2023 LSBC 13
Hearing File No.: HE20210010
Citation 1 Issued: June 3, 2021
Hearing File No.: HE20210081
Citation 2 Issued: December 13, 2021
Decision Issued: April 3, 2023

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

WILLIAM CAREY LINDE

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	May 13 and 14, 2022
Written submissions:	September 6, 2022
Panel:	Thomas L. Spraggs, Chair Brian Dybwad, Lawyer Guangbin Yan, Public representative
Discipline Counsel:	Morgan L. Camley, Lisa Marie Low and Melanie Power
Appearing on his own behalf:	William Carey Linde

INTRODUCTION AND PRELIMINARY MATTERS

[1] William Carey Linde (the "Respondent") is a senior lawyer with over 50 years of practice in British Columbia. The Law Society alleges that he committed professional misconduct as detailed in two citations alleging various breaches of court orders.

[2] The first citation was issued on June 3, 2021 (the "First Citation") and the second citation was issued on December 13, 2021 (the "Second Citation"). Throughout these reasons, the First Citation and the Second Citation are referenced collectively as the "Citations".

[3] The alleged professional misconduct relates to court order breaches arising from the Respondent representing two different clients who were engaged in two separate family law disputes relating to medical treatment of a child. One of the alleged court order breaches arose when the Respondent was representing a mother, known in a family matter as AM (the "AM Family Matter").

[4] The remainder of the alleged court order breaches or alleged professional misconduct related to a period where the Respondent represented a father known in the proceedings as CD (the "CD Family Matter"). The issues before the court were contentious between the parties and attracted a measure of media attention. CD was unsuccessful in opposing the method of medical treatment for the child. CD was ultimately arrested and imprisoned for intentional breaches of the same orders that the Respondent is alleged to have breached.

[5] The First Citation alleges that the Respondent engaged in professional misconduct as follows:

> 1. Between approximately May 2019 and November 20, 2020, in the course of representing CD in a family matter, you breached the terms of one or more of the orders made by the Honourable Mr. Justice Bowden on February 27, 2019 (the "Publication Ban") and by the Honourable Madam Justice Marzari on April 15, 2019 (the "Anonymization Order" and the "Protection Order"), by posting on-line, causing to be posted on-line or failing to remove from on-line, one or more of the documents itemized in Schedule "A", when you knew or ought to have known that doing so was contrary to one or more of the Publication Ban, Anonymization Order, Protection Order and rules 2.1-1(a) and 2.2-1 of the *Code of Professional Conduct for British Columbia*.
>
> This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act.*

2. In approximately May 2019, in the course of representing CD in a family matter, you breached the terms of the order made by the Honourable Madam Justice Marzari on April 15, 2019 (the "Protection Order"), by making one or more statements in interviews with media outlets that were reproduced in one or more of the documents posted on-line and itemized in Schedule "B", when you knew or ought to have known that doing so was contrary to one or more of the Protection Order and rules 2.1-1(a) and 2.2-1 of the Code of Professional Conduct for British Columbia.

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

3. On or about January 18, 2021, in the course of representing AM in a family matter, you breached the terms of an order made by the Honourable Mr. Justice Brundrett on November 17, 2020 (the "Brundrett Order"), by emailing a copy of the Brundrett Order and a related sealing order to the editor of a legal publication when you knew or ought to have known that doing so was contrary to one or more of the Brundrett Order and rules 2.1-1(a) and 2.2-1 of the *Code of Professional Conduct for British Columbia*.

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

[6] The Second Citation alleges that the Respondent engaged in professional misconduct as follows:

1. On or about May 15, 2021, in the course of representing CD in a family matter, you provided information about a person's gender identity, physical and mental health, and mental health status or treatments, to an American media outlet during a recorded interview, when you knew or ought to have known that one or more of the terms of CD's Release Order of April 30, 2021 prohibited CD, either directly or indirectly through a third party, from transmitting such information, contrary to one or more of rules 2.1, 2.1-1(a), 2.2-1 and 7.5-1 of the *Code of Professional Conduct for British Columbia*.

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

2. On or about May 15, 2021, in the course of representing CD in a family matter, you gave a recorded interview to an American media outlet about a person's medical and personal information without making your participation in the interview conditional on the interviewer's agreement to adhere to the applicable

publication bans and anonymity orders, when you knew or ought to have known that:

(a) the Court had, in related proceedings, clarified that a person speaking about the case had an obligation to ensure that their audience was aware of both the existence of the publication bans and anonymity orders, and their obligation not to breach same; and/or

(b) approximately one month before the interview, Mr. Justice Tammen, in sentencing CD for criminal contempt following his conduct in breaching the publication bans and anonymity orders, found it an aggravating factor that CD targeted American media outlets for the purpose of speaking about the case, contrary to one or more of rules 2.1, 2.1-1(a), 2.2-1 and 7.5-1 of the *Code of Professional Conduct for British Columbia.*

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

PRELIMINARY ISSUES

[7] In *Law Society of BC v. Linde*, 2022 LSBC 12 and *Law Society of BC v. Linde*, 2022 LSBC 15, Bencher LeBlanc considered several pre-hearing applications and made the following orders relevant to this hearing:

[47] The Respondent's May 8, 2022, application for document production and responses to questions pursuant to Rule 5-4.3(1) is dismissed.

[48] The Respondent's March 14, 2022, application concerning alleged bias is abandoned.

[49] The application for an adjournment is denied. The hearing of Citation 1 and Citation 2 will be heard starting on May 16, 2022 and will be held in-person at the offices of the Law Society of BC.

