2005 LSBC 50
Report issued: November 16, 2005
Citation issued: October 20, 2003

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a section 47 review concerning

Re: Lawyer 5

Respondent

Decision of the Benchers

Review date: October 21, 2005

Quorum:
Majority decision:
Gavin Hume, Q.C.
Dr. Maelor Vallance
Patrick Kelly
Carol Hickman
Robert Brun, Q.C.

Concurring decision:
Gregory Rideout

Minority decision:
Bruce LeRose

Minority decision:
Gordon Turriff, Q.C.

Counsel for the Law Society: Gerald Cuttler
Counsel for the Respondent: Dennis Murray, Q.C.

Background

[1] This is a Review, pursuant to Section 47(1) of the *Legal Profession Act* on the record. The Review is brought by the Law Society, seeking reversal of the decision of the Panel below ordering anonymous publication.

[2] The report of the Panel, declining publication, was issued on April 4, 2005, following a hearing on March 9, 2005.

[3] The evidence at the Hearing and the decision of the Panel were contained in the Record as required by Rule 5-14(3) of the Law Society Rules. That Record comprised the following:

(a) An agreed statement of facts including admissions;

(b) Transcript of the proceedings;

(c) Affidavit and documents submitted by the Respondent.

[4] With respect to counts 1, 3 through 7, and 9 of the Amended Schedule to the Citation dated October 20, 2003, the Respondent admitted that his conduct constituted conduct unbecoming a member of the Law Society. The Counts alleged against the Respondent are:

> "1. That you took $15,000.00 from your client, D.H., in 1997 without documentation that these funds were gifted to you.
>
> 3. That you received trust funds from your client, D.H., but did not deposit them forthwith into a pooled or separate trust account, contrary to Rule 803.
>
> 4. That you failed to record each trust transaction regarding your client, D.H., within seven (7) days after the transaction, contrary to Rule 844 and Canon 3(8) of the *Professional Conduct Handbook*.
>
> 5. That you failed to record each non-trust transaction regarding your client, D.H., within thirty (30) days after the transaction, contrary to Rules 825, 843 and 844 and Canon 3(8) of the *Professional Conduct Handbook*.
>
> 6. That you co-mingled money belonging to your client, D.H., with your own money in a bank account, contrary to Canon 3(8) of the *Professional Conduct Handbook*.
>
> 7. That you failed to preserve adequately and keep safe valuables belonging to your client, D.H., by failing to maintain with your accounting records a complete listing of the valuables of this client in your custody, contrary to Chapter 7.1, Ruling 5 of the *Professional Conduct Handbook*.
>
> 9. That you accepted gifts totalling $30,000.00 from your client, D.H., in 1996 and 1997 when you knew that all or part of these gifts were derived from the funds which you caused to be removed from the Estate of J.M.H. for the use of your client, D.H., contrary to Chapter 2, Ruling 1, and Chapter 6, Rulings 1 and 2, of the *Professional Conduct Handbook*."

[5] The Respondent made a conditional admission and the Panel below accepted the admission and penalty pursuant to Rule 4-22.

[6] The Panel determined that the conduct was conduct unbecoming a member of the Law Society and determined that the jointly submitted penalty was appropriate. The penalty was as follows:

> (a) A reprimand
>
> (b) A fine in the amount of $3,500
>
> (c) Costs in the amount of $2,500

Both costs and fine are payable over a twenty-four month period.

[7] At the Hearing, the Respondent sought an Order pursuant to Rule 4-38.1 that the Respondent's name not be published and that the decision be published anonymously. The Panel below ordered that the publication not identify the Respondent.

[8] The actual publication contained errors. The Respondent and the Law Society have agreed on the revisions to be made to the existing Discipline Case Digest. The Panel understands that the appropriate corrections will be made in the appropriate manner and the corrections will be published in the usual manner.

[9] The Panel considered, in detail, the application by the Respondent that the publication of the Panel's decision not identify the Respondent. The application was opposed by the Law Society.

