2018 LSBC 13
Decision issued: April 20, 2018
Citation issued: October 20, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MALCOLM HASSAN ZORAIK

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	January 19, 2018
Written submissions:	January 25, 2018, February 1, 2018 and February 8, 2018
Panel:	Sandra Weafer, Chair Satwinder Bains, Public representative Sharon D. Matthews, QC Bencher[1]

Discipline Counsel:	Jaia Rai
Counsel for the Respondent:	Russell Tretiak, QC

INTRODUCTION

[1] On September 26 2017 this Hearing Panel found that Mr. Zoraik's conduct in relation to his criminal convictions for fabrication of evidence and public mischief amounted to professional misconduct, and that the matter should not be stayed on

[1] Ms. Matthews, QC, did not participate in the preparation of these reasons and was not a member of the panel as of February 27, 2018. As of that date, Ms. Weafer is chair of the panel.

the basis of delay. This hearing is to determine the appropriate disciplinary action in respect of that misconduct.

[2] These disciplinary proceedings are in furtherance of the obligation of the Law Society to govern the legal profession in the public interest by ensuring the independence, integrity, honour and competence of lawyers. As such, the purpose of our job in determining the appropriate disciplinary action is to act in the public interest, maintain high professional standards and protect the public confidence in the legal profession rather than to punish any offender.

[3] The position of the Law Society in this matter is that the appropriate disciplinary action is disbarment. Counsel for Mr. Zoraik says that, in the circumstances of this case where Mr. Zoraik has not been practising law since the events of 2009 and where he has been rehabilitated, a reprimand is the appropriate sanction.

[4] We have determined that the appropriate disciplinary action in this case is disbarment for the reasons that follow.

FACTS

[5] We summarized the background to the events leading to Mr. Zoraik's conviction in our decision on Facts and Determination (*Law Society of BC v. Zoraik*, 2017 LSBC 34). We reproduce them below. These facts were supplemented at this hearing by testimony from witnesses, including Mr. Zoraik.

> **Background to criminal convictions**
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> [2] In April 2009 Mr. Zoraik acted for the plaintiff in a personal injury lawsuit. This was a jury trial where liability was contested. On April 28, 2009 the jury returned a verdict for the defence, after about 20 minutes of deliberation. That same day Mr. Zoraik, on behalf of the plaintiff, applied to set aside the verdict due to the brevity of the deliberations. That application was adjourned to May 13, 2009 and later to July 30, 2009.
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> [3] On May 6, 2009 an envelope was placed on a counter in the Sheriff's office at the Victoria courthouse. The envelope contained a letter purportedly written by the husband of a juror who claimed that his wife, the juror, had been offered money for her vote. The allegations in the letter were false. Mr. Zoraik was the author of the letter and placed the letter in the Sherriff's office.

> [4] Mr. Zoraik was interviewed by Victoria police on June 18 with respect to the letter. He feigned any knowledge of the letter. He then sought to obtain the Victoria police file with respect to the matter, ostensibly for use in his application to set aside the jury finding. In the Agreed Statement of Facts filed in this matter, Mr. Zoraik agrees that he knew that the letter was likely to become evidence in the application to set aside the jury finding, and he agrees that he sought to have the court rely on the letter.
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> [5] Mr. Zoraik was charged on July 20, 2009 with public mischief, obstruction of justice and fabrication of evidence. He was found guilty on all counts on June 14, 2010, and on November 2, 2010 he was sentenced to a conditional sentence order of 18 months. (A judicial stay was entered on the obstruction of justice charge applying *R. v. Kienapple*, [1975] 1 SCR 729). An appeal to the BC Court of Appeal was dismissed on June 26, 2012.
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> [6] Mr. Zoraik admits that the findings of the BC Court of Appeal are conclusive proof of the findings made by the court. The Court of Appeal found that the convictions were "firmly grounded in compelling evidence which, when accepted by the judge, formed a solid evidentiary basis for the convictions." (*R. v. Zoraik*, 2012 BCCA 283 at para. 38)

[6] The allegations in the citation were admitted by Mr. Zoraik. As such, our decision on Facts and Determination dealt largely with the question of the delay between the events in 2009 and the hearing on facts and determination in 2017. We made the determination that the matter should not be stayed as a result of delay and that the facts supported a finding of professional misconduct.