[50] I grant the relief sought by the Law Society and amend my March 27, 2022 order on the following terms:

1. Any ruling or publication on this matter shall be redacted for confidential and privileged information, which includes anonymizing names or redacting information including but not limited to (the "Confidential Information"):

(a) The name of the Respondent's former client in proceeding *AB v. CD and EF*, BCSC, Vancouver Registry No. E190334 and No. CA46229 and *AB v. CD and EF*, BC Court of Appeal, Vancouver Registry No. CA46229 ("**CD**");

(b) The name of CD's child ("**AB**");

(c) The name AB's mother ("**EF**");

(d) The name of the doctor(s) that provided treatment to AB;

(e) The name of the Respondent's former client in proceeding *AM v. Dr. F.*, Vancouver Registry No. 2011599 ("**AM**");

(f) The name of AM's child ("**YZ**");

(g) The name of YZ's father ("**WX**");

(h) the name of the doctor(s) that provided treatment to YZ;

(i) any information that could disclose the identity of AB, CD, or EF;

(j) any information that could disclose the identity of YZ, AM or WX;

(k) any information or documentation relating to either AB's or YZ's gender identity, physical and mental health, medical status or treatments;

(l) the names of the interviewers and reporters to whom the Respondent disclosed any of the information set out in paragraphs (a) to (k) inclusive, and names of the news outlet the aforementioned individuals or reporters worked for or online publications the individuals are associated with to, and the title of the online publications; and

(m) any reference to the exact words of interviews given by the Respondent to the individuals or reporters and media outlets that disclosed any of the information set out in paragraphs (a) to (k) inclusive.

2. All documents and materials filed up to and including the date of this Order and thereafter shall be permanently sealed, subject to a further order of the Law Society Tribunal.

3. The hearing of Citation #1 and Citation #2 shall be closed to the public.

4. All parties are prohibited from publishing online or providing information to be published online copies of any documents filed in this proceeding that contains any of the Confidential Information.

5. All parties are prohibited from publishing online or permitting to be published online copies of correspondence between the named parties and correspondence received from the Law Society Tribunal.

6. The Respondent shall remove from his website, https://divorce-for-men.com/ and any other website that the Respondent has control over, any documents that contain the Confidential Information, including, the Schedules attached to Citation issued May 27, 2022.

[8] Relating to the application for bias, Bencher LeBlanc ordered in *Law Society of BC v. Linde*, 2022 LSBC 12 that any application pertaining to alleged bias was to proceed by written submissions. This application was held to have been abandoned, having received no submissions by the date required.

[9] The in-person hearing occupied two days: May 13 and 14, 2022 (the "Hearing"). On the first day of Hearing, the Respondent sought to re-address some of the issues addressed in the orders of Bencher LeBlanc. The Panel provided an oral ruling dismissing the preliminary application of the Respondent to reconsider an unofficial recording of the Hearing, the abandoned application for bias and re-opening the proceedings to the public.

Application to allow Unofficial Recording

[10] The Panel ruled that no unofficial recordings would be permitted. The Panel held that any attempt to make a personal recording of the proceedings was unnecessary as there was an official court reporter. Further, the Law Society provided extensive written materials, which factored against the utility of a real-time recording for counsel purposes.

Application to Re-open Closed Proceedings

[11] The Panel upheld the order closing the proceedings to the public made by Bencher LeBlanc. While the open hearing process is a fundamental value in a democracy, for the reasons articulated by Bencher LeBlanc, the Panel was satisfied with the limitations imposed to prevent harm, whether it be physical or emotional. The duty to do no harm is an important one, if not a paramount consideration.

Bias Application

[12] The Respondent is a senior member of the bar and was called in 1971. During his submissions, he recounted the difficulty of the case that gave rise to this proceeding and referred to "being accused of the possession of ideas for the purposes of trafficking."

[13] The Respondent introduced various documents into the Hearing, which contained four affidavits marked by consent as Exhibit 3. The materials contained in these affidavits comprise almost 350 pages of information. The Panel reviewed Exhibit 3 in detail.

[14] The content of the Respondent's documents contains various correspondence of communications with the Law Society and some corollary correspondence relating to the proceedings that give rise to the Citations. Some of the correspondence dates back to 1971. The thrust of the arguments relating to these documents is of long-standing bias by the Law Society towards the Respondent.

[15] The Respondent's evidence and his submissions respecting that evidence focused on an argument respecting the Law Society's bias against him. The essence of the Respondent's argument is of general bias by the Law Society against him over his career.

[16] The Respondent led oral evidence and tendered documentary evidence in this case about experiencing a two-day credentials hearing in 1971 before all the Benchers, and he made submissions about further suboptimal treatment relating to other prior complaint investigation processes. Of issue was the Respondent obtaining a library card for his dog while attending law school.

[17] The Panel accepts that the Law Society investigation process is not intended to be lawyer friendly. It is unpleasant to be investigated and accused of not meeting standards that all lawyers are expected to meet. The process is intended and designed to be fair.

[18] The mandate of the Law Society is articulated in s. 3 of the *Act* which sets out the objects and duty of the Law Society:

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,

(b) ensuring the independence, integrity, honour and competence of lawyers,

(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,

(d) regulating the practice of law, and

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[19] The Respondent's argument that the Law Society has treated him in a biased fashion, which should be considered by the Panel, is a non sequitur. The Law Society has presented a case, largely through a detailed Notice to Admit ("NTA"), which has presented compelling, cogent and convincing evidence of admitted breaches. In fact, as will be discussed further below, the Respondent admits to the majority of the breaches as alleged in the Citations and detailed in the NTA.

[20] The Respondent's submissions of bias are rejected. The Respondent has produced no evidence of bias in connection with the investigation of the conduct at issue in this proceeding.

SUPPLEMENTAL SUBMISSIONS RE: *HARDING APPEAL*

[21] Following the Hearing, the Court of Appeal provided reasons that could impact the earlier submissions of the parties. The Panel invited further submissions about the potential application of the Court of Appeal decision.

