2018 LSBC 09
Decision issued: March 13, 2018
Citation issued: June 18, 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 DISCIPLINARY ACTION

Hearing date:	January 10, 2018
Panel:	Shona Moore, QC, Chair Dan Goodleaf, Public representative Lisa J. Hamilton, QC, Lawyer
Discipline Counsel:	Robin N. McFee, QC, Jessie I. Meikle-Kahs
Counsel for the Respondent:	Gerald A. Cuttler, QC

[1] This hearing was convened for the sole purpose of determining the appropriate disciplinary action arising from a finding of professional misconduct by a review board (2015 LSBC 45) upheld by the Court of Appeal in *Harding v. Law Society of BC*, 2017 BCCA 171. Given the passage of time since the hearing on facts and determination in 2014, the Hearing Panel was reconstituted.

BACKGROUND

[2] In 2013, Mr. Harding was cited for professional misconduct for his conduct at a Unitow lot where he attended on June 26, 2012 as his mother-in-law's lawyer to take pictures of the damage to her car. A Unitow employee refused him access to the lot and the interactions between the Respondent and the Unitow employee escalated. Eventually, the Respondent telephoned the Surrey RCMP non-emergency line and told the dispatcher:

> … they say they won't let me in and … I told the lady at the switchboard that I need someone there to talk to these idiots because otherwise, you'll have to send a police officer, probably to arrest me because I'm going to get a crowbar and smash up the place (the "Crowbar Comment").

[3] On June 27, 2014, a hearing panel found that none of the Respondent's interactions with the Unitow employees or with the police dispatcher constituted professional misconduct. With respect to the Crowbar Comment, the original hearing panel found that, while the Respondent's statement to the dispatcher was "an intemperate overstatement," it was made in the "context of protecting a client's interest" and was not made as a threat (2014 LSBC 29).

[4] On review, the majority of the review board found that the Respondent committed professional misconduct when he made the Crowbar Comment even though the comment was not intended as a threat. The review board reasoned:

> [44] … the Respondent knew full well what the impact of his words would be – it would cause the police to attend when they otherwise may not have, or may have come at a later time. This is the problem with the Respondent's comment and the intention behind those words: one cannot say whatever one likes in order to motivate, or manipulate, a person or entity, such as a peace officer, to do something they may not have otherwise done. You cannot yell "fire" in a crowded theatre when there is no fire.
>
> [45] The Respondent knew full well that raising the possibility of violence, even if he did not actually intend any violence, would cause the police to attend. This is wrong, and it is difficult to see how this is not professional misconduct. A lawyer not getting his way and then behaving in a manner that is described as "aggressive and rude" and "aggressive and condescending," in and of itself, may or may not "cross the line." However, if in addition to that the lawyer then escalates the situation by raising the spectre of violence by saying something (the "crowbar" comment) that is "ill-considered," "ill-advised" and "should not have been

made" with the intent of causing the police to attend, this is "a marked departure from that conduct the Law Society expects of its members."

[5] The Respondent appealed to the Court of Appeal.

[6] The Court of Appeal dismissed the appeal. The Court held that it was reasonable for the majority of the review board to conclude that the Crowbar Comment, even though not a threat, nevertheless constituted professional misconduct in that he intentionally raised the spectre of violence in order to convince the police to attend what was objectively a trivial dispute between Mr. Harding and Unitow.

[7] We turn now to a consideration of what disciplinary action should be taken.

POSITION OF THE PARTIES

The Law Society's position

[8] The Law Society seeks a suspension of six weeks.

[9] The Law Society tendered a copy of the Respondent's professional conduct record. Between November 2000 and the date of the incident giving rise to this current finding of professional misconduct, the Respondent attended two Conduct Reviews and was found to have committed professional misconduct on two citations for his incivility to or about opposing counsel.

[10] In light of this record, the Law Society suggests that we should have regard to the principle of progressive discipline in order to send a "clear message to the public and the legal profession, that the Law Society will not tolerate lawyers who repeatedly ignore their professional responsibilities." (*Law Society of BC v. Batchelor*, 2013 LSBC 9)

[11] The Law Society submits that this is the fifth time that the Respondent has received or faced discipline for incivility, and invites us to conclude that the previous fines that have been imposed on the Respondent for incivility have not deterred his behaviour.

[12] Further, with respect to other potentially mitigating or aggravating factors, the Law Society emphasizes that the Crowbar Comment was made in an attempt to gain an advantage, that is, the attendance of the RCMP.