[10] Rule 4-38.1(3) provides as follows:

> (3) The panel may order that publication not identify the Respondent if:
>
> (a) the panel has imposed a penalty that does not include a suspension or disbarment; and
>
> (b) publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication.

[11] Rule 4-38.1(3) was amended in March of 2004 and has been the subject matter of an extensive review: *The Law Society of British Columbia* v. *Kevin Patrick Doyle,* (2005) LSBC 24, July 24, 2005.

[12] *Doyle, supra* , said the following with respect to Rule 4-38.1(3):

> "25. In analyzing whether the member is entitled to an order that his name not be identified the correct analysis required to be undertaken by the Panel is the following:
>
> (a) Firstly, the member must not be subject to a suspension or a disbarment. In other words, by necessary implication, the impugned behaviour must not be so serious as to have attracted penalties from the draconian end of the spectrum.
>
> (b) Secondly, the Panel must analyze what harm the member says he or another identifiable individual may suffer if his name were to be published. The harm must be so severe as to be characterized as grievous harm.
>
> (c) If the harm if found not to be grievous, that ends the matter.
>
> (d) If the harm in publishing the name is found to be grievous, only then does the Panel move on to weigh that grievous harm in publishing the name against the public interest and the Law Society's interest. Only if the grievous harm outweighs those two interests should the Panel exercise its discretion to grant an order directing that the member's name not be disclosed."

[13] The first issue under review was whether or not the Panel concluded grievous harm would occur if the Respondent's name was identified. Grievous harm was described in *Doyle, supra,* as follows:

> "26. What is grievous harm and when can it occur? This review Panel finds that grievous harm can only occur in rare and exceptional circumstances, taking it out of the ordinary, or beyond what one would reasonably expect in the circumstances. The focus is on the member's personal circumstances. In order to be grievous, the harm must be exceptional, unusual, onerous, and injurious to a member, and cause a member to experience catastrophic loss both personally and professionally. The harm must involve significantly more than damage to the member's reputation or embarrassment than would normally be expected to flow from being found guilty of professional wrongdoing."

[14] During this Review, counsel for the Law Society submitted that the Hearing Panel erred on this issue as follows:

> (a) It applied the wrong test in determining the issue of whether the "publication will cause grievous harm to the Respondent" as required by Rule 4-38.1(3)(b). Specifically, it erred by applying a test of whether there is a "possibility" of grievous harm (paragraph 16) and whether a reasonable member of the public would decide that publication "*could*" cause grievous harm (paragraph 24);
>
> (b) It found that the Respondent would suffer the "*possible* loss of a major client" and that this was

sufficient to establish "likely grievous harm" (paragraph 23), when on the evidence the Respondent's concern over losing the client is speculative.

[15] The scope of review applicable under Section 47 of the *Legal Profession Act* is broad. The test to be applied by the Benchers on Review is "correctness" . The evidence before the hearing panel was in the form of Affidavit evidence. The findings of fact of the Hearing Panel were not findings made on *viva voce* evidence though some of the findings appear to be based on statements of counsel at the initial hearing. As a result, this Panel is in the same position as the Hearing Panel, to weigh and consider the evidence, without the need for deference to the finding of facts.

[16] This Review Panel finds that grievous harm, as interpreted in *Re: Doyle (supra)*, would occur if the Respondent's name was publicized. The Panel reaches that decision on the basis of its review of the Affidavit of the Respondent and the other findings of fact set out in the decision under review.

[17] The Respondent is 67 years of age, having practiced law in British Columbia for 41 years with no history of discipline, with the exception of the decision under review. He is the sole source of support for his wife. They are not wealthy and maintain a mortgage and other expenses. In addition, his wife suffers multiple sclerosis and requires extra medication paid for by the Respondent for eight months a year. His principal, and essentially only client, is the [client], at a fixed retainer of $90,000 per year.

[18] On the evidence contained in the Affidavit and in the decision under review, the Panel concludes, on a balance of probability, and despite the fact that the breaches giving rise to the finding of "conduct unbecoming" occurred approximately eight years ago, the publication of the Respondent's name would create significant risk of the loss of this client.