[22] The Panel sought further submissions related to the potential application of the Court of Appeal decision in *Law Society of BC v. Harding*, 2022 BCCA 229 (the "*Harding Appeal*").

[23] The Law Society submits that the recent Court of Appeal decision does not apply to the present case as the facts in the *Harding Appeal* are distinguishable.

[24] The Law Society submits that the *Harding Appeal* is about incivility in and out of the courtroom and the *Charter* right of freedom of expression. In the present case, the Law Society submits that the alleged misconduct relates to statements and information disseminated contrary to specific terms of court orders.

[25] The Respondent advances the position that the *Harding Appeal* affirms the need for *Charter* consideration in the analysis of adjudicating citations. This is specifically referred to at paras. 64, 139 and 141 of the decision:

> [64] As explained in *Groia v. Law Society of Upper Canada*, 218 SCC 29, a law society's task of proportionately balancing *Charter* values with the statutory mandate, means that it is important to determine whether the lawyer's impugned statements were made in good faith and on a reasonable basis.
>
> [139] Here, the LSBC Panel cited *Doré v. Barreau du Québec*, 2012 SCC 12 simply for the proposition that a lawyer has professional constraints when criticizing the justice system. It did not follow the approach mandated in *Doré*, that required it to engage in a proportionate balancing of the LSBC statutory mandate with the *Charter* values engaged by Mr. Harding's statements.
>
> [141] In the present case, the LSBC Panel erred in its approach by failing to consider the *Charter* values of expression that were at play in Mr. Harding's statements to Mr. Mulgrew. The LSBC Panel's decision did not consider Mr. Harding's expressive rights, the role of lawyers in holding all justice system participants accountable, or the public interest in being educated about legal matters and debating whether some legal principles should be reformed.

[26] The Respondent summarizes his position in relation to other binding jurisprudence from the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 and the consideration of "what is really going on".

[27] The Respondent characterizes "what is really going on" as "… I, as counsel in legal proceedings, took issue with an ideological agenda which, I believe, is damaging to children. The gender ideology at issue in those proceedings has become dominant within many powerful institutions, including governments, the courts and the LSBC. I am now targeted by the LSBC which is misusing its disciplinary powers to punish me for not adhering to the required ideological narrative."

[28] The Respondent further argues that the *Harding Appeal* applies by analogy because the admitted court order breaches were unintentional and inadvertent.

[29] We accept the position of the Law Society relating to the application of the Court of Appeal in the *Harding Appeal*. The Harding Appeal is distinguishable from the instant case because the communications at issue were not alleged to be contrary to

a court order. There were court orders in place restricting certain communication, which was not an improper infringement of free speech.

EVIDENCE

[30] At the Hearing, the Law Society introduced the detailed NTA dated March 31, 2022 spanning 42 pages with 193 propositions of fact. The Law Society provided and relied entirely upon the evidence contained in the NTA.

[31] Under Rule 4-28 of the Law Society Rules, a party may request that the other party admit the truth of a fact or the authenticity of a document for the purpose of the hearing if the request is made no less than 45 days before the hearing date. The Respondent admits that the NTA was served on the Respondent on April 3, 2022.

[32] In the Respondent's Response to NTA, the Respondent initially admitted all of the facts in the NTA, except for 13 specific admissions, which were further contextualized in submissions at this Hearing.

[33] The Respondent testified on his own behalf in a presentation that was mixed evidence and argument.

[34] In seeking findings of professional misconduct against the Respondent, the Law Society relied extensively on admissions obtained from the NTA.

[35] The Law Society declined cross-examination of the Respondent. Most of the Respondent's evidence and argument related to contextualizing the issues surrounding the admissions from the NTA. Details of the relevant arguments are considered further in these reasons.

ISSUES

[36] The Panel must determine:

(a) if the Respondent engaged in the conduct as alleged in the Citations; and

(b) if so, whether that conduct amounts to professional misconduct pursuant to s. 38(4) of the *Legal Profession Act,* SBC 1998 c. 9 (the "*Act*").

ONUS AND BURDEN OF PROOF

[37] The onus is on the Law Society to establish the facts underlying the allegations of professional misconduct, or some lesser form of misconduct, as the panel may find

(*Foo v. Law Society of British Columbia*, 2017 BCCA 151, at para. 63). The evidence must be clear, convincing and cogent. The onus of proof is on the Law Society to prove the allegations on a balance of probabilities. In other words, is it more likely than not that the allegations are true?

[38] Section 38(4) of the *Act* sets out the four adverse determinations normally available to a hearing panel: professional misconduct; conduct unbecoming a lawyer; breach of the *Act* or rules; and incompetent performance of duties undertaken in the capacity of a lawyer.

[39] The Law Society seeks findings of professional misconduct in relation to the Citations pursuant to s. 38(4) of the *Act*. The Law Society is not seeking any other finding except professional misconduct. If the Law Society does not prove professional misconduct, allegations in the Citations will be dismissed.

TEST FOR PROFESSIONAL MISCONDUCT

[40] "Professional misconduct" is not a defined term in the *Act*, the Rules or the *Code of Professional Conduct for British Columbia* (the "*BC Code*") and is contextual in its application. Professional misconduct has been considered in numerous decisions of this Tribunal and has been articulated in *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 144, as "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members."

[41] The review board in *Re: Lawyer 12*, 2011 LSBC 35, at para. 7 and 8, agreed with following:

> …the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

[42] In *Law Society of BC v. Harding*, 2014 LSBC 52, the hearing panel directs that emphasis should be placed on a view of the circumstances as a whole in determining whether given conduct rises to the level of professional misconduct. The panel states at para. 79:

> Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a 'mere mistake', 'inadvertence', or events 'beyond one's control' is not determinative. While such evidence is relevant as part

> of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds.

