2016 LSBC 23
Decision issued: June 14, 2016
Oral reasons: April 14, 2016
Citation issued: July 15, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JOSEPH HARRY MCCARTHY

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	April 14, 2016
Panel:	Nancy Merrill, QC, Chair James Dorsey, QC, Lawyer Lois Serwa, Public representative
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	Terence La Liberté, QC

BACKGROUND

[1] On July 15, 2015 a citation was issued against the Respondent alleging that:

1. On or about May 8, 2013, in the course of representing your client SI, you challenged your client to a fight at the Prince Rupert courthouse, contrary to Rule 2.2-1, 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*.

2. On or about June 10, 2013, you disclosed confidential information of a former client, SI, by forwarding or causing to be forwarded a disclosure package to Crown Counsel that contained privileged handwritten notes made by your

former client, contrary to one or both of Rules 3.3-1 and 3.3-2 of the *Code of Professional Conduct for British Columbia*.

The citation alleges that the above conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[2] This citation comes before this Panel as a conditional admission of a breach of the Law Society Rules and a consent to specified disciplinary action pursuant to Rule 4-30. By undated letter faxed to the Law Society on December 18, 2015, the Respondent admitted the allegations contained in the citation are proven and that they constitute professional misconduct. The Respondent consented to the following disciplinary action:

(a) payment of a fine in the amount of $6,000 by April 30, 2016; and

(b) payment of costs in the amount of $1,236.25 by April 30, 2016.

[3] The Discipline Committee accepted the Respondent's conditional admission and the proposed disciplinary action. This disposition was recommended by counsel for the Law Society on the instructions of the Discipline Committee.

[4] The Panel provided its oral decision on April 14, 2016. We found that the Respondent had engaged in professional misconduct and disclosed confidential client information, and we ordered him to pay a fine in the amount of $6,000 and costs in the amount of $1,236.25 by April 30, 2016. We also granted a sealing order pursuant to Rule 5-8(2). These are our written reasons.

AGREED STATEMENT OF FACTS

[5] Counsel for the Law Society submitted an Agreed Statement of Facts, filed as Exhibit 2, which can be summarized as follows:

(a) The Respondent was called and admitted as a member of the Law Society of British Columbia on May 17, 2007.

(b) Initially he practised as a sole practitioner in Vancouver, primarily in the area of criminal law. Since January 2012 he has been practising criminal law in Smithers as a sole practitioner.

(c) The Respondent's client (the "Client") in this matter had been charged with assaulting his brother, uttering threats and assaulting a

peace officer. One of the terms of his bail conditions was that he not attend any property where his brother might be engaged in business.

(d) Before retaining the Respondent, the Client attended court without counsel and received the disclosure package and Crown Counsel Disclosure Notice. The Client made several hand-written notes on the disclosure documents.

(e) The Respondent was then retained by the Legal Services Society in August, 2012 to represent the Client regarding the criminal charges. The Client gave the disclosure package with his hand-written notations to the Respondent.

(f) On May 4, 2013 the Client sent a fax to the Respondent regarding the bail application scheduled for May 8, 2013. The fax included hand-written notations by the Client and attached other documents for the Respondent's review.

(g) The Client advised the Respondent that he wished to vary the bail conditions to allow him to attend a property where his brother could be engaged in business, because there were hazardous materials located there that required some maintenance. On May 8, 2013, the Client and the Respondent met at the Prince Rupert courthouse to attend the bail variation application.

(h) The Client and the Respondent met in the interview room on the third floor of the Prince Rupert courthouse. The Client's wife joined them. The Client and the Respondent argued. The Client had not retained a civil lawyer to deal with the dispute he was having with his brother as the Respondent had recommended. The Respondent suggested that the Client could have, and should have obtained some employment, which would have provided him with funds to retain a civil lawyer to handle the civil dispute.

(i) During this conversation in the interview room, the Respondent became frustrated with the Client, raised his voice, and told him he was withdrawing as counsel. The conversation ended, and everyone left the interview room.

(j) After leaving the interview room, the Client and his wife turned to walk down the hallway, and the Respondent turned to walk in the opposite direction. The Client then made a derogatory remark to the Respondent.

(k) Upon hearing this derogatory remark, the Respondent turned and walked back toward the Client. He stood very close to the Client, and although he does not recall the exact words he used, the Respondent admits he used words that challenged the Client to a physical fight. The Respondent admits his voice was raised and his tone abrasive and unpleasant. The Respondent had a briefcase in each hand when he challenged the Client to a fight. They then went their separate ways.

