2018 LSBC 36
Decision issued: December 3, 2018
Oral Decision: October 2, 2018
Citation Issued: April 19, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

TIMOTHY JEREMY VONDETTE

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	October 2, 2018
Panel:	Sarah Westwood, Bencher, Chair Gillian Dougans, Lawyer Carol Gibson, Public Representative
Discipline Counsel:	Sarah Conroy and Tara McPhail
Counsel for the Respondent:	Michael Shirreff and Jennifer Crosman

BACKGROUND

[1] On April 19, 2018, the Discipline Committee of the Law Society of British Columbia issued a citation (the "Citation") to the Respondent pursuant to the *Legal Profession Act* and the Rules of the Law Society. The Citation alleges that, from approximately April 2013 and continuing into 2018, in the course of representing a client in a personal injury matter, the Respondent failed to provide the quality of service expected of a competent lawyer contrary to rule 3.2-1 of the *Code of Professional Conduct for British Columbia* by failing to do one or more of the following:

(a) ensure that work was done in a timely manner, including the resolution of litigation costs;

(b) schedule and attend at a Registrar's hearing to resolve litigation costs;

(c) wait until the costs hearing was concluded or until litigation costs had been otherwise resolved before taking legal fees, contrary to your written retainer agreements with your client;

(d) respond to your client's telephone calls; and

(e) answer reasonable requests from your client for information.

That conduct was stated to be professional misconduct pursuant to section 38(4) of the *Legal Profession Act*.

[2] The Respondent admits that he was properly served with the Citation.

[3] The matter came on for hearing pursuant to Rule 4-30. Under this Rule, the Respondent made a conditional admission of professional misconduct and agreed to proposed disciplinary action with respect to subparagraphs (a), (d) and (e) of the Citation. The Law Society advised the Hearing Panel that it would not proceed on the non-admitted allegations, (b) and (c), and that the parties had agreed to a disposition under Rule 4-30 on that basis.

[4] Rule 4-30 requires that a hearing panel consider the conditional admission and the proposal and, if the panel finds them acceptable, impose the proposed disciplinary action.

[5] Rule 4-31 provides that, in considering a proposal under Rule 4-30, a hearing panel may only accept or reject the proposal and related disciplinary action. It is not open to the hearing panel to come to a different conclusion regarding the proposed disciplinary action, to reconsider the citation, or otherwise to vary the proposal approved and recommended by the Discipline Committee.

[6] At its meeting on September 20, 2018, the Discipline Committee considered and accepted the proposal and instructed Discipline Counsel to recommend the acceptance of the proposal to the hearing panel.

[7] In this case, the Respondent admitted the allegations set out in subparagraphs (a), (d) and (e) of the Citation that, in summary, he failed to ensure that costs were resolved in a timely way. He also acknowledged that he failed from time to time to respond to his client's telephone calls and that there were times when he should have returned his client's telephone calls and did not do so. The Respondent also admits that this conduct constitutes professional misconduct.

[8] The Law Society and the Respondent propose that disciplinary action be a fine of $3,000 plus costs in the amount of $1,261.25, the total payable in 12 monthly instalments each in the amount of $355.11, with the first instalment due and payable on November 1, 2018.

This would result in the circumstances summarizing this matter being published pursuant to Rule 4-48, and that publication would identify the Respondent by name.

[9] At the conclusion of the hearing, the Hearing Panel gave an oral decision that the conduct described in the Agreed Statement of Facts (the "ASF") at issue in this proceeding constitutes professional misconduct. We accepted the proposed specified disciplinary action and ordered a fine in the amount of $3,000 plus costs in the amount of $1,261.25, the total payable in 12 monthly instalments each in the amount of $355.11, with the first instalment being due and payable on November 1, 2018. The Respondent also sought, and the Law Society consented to, an order pursuant to Rule 5-82 in the nature of a "non-disclosure order", such that portions of the exhibits entered in evidence and the transcript of this proceeding, including information with respect to the Respondent's income and law practice, not be disclosed to the public. The Hearing Panel so ordered.