[43] The Law Society submits that the *BC Code* sets out the standards that lawyers in British Columbia are expected to meet in relation to their professional obligations.

[44] The Law Society seeks that the Respondent's conduct be found contrary to one or more of the following rules of the *BC Code*:

(a) rule 2.1 - Cannons of Legal Ethics;

(b) rule 2.1-1(a) - a lawyer's duty to the state;

(c) rule 2.1-2 - a lawyer's duty to courts and tribunals; and

(d) rule 7-5.1 - a lawyer's obligations when communicating with the media.

FACTS

The CD Family Matter

[45] This matter first came before a court on December 12, 2018. CD filed an application in the Provincial Court of British Columbia asking that AB be prevented from seeking certain medical treatment without CD's consent.

[46] The allegations in the Citations refer to the following court orders in the CD Family Matter:

(a) Justice Bowden's order dated February 27, 2019 referred to as the Publication Ban.

(b) Justice Marzari's orders dated April 15, 2019 referred to as the Anonymization Order and the Protection Order.

(c) Justice Willcock's order dated April 30, 2021 referred to as CD's Release Order.

[47] The allegations in the Second Citation also refer to the reasons of Mr. Justice Tammen in sentencing CD. Justice Tammen gave Oral Reasons for Judgment Re Sentencing for contempt dated April 16, 2021 (the "Sentencing Decision").

[48] Additionally, the allegations in the Second Citation refer to clarification by the Court "in related proceedings" but, does not include a description of which related proceedings.

[49] The Publication Ban as ordered by Justice Bowden included the following provisions:

> In these proceedings, including all applications associated with the proceedings, … The applicant young person shall be referred to as AB, his father shall be referred to as CD and his mother shall be referred to as EF
>
> The publication by any person of any information that may disclose the identities of AB, his father or his mother is prohibited.

[50] The Anonymization Order and the Protection Order as ordered by Justice Marzari included the following provisions:

> There shall be a prohibition against the publication in any document, broadcast, transmission or dissemination, of copies, hyperlinks or descriptions of previous publications containing non-anonymized party and witness names …
>
> … [T]he Respondent [CD] shall not directly or through an agent or third party share information or documentation relating to [AB's] sex, gender identity, sexual orientation, mental or physical health, medical status or therapies ...
>
> …
>
> This protection order will expire on April 15, 2020, subject to any extension issued by the court.

[51] The Publication Ban ordered by Justice Bowden on February 28, 2019 and the Protection Order of Justice Marzari dated April 15, 2019, were appealed September 2019 and reasons were issued by the Court of Appeal dated January 10, 2020 ("2020 Court of Appeal Reasons").

[52] In the 2020 Court of Appeal Reasons the Court altered and vacated some of the terms of the Publication Ban and the Protection Order. The terms that were

substituted in the Publication Ban did not alter the provision prohibiting publication of any information that would disclose the parties' identities. The Protection Order was replaced with a conduct order (the "Conduct Order"). The terms of the Conduct Order included the following:

> CD shall not, directly or indirectly through a third party, publish information or provide documentation relating to AB's gender identity, physical and mental health, medical status and treatments ...

The Conduct Order was also to remain in effect for one year commencing April 15, 2019. Consequently, the Conduct Order expired April 15, 2020.

[53] On March 10, 2020, CD appeared before Mr. Justice Tammen who ordered that the conduct of CD be referred to the BC Prosecution Service for consideration of initiation of criminal contempt proceedings.

[54] On April 16, 2021, Mr. Justice Tammen sentenced CD for contempt for breaching the various orders at issue in these proceedings (the "Sentencing Decision").

[55] On April 30, 2021, CD was released on bail pending the appeal of the Sentencing Decision. On that date Justice Willcock ordered in CD's Release Order:

> The APPELLANT shall not, directly or indirectly through a third party, publish, broadcast or transmit information or provide documentation relating to AB's gender identity, physical and mental health, medical status or treatments….
>
> The APPELLANT shall not directly or indirectly through a third party, publish broadcast or transmit any information or provide documentation information that could identify the parties referred to in this proceeding … including by repeating or otherwise making such information known in any forum, including in writing, orally, by any electronic medium, by telephone, or in person, in relation to these proceedings.

[56] On May 15, 2021, the Respondent gave an interview to a reporter who works for an American media outlet. The Respondent admits that he identified CD as his client and he referred to a medication taken by AB The Respondent admits that when he identified CD as his client and referred to the medication taken by AB he breached the terms of CD's Release Order, the Anonymization Order and the Publication Order.

[57] The Respondent gave evidence at the Hearing that he advised the interviewer that she could not use his client CD's, real name and she agreed to that condition. He

states that the interviewer's statement that the Respondent "made it clear that I could choose whether or not I would use his name in my reporting" was incorrect and stated that "I never told her that." The Respondent went on to state "I may have said that the rules or the laws in Canada are not extraterritorial, but she said she wouldn't do it, and I took her at her word." His evidence at the Hearing was consistent with the transcript of the interview and with what the Respondent told the investigator during the course of the investigation.

[58] The Law Society submits however that the Respondent made an admission at para. 158 of the NTA that "[t]he Respondent advised [the interviewer] that it was her choice whether or not to use CD's real name in the … Interview." and that the Respondent should not be permitted to withdraw that admission at the Hearing. For the reasons set out below, there is no need to address this evidentiary issue.

[59] In addition to the May 15, 2021 interview, there are seven other instances in about April, May, September 2019 and November 2020 where the Respondent shared information relating to AB's sex, gender identity, medical treatment and diagnosis. The Respondent admits these breaches of the court orders although he gave evidence that he thought he had appropriately redacted one of the documents that was posted.

The AM Family Matter

[60] The Respondent was counsel for the mother in this matter and was present when Madam Justice Fitzpatrick made anonymization orders pertaining to the identity of the mother who was to be identified as AM and the child who was to be identified as SB.