HEARING ON DISCIPLINARY ACTION

[7] The hearing on disciplinary action took place on January 19, 2018. We heard from two witnesses: Mr. Troy De Souza and Mr. Zoraik. In addition we referred to reference letters by persons who know Mr. Zoraik.

[8] Mr. Zoraik grew up in Mogadishu, Somalia. In high school he became involved in student protests against the government, which was then ruled by a military junta. His family was fearful for his safety, and so he fled the country to Saudi Arabia, where he stayed for two years. He came to Canada as a refugee. He undertook

significant training in English as a second language. He also speaks Somali and Arabic.

[9] In 1991 he graduated from Simon Fraser University with a degree in political science. He and his wife were married the following year and have one son.

[10] Mr. Zoraik was interested in going to law school but could not afford it. He used his ability to speak Somali and Arabic to work as an interpreter and a translator for the Immigration Refugee Board and in other justice system proceedings. He also worked as a social services worker for the Surrey Community Resource Society. He supplemented his income and financed his eventual legal education by driving a taxi.

[11] In 1997 he was accepted into the Faculty of Law at the University of Victoria. The family moved to Victoria from White Rock. After law school, Mr. Zoraik articled with Gordon and Velletta in Victoria and concluded his articles at Cardinal Emberton Rusk Carfra where he stayed as an associate for two years after his articles. He became a sole practitioner in 2003 under a space-sharing arrangement with Mr. Brock Emberton. That arrangement lasted until 2010 when Mr. Zoraik was required to stop practising due to the events that led to his criminal conviction and this citation.

[12] His practice from 2003 to 2010 was focused on personal injury, family law, immigration law, employment law and some general civil litigation. Prior to the events that led to this citation he was active in the Victoria Bar Association, and he volunteered with the Victoria Immigration and Refugee Society. He was also a soccer coach in the community and was involved in several fund raising activities. He and his wife bought a house, which they tore down and rebuilt into a home that they were very proud of.

[13] Mr. Zoraik did not testify about the incidents that gave rise to this citation, namely the falsified letter and his plan to use it in the civil proceedings. Rather, his evidence was about the aftermath of the criminal charges and conviction.

[14] He testified that, after the conviction, he gave an undertaking not to practise law and his life changed. He described a difficult dark time where he fell into depression. He sought treatment, and although he could not afford the psychiatric treatment, his doctor arranged for a colleague to treat him on a pro bono basis. He engaged in that treatment until he left Victoria in 2012. Due to his practice being wound up, he began driving a taxi again. He described that his wife had to work very hard to supplement the mortgage insurance that was paying their mortgage, and he felt very bad to see the impact that his inability to earn a living had on her.

[15] At the time of the conviction, Mr. Zoraik's son had just graduated from high school. Mr. Zoraik attended the graduation and was humiliated because of the public press pertaining to his convictions. He described his son as putting on a brave face, but he said that he could tell that he was devastated. He said that his son went into a long period of time where he gave up on everything. He started university but dropped out and did not do much between 2010 and 2014. This also took its toll on his wife as she could see her son's situation deteriorating.

[16] In 2012 they lost their home to foreclosure. He ultimately had to declare bankruptcy and was discharged in 2015. In 2012 Mr. Zoraik and his wife left Victoria so he could pursue graduate studies in law. He received a scholarship to attend a university in Arizona but was not able to do so because of his convictions, so ultimately they moved to Toronto where he attended Osgoode Hall and completed a Master of Laws in 2013. He drove a taxi while attending the Master's Program. He applied to the Law Society of Upper Canada (as it was then known) but given that at the time his status in British Columbia was that of a disbarred lawyer[2], he was required to article.

[17] He articled for five months and wrote the bar examinations in Ontario. The Law Society of Ontario (as it is now known) will determine whether he is qualified to be enrolled as a barrister and solicitor subsequent to these proceedings. When he finished his articles and wrote the bar exams he continued working at the firm where he articled, Doli Law, in a capacity that is described as under supervision of one of the lawyers at the firm. His goal is to be admitted to the Bar in Ontario.

[18] On a personal level he wants to make things right for his family and to be a good example to his son by showing resiliency. He wants the chance to prove to the community at large and to society that he can be a better person. He says that he accepts the nature and gravity of the offences for which he has been convicted. The consequences have been terrible for himself and for his family. He says his son has paid a very heavy price. He says that he has learned a great deal and that he is a better man today.