[10] What follows are our reasons for those decisions.

AGREED STATEMENT OF FACTS

[11] Below are portions of the ASF that we have anonymized to protect the identity of the Respondent's client and preserve solicitor-client privilege.

Member Background

[12] The Respondent was called to the bar and admitted as a member of the Law Society of British Columbia on March 19, 1986.

[13] The Respondent practises law as a sole practitioner in Vancouver, British Columbia, almost exclusively in the area of plaintiff personal injury claims.

Background Facts

[14] The client is also the Complainant in this matter.

[15] Between November 2010 and February 2011, the Respondent was retained by the Complainant to handle the Complainant's claims with respect to four motor vehicle accidents in three British Columbia Supreme Court actions (the "Actions").

[16] Before retaining the Respondent, the Complainant had been represented by two previous counsel. At the time of retaining the Respondent, the Defendants had offered the Complainant $25,000 to resolve three claims and an application had been delivered seeking to have one claim dismissed as being commenced after the expiry of a limitation period.

[17] The Actions proceeded to a jury trial and were heard together in March 2013, with the trial spanning a total of 12.5 days. On March 28, 2013, the jury awarded the Complainant damages in the amount of $328,500. Before trial, the Defendants had delivered a formal offer to settle the Actions for $60,000, which the Complainant did not accept.

[18] The damages awarded to the Complainant were later reduced to $307,159 to account for the Complainant's income loss (the "Damages Award").

[19] On March 28, 2013, the trial judge also awarded costs to the Respondent on Scale B.

[20] On July 18, 2013, the Respondent received $307,159 from ICBC in payment of the Damages Award (the "Funds"), which the Respondent deposited into trust.

[21] On July 23, 2013, the Respondent disbursed those funds to the Complainant and to the Respondent's law corporation in payment of the Respondent's fees. When it came time to determine the net amount to be paid to the Complainant, the Respondent agreed to reduce his fee to 28% of the total jury award, instead of the 33 1/3% set out in the parties' retainer agreement.

[22] In June and July of 2013, the Respondent drafted bills of costs and communicated with opposing counsel regarding the outstanding issue of costs and disbursements payable pursuant to the Costs Award (the "Costs Issue").

[23] On September 20, 2013, the Respondent set down a pre-hearing conference for a costs hearing to deal with the Costs Issue.

[24] The pre-hearing conference occurred on September 26, 2013, resulting in an order setting out steps to be taken by counsel in respect of a future costs hearing before a Registrar. The date for the future costs hearing was not set down at this time.

[25] On October 15, 2013, the Respondent received particulars from opposing counsel regarding the matters at issue in relation to the Costs Issue.

[26] On December 12, 2013, the Respondent sent a letter to opposing counsel enclosing the draft orders after trial.

[27] In the subsequent years, the Respondent took only limited steps to advance the Costs Issue, one of which included preparing a lengthy affidavit from an expert who had been essential to the Complainant's position at trial. The Respondent, however, did not schedule the Costs Issue for a hearing.

[28] On January 23, 2017, the Complainant complained to the Law Society because the Respondent had not yet resolved the Costs Issue.

[29] After approximately November 2013 and through December 2016, the Complainant attempted to address matters with the Respondent on multiple occasions by telephone and email and by setting appointments. The Respondent did not respond to any substantive matters. Three times in 2016 the Complainant became confrontational when attempting to discuss the Costs Issue with the Respondent, causing the Respondent to ask him to leave on at least one occasion.

[30] On March 14, 2017, Law Society staff informed the Respondent about the Complainant's complaint.

[31] After the Complainant initiated the Law Society complaint, the Respondent took steps to retain more experienced counsel to assist with the finalization of the materials necessary to have the Costs Issue adjudicated by the Registrar. The Respondent then obtained a hearing date for the Costs Issue of April 4, 2018 and finalized his own affidavit in support of the application in February 2018.