[61] On November 17, 2020, Mr. Justice Brundrett ordered the anonymization of one of the defendants, to be referred to as Dr. F and that there was a publication ban on Dr. F's real name or contact information (the "Brundrett Order")

[62] The Brundrett Order stated as follows:

> That [the doctor] be identified by the pseudonym "Dr. F" in these proceedings including in any reasons for judgment;
>
> …
>
> A publication ban on the use of the name of [Dr. F's actual name] in connection with these proceedings and any related proceedings regarding SB's care and counselling. Publication of [Dr. F]'s contact information in

relation to this proceeding or SB's care more generally is also to be prohibited;

[63] On January 17, 2021, the Respondent emailed the editor of *The Advocate*, Michael Bain, KC, a copy of the sealing order and a copy of the Brundrett Order from the Supreme Court file. The style of cause on both orders sent by the Respondent to Mr. Bain, KC showed Dr. F's full name.

[64] The Respondent gave evidence at the Hearing that nothing he was sending to *The Advocate* was meant to be published. The Respondent had previously communicated with Mr. Bain, KC about the type of litigation at issue in the AM Family Matter. The Respondent felt that an exchange he had with the Court during submissions would be of interest to *The Advocate*. The Respondent sent the materials to Mr. Bain, KC to "verify what I was talking about, not with any intention of anything being published." The Respondent further clarified in his evidence that Mr. Bain, KC was a lawyer and as such he would understand that it would be a breach to publish the materials, or the information, subject to the publication ban in the Brundrett Order.

ANALYSIS AND LEGAL REASONING

Allegations in the Citations

[65] In allegation 1 of the First Citation, it is alleged that the Respondent breached the Publication Ban, the Anonymization Order and the Protection Order by posting, causing to be posted, or failing to remove, eight documents. The Respondent admits to the substance of the breaches of the court orders as alleged. He provided evidence at this Hearing respecting his attempts to redact one of the documents and remove documents that had been posted on-line.

[66] In allegation 2 of the First Citation, it is alleged that the Respondent breached the Protection Order by making statements in two interviews that were reproduced in postings online. The Respondent admits the breaches as alleged. In the interviews he referred to AB using pronouns, mentioned medical treatments and mental health information contrary to the terms of the Protection Order which stated that CD shall not directly or through an agent share information relating to AB's sex, gender identity, mental or physical health or medical therapies.

[67] Allegation 3 of the First Citation arose from the Respondent representing a different client in an unrelated family law dispute which involved similar facts and legal issues. The Respondent denies the breach of the court order as alleged in

allegation 3 of the First Citation. The Panel will discuss this allegation later in these reasons.

[68] In allegation 1 of the Second Citation, it is alleged that the Respondent breached CD's Release Order of April 30, 2021 when the Respondent provided information in an interview on May 15, 2021 about a person's gender identity, physical and mental health, and mental health status or treatments. The Respondent admits the breaches as alleged.

[69] In allegation 2 of the Second Citation, it is alleged that the Respondent gave the May 15, 2021 interview about a person's medical and personal information without making the interview conditional on the interviewer's agreement to adhere to the applicable publication ban and anonymity orders when he knew or ought to have known:

(a) The Court had clarified that when speaking about the case there was an obligation to make the audience aware of the publication bans, anonymity orders, and their obligation not to breach those orders, and/or

(b) Mr. Justice Tammen when sentencing CD for criminal contempt found it an aggravating factor that CD targeted American media outlets for the purpose of speaking about the case.

[70] The Respondent denies the underlying facts as alleged in allegation 2 of the Second Citation. The Respondent gave evidence that prior to giving the May 15, 2021 interview, he explained the publication bans and anonymity orders and the interviewer agreed to not publish CD's name.

[71] The Law Society alleges that the Respondent deliberately engaged in "misgendering", a term that is the continued ignoring of a person's chosen pronouns addressed to their assigned biological birth. While the topic may be controversial, the Panel need not address or, by any means, reconsider the scope of the controversy as that has been articulated through all levels of courts in British Columbia.

[72] The issue before the Panel is narrow and focused. As stated earlier, the question that must be answered is, do the admitted breaches of court orders constitute professional misconduct? This is the only relevant analysis that the Panel must consider.

[73] While the Respondent admits the underlying facts of much of the Law Society's allegations, he submits that the breaches were unintentional and should not be found as professional misconduct.

[74] The Respondent's position is that the admitted conduct should amount to conduct unbecoming. The Respondent submits that his admitted breaches were unintentional and had a "*de minimis*" impact in the sense of their consequences.

[75] While the Respondent used the term "conduct unbecoming" in his oral submissions, the Respondent indicated that he was unfamiliar with the four adverse determinations available to a hearing panel under s. 38(4) of the *Act*. The substance of the Respondent's submission was that his conduct did not amount to professional misconduct under the *Act*.

[76] While professional misconduct refers to conduct occurring in the course of the lawyer's practice, conduct unbecoming the profession refers to conduct in the lawyer's private life (*Law Society of BC v. Berge*, 2005 LSBC 298 para. 77). It is clear from the evidence that the conduct at issue in the instant case is conduct that occurred in the course of the Respondent's practice and consequently an adverse determination of conduct unbecoming the profession would not apply.

Allegations 1 and 2 in the First Citation and Allegation 1 in the Second Citation

[77] At the outset, these reasons address a simple yet paramount issue. Do the Respondent's admitted failures to comply with court orders, in the totality of the circumstances of this case, amount to a marked departure from the expectations and behaviours of lawyers in British Columbia?