[19] In addition to his work with immigrants at Doli Law, Mr. Zoraik volunteers in the Somali community. At present he is working on an initiative to establish a mentoring program for Somali immigrants to help them to adjust to Canadian society and become contributing members. He also volunteers with a Law Society

[2] At that time, Mr. Zoraik had been disbarred by the Law Society of British Columbia pursuant to a summary hearing under what was then Rule 4-40. That decision was overturned by the British Columbia Court of Appeal and ultimately a citation was issued leading to these proceedings. See 2017 LSBC 34, paras. 9 to 14.

of Ontario program called "Lawyers Feed the Hungry", which involves serving hot meals to homeless people three times per week.

[20] Mr. Zoraik's evidence was that he accepted the Provincial Court verdict pertaining to his convictions (and the decision of the Court of Appeal to not overturn the conviction). However, he acknowledged that he had never spoken with Mr. De Souza or any of the other persons who have provided character references about the details of the false letter he wrote and how he attempted to use it. He was asked on cross-examination about the fact that he had not testified about why he did these things. He explained that he should not be judged on one event in his life when he had led a life free of any contraventions prior to that event.

[21] Mr. De Souza is a lawyer who practises in Victoria, British Columbia and has done so for about 20 years. He has known Mr. Zoraik through bar functions, including the Victoria Bar Association, since about 1999. Over the course of their acquaintance they became professional colleagues as well as friends, and Mr. De Souza says that he also became friends with Mr. Zoraik's wife, Yasmin, and the Zoraiks' son.

[22] With regard to Mr. Zoraik's reputation in the legal community, Mr. De Souza said that Mr. Zoraik was likeable and personable. He was active in the Vancouver Island Immigration Refugee Society, and the people with whom he interacted were glowing in their praise for the volunteer work that Mr. Zoraik did with that organization.

[23] Mr. De Souza became aware of the criminal charges against Mr. Zoraik that are related to this citation through the news in Victoria at the time. He said he did not address or question Mr. Zoraik on the charges in any detail. He saw it as his role as a friend to be supportive. In addition, his practice includes what he refers to as a law enforcement element, and for that reason he did not want to delve into the details. He attended the trial at Provincial Court on two occasions, and he testified as a character witness at the trial.

[24] From Mr. De Souza's perspective, Mr. Zoraik was very sorry for what had happened and accepted the verdict of the court. He worked to rebuild his life from that point forward. Mr. De Souza's evidence before this Panel concentrated on the difficulties Mr. Zoraik had in rebuilding his life, including the terrible financial burden for the family, and the impact it had on Mr. Zoraik's wife and son. In particular, both Mr. Zoraik's wife and son, from the perspective of Mr. De Souza, suffered setbacks in their own education and career aspirations as well as financial difficulties that resulted from Mr. Zoraik's loss of livelihood.

[25] Mr. De Souza described how Mr. Zoraik went from being a lawyer to driving a taxi to support his family and that the family lost their beautiful home. Mr. De Souza also described what he observed as Mr. Zoraik's son falling into a depression that held him back from pursuing post-secondary education for about four years. Eventually Mr. Zoraik and his wife moved to Ontario. At that time, Mr. De Souza kept in contact with him and visited with them and stayed with them on more than one occasion. He also visited Mr. Zoraik at his current place of employment in Etobicoke, Ontario, a law firm in which Mr. Zoraik was working initially as an articled student and now in a non-lawyer capacity while his application to be a member of the Law Society of Ontario awaits these proceedings.

[26] Mr. De Souza described his significant personal experience as an immigrant to Canada. He described the immigrant success story as the exception and not the rule. He was of the view that Mr. Zoraik's post-conviction steps to immerse himself in the law, pursue a Master's Degree and work towards being able to practise law again as remarkable. In his view Mr. Zoraik will never do anything like what he did to give rise to this citation. He had no doubt that Mr. Zoraik will conduct himself with utmost care. He said that Mr. Zoraik understood that what he did was wrong and improper and must never happen again. He was confident in these views, although he conceded that he had not actually spoken with Mr. Zoraik about the fabrication of the letter and the criminal offences with which he was charged. He based his view on the fact that Mr. Zoraik accepted the decisions of the courts pertaining to his conviction.

ISSUE

[27] What is the appropriate disciplinary action given of the options mandated by s. 38(5) of the *Legal Profession Act*?