[32] The Defendants in the Actions had originally offered the Complainant $85,000 as settlement of all taxable costs and disbursements. After the Respondent attended the Registrar's hearing, the court ordered $120,135.79 for taxable costs and disbursements, of which the Complainant was entitled to receive $53,751.55. The Respondent provided the Complainant with $55,500, issuing a final statement of account on April 24, 2018.

[33] It took the Respondent approximately five years from the date judgment was rendered in the Actions, and over a year from when he was informed of the Complainant's Law Society Complaint, to resolve the Costs Issue.

[34] The Respondent acknowledged that, between September 2013 and January 2017, he failed from time to time to respond to the Complainant's telephone calls and that there were times when he should have returned the Complainant's telephone calls and did not do so.

ISSUE

[35] The issue in this case is whether the Respondent acted in a manner that constitutes professional misconduct and, if so, whether the proposed disciplinary action is within the acceptable range for this conduct.

Discipline Violation – Professional Misconduct

[36] This Panel accepts the admission of the Respondent that his conduct in respect of allegations (a), (d) and (e) in the Citation constitutes professional misconduct.

[37] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook* or the *Code of Professional Conduct for British Columbia*, but has been considered by Law Society hearing panels in several cases.

[38] The leading case regarding the issue of professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16, in which the hearing panel concluded at paragraph 171 the test 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.

[39] In *Martin*, the panel also commented at paragraph 154:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[40] Following this line of reasoning, the hearing panel at paragraph 35 of *Law Society of BC v. Lyons*, 2008 LSBC 09, set out the factors to consider in determining whether particular conduct rises to the level of professional misconduct, stating:

> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

[41] In *Law Society of BC v. Harding*, 2014 LSBC 52, the respondent, amongst other matters, delayed taking any substantive steps to advance his client's action for over four years. Here, the hearing panel gave particular consideration to how to apply the *Lyons* factors when the allegation of professional misconduct arises out of a failure to represent a client in a conscientious, diligent and efficient manner, particularly where the allegations involve delay or lack of activity.

[42] At paragraph 88, the hearing panel in *Harding* wrote:

> … expressing the *Lyons* factors in terms of specifics that apply when the allegation is that professional misconduct arose out of a failure to represent a client in a conscientious, diligent and efficient manner, particularly where the allegations involve delay or lack of activity, we distill the following factors to be considered:
>
> (a) gravity of the misconduct requires a consideration of:

i. the length of the delay or lack of activity;

ii. whether the delay or lack of activity was coupled with representations to the client about the case that were not true or failing to communicate with the client; and

iii. the nature of the steps that could or should have been taken to advance the case;

(b) duration of the misconduct also requires a consideration of the length of the delay or lack of activity;

(c) the number of breaches takes into account whether the citation is based on a single incident or a series of incidents that should be considered together;

(d) the presence or absence of *mala fides* requires an assessment of the reasons for the delay or lack of activity; and

(e) the harm caused by the respondent's conduct requires an assessment of the consequences to the client in not advancing the case.

[43] With specific reference to the last consideration, the harm caused, the hearing panel in *Harding* commented (at paragraph 128) that "[d]elay in resolution of litigation is a serious issue generally, and the administration of justice suffers when cases are inordinately and inexcusably delayed."

[44] Accordingly, in applying the *Lyons* and *Harding* considerations to the Respondent's conduct in the instant case, the following is clear:

(a) the length of delay of approximately five years in resolving litigation costs;

(b) the Respondent's failure, during the period from November 2013 to December 2016, to communicate substantively with his client;

(c) the duration of the misconduct, again of approximately five years;

(d) the harm caused: the client stated that the delay had an emotional impact on him, and it should be noted that the client was deprived, for the period of the delay, of the costs to which he was entitled, and which he did not receive until 2018.