[78] The Respondent admits the breaches in allegations 1 and 2 of the First Citation and allegation 1 in the Second Citation, but submits that they were not deliberate. The Respondent noted that in "49 years of practice I have never knowingly breached an order. I have never counselled anyone to do so." The Respondent also acknowledged that "when an order is made in a matter there is an obligation to abide by it". Any breaches were "mistakenly or unknowingly" made.

[79] There is no dispute that court orders must be obeyed until they are reversed (*Larkin v. Glase*, 2009 BCCA 321). In the following analysis, while inadvertent and innocent non-compliance of court orders may not always amount to professional misconduct, in most situations, they do. In this case, the non-compliance can be described as imprudent in some respects and entirely avoidable in others. All of the admitted infractions could have been avoided.

[80] The analysis by design is contextualized by the facts. *Martin* assists further:

> [170] The Panel finds that the real issue is not whether the behaviour complained of can be described as a single act, or a series of acts, and whether it is labelled as gross negligence or not.
>
> [171] The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.
>
> [172] In the circumstances, the Respondent's non-review of the accounts amounted to acting in a manner that was a marked departure from the standard expected of a competent solicitor; it is professional misconduct, because it was conduct which constituted gross culpable neglect in his duties as a lawyer, in particular, his duty to the public funder in this extraordinary case.

[81] The issue of complying with court orders is non-controversial. The Respondent is a lawyer who has been practising family law for 50 years. The Respondent outlined his initial involvement was pro bono for his client. The fundamental position of the Respondent's client was that when the child turned 19, the child could make up their own mind about any medical treatments. The series of court orders that flowed related to the disposition of the dispute over the wishes of the child to undertake medical treatment before the age of majority.

[82] What seems to have been a focus, at some point, was a further contextual complexity in that the subject matter of the court orders was in the emotionally charged sphere of family law.

[83] While family law, by its very nature, is intimately personal and often emotionally strained, there was further compounding intensity about the nature of the impact of the orders themselves. The issue of the particular medical treatment for individuals under parental care brought not only opposing views to the issue that gave rise to the orders, but views that carried a certain level of public attention to the proceedings and issues generally.

[84] The issue of the particular medical treatment is controversial. The issue may likely continue to be controversial. Lawyers should never be afraid to advance good faith arguments about any topic that serves their client's best interests, within the bounds of ethics, good faith and upon some legal basis. The issue before this Panel is not about advocacy on controversial issues, but how the fundamental expectations of

lawyers in a system that provides for certain expectations of behaviour must be met when the advocacy issues are determined by a court order.

[85] The attributes of an advocate inside the arena of a courtroom change when an order is pronounced. At that time, subject to appellate review considerations, the advocacy work of counsel is over. Court orders, subject to reasonable and prudent clarification, must be followed from pronouncement. Appeals of an order do not constitute a stay of the order unless otherwise ordered. These are elemental concepts for practising lawyers.

[86] When a lawyer ventures to make statements outside of the courtroom, and with the understanding that a court has ruled on the scope of what may be discussed, a responsible lawyer must take vigilant care to be compliant with the precise order pronounced. Where the order may be broad reaching, proportionate prudence must be exercised.

[87] By the very nature of the Respondent's admissions, there was insufficient care in the present case. Preventable court order breaches occurred. The Panel does not find that the Respondent breached with *mala fides*, but as he has indicated in his own submissions, excessive zeal. The Panel finds that this zeal should have remained in the courtroom and stopped when articulating the admitted breached orders was manifestly obvious.

[88] The Respondent's position is that the breaches were unintentional. The submissions and evidence of the Respondent are likely best summarized in his own words from the Hearing. The Respondent appeared to conflate an unintentional breach of an order with the severity of the consequences or the damages that result from the breach.

[89] Of particular insight is the Respondent's submissions during the Hearing on May 18, 2022. He noted that one of the websites that had documents posted that "shouldn't have been up there" had only about 137 visits after several months. The Respondent submitted the following about the court order breaches at issue:

> … I think the ones that I have been accused of doing are *de minimis* in the sense of their consequences.
>
> … what are the odds that this particular child in question is going to become aware of any of this?
>
> Because it must be remembered — and I don't expect you to have known all this. This particular child from grade 7 and grade 8 was in a school

> where for some time everybody knew …, this was not a secret to anybody anywhere in that community. There was always this assumption that, you know, [the child]'s got to be protected in a bubble.

[90] The Panel notes that the consequences of the breaches would potentially be relevant to a disciplinary action phase of the proceedings, but do not assist with respect to consideration of whether there was an unintentional breach of the court orders and whether that inadvertent breach amounts to professional misconduct.

[91] The Respondent admits his zealousness on this issue that gave rise to these proceedings. Zeal on issues in and of itself is well protected for advocates. As noted above, there is significant scope for advocacy so long as there is a good faith legal position to be advanced.

[92] Of consideration in this proceeding is the controversial subject matter that these orders dealt with. The word consideration is intentional because what follows in this analysis is that the potential for controversial topics or subject matters do not actually impact the way the standards are set out in the *Act* and the rules for lawyers to apply. In many respects, the legal system, by design, requires that it deal with difficult issues with difficult outcomes for various parties. The outcomes pronounced in the form of orders that a plain understanding of the word "order" would indicate, are things that must be followed. The rule of law cannot be a "choose your order to follow" endeavour. It flows further that where there is uncertainty, it is at the peril of the parties to seek conformity through clarification of the order.

[93] Consequently, there will be, from time to time, unintentional breaches of court orders. Innocent, good faith, misunderstandings of an order, or the unintentional breach of a court order, is quite excusable depending on the context of the breach.

[94] The plain meaning of intentional and deliberate becomes meaningful in the circumstances of this case. While the Respondent's client deliberately disobeyed the orders, the Panel finds that the Respondent did not. The word intentional is the best term for what the Panel finds the Respondent did here. Intentionality was present in the sense that the Respondent took a course of action that seemed to be a form of advocacy for his client at the time, but he was misguided as to the impact and non-compliance of court orders. The Panel accepts that the non-compliance, while not necessarily deliberate, was nevertheless intentional. Intentional in that the Respondent knew better and had he been more prudent, his breaches would have been avoided.