THE LAW

[28] Pursuant to s. 38(5) of the *Legal Profession Act*, SBC 1998, c. 9, following an adverse determination such as that made by this Hearing Panel, we must do the following:

> (5) If an adverse determination is made under subsection (4) against a respondent other than an articled student or a law firm, the panel must do one or more of the following:
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> (a) reprimand the respondent;
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> (b) fine the respondent an amount not exceeding $50 000;

(c) impose conditions or limitations on the respondent's practice;

(d) suspend the respondent from the practice of law or from practice in one or more fields of law

  (i) for a specified period of time,

  (ii) until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection,

  (iii) from a specified date until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection, or

  (iv) for a specific minimum period of time and until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection;

(e) disbar the respondent;

(f) require the respondent to do one or more of the following:

  (i) complete a remedial program to the satisfaction of the practice standards committee;

  (ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;

  (iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;

  (iv) practise law only as a partner, employee or associate of one or more other lawyers;

(g) prohibit a respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2) (a) or 17 (1) (a) from practising law in British Columbia indefinitely or for a specified period of time.

FACTORS TO CONSIDER

[29] In order to determine the appropriate disciplinary action in this case the Panel should consider factors in four broad non-exhaustive categories of factors. These are:

(a) Nature and gravity and consequences of the conduct;

(b) Character and Professional Conduct Record of the respondent

(c) Acknowledgement of the misconduct and remedial action;

(d) Public confidence in the legal profession.

(*Law Society of BC v. Dent*, 2016 LSBC 5)

Nature and gravity of the offence

[30] In this case, the nature and gravity of the offence call for a severe sanction. There is no dispute that this was a serious offence. Mr. Zoraik not only forged a letter indicating that the jury process in his client's trial had been tampered with, but he also sought to rely on that forged letter as evidence before the court in order to attempt to set aside the jury verdict. As the sentencing judge said in his reasons, his actions are "so contrary to his oath, to his professional responsibility, that they remain what they are: planned actions, actions that can only be described as despicable."

(Reasons for sentence of Brooks PCJ, November 2, 2010, para. 14)

[31] To his credit, Mr. Zoraik does not seek to minimize the seriousness of his offence. In his testimony before this Panel he accepted that the offence was very serious.

Character and Professional Conduct Record of the respondent

[32] Mr. Zoraik submitted numerous letters of support in addition to the testimony of Mr. Troy DeSouza. These character references, from members of the Ontario Bar, from Mr. DeSouza and from a doctor who has known Mr. Zoraik socially for more than a dozen years, refer to Mr. Zoraik as someone who is of good character and who has learned from his mistake. They refer to his efforts since the conviction – obtaining his LLM degree, re-articling and working as a licensing prospect in Ontario. They highlight his volunteer activities and the contribution he is making to the Somali community in Ontario. All of this is laudable. The concern,

however, is that many of these same positive things could be, and were said of Mr. Zoraik's character before the events giving rise to his conviction. He was described as "professional and honest" in his dealings with clients. Mr. DeSouza spoke of Mr. Zoraik's involvement in the Victoria bar prior to his conviction and the assistance he provided to the refugee community in Victoria. Mr. Zoraik testified, and Dr. N wrote, about his volunteer activities in Victoria, including his role as a soccer coach. It is hard to place great weight on character references when, notwithstanding what appeared to be good character before, this misconduct still occurred.

[33] In addition, in the face of such serious misconduct, we place less weight on character witnesses. As the review panel stated in *Law Society of BC v. Hordal*, 2004 LSBC 36 at para. 69 "

> It is clear that this is a very popular member of the community Bar in which he practices. It is however also true that he has significantly impaired the reputation of the legal profession in that community by this conduct. That misconduct must be identified, criticized and penalized in an appropriate manner.

Acknowledgement of misconduct and remedial action

[34] Mr. Zoraik has accepted the court's findings and agreed that, subject to our determinations on delay, his conduct constitutes professional misconduct. He signed an undertaking not to practise after the criminal charges were laid, and he has not practised in BC since then. After his move to Ontario he obtained his LLM and re-articled. (In Ontario the "fitness" test is done after articles and prior to admission as a lawyer. This contrasts to BC where fitness is considered at the time of an application to enrol in the admission program.) Once this discipline process in BC is completed, he will have to go through an admissions hearing in Ontario if he wishes to get called to the bar there.