[45] In our view, the Respondent's conduct in relation to the factors of delay, the failure to respond, and the harm caused do amount to a marked departure from that conduct the Law

Society expects of lawyers, and accordingly, the Respondent's admission of professional misconduct in respect of allegations (a), (d) and (e) in the Citation is appropriate. We accept the admission and find that the Respondent committed professional misconduct in respect of these allegations.

[46] It is noted that the Law Society is only seeking to proceed on allegations (a), (d) and (e) in the Citation and that, given the Respondent's admission of professional misconduct, the Law Society is not proceeding with allegations (b) and (c).

[47] Following the recent decision in *Law Society of BC v. Kaminski*, 2018 LSBC 14, we find that the decision not to proceed on allegations (b) and (c) is not a bar to proceeding under Rule 4-30. As in *Kaminski*, Discipline Counsel informed the Hearing Panel that, in recommending the acceptance of the conditional admission and proposed disciplinary action, the Law Society agreed not to proceed with the other allegations in the Citation, which were not admitted by the Respondent. Accordingly, we do not find the omission of allegations (b) and (c) from the Law Society's case to pose a bar to proceeding under Rule 4-30.

Appropriateness of Penalty

[48] In considering the Discipline Committee's recommendation regarding the penalty to be imposed, the question faced by this Panel is not whether we would impose the same sanction as is proposed by the parties but, rather, whether this Panel finds the proposal is fair and reasonable in all the circumstances.

[49] Deference should be given to the recommendation of the Discipline Committee to accept the proposal if the proposed disciplinary action is within the range of a "fair and reasonable disciplinary action in all of the circumstances." As stated in *Law Society of British Columbia v. Rai*, 2011 LSBC 02, at paragraphs 6 through 8:

> This proceeding operates (in part) under Rule 4-22 of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.
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> This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes

> that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"
>
> This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

[50] In *Law Society of BC v. Lessing*, 2013 LSBC 29, a Law Society review panel reaffirmed the factors relevant to the issue of sanction considered in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, and noted they reflect the objects and duties of the Law Society set out in section 3 of the *Legal Profession Act*. The review panel in *Lessing* placed particular emphasis on public protection, including public confidence in the profession generally.

[51] The review panel in *Lessing* observed that not all the *Ogilvie* factors would come into play in all cases and the weight to be given to these factors would vary from case to case but noted that the protection of the public (including public confidence in the disciplinary process and public confidence in lawyers generally) and the rehabilitation of the respondent were two factors that, in most cases, would play an important role. However, the review panel stressed that, where there was a conflict between these two factors, the protection of the public, including protection of the public confidence in lawyers generally, would prevail.

[52] In the recent decision *Law Society of BC v. Dent*, 2016 LSBC 05, the panel examined the *Lessing* review panel's comments about the *Ogilvie* factors and provided guidance in how the *Ogilvie* factors should be considered when determining sanction. The panel in *Dent* stated at paragraphs 16 to 18:

> It is time to provide some simplification to this process. It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.

> There is an obligation on counsel appearing before the hearing panel to point out to the panel those factors that are primary and those factors that play a secondary role. Secondary factors need to be mentioned in the reasons, if those secondary factors tip the scales one way or the other. However, in most cases, the panel will determine the appropriate disciplinary action on the basis of the primary factors without recourse to the secondary factors.
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> In addition, it is time to consolidate the *Ogilvie* factors, ("consolidated *Ogilvie* factors"). It is also important to remember that the *Ogilvie* factors are non-exhaustive in nature. Their scope is only limited by the possible frailties that a lawyer may exhibit and the ability of counsel to put an imaginative spin on it.

[53] Taking into consideration the comments of the panel in *Dent*, in applying the principles set out in *Ogilvie* and *Lessing*, the Law Society and the Respondent agree that the application of the principles set out in those cases supports the proposition that the factors and considerations most relevant in the circumstances of this case are as follows:

a) the nature and gravity of the misconduct;

b) the Respondent's professional conduct record ("PCR") and consideration of progressive discipline;

c) the presence or absence of mitigating or aggravating factors (other than PCR); and

d) the range of sanctions imposed in prior similar relevant cases.