[19] The Review Panel is of the view that it would not be possible to provide more cogent evidence of the risk associated with respect to the potential loss of a client than that provided by the Respondent. For example, it does not appear reasonable to expect to obtain an Affidavit from a public body or other evidence to the effect that upon the publication of the Respondent's name, it would terminate the solicitor/client relationship.

[20] The Respondent has been involved in public life and worked with public bodies for a major portion of his professional career and is in a position to appropriately inform this Panel of the risks associated with publication.

[21] The next issue, having found that the harm is grievous, is to weigh the grievous harm of publishing the name against the public's and the Law Society's interests.

[22] This Panel has concluded that the grievous harm outweighs these two interests for the reasons that follow.

[23] The activity which gave rise to the finding of conduct unbecoming occurred in 1997, some eight years ago. The Panel below describe the circumstances as follows:

> "21. Before the offence occurred, the Respondent's Law Society record was unblemished. The Panel concludes that the Respondent offered, with integrity, to the public, legal services that were honourable and competent. He contributed to his community and was Mayor of a small urban community at age 28. The Respondent met Dr. H as a colleague of the local Hospital Board. Over time the friendship of this meeting extended to the spouses and, as couples, their friendship and trust developed from the 1970's onward. It was only natural that Dr. H appoint the Respondent executor with the particular task of administering the life estate for Mrs. H. This description establishes the height from which a fall from grace could occur if this Non-Identity application were not successful.

22. The offence itself is set in the context of this friendship. The offence was a one time occurrence of Accounting Rules which did not in any manner benefit the Respondent. The Respondent's client was never at risk and nor was the public. All funds were accounted for. Throughout the Law Society's investigation the Respondent remained cooperative, helpful and open. The Law Society, for no adverse reason to the Respondent, took eight years to bring this matter to a hearing. During the eight year period, this 67 year old Respondent continued providing with integrity, the same honourable and competent legal services. The Respondent's 41 year practice has now developed to a point where he enjoys the retainer of one significant client for most of his fees.

23. The Respondent contritely admitted his wrong doing, was accordingly humbled and is obviously the wiser. If this Non-Identity Application is unsuccessful, then likely grievous harm, being loss of reputation, especially the possible loss of a major client, is certainly not a deserving ending to the Respondent's respected legal career."

[24] During the course of the hearing, counsel for the Respondent committed to provide the Respondent's principal client, the [client], with copies of the decision below and this decision. Subsequent to the Review, we were advised that, in fact, the [client] had already received a copy of the decision under review.

[25] In *Re: Doyle* the panel stated as follows:

"42. A fair, large and liberal construction of Section 3 of the *Legal Profession Act* and Rule 4-38 and 4-38.1 instructs the Benchers that it is not in individual lawyers'interests or lawyers'interests as a group that ought to serve as the focus of any inquiry regarding non-identification. It is a question of how lawyers fit in to the larger public society. The discipline activities of the Law Society of British Columbia and the results of its hearings, where adverse to members, are of large interest and instruction and even occasional notoriety. Nonetheless justice must be done and equally importantly, must be seen to be done. This can best occur only with publication of disciplined lawyers'names."

[26] This Panel agrees with that statement. However, the circumstances which resulted in Mr. Doyle's name being publicized differs significantly from these circumstances. In *Doyle*, the Panel summarized its view with respect to the facts which gave rise to the need to publicize as follows:

"… the Respondent appropriated to himself client monies remitted for the purpose of satisfying PST/GST obligations to the government over a twelve year period. This misconduct involved the misuse of public funds which is something of public interest in the broad sense."

[27] That offence was an ongoing offence over a twelve year period. In contrast, the Respondent engaged in some accounting breaches flowing from his close relationship with his client, some eight years ago. There cannot, in this Panel's view, be an ongoing public need to know the name of the Respondent, given the nature of the offence, the passage of time and the commitment to provide copies of the decisions to the main client of the Respondent. In addition, the public will know that a member was sanctioned for the accounting errors some eight years ago but that subsequently the Respondent has continued to practice in an exemplary way.