(l) Other members of the public were in the hallway close at hand when the Respondent challenged the Client to a fight.

(m) The Respondent informed Crown Counsel that he was going to withdraw as the Client's counsel, and on May 9, 2013 filed by fax a Notice of Withdrawal of Designated Counsel form.

(n) On May 15, 2013, the Client wrote to the Respondent requesting that all documents that were supplied by the RCMP, Crown Counsel or himself be returned and that the envelope could be left at the Court Registry in Prince Rupert or mailed to him by regular post.

(o) The Respondent received the Client's letter on June 3, 2013. He then instructed his assistant to send the disclosure documents he had received from the Client to Crown Counsel in Prince Rupert.

(p) On June 10, 2013, the Respondent wrote to Crown Counsel in Prince Rupert enclosing the disclosure documents the Client had originally provided to him.

(q) The Respondent states that when he sent the Client's disclosure documents to Crown Counsel, he:

i) did not give the matter sufficient consideration;

ii) wanted no further contact with the Client;

iii) did not stop to think about the disclosure;

iv) should have returned the materials to the Client;

v) knew there were notes on the disclosure documents, but did not turn his mind to the fact that the notes may be subject to solicitor-client privilege or contain confidential information; and

vi) did not send the disclosure documents to the Crown out of any malice towards the Client.

(r) The Client made an application for a judicial stay of proceedings regarding the criminal charges. The presiding Provincial Court Judge found:[1]

> The Client requested Mr. McCarthy, because Mr. McCarthy came to Prince Rupert on a regular basis and did not practise in Prince Rupert or live in Prince Rupert, that Mr. McCarthy provide those documents to the court registry for pick-up by the Client. What happened – and I have to confess, I find it totally inexplicable – is that Mr. McCarthy, instead of providing the documents to a court registry for transmission to the Client, provided them to the court registry with directions that they should be transmitted to Crown counsel. That was done.
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> The only suggestion that is made is that this was a mistake by Mr. McCarthy. As is sometimes the case with duty counsel, when the need for the circumstances has been finished, when duty counsel have represented someone in custody, they return the disclosure to Crown counsel office so that it can later be provided to the accused or to counsel who may be appointed to represent them in the long term. It is suggested that the Respondent may have carelessly done that with these documents that had been provided to him.
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> It would appear from the review of the record of proceedings that the Client had clearly appeared on this file personally for some three months before Mr. McCarthy became involved, and the disclosure almost certainly would have been provided directly to the Client and then from him to Mr. McCarthy. But, for whatever reason, and however it was in error, what is clear is that Mr. McCarthy provided these documents to the court registry with the direction that they be given to Crown counsel, which was done. That had the very clear and obvious potential for a breach of the solicitor-client privilege between the Client and Mr. McCarthy, as the Client had made, and it is not in any way disputed, notes upon the various disclosure documents which were intended to be for the benefit of and communications between he [sic] and his solicitor for the purpose of this litigation.

[1] The identity of the Client has been anonymized

(s) The Respondent admits that, on or about May 8, 2013, he challenged the Client to a fight at the Prince Rupert courthouse, contrary to rules 2.2-1, 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia* as set out in the citation.

(t) The Respondent admits that this conduct constitutes professional misconduct.

(u) The Respondent admits that, on or about June 10, 2013, he disclosed confidential information of the Client by forwarding or causing to be forwarded a disclosure package to Crown counsel that contained privileged hand-written notes made by the Client, contrary to one or both of rules 3.3-1 and 3.3-2 of the *Code of Professional Conduct of British Columbia* as set out in the citation.

(v) The Respondent admits that this conduct constitutes professional misconduct.

DECISION

[6] We have been referred to the often cited case of *Law Society of BC v. Ogilvie*, 1999 LSBC 17, which states at paragraph 10:

> The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. 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:
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> 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;

e) the advantage gained, or to be gained, by the respondent;

f) the number of times the offending conduct occurred;

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;

h) the possibility of remediating or rehabilitating the respondent;

i) the impact upon the respondent of criminal or other sanctions or penalties;

j) the impact of the proposed penalty on the respondent;

k) the need for specific and general deterrence;

l) the need to ensure the public's confidence in the integrity of the profession; and

m) the range of penalties imposed in similar cases.

[7] The Respondent provided ten letters of reference that speak to his integrity and character. His counsel advised the Panel that the Respondent takes on approximately 80 percent of the legal aid work in the area, conducts continuing professional development courses for his colleagues and is a leader in his legal community.