This Panel accepts these as the relevant considerations in this matter.

Nature and Gravity of the Misconduct

[54] The misconduct admitted in this case is serious. A delay of five years to resolve taxable costs and disbursements is egregious. It is noted, however, there are no elements of dishonesty associated with the delay, such as misleading the client about the status of the matter, nor is the allegation that the Respondent failed to take *any* steps over the course of five years. Ultimately, the Respondent did achieve a successful outcome for the Complainant. Despite this, the Respondent's failure to respond to the Complainant and the Respondent's delay of five years in resolving the issue of costs is an aggravating factor.

The Respondent's PCR and Progressive Discipline

[55] The Respondent has practised law in British Columbia since 1986. The Respondent has no PCR in a practice spanning approximately 32 years. This is a mitigating factor.

Presence or Absence of Other Mitigating or Aggravating Factors

[56] Other aggravating factors in this matter include the stated emotional impact on the Complainant resulting from the delay and lack of communication, and the fact that the Complainant was deprived of the financial benefit of the Costs Award for five years as a result of the Respondent's delay.

[57] In addition to the absence of a PCR, other mitigating factors in the matter include:

a) The Respondent has admitted all of the facts underlying allegations (a), (d) and (e) of the Citation and has acknowledged the misconduct, both at the investigation stage and early in the discipline process;

b) The Respondent did ultimately resolve the costs issue, obtaining a favourable result for the Complainant. In addition, the Respondent has taken proactive steps to ensure that similar mistakes do not occur in the future, including taking courses on dealing with procrastination, reading books about the topic, and engaging with programs to address this difficulty. There is, therefore, a good possibility of remediation; and

c) The Citation represents one allegation (with sub-allegations) in relation to one matter, and there is no evidence that this is a repeated pattern of conduct in the Respondent's practice.

[58] A further mitigating factor that deserves particular consideration is the Respondent's annual income. The Respondent does not have a particularly profitable practice, and given the Respondent's financial circumstances, the parties submit that the impact of even a small fine will be significant.

Range of Sanctions in Prior Similar Cases

[59] In considering this factor, this Panel has to be mindful of its obligations under Rule 4-30, which limits its authority to accepting or rejecting the proposed sanction. It is not open to the Panel to vary the penalty to which the parties have agreed. The Panel must, therefore, consider whether the proposed penalty is within the range of sanctions in prior similar relevant cases and, accordingly, whether it should be accepted or rejected on that basis.

[60] Similar relevant cases have attracted fines in the ranges of $1,000 to $3,000 and $4,500 to $7,500. Generally, lawyers who received fines in the $4,500 to $7,500 range all had PCRs or more aggravating factors than in the Respondent's case, while those with fines in the $1,000 to $3,000 range had much less delay than in the Respondent's case. The parties agree that the following cases represent the relevant cases applicable to the Respondent's circumstances and provide the appropriate range within which to consider the submission on penalty.

[61] The panel in *Law Society of BC v. Plested*, 2007 LSBC 45, ordered a $1,000 fine and a referral to the Practice Standards Committee in a case where, in a real estate transaction, the lawyer failed to reply to client communications, failed to keep his client reasonably informed, and delayed for approximately one year in providing a final report and satisfactory mortgage documentation to his client. The panel also found that he failed to reply to the Law Society on numerous occasions and noted his PCR of a previous conduct review for failing to deal with a client's matter promptly and failing to respond to the client. The lawyer was called in 1974 and practised as a sole practitioner. The panel considered the lawyer's modest annual income of $30,000 to $40,000 when determining the appropriate fine.

[62] In *Law Society of BC v. Wesley*, 2016 LSBC 07, the lawyer failed to enter an order for approximately a year and a half and failed to advise the client concerning the risks of not entering the order. The failure to enter the order caused financial prejudice to the client as it enabled the father to stop paying child support, prevented the client from enforcing the order through the Family Maintenance Enforcement Program, and other matters. The lawyer practised primarily as a family lawyer for 33 years, and her PCR consisted of one referral to the Practice Standards Committee. Again, the panel considered the lawyer's income in determining the appropriate fine of $3,000.