[95] The “what is really going on” test is that the Respondent, for reasons that he admits, did in fact breach court orders. The issue of intentionality can be articulated as the continuum of care that a reasonably prudent lawyer in similar circumstances would have performed. Regardless of the Respondent’s subjective intentions, avoidable breaches occurred.

[96] While the Respondent submits that the orders were inadvertently breached and that no harm resulted. It is however the potential harm that could flow from the breaches, as accepted by the court, that is exactly why the Respondent should have exercised more care. The protection of the public requires and expects lawyers to be held to these basic and fundamental practice principles for the administration of justice to function. Frequently, legal issues also have controversial social, political or moral principles or narratives associated with them, but a pronounced court order is never to be ignored or tread upon.

[97] The Respondent’s former client, at the time of the breaches, was dealing with a deeply personal family law dispute in his life. To give any specific consideration or weight to the controversial subject matter between the parties serves only to obfuscate the issue of concern about how a lawyer is expected to behave. There was serious, deliberate and intentional disobedience of the court orders by CD. Whether or not that directly or indirectly influenced the Respondent as counsel is irrelevant. Counsel are duty bound by the canons of legal ethics.

[98] The legal system, by necessity, is the forum in which difficult and often polarizing issues are wrestled with until final pronouncement is determined by the courts. As submitted by the Respondent, the key issue for the Respondent’s client was that his biological child was undertaking medical processes against his wishes. Strongly held opposing views are appropriate and should be expected in a free and democratic society. Unfortunately, at some stage prior to this Hearing, there were admitted breaches of the court orders by the Respondent.

[99] The Respondent made submissions that provide insight into the non-legal issues that surrounded the only issue of determination for this Panel, which is whether or not the finding, on the evidence as a whole, amounts to professional misconduct.

[100] There were a number of warnings from the court that would have alerted conscientious counsel as to the scope of expectations relating to the orders. For example, the Respondent was in attendance on June 25, 2019 when Justice Marzari issued a clarification stating: “I’m concerned that there was a misconception when this matter came before me in April and that the misconception is continuing, that as long as AB’s name is anonymized, that anything about AB’s medical history,

gender identity, sex, therapies, et cetera, deeply, deeply personal information to AB, could be published."

[101] The prohibition against publication was made against parties and any agents, including the Respondent. Under all of the circumstances, the Panel finds that the breaches of courts orders as alleged in allegation 1 and 2 of the First Citation and allegation 1 of the Second Citation amount to professional misconduct.

Allegation 2 in the Second Citation

[102] The Panel notes that allegation 2 as it is written in the Second Citation seems to impose a burden on the Respondent that is not clearly supported from the evidence presented at the Hearing. The allegation provides that the Respondent committed professional misconduct when he did the following:

(a) gave a recorded interview;

(b) to an American media outlet;

(c) about a person's medical and personal information;

(d) without making his participation conditional on the interviewer's agreement to adhere to the applicable publication bans and anonymity orders;

(e) when he knew or ought to have known:

(i) the Court had, in related proceedings, clarified that a person speaking about the case had an obligation to ensure that their audience was aware of the existence of the publication ban and anonymity orders, and/or

(ii) Mr. Justice Tammen, in sentencing CD for contempt, found it an aggravating factor that CD targeted American media outlets for the purpose of speaking about the case.

[103] As the Panel reads the allegation, it can be proven in three circumstances. The first circumstance is if all of the facts listed in paragraphs (a) to (e) are proven on a balance of probabilities. Alternatively, the allegation can be proven if all of the facts are proven but one of paragraph (e)(i) and paragraph (e)(ii) is not proven because of the wording "and/or". There must be clear, convincing and cogent evidence.

[104] Where the Law Society submissions are lacking are in relation to establishing that the Respondent had an obligation to make his participation in an interview conditional on the interviewer's agreement to adhere to the publication bans and anonymity orders. Furthermore, it is far from clear based on the evidence before the Panel that the Court had, in related proceedings, clarified that a person speaking about the case had an obligation to ensure that their audience was aware of the existence of the publication bans and anonymity orders. In addition, it is not clear based on the evidence before the Panel that Mr. Justice Tammen found it an aggravating factor that "CD targeted American media outlets".

[105] In the 2020 Court of Appeal Reasons the Court stated the following with respect to CD:

> This order should not restrict CD's right to express his opinion in his private communications with family, close friends and close advisors, provided none of these individuals is part of or connected with the media or any public forum, and provided CD obtain assurances from those with whom he shares information or views that they will not share that information with others.

[106] The circumstances being addressed by the Court of Appeal are distinguishable from the circumstances of the Respondent and his obligations. CD was not able to speak publicly because of the combination of the Publication Ban, Anonymization Order and the Protection Order. Under the terms of those orders the publication of any information that could identify CD was prohibited. Consequently, the 2020 Court of Appeal Reasons address whether the Publication Ban and the Protection Order violate CD's rights under the *Charter*. The Court found that CD's "right to express his opinion publicly and to share AB's private information to third parties may properly be subject to constraints aimed at preventing harm to AB." The Courts comments about CD obtaining assurances from others about not sharing information publicly was in the context of CD expressing his opinion in private communications with family, close friends and close advisors. Such comments do not apply to the instant circumstances.

[107] Accepting that the Respondent was an agent of CD and that the Respondent was himself directly bound by the Publication Ban, the Anonymization Order and CD's Release Order, there is an absence of clear and cogent evidence that the Court had, in related proceedings, clarified that a person speaking about the case had an obligation to ensure that their audience was aware of the existence of the publication band and anonymity orders.