[13] The Law Society acknowledges that the Respondent provided a letter of apology to the Law Society on May 15, 2013, but says it falls short in that it does not

specifically acknowledge nor apologize for the comment, that was described by the Court of Appeal as an attempt to raise "an alarm to convince the police to attend what was, objectively, a trivial dispute" between the Respondent and the tow company. The Law Society urges us to conclude that the Respondent's comment was deliberate and calculated, rather than conduct that arose in the heat of the moment and out of a lack of control.

The Respondent's position

[14] The Respondent tendered, by consent, a number of documents including a number of reports in respect of his counselling sessions in 2013 and 2014 and on January 27 and December 4, 2017; letters of support written by fellow lawyers and clients, dated in 2013; a package of letters of support from fellow lawyers, from 2015; medical records dated 2015; and a letter dated January 6, 2018 from a fellow lawyer who has practised in association with the Respondent since 2004.

[15] The Respondent gave evidence before the original hearing panel but not at this hearing.

[16] The Respondent argues that the misconduct in the case before us is no longer indicative of the Respondent's character. Following the finding of professional misconduct for incivility in 2013 LSBC 25, the Respondent attended and completed anger management counselling. Counsel for the Respondent argues that a suspension is not necessary in order to achieve general or specific deterrence, and in consideration of all of the relevant factors, the Respondent seeks a fine as the appropriate sanction.

DECISION

[17] The primary purpose of disciplinary proceedings is the fulfilment of the Law Society's mandate set out in section 3 of the *Legal Profession Act*, namely, to uphold and protect the public interest in the administration of justice.

[18] As stated in Mackenzie, *Lawyers and Ethics: Professional Regulation and Discipline*, loose-leaf (Toronto: Carswell, 1993) at page 26-1:

> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

> In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

[19] In British Columbia, the leading cases concerning the principles to be considered when assessing sanction include: *Law Society of BC v. Ogilvie*, 1999 LSBC 17, *Law Society of BC v. Lessing*, 2013 LSBC 29 and *Law Society of BC v. Martin*, 2007 LSBC 20.

[20] At paragraph 55 of *Lessing*, the review panel refers to *Ogilvie*:

> The above objects and duties set out in section 3 of the Act are reflected in the factors set out in *Law Society of BC v. Ogilvie*, at paras. 9 and 10 of the penalty stage:
>
> 9. Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows the sentencing process must ensure that the public is protected from acts of professional misconduct. Section 38 of the Act sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. *In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.*
>
> 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:
>
> (a) the nature and gravity of the conduct proven;
>
> (b) the age and experience of the respondent;
>
> (c) the previous character of the respondent, including details of prior discipline;
>
> (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 on 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.

[emphasis added in *Lessing*]

[21] All of the *Ogilvie* factors do not come into play in all cases. Further, the weight given to the factors varies from case to case. Some factors may play a more important role in one case and the same factors may play little or no role in another case.

[22] In this case, the Law Society put much focus on the importance of:

(a) the effect of the conduct on the reputation of the profession or the Law Society's ability to regulate; and

(b) the Respondent's professional conduct record and consideration of progressive discipline.

[23] The Respondent, however, puts focus on the importance of the Respondent's rehabilitation and the efforts he has made subsequent to the incident to rehabilitate himself.

[24] We will address *Ogilvie* factors (a), (b), (c), (g), (h), (i), (k), (l) and (m) as relevant to this hearing.

Nature and gravity of the conduct

[25] In *Doré v. Barreau du Québec*, 2012 SCC 12 at paragraph 61, the Supreme Court emphasized the importance of professional discipline to prevent incivility in the legal profession, holding that the duty to encourage civility both inside and outside the courtroom rests with the Court and the lawyer.

[26] In *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94, the hearing panel stated at paras. 63 and 65:

> The requirement of civility is more than good manners in the courtroom and practice. Rather, the rationale underlying the requirement of civility reflects a concern with the effect of incivility on the proper functioning of the administration of justice and public perception of the legal profession.
>
> …
>
> Our system of justice is based on the premise that legal disputes should be resolved rationally in an environment of calm and measured deliberation, free from hostility, emotion, and other irrational or disruptive influences. Incivility and discourteous conduct detracts from this environment, undermines public confidence and impedes the administration of justice and the application of the rule of law.

[27] Incivility was an issue in *Law Society of BC v. Foo*, 2014 LSBC 21, where a lawyer told a social worker that he "should shoot" her because she apprehends too many children. Mr. Foo's explanation was that he made the statement jokingly without forethought. The panel in *Foo* considered the seriousness of the conduct to be an aggravating factor.