[63] The panel in *Law Society of BC v. Chiasson*, 2014 LSBC 32, imposed a fine of $4,500 on a lawyer who failed to take any substantive steps to advance his client's personal injury claim for approximately 18 months, failed to respond to the client during that time, negotiated and accepted a settlement from ICBC on the client's behalf after being fired by the client, and took a greater percentage of fees from the settlement than had been agreed in his retainer agreement and under the *Act*. The lawyer's PCR consisted of a conduct review and referral to the Practice Standards Committee.

[64] In *Law Society of BC v. McLellan*, 2011 LSBC 23, the lawyer, having formed the opinion that his client's case was not worth pursuing but had not informed his client of this opinion, took few steps for six years on the client's case, notwithstanding his client's inquiries. The panel imposed a fine of $5,000. The lawyer's PCR consisted of two conduct reviews and a previous, proven citation resulting in a fine of $3,000.

[65] The panel in *Law Society of BC v. Menkes*, 2016 LSBC 24, imposed a fine of $7,500 on a lawyer who delayed for approximately four years in taking steps to advance the client's claim, failed to respond to communications from the client and failed to take steps he told the client he would take. The lawyer never served the claim that he filed on his client's behalf, and the client had to retain new counsel due to her potential claim against the lawyer. The lawyer's PCR consisted of three conduct reviews and a referral to the Practice Standards Committee.

[66] Finally, in *Law Society of BC v. Hart*, 2014 LSBC 17, a fine of $7,500 was considered appropriate where, in a relatively straightforward matrimonial matter, the lawyer took almost three years to resolve a claim that could have concluded within a third of that time. The lawyer also failed to respond to communications from the client, and the lawyer's conduct impacted the client both financially and emotionally. The lawyer had an extensive PCR, consisting of three prior citations, three conduct reviews and a referral to the Practice Standards Committee.

[67] In the instant case, the length of the delay, coupled with the failure to respond to the Complainant, and the emotional impact on the Complainant would suggest an appropriate range of penalty between $3,000 and $5,000. A five-year delay would suggest the penalty imposed should lie in the upper limit of this range.

[68] In the particular facts of this Respondent's limited income, however, the Panel takes note of the findings in *Plested* and *Wesley* that a lawyer's minimal annual income may be taken as a mitigating factor when considering the appropriate penalty to impose.

[69] The Panel notes, and agrees with, the Law Society's submission that, but for the Respondent's financial circumstances, a fine below $5,000 would not have been recommended. The Panel concurs with this assessment and in this specific situation, finds that a lower fine is acceptable.

[70] Additionally, the Panel takes note of the mitigating factors of the Respondent's lack of a PCR and the steps he has already taken to remediate and address the issues that led to the delay.

[71] Accordingly, on the basis of the foregoing, this Panel accepts and confirms the proposed disciplinary action of a $3,000 fine.

CONCLUSION

[72] The proposed sanction of a $3,000 fine is within the range of sanctions ordered in prior, similar cases and is an appropriate sanction in light of the Respondent's financial

circumstances, his PCR, the seriousness of the misconduct and all of the circumstances of this case.

ORDER TO PROTECT CONFIDENTIAL AND PRIVILEGED INFORMATION

[73] The Law Society made an application pursuant to Rule 5-8(2) for a "non-disclosure order" such that information protected by client confidentiality and solicitor-client privilege in any exhibit filed in these proceedings and in the transcript of the proceedings must be redacted if any person other than a party seeks to obtain a copy.

[74] The Respondent also requested that information concerning the financial aspects of his law practice and his annual income be kept confidential. The Law Society does not oppose this request.

[75] Openness and transparency are an important part of these disciplinary proceedings. Rule 5-8(1) provides that every hearing is open to the public. Rule 5-9 permits any person to obtain a transcript of the hearing or a copy of an exhibit entered during a public portion of a hearing.