[28] In the view of this Panel, an eight year period between the offence and the decision, with exemplary practice during that period, is another cogent reason not to publicize the Respondent's name.

[29] Costs follow the event.

Concurring decision of Gregory Rideout

[30] I agree with the majority in relation to the disposition of this Review.

[31] In particular I agree with the majority of this Panel that an approximate eight year delay between the initial complaint until the discipline decision that was issued on the 4th day of April, 2005, is unreasonable and unjustified.

[32] I commence with the proposition that it is in both the public interest and in the interest of a member that complaints and any subsequent disciplinary action be dealt with expeditiously. Where there is a prima facie unreasonable or undue delay in that process such can result in unfairness. Indeed, while each case will turn on its own individual facts, there may be instances where delay becomes so oppressive as to otherwise engender an abuse of process.

Chronology

[33] I have reviewed with care the Affidavit of the Respondent sworn the 2nd day of March, 2005, which forms part of the Record of proceedings and which was filed in accordance with the Rules of the Law Society. Attached as an Exhibit to the Affidavit is a chronology which reveals that the Respondent was first contacted by the Law Society in relation to the complaint resulting in the issuance of a citation by correspondence dated the 15th day of April, 1997.

[34] As a result of the initiating correspondence the Respondent prepared a comprehensive response of some approximate 16 pages with 9 documents attached which package was forwarded to the Law Society on the 4th day of June, 1997. There was further correspondence between the Law Society and the Respondent over the next two months concluding with the Respondent providing a further 11 page response with documents attached which was forwarded to the Law Society on the 18th day of August, 1997.

[35] Thereafter, there was no further action apparently taken in relation to this matter until May of 2000, when an investigator with the Law Society attended at the office of the Respondent and performed a comprehensive analysis of office files. The materials reveal that the Respondent was fully co-operative with respect to this analysis.

[36] Upon conclusion of the analysis the Law Society did provide a copy of the investigator's report to the Respondent in July of 2000, and, at that time, advised the Respondent that a new staff member had taken over conduct of this file.

[37] In or about the same time frame the Respondent retained the services of counsel, Dennis Murray, Q.C. There appears to have been communications between counsel for the Respondent and the Law Society wherein it was proposed by counsel for the Respondent that he attend in Vancouver to see what could be done to move the investigation forward.

[38] In October of 2000, counsel for the Respondent indeed attended at Vancouver and met with the new staff member assigned to the investigation and that at that time there appeared to be no further request for information raised in the initial complaint in April of 1997.

[39] In May of 2001, the Respondent attended the Law Society offices in Vancouver upon the request of the staff member assigned to the file to discuss related files and, again, there does not appear to be any discussion as to the original complaint.

[40] In July of 2001, the Respondent again attended at Vancouver upon the request of the staff member assigned to the file to discuss various files that were referenced in the report of the Law Society in July of 2000. Apparently there was no further discussion of the original complaint.

[41] In October of 2001 either the Respondent or counsel on his behalf were apparently advised that a third staff member had now assumed conduct of the investigation.

[42] In early December of 2001, the Respondent wrote to the staff member now assigned to his file in relation to a status inquiry respecting the original complaint. The Law Society responded by correspondence in late December of 2001, advising the Respondent that he would receive a response in or about the middle of January of 2002.

[43] Thereafter, nothing appears to have been done in relation to the original complaint until early July of 2003, when the Law Society forwarded correspondence to the Respondent, advising him that, again, another new staff member had now been assigned to his file and that the original complaint generated in April of 1997 would be referred to the Discipline Committee for a review to determine if a citation should issue.

[44] In September of 2003, the Law Society forwarded correspondence to the Respondent and advised that a citation in relation to the original complaint would be forthcoming. By citation issued on the 20th day of October, 2003, the Respondent was put on notice that a Hearing Panel of the Law Society would be constituted to inquire into his conduct in relation to the original complaint.