[8] The Respondent has acknowledged his conduct and has apologized for it. The Panel accepts that the Respondent is remorseful and understands the inappropriateness of his conduct.

[9] The Respondent has no prior conduct record and did not benefit or profit from his conduct.

[10] However, the Respondent's incivility is worthy of rebuke. As his counsel stated, "we are supposed to rise above it and typically do." In this case the Respondent did not rise above it. His incivility to the Client was disrespectful, embarrassing and negatively reflects on the legal profession as a whole.

[11] The Respondent's disclosure of the Client's confidential communications is a serious breach of the *Professional Code of Conduct of British Columbia*, however unintentional it may have been. In *Law Society of BC v. McLeod*, 2015 LSBC 03 at paragraph 13, the hearing panel quoted from *MacDonald Estate v. Martin*, [1990] 3 SCR 1235:

> Lawyers are an integral and vitally important part of our system of justice. It is they who prepare and put their clients' cases before courts and tribunals. In preparing for a hearing of a contentious matter, a client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations.
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> Our judicial system could not properly operate if this were not the case. It cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed.

[12] The panel in the *McLeod* case noted that client harm following a breach of client confidentiality is irrelevant to a determination of professional misconduct (at paragraph 15).

[13] Although it did not, the Respondent's breach of solicitor-client confidentiality had the potential to seriously prejudice the Client in his criminal proceedings.

[14] After considering the circumstances as set out in the Agreed Statement of Facts and after hearing the submissions of counsel, the Panel finds that the Respondent engaged in professional misconduct as alleged in the citation.

[15] Because this citation comes to this Panel under Rule 4-30 with a conditional admission and proposed disciplinary action accepted and recommended by the Discipline Committee, we must either accept or reject the penalty proposed by the Respondent. We cannot vary or impose a different penalty.

[16] Is the proposed disciplinary action fair and reasonable for both incivility and for breach of confidential client information in all of the circumstances?

[17] In support of the Discipline Committee's recommendation, counsel for the Law Society referred to a number of cases dealing with incivility and breach of confidential client information. They identify a range of sanctions for the serious misconduct of breaching solicitor-client confidentiality and for the not as serious incivility.

[18] Sanctions for breach of confidential client information cases have ranged from fines to suspensions. The fines have ranged from $2,500 to $7,500. Suspensions

were given in cases where there were significant prior conduct records, additional infractions or more egregious conduct.

[19] Incivility cases attracted fines ranging from $1,000 to $3,000.

[20] The Respondent has proposed that he pay a fine of $6,000 and costs in the amount of $1,236.25. The Discipline Committee has accepted this proposal.

[21] The Panel finds the disciplinary action to which the Respondent consents and that the Discipline Committee has accepted and recommends are within the range of appropriate sanctions and is fair and reasonable in the circumstances.

[22] We therefore order the Respondent to pay a fine of $6,000 and costs in the amount of $1,236.25 by April 30, 2016.

SEALING ORDER

[23] Discipline counsel applied for a sealing order in these proceedings to protect confidential information about the Client from being disclosed. The Respondent consented to this application.

[24] Rule 5-8(2) of the Law Society Rules provides that, upon application or its own motion, a panel may order that specific information not be disclosed to protect the interests of any person. Rule 5-8(5) requires that, if the panel makes such an order, it must give its written reasons for doing so. In the absence of such an order, Rule 5-9(2) of the Law Society Rules permits a person to obtain a copy of an exhibit entered into evidence when a hearing is open to the public.

[25] We find that the citation (Exhibit 1) and the Agreed Statement of Facts (Exhibit 2) contain confidential information of the Client that should not be disclosed. We therefore make the following order:

(a) should anyone apply for a copy of the citation in this matter, the citation must be anonymized prior to being provided;

(b) should anyone apply for a copy of the Agreed Statement of Facts in this matter, all confidential client information must be redacted prior to being provided; and

(c) should anyone apply for a copy of the transcript of these proceedings, the Client's name, any identifying information about the Client and any

confidential solicitor-client information must be redacted prior to being provided.

ORDER

[26] We order that the Respondent:

(a) pay a fine in the amount of $6,000 by April 30, 2016; and

(b) pay costs in the amount of $1,236.25 by April 30, 2016.

[27] The Executive Director is instructed to record the Respondent's admission and the disciplinary action on his professional conduct record.