[76] However, the Rules also recognize that there may be legitimate reasons to restrict public access to a hearing or to exhibits filed at a public hearing. For example, a person's ability to obtain a copy of an exhibit is expressly subject to solicitor-client privilege. Rule 5-8(2) permits a panel to make an order that specific information not be disclosed in order to "protect the interests of any person."

[77] In this case, the evidence of the events giving rise to the Citation and the evidence filed in this hearing include information that is subject to solicitor client privilege.

[78] In our view, the interest of the Complainant and other third parties in maintaining the confidentiality of the information given in evidence outweighs the public interest in that information being disclosed on request.

[79] With respect to information relating to the Respondent's financial circumstances and annual income, the Law Society raised the case of *Law Society of BC v. Kirkhope*, 2013 LSBC 35, where, as here, the respondent provided information about the financial aspects of his law practice. In considering the lawyer's request that such information not be disclosed, the panel stated at paragraph 22 that "we are of the view that financial information with respect to the Respondent's income and law practice need not be disclosed to the public in order to carry out the mandate of the Law Society." This Panel concurs with that conclusion.

[80] Accordingly, pursuant to the discretion afforded by Rule 5-8(2), we have ordered that:

a) If any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, client names and identifying information, any information protected by solicitor-client privilege, and any financial information with respect to the Respondent's income and law practice, shall be redacted from the exhibit before it is disclosed to that person; and

b) If any person, other than a party, applies for a copy of the transcript of these proceedings, client names and identifying information, any information protected by solicitor-client privilege, and any financial information with respect to the Respondent's income and law practice, shall be redacted from the transcript before it is disclosed to that person.

COSTS

[81] The authority to order costs is derived from section 46 of the *Legal Profession Act* and Rule 5-11 of the Law Society Rules 2015. The rule provides, in part:

> (3) Subject to subrule (4), the panel or review board must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society.
>
> (4) A panel or review board may order that the Society, an applicant or a respondent recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4 if, in the judgment of the panel or review board, it is reasonable and appropriate to so order.
>
> (5) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.
>
> (6) In the tariff in Schedule 4,
>
> (a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and
>
> (b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units applies.

[82] Hearing panels are required to consider the tariff when calculating costs, and the costs calculated under the tariff *are to be awarded* unless, under Rule 5-11(4), a panel determines it is reasonable and appropriate to award no costs or costs in an amount other than that permitted by the tariff. The tariff not only gives guidance to hearing panels on

the items to consider when calculating costs, but it gives respondents guidance on the range of costs to be expected.

[83] The costs are calculated under section 25 of the tariff, which applies to hearings under Rule 4-30. The range presented in the tariff is $1,000 to $3,500, exclusive of disbursements.

[84] The Law Society has provided a draft bill of costs proposing costs of $1,000 plus disbursements, payable by April 30, 2018 or such other date as ordered by the Hearing Panel. The Respondent does not disagree with this assessment.

[85] The only disbursements included in the proposed costs are for court reporter fees in accordance with Rule 5-11(6) for a half day, or $236.50, and courier costs of $25. The total costs inclusive of disbursements are $1,261.25.

[86] Despite being at the lowest end of the range provided for in the tariff, the proposed costs of $1,261.25 are reasonable and appropriate, given that the Respondent consented to a disposition of the matter under Rule 4-30, the Citation contains only one allegation (with several sub-allegations) arising from a single client matter, and the facts are not overly complex.

[87] Finally, the Respondent asks to pay the fine and costs by way of 12 equal monthly instalments in the amount of $355.11, with the first instalment being due and payable on November 1, 2018. The Law Society takes no issue with this request and this Panel accordingly so orders.

[88] For all of the foregoing reasons, this Panel accepts the Respondent's proposal in full and as recommended by the Discipline Committee, pursuant to Rule 4-30.

[89] The Executive Director is instructed to record the Respondent's admission on his professional conduct record.