileged person discloses to third parties privileged information, or where the validity of the privileged information is called into question by the privileged person, the law permits disclosure where fairness and consistency require it.

[53] In *Rogers v. Hunter*, [1981] BCJ No. 1981, the following passage from Wigmore, Evidence was cited:

> What constitutes a *waiver by implication*?
>
> Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.
>
> [emphasis in original]

[54] Similarly, in *Transportaction Lease Systems Inc. v. Virdi*, 2007 BCSC 132, Mr. Justice Burnyeat wrote as follows, at paragraph 17:

> Solicitor client privilege can only be waived by the client … . However, privilege can be waived expressly, inferentially or by conduct by a client. Where privilege has been waived, a solicitor can be called upon to answer questions about communications between that solicitor and his or her client. Statements or facts can be put into issue by a client in a number of ways and can arise from a number of sources:
>
> (a) where the instructions given by a client to the lawyer are put in issue when a client denies that any such instructions were given: *Souter v. 375561 B.C. Ltd.*, [1994] BCJ No. 2623 (SC); *Souter v. 375561 B.C.*

> *Ltd.* (1995), 1995 CanLII 843 (BCCA), 15 BCLR (3d) 213 (CA); *Hansen v. Stierle*, [1996] BCJ No. 941 (SC); *Lin and Lin v. Leung et al*, [1991] BCJ No. 641 (SC); and *Land v. Kaufman* (1991), 1 CPC (3d) 234 (Ont.Ct.J.); ...

[55] The Panel has determined that the law described herein has equal application to the waiver of the entitlement to the preservation of the confidentiality of the communication as it does to the privileged communications that existed between Mr. Nielsen and JP. In that regard, therefore, we find that JP waived her entitlement to the preservation of the confidential information and that Mr. Nielsen did not offend Chapter 5 in his January discussion with Detective Rowley.

[56] While the circumstances of the discussion with Detective Rowley are the opposite of the situation described by his Lordship in *Transportaction*, the point is the same. When the client advises others of instructions given on advice by the lawyer that the lawyer knows to be untrue, the implied waiver of the privilege (and confidentiality) is engaged.

[57] It is the finding of this Panel that, during her interview with Detective Rowley, JP did provide information to Detective Rowley that she had received legal advice from Mr. Nielsen to video the children. JP further stated that this was her explanation for doing so. In saying this JP waived any entitlement that she might have had to have the confidentiality of that information preserved. The Panel therefore finds that Mr. Nielsen did not improperly disclose confidential information.

CONCLUSION

[58] The Panel has determined that Mr. Nielsen has not committed any act of professional misconduct.

[59] The Law Society has the burden of demonstrating, with credible evidence, on the balance of probabilities, that Mr. Nielsen has professionally misconducted himself. It is the decision of the Panel that the Law Society did not meet the standard required.

[60] Accordingly, the citation is dismissed with costs payable to Mr. Nielsen. If counsel are not able to agree on the terms of the cost order, the Panel is prepared to consider written submissions to be provided within 30 days of the issuance of this decision

[61] The Panel further orders that all material provided by way of evidence, submissions and any transcript of this hearing be sealed for all purposes so that the interests of the infant children of JP are protected.