[28] Incivility was also an issue in *Law Society of BC v. Johnson*, 2014 LSBC 50, where a lawyer was disciplined for saying "fuck you" to a police officer at the courthouse. The panel described the conduct as moderately serious even though the lawyer had been provoked by the police officer in that case.

[29] In the case before us, the conduct is moderately serious, particularly because the Respondent made the statement with the intention of motivating or manipulating the police into assisting him on a priority basis.

[30] Specifically, the Respondent wrote a letter dated January 16, 2013 to the Law Society Professional Conduct Department, in which he stated that he made the Crowbar Comment because "I was trying to convince the police to attend. They

were balking. Raising the issue of 'keeping the peace' raises the urgency for police." (*Harding*, BCCA, paragraph 60)

[31] On May 15, 2013, the Respondent provided an apology to the Law Society in which he stated that it was not appropriate to say the words "I need someone there to talk to these idiots, because otherwise you're going to have to send police officers to arrest me, because I'm going to get out a crowbar and smash up the place." The Respondent said:

> I was attempting to express my frustration and urge the police to attend by using sarcasm. At the time, I believed that it was obvious that my words would not be mistaken to be a real threat, and I do not think they were perceived as such. However, I acknowledge that the words I used could have led to my intention being misunderstood and I am sorry for that.
>
> (*Harding*, BCCA, paragraph 61)

[32] The Respondent testified before the hearing panel. In direct examination, he was asked why he used the words to the effect "get a crowbar and smash up the place." He answered:

> I was getting very frustrated. My impression was I was being gamed by the Unitow people. Then I phoned the dispatch. And this is my second call to the RCMP. So that second call I'm talking to the dispatcher, and I felt like she wasn't listening, and I was concerned that with the allocation of police resources nobody would ever come, and I wanted to let the dispatcher know how frustrated I was, and that's all I meant.
>
> (*Harding*, BCCA, paragraph 62)

[33] The statement was not intended as a threat; however, it was intended to convince the police to attend and to raise the urgency of the matter. As the Court of Appeal explains in paragraph 79 of its decision, "The gravamen of the misconduct was raising an alarm to convince the police to attend what was, objectively, a trivial dispute between Mr. Harding and Unitow."

[34] The nature and gravity of the conduct is a significant aggravating factor.

Age and experience of the lawyer

[35] The Respondent is a senior, experienced lawyer called to the Bar in 1990. He is in his 50s. The Respondent should know better than to make such a statement.

The previous character of the respondent including details of prior discipline

[36] Rule 4-44(5) provides that the panel may consider the lawyer's professional conduct record in determining the appropriate discipline.

[37] At paragraph 72 of *Lessing*, the review panel indicated that the weight given to a lawyer's professional conduct record varies based on the following factors:

(a) the dates of the matters contained in the conduct record;

(b) the seriousness of the matters;

(c) the similarity of the matters before the panel;

(d) any remedial actions taken by the Respondent.

[38] A summary of the Respondent's professional conduct record is contained in the decision of the hearing panel in *Law Society of BC v. Harding*, 2016 LSBC 09 at paragraphs 136 to 140:

> *Citation issued November 20, 2002.* On April 14, 2003 a hearing panel accepted the Respondent's Rule 4-22 (now Rule 4-30) admission of professional misconduct as alleged in the citation (*Law Society of BC v. Harding*, 2003 LSBC 20). The misconduct related to a social gathering on November 29, 2000 at which the Respondent told a number of lawyers that S, a lawyer he was suing for negligence on behalf of S's former clients, had at an examination for discovery admitted enough to have himself disbarred and that the Respondent was going to get S disbarred. Six weeks later the Respondent wrote to S stating that, if he had made these comments, he unreservedly retracted them and offered his sincere apology. The Respondent was fined $1,000.
>
> *Conduct review authorized on April 1, 2004.* On June 29, 2004 a conduct review subcommittee issued a report regarding an incident where the Respondent had alleged that "opposing counsel had refused to comply with the Rules of the court, offered false evidence or misstated the facts and law, asserted untruths, [and] failed to conduct himself as a reasonably [sic] trial lawyer." After the judge determined that these allegations had no basis, the Respondent apologized to the court and opposing counsel for making them. At the conclusion of the trial, however, he made further uncivil and personal remarks regarding opposing counsel. The subcommittee took the view that a matter of this nature was unlikely to

arise again, it appears because the Respondent had taken steps to avoid a recurrence.