[108] There is also a lack of clear and cogent evidence that Mr. Justice Tammen found that it was "an aggravating factor that CD targeted American media outlets for the purpose of speaking about the case." In the evidence before the Panel, Mr. Justice Tammen, in the Sentencing Decision, observed that the most serious breaches occurred when CD gave an interview to an organization which publishes online in the United States and stated "[m]ost importantly, two medical documents related to AB were provided to [the American organization] and posted online, where they remain accessible." Mr. Justice Tammen went on to say that "[n]either CD nor his counsel has ever explained the motivation to provide American online publications with AB's medical and personal information, knowing that it would be potentially posted online in perpetuity".

[109] Mr. Justice Tammen noted that CD had "blatantly, willfully, and repeatedly breached court orders, most particularly and disturbingly those related to the … publication bans covering things which might tend to identify the participants in this case." Furthermore, Mr. Justice Tammen observed "[i]t is difficult to conceive of a more egregious set of facts. The aggravating factors are numerous ..."

[110] Mr. Justice Tammen appears to focus on the aggravating factors that CD was intentionally and expressly breaching court orders particularly providing medical and personal information and information that would tend to identify the participants in the case. It does not follow from the evidence that the Respondent was obligated to obtain the interviewer agreement to adhere to publication bans because the Respondent knew of Mr. Justice Tammen's reasons in the Sentencing Decision. The Panel finds that it has not been proven that Mr. Justice Tammen "found it an aggravating factor that CD targeted American media outlets for the purpose of speaking about the case".

[111] The statements of Mr. Justice Tammen reinforce the importance of following the terms of the orders that were intended to protect AB's personal information and protect AB's identity. Allegation 2 of the Second Citation appears to distract from the central issue of whether the Respondent breached the Court orders protecting AB's identity and private health information.

[112] The Panel finds that the Law Society has not proven that the Respondent had an obligation separate from his obligation to not breach the court orders, to make participation in the interview conditional on the interviewer agreeing to comply with the publication bans and anonymity orders.

[113] Irrespective of this finding, the Panel should not be seen to be condoning the Respondent's actions in agreeing to the interview and not exercising meticulous care to ensure he did not share protected information. Particularly when the

Respondent was well aware of the court orders that prohibited sharing that information and that those orders applied to the Respondent directly. Also, the Respondent was well aware that CD was sentenced for contempt for breaching those orders and CD's Release Order specifically prohibited sharing the protected information directly or through a third party. However, the factual elements have not been proven for allegation 2 of the Second Citation as it is alleged.

[114] Given this finding, it is not necessary to decide whether the Respondent should be permitted to withdraw his admission at para. 158 of the NTA as the Panel has found that the Respondent did not have an obligation, separate from the Respondent's obligation to comply with the court orders, to obtain an agreement from the interviewer prior to the interview.

Allegation 3 in the First Citation

[115] The allegation is that the Respondent breached a publication ban when he sent an email to Mr. Bain, KC attaching a copy of the draft sealing order for the appeal file that identified Dr. F by name. The Brundrett Order ordered "a publication ban" on the use of the name of Dr. F in the proceedings.

[116] The Panel finds, based on the Respondent uncontroverted evidence, that he was discussing this type of litigation with Mr. Bain, KC the editor of *The Advocate*, and provided the requested information because he thought it would be of interest and not for the material to be published. The Panel finds that the Respondent acted reasonably in the circumstances when he presumed that Mr. Bain, KC as a lawyer would understand the meaning of the sealing order and would not inadvertently publish the materials.

[117] Upon considering all of the circumstances and on the plain meaning of the Brundrett Order, the Respondent did not publish the name of Dr. F when he emailed the documents to Mr. Bain, KC. The definition of "publication" found in the Canadian Oxford Dictionary (2nd ed. Don Mills (Ont.): Oxford University Press, 2004) is "the act or an instance of making something publicly known". Publication is defined in Black's Law Dictionary (St. Paul, Minnesota, West Corp., 6th ed., 1990) as "to make public; to make known to people in general." While there are circumstances in law, such as a libel claim, where sharing information with one person could be considered publication, those are not the circumstances of the current case. By sharing the materials with Mr. Bain, KC in these circumstances the Respondent has not breached the Brundrett Order as it is alleged in the First Citation.

[118] If the Panel is incorrect in finding that emailing Mr. Bain, KC did not breach the publication ban in the Brundrett Order, the Panel finds that any breach was an innocent, good faith, misunderstanding of the order, or an unintentional breach, that does not amount to a marked departure from the conduct expected of a lawyer.

[119] Of the two Citations, all of the alleged misconduct related to the issue of publication. In the First citation, in relation to allegation 3 there is a distinction that does give a different context to the earlier breaches. The Respondent contextualized the information he provided to Michael Bain, KC as editor of "The Advocate". The Advocate is a legal community publication, and it deals with issues that often involve issues of interest to the legal community. While it is a form of media, it is quite a different type of publication. The publication is nearly entirely centered around lawyers and issues affecting lawyers. Some distinction should come of that, and the Panel finds that it does.

[120] The Respondent submitted that nothing that the Respondent sent to Mr. Bain, KC and the Advocate was meant to be published. There was an interaction that attracted some specific considerations in the context of how counsel might be able to advance a distinct issue in advocacy. There was no evidence of publication and as Mr. Bain, KC is also a lawyer, there was a reasonable expectation that Mr. Bain, KC, would be in a position to consider the issues raised in the Court Orders.

DISPOSITION AND RESULT

[121] The Panel finds that the Respondent has committed professional misconduct in relation to allegation 1 and 2 of the First Citation and allegation 1 of the Second Citation. The Panel dismisses allegation 3 in the First Citation and allegation 2 of the Second Citation.