[45] The first hearing date was set for February of 2004, but could not proceed on that date as a result of lack of disclosure requested by counsel for the Respondent. Thereafter, as a result of various calendar conflicts and disclosure issues, the hearing was not re-scheduled until the fall of 2004. Through that same time-frame there were ongoing discussions between counsel for the Law Society and counsel for the Respondent as a result of which there was agreement with respect to a conditional admission which proposed conditional admission was accepted by the Discipline Committee in early February, 2005 and the matter remitted to a Hearing Panel which hearing took place in March, 2005.

[46] The chronology establishes that from the time of complaint to issuance of the citation that some 78 months or 6½ years had transpired and that from the date of issuance of the Citation to a hearing date that a further 17 months had transpired for a total timeframe from complaint to hearing of 95 months or one month short of 8 years.

Discussion

[47]I find that throughout the time-frame from initial complaint until hearing that the Respondent was entirely co-operative with requests made by the Law Society and that at no time did the Respondent waive the time delay. Indeed, I find that the delay in this case does fall squarely at the feet of the Law Society.

[48] It is my view of the chronology that there are indeed some exceptional time delay gaps which, when raised at the hearing of this Review, were described by counsel for the Law Society as a "black hole" .

[49] In particular, I note that from August 18, 1997, until May of 2000, some 33 months pass in which there appears to be no action taken by the Law Society or, at least, none that was presented to the Benchers sitting on this Review. I also note that from December of 2001 until early July of 2003 that a further approximate 18½ months transpires in which apparently nothing was being done in relation to the complaint.

[50] The facts relating to the complaint were, at the end of the day, not particularly complex and do not, in my opinion, justify the approximate 6½ years pre-citation delay. Clearly the Law Society had sufficient institutional resources to have brought this matter to the citation stage in a much more expeditious timeframe. It is my opinion that the Benchers must not be seen to encourage or to condone through inaction the investigatory arm of the Law Society having the luxury of setting their own time schedule without giving due consideration to any prejudice which may occur to a member. Equally it is paramount to the public

interest that the investigation of complaints be conducted with expedition.

[51] In the unchallenged Affidavit evidence of the Respondent he clearly identifies that the delay has had a significant and substantial impact on his professional and personal life.

[52] I find that in this case the delay of 6½ years prior to the issuance of the citation coupled with the delay of one year and five months post-citation to hearing does establish an inference of prejudice per se to the Respondent.

[53] As I noted earlier, the citation was issued on the 20th day of October, 2003. At the time of issuance notice of disciplinary action to the profession was regulated by Rule 4-38 which provides as follows:

> (1) The Executive Director must publish and circulate to the profession a summary of the circumstances and of any decision, reasons and action taken:
>
> (a) at the conclusion of a hearing on a citation,
>
> (b) at the conclusion of a hearing before the Benchers under section 47 of the Act,
>
> (c) at the conclusion of an appeal to the Court of Appeal under section 48 of the Act,
>
> (d) when a respondent is suspended until the conclusion of a hearing of a citation under Rule 4-17(1),
>
> (e) when a lawyer or former lawyer is suspended or disbarred under Rule 4-40, or
>
> (f) when an admission is accepted under Rule 4-21 or 4-22.
>
> (2) As exceptions to subrule (1),
>
> (a) the Benchers may, in their discretion, determine not to publish a summary of the case,
>
> (b) the Benchers or the panel may order that the summary not identify the respondent, only if none of professional misconduct, misappropriation or wrongful conversion of funds, or incompetence was involved, and
>
> (c) the summary must not identify the respondent if the citation was dismissed, unless the respondent consents in writing.
>
> (3) A panel that orders that a respondent's identity not be disclosed under subrule (2)(b) must state in writing the specific reasons for that decision.

[54] In March of 2004, Rule 4-38 was amended to remove the exceptions to non-publication and Rule 4-38.1(3) was enacted which provides as follows:

> (3) The panel may order that publication not identify the respondent if

(a) the panel has imposed a penalty that does not include a suspension or disbarment, and

(b) publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication.

[55] It is clear that Rule 4-38.1(3) has substantially raised the bar in situations where a member is seeking an order for anonymous publication of his or her name.