[35] Mr. Zoraik appeared sincere in his testimony about his desire to demonstrate that he is a better person now, to make things right for his family, and to be a good example for his son. We appreciate that he is taking positive steps toward those ends, albeit with no explanation for what caused his misconduct in the first place. However, this Panel places more significance on the nature of this misconduct and the importance of maintaining public confidence in the legal profession and the disciplinary process.

Public confidence in the legal profession

[36] As set out above, disciplinary proceedings such as this are in furtherance of the obligation of the Law Society to govern the legal profession in the public interest by ensuring the independence, integrity, honour and competence of lawyers. A lawyer committing any criminal offence is serious; however, this Panel views this type of offence – an offence against the administration of justice – as requiring the most severe sanction. Mr. Zoraik was an officer of the court and duty bound to uphold the administration of justice, but instead he abused that position and fabricated evidence that he then sought to use to mislead the court.

[37] Any sanction that we impose should be within the range of penalties imposed in similar cases. Fortunately, there are not a large number of previous cases where a lawyer has committed a Criminal Code offence that is designed to subvert the administration of justice. We were however referred to a small number of analogous cases.

[38] In *Law Society of BC v. Mastop*, 2013 LSBC 37, the respondent lawyer obtained an Information to Obtain (ITO), filed by the police to support a search warrant relating to one of his clients. An ITO can reveal sensitive information, including information from informers. Mr. Mastop provided this ITO to another client, a member of a criminal organization who wanted to determine who the informer was. Mr. Mastop's conduct was seen as undermining the system of justice and "a deliberate attempt to assist a criminal organization in committing an indictable offence." Mr. Mastop was disbarred.

[39] Another analogous case is *Law Society of Upper Canada v. Li*, 2010 ONLSHP 6. In that case the lawyer was convicted of three counts of trafficking. He used his position as a lawyer to get narcotics to an inmate client. Lawyers were not searched by jail staff and were allowed to meet with clients alone in an interview room. In the criminal trial, the judge found that the lawyer used his position of trust as a barrister and solicitor to facilitate the offence. The Law Society Tribunal in Ontario found he should not be permitted to surrender his licence, and he should instead be disbarred. We note that, in that case, the disbarment took place six years after the conduct in issue.

[40] This Panel is aware that there are cases, referred to us by the parties, where lawyers have been convicted of criminal offences related to the administration of justice that did not result in disbarment, including *Law Society of Upper Canada v. Maroon*, 2005 ONLSHP 21 and *Law Society of Alberta v. Randhawa*, [1996] LSDD No. 283. These are cases where lawyers perjured themselves, and based on the evidence in each case, it was determined that suspensions (of six months and

two years respectively) were appropriate. It is this Panel's view that Mr. Zoraik's conduct was more serious and is therefore deserving of a more serious penalty. In addition, we are guided by the decision of the benchers in *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 60: where there is a conflict between the factors of rehabilitation of the lawyer and protection of the public, protection of the public will prevail.

[41] Counsel for Mr. Zoraik also referred us to credentials cases where individuals were seeking to become members of the Law Society, either for the first time or after a previous disbarment. We find those cases to be of limited utility in the disciplinary context. Disciplinary hearings are focused on determining an appropriate sanction for conduct that has occurred. The individual's current good character is a factor to be considered but not the focus of the inquiry. Applications for admission or readmission are more focused on current good character, while taking into account the events in issue and the sanction that was imposed for the conduct. We understand that Mr. Zoraik has a pending application for admission in the Law Society of Ontario. He will be given the chance in the context of that hearing to convince a panel that he is currently of good character.

DECISION

[42] For the reasons set out above, we order that the Respondent, Malcolm Hassan Zoraik, be disbarred.

COSTS

[43] Counsel for the Law Society is not seeking costs in this matter due to the unique circumstances of this case. The general rule is that costs are to be awarded to the Law Society if the citation is proven. Mr. Zoraik was originally ordered disbarred after a Rule 4-40 hearing in 2013. That decision was set aside by the BC Court of Appeal in March 2015 (for a full discussion of the procedural history of this case, see our reasons on Facts and Determination), and this citation was ultimately issued. As Mr. Zoraik has had to defend the allegations against him in both the Rule 4-40 process and in this citation, the Law Society is not seeking costs. In the particular circumstances of this case we agree that costs are not appropriate. Pursuant to Rule 5-11 we exercise our discretion not to award costs.