Conduct review authorized on September 8, 2005. A conduct review subcommittee issued a report relating to an incident in which the Respondent wrote letters suggesting that another lawyer had committed perjury and pressured a witness to give untruthful evidence. Moreover, in an account presented to his client, the Respondent's time entry indicated that, in his discussion with the other lawyer, the lawyer "admits telling C to say 'don't know' w/r seatbelt –just doesn't get it (perjury)." The subcommittee noted that the Respondent now understood the need to avoid ill-considered or uninformed criticism of the competence, conduct or advice of other lawyers. The subcommittee was satisfied that the Respondent had systems in place to avoid a recurrence of such conduct and that he had taken steps to avoid emotional outbursts that transgress the rules. Finally, the subcommittee observed that the Respondent recognized that there is a limit to the patience of the Law Society concerning potential future occurrences of a similar nature.

Citation issued October 18, 2010. On August 30, 2013, a panel found that the Respondent committed professional misconduct as alleged in the citation (*Law Society of BC v. Harding*, 2013 LSBC 25). The misconduct involved the Respondent writing to his client's former lawyer two letters dated March 15, 2010 that contained rude and discourteous remarks directed at the former lawyer. In the first letter, the Respondent inaccurately suggested that a Law Society ethics advisor had referred to the former lawyer as stupid and dishonest. In the second letter, he refused to retract the offensive comments and continued to be abusive, condescending, rude, disrespectful and discourteous towards the other lawyer. The Law Society and the Respondent together submitted that a fine of $2,500 was appropriate, given that the Respondent had provided an undertaking that he would continue to receive counselling and treatment from a psychologist. The panel was of the view that a short suspension together with the undertaking was a more appropriate result. However, in light of the parties' joint submission, the panel "with reservation" accepted the lesser penalty of a $2,500 fine (*Law Society of BC v. Harding*, 2014 LSBC 6). We have been informed that the Respondent has fulfilled the terms of this undertaking.

Citation issued February 22, 2013. On November 3, 2014, a panel found that the Respondent had committed professional misconduct by failing to

> provide his client with an acceptable quality of service and failing to recommend that the client obtain independent legal advice, as alleged in the citation (*Law Society of BC v. Harding*, 2014 LSBC 52). The Respondent failed to take any steps in advancing his client's claim in a personal injury matter, except for a single meeting with the client, over a period of 49 months, from January 12, 2007 to February 11, 2011. The reason advanced for his inaction was that, due to workload pressures, he did not diarize the file and so it was not subject to his "bring forward" system. The defendants brought an application to dismiss the client's action for want of prosecution. The Respondent swore an affidavit on the application admitting that the failure to take any steps was entirely his fault, for the reasons just mentioned. He did not, however, recommend to his client that she obtain independent legal advice regarding the want of prosecution application. The application was dismissed on the basis that, while there had been inexcusable delay on behalf of the Respondent, the defendants had not suffered serious prejudice. The panel fined the Respondent $6,000 for these two instances of misconduct (*Law Society of BC v. Harding*, 2015 LSBC 25).

[39] The case just quoted from involved a citation issued February 11, 2015. The Respondent conditionally admitted to four instances of professional misconduct: failing to serve a client in a conscientious, diligent and effective manner; twice failing to recommend to a client that she obtain independent legal advice; and failing to provide the client with reasonable notice before withdrawing as her lawyer. The disciplinary action imposed was a fine of $15,000 and costs of $2,125.

[40] Overall, the Respondent's professional conduct record reveals that both of his conduct reviews (April 1, 2004 and September 8, 2005) and two previous citations (November 20, 2002 and October 18, 2010) relate to incivility. Accordingly, this is the fifth time that the Respondent has faced some sort of discipline process for incivility.

[41] We find the Respondent's prior discipline record a significant aggravating factor.

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

[42] As noted above, on May 15, 2013, the Respondent provided an apology letter to the Law Society stating:

> It was not appropriate for me to say these words. I never had any intention to "get a crowbar and smash up the place" or to do anything like that at all. I was attempting to express my frustration and to urge the police to attend by using sarcasm. At the time, I believed that it was obvious that my words would not be mistaken to be a real threat, and I do not think they were perceived as such. However, I acknowledge that the words I used could have led to my intention being misconstrued and I am sorry for that.

[43] The Respondent has not, however, apologized for raising an alarm to convince the police to attend.

[44] This factor does not weigh significantly in the Panel's decision.

The possibility of remediating or rehabilitating the respondent

[45] The Respondent underwent 36 counselling sessions for anger management issues with Dr. Ravvin between October 22, 2013 and October 2, 2014 and attended two follow-up sessions on January 27, 2017 and December 4, 2017 according to the report of Dr. Ravvin dated December 22, 2017.