[56] I agree with the concern raised by Lay Bencher Patrick Kelly at this hearing that the inordinate pre-citation and post-citation delay has had a negative consequential impact on the Respondent as he now faces a new standard for anonymous publication which standard was not in place at the time of the issuance of the citation.

[57] In the decision of *NLK Consultants Inc. v. British Columbia (Human Rights Commission)*, [1999] B.C.J. 380 the Petitioner sought a stay of Human Rights Proceedings based in large measure on the delay where a complaint was made to the Human Rights Commission in 1993 and a Notice of Hearing was not issued until March, 1998. While the case is one of Judicial Review of an Administrative process the principles which flow from the decision would, in my opinion, apply to the Law Society disciplinary process.

[58] The Court ultimately found in *NLK Consultants Inc.* that there was an unexplained and unreasonable delay of 58 months and that this delay did constitute a breach of natural justice. The Court further found that the unexplained and unreasonable delay did establish the inference of prejudice per se to the Petitioner.

[59] While circumstances surrounding delay issues will vary infinitely on a case by case basis, it should not be difficult to determine what is or is not unreasonable or unjustified delay. In this particular case the unexplained and unreasonable delay has been established resulting in an aura of oppression.

Conclusion

[60] For these reasons coupled with the reasons of the majority, it is my view that it is both in the public interest and in the interest of the Respondent that the finding of the Hearing Panel issued on the 4th day of April, 2005, declining publication of the Respondent's name was correct and that same be upheld.

Dissent/Minority Decision of Bruce LeRose

[61] The scope of review applicable in Section 47 of the *Legal Profession Act* is a broad power of review with discretion to substitute the Review Panel's own decision for that of the Hearing Panel below. [*Hordal* , [2004] L.S.B.C. 36] The test to be applied by the Benchers on review is "correctness" . Thus, if the Benchers find that the Panel below was not correct, the Benchers may substitute their own judgment for that of the Hearing Panel. [*Doyle*, (2005) L.S.B.C. 24 at paragraph 11]

[62] The issues for this Review Panel to decide are as follows:

1. Was the Hearing Panel correct in finding that the Respondent will suffer grievous harm if his name is published in the summary of this discipline case, and

2. If the Hearing Panel was correct in finding that publication of the Respondent's name would cause grievous harm to the Respondent, then was the Hearing Panel also correct in finding that such grievous harm caused by publication of the Respondent's name outweighs the interests of the public to know his name and the interests of the Law Society to publish his name?

[63] In order to deal with the first issue, an assessment of the evidence must be made to determine whether the Respondent has met the necessary threshold of proof to establish grievous harm.

[64] The entire Review Panel in this matter agree that the appropriate test is the civil onus of "a balance of probabilities" . That is to say that based on the evidence heard by the Hearing Panel, it is more likely than not that the Respondent will suffer grievous harm if his name is published in the Hearing Summary.

[65] The evidence relied upon by the Hearing Panel was taken almost exclusively from an Affidavit of the Respondent. No other evidence was tendered in support of the Respondent's application for anonymous publication. In summary, the evidence taken from the Affidavit sets out the following:

> a)The Respondent is 67 years of age, having practiced law in British Columbia for 41 years with no history of discipline, with the exception of the decision under review.
>
> b) He is the sole source of support for his wife. They are not wealthy and maintain a mortgage and other expenses. In addition, his wife suffers from multiple sclerosis and requires extra medication paid for by the Respondent for eight months a year.
>
> c) His principal client is the [client] with whom he has a fixed retainer of $90,000.00 per year. The Respondent has had this contract since 1971.
>
> d) It has taken eight years for the Law Society to deal with this complaint. The complaint arose in 1997, the citation was not issued until October 2003 and the hearing was in March 2005.
>
> e) Throughout the Law Society investigation, the Respondent remained cooperative, helpful and open.
>
> f) During the eight-year period from the time of the complaint in 1997 to the Hearing Panel decision in March of 2005, the Respondent continued providing with integrity, the same honourable and competent legal services to his clients including the [client].
>
> g) The offence was a one-time transgression of accounting rules. Neither the client nor the public were ever at risk.

[66] The Respondent's Affidavit also deposes as a matter of opinion the following [at paragraph 8]:

> *"… . The public perception that their lawyer is unprofessional would, in my experience, be a powerful influence on decisions which could ruin me.* "

Further on in the same paragraph, it goes on to say

> *"… In this case, I am asking the Law Society to refrain from publication because the potential repercussions to me and my family are so devastating, and eight years has passed during which I have practiced with honour, acknowledged (eight years ago) my shortcomings in this confusing of personal care and friendship with my responsibilities of accounting as a lawyer, and the public has been fine for all that time, not having publicized knowledge of the mistakes I made."*

[67] The Review Panel also heard from Mr. Murray, the Respondent's Counsel, that the [client] was aware of the citation and the Hearing Panel's decision.

[68] The thrust of the Respondent's argument for anonymous publication is not that the [client] will end its 34-year relationship with the Respondent because of this finding of conduct unbecoming a member, but rather that if his name is published, the public scorn will be such that the [client], a public body, may be compelled by this scorn to end this long standing relationship.

[69] With the greatest of respect to the Hearing Panel and indeed the Respondent, in my view, this evidence falls far short of establishing that it is more likely than not that publication of the Respondent's name will generate any such response from the public which will lead to the demise of the Respondent's retainer with the [client].

[70] The only evidence that the Hearing Panel could seize upon to arrive at its conclusion is the opinion of the Respondent. Although it was clear that the [client] was aware of this matter, there was no evidence from it that the finding of conduct unbecoming a member or the publication of the Respondent's name would impact negatively on its long standing arrangement with the Respondent.

[71] Similarly, there was no corroborating evidence that the [client} would be unduly influenced by public perception if the Respondent's name were published in the summary of this discipline case. The only evidence that the Hearing Panel had before it was really only the Respondent's own speculation.

[72] In coming to this conclusion, I take comfort in the findings of the Hearing Panel at paragraph [27] where it says:

> "*The public interest is not so focused on punishment that it does not have elements of compassion, decency and respect for privacy"*

A reasonable and well informed public that reads a published summary of this discipline case is equally capable of arriving at the conclusion that this is a relatively minor transgression that happened eight years ago and that no further punishment is necessary. To assume otherwise is not only a great disservice to the public but also an attack on the transparency for which the applicable Rule 4-38.1(3) is intended.

[73] The answer to issue (1) then is no, the Hearing Panel was not correct in finding that the Respondent will suffer grievous harm if his name is published in the summary of his discipline case.

[74] *Doyle* , supra, established that: *"… if the harm is found not to be grievous, that ends the matter"* [paragraph 25(c)]. Accordingly, there is no need to answer the question posed in issue (2).

[75] The Respondent's name should be published in the summary of this discipline case. There will be no order as to costs of this Review as counsel for the Law Society has quite rightly taken that position.

Dissent/Minority Decision of Gordon Turriff, Q.C.

[76] I have had the privilege of reading the decision of my colleagues, Dr. Vallance, Mr. Kelly, Mr. Hume, Q.C., Ms. Hickman, Mr. Rideout and Mr. Brun, Q.C., including the separate reasons stated by Mr. Rideout. I have also had the privilege of reading a draft of the decision of my colleague, Mr. LeRose.

[77] I agree with Mr. LeRose that the panel was wrong to have ordered that the publication of the panel's April 4, 2005 decision must not identify the Respondent. I agree with Mr. LeRose that the Respondent has not proved, on a balance of probabilities, that publication will cause him grievous harm.

[78] I also agree with Mr. LeRose that those who deal with the Respondent in future will be able to judge for themselves whether the Respondent should have their confidence where eight uneventful years have passed since his unbecoming conduct. I would not make a case for delay on behalf of the Respondent where he chose not to make the case himself.

[79] I reiterate the important public message delivered by the Benchers in the *Doyle* case: there will be very few instances in which respondents are not identified. This must be so, for the reason given by the Court of

Appeal for England in *Bolton v. Law Society* [1994] 2 All E.R. 486 (C.A.), at page 493: "The reputation of the profession is more important then the fortunes of any individual member" .