[46] Dr. Ravvin confirms that the Respondent made good progress addressing his mood and anger issues.

[47] Counsel for the Respondent points out that the Respondent's counselling has worked and that he has not had any conduct reviews or citations issued since he underwent counselling.

[48] This is a significant mitigating factor.

The need for specific or general deterrence

[49] Both specific and general deterrence are factors for the Panel to consider.

[50] The Respondent submits that there is no need to be concerned about specific deterrence as the Respondent has learned from his counselling sessions with Dr. Ravvin. In our view, there is insufficient evidence before us to determine what effect the counselling sessions have had on the Respondent's conduct. Further, the Respondent's professional misconduct in this case was not the result of a momentary, unintended, angry outburst, but was in fact a calculated, intentional statement. As noted, however, there is no evidence that the Respondent has had any further discipline hearings or conduct reviews for "incivility" since his completion of counselling with Dr. Ravvin in November 2014.

[51] General deterrence is an important consideration. In *Johnson* at paragraph 19(k), general deterrence was held to be a significant factor in the context of incivility:

> The profession must know that courtesy, civility, dignity and restraint should be the hallmarks of our profession and that lawyers must strive to achieve such. The profession should also know that a marked departure from such standards will be sanctioned.

[52] It is the view of this Panel that we must communicate to the profession that this type of statement made by a lawyer in order to get his way is not acceptable.

The need to ensure the public's confidence in the integrity of the profession

[53] The public needs to have confidence in lawyers. The Respondent's conduct undermines the public's confidence in the integrity of the profession. We consider this to be an aggravating factor.

The range of penalties imposed in similar cases

[54] We have reviewed all of the authorities provided by the parties and find the cases of *Foo* and *Johnson* are the most similar to the case before us. In *Foo*, the lawyer made a statement at the courthouse that he should "shoot" the social worker. Mr. Foo, unlike the Respondent, was found not to have considered the impact of his words in advance. In terms of Mr. Foo's professional conduct record, he had a previous citation and three prior conduct reviews, which the panel found was a significant aggravating factor. The panel in *Foo* imposed a two-week suspension.

[55] In *Johnson*, the lawyer swore at a police officer at the courthouse. Mr. Johnson had an extensive discipline record including a previous 30-day suspension for incivility. Mr. Johnson had suffered from addiction issues that related to some of his discipline history. The panel imposed another 30-day suspension, but indicated it would have imposed a longer suspension of two months or more but for the fact that the police officer was found to have provoked Mr. Johnson (*Johnson*, para. 12).

[56] In this case, the Crowbar Comment was not made at a courthouse nor was it intended to be a threat. However, the Respondent made the statement unprovoked while acting in his capacity as a lawyer with the intention to cause the police to escalate the priority of his call.

[57] At the same time, the Respondent has not previously received a suspension for misconduct as in *Johnson*. As well, the Respondent before us has taken extensive counselling following his citation in 2012 and has not been cited further since receiving counselling in 2013 to 2014.

CONCLUSION AND ORDER

[58] In balancing the relevant factors and considering the range of sanctions in other cases, we find that the appropriate discipline in this case is a three-week suspension, to commence on a date agreed to by both counsel but not more than five months from the date of this decision. If counsel are unable to agree to the date of the commencement of the suspension, counsel can make written submissions within 15 days.

COSTS

[59] The Law Society seeks an order that each party bear its own costs of the facts and determination hearing and the Law Society receives the costs of the sanction hearing.

[60] In this case, the Law Society initially alleged five counts of professional misconduct against the Respondent. It then amended the citation to allege only three counts. The hearing panel dismissed all three counts. On review, the majority found the Respondent had committed professional misconduct with respect to one of the three counts.

[61] The Respondent submitted that he was "successful" on two of the three counts (or four of five, if the original citation is considered). The Respondent sought to be awarded one-third of the costs, excluding the sanction hearing. In the alternative, the Respondent submitted that the parties should bear their own costs, with the exception that the Respondent should pay the costs of the court reporter for the sanction hearing.

[62] In *Law Society of BC v. Dunnaway*, 2000 LSBC 2, [2000] LSDD No. 29, as in this case, there was divided success at the facts and determination phase; however, the respondent was ordered to pay the Law Society costs for the sanction hearing.

[63] The main focus at this sanction hearing was on whether a fine or suspension was appropriate, and the Panel has ordered a suspension.

[64] The Panel therefore orders the Respondent to pay costs in the amount of $4,744.79 for the sanction hearing and that each party bear its own costs of the facts and determination hearing. Unless the parties agree otherwise, the Respondent must pay the costs award on or before June 30, 2018.