2019 LSBC 16
Decision issued: May 6, 2019
Citation issued: December 15, 2017

NOTE: On October 24, 2019 the Discipline Committee considered and accepted a proposal under Rule 4-29. Under the proposal, the Respondent admitted professional misconduct as found by the Hearing Panel, obtained permission from the Discipline Committee to resign from membership in the Law Society and provided an undertaking not to apply for reinstatement for a period of 12 years. The Respondent acknowledges that s. 15(3)(a) of the *Legal Profession Act* will apply to him such that he may not practice law, whether or not the act is performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed.

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

HOMAYOUN SEBASTIAN NEJAT

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing date:	March 12, 2019
Panel:	Lisa J. Hamilton, QC, Chair Ralston S. Alexander, QC, Lawyer Carol J. Gibson, Public Representative
Discipline Counsel:	Kathleen M. Bradley
Counsel for the Respondent:	Michael D. Shirreff

BACKGROUND

[1] On December 15, 2017, a citation was issued against Hamouyan Sebastian Nejat (the "Respondent") pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society

Rules on the direction of the Chair of the Discipline Committee. The citation was amended pursuant to Rule 4-21(1)(a) on March 6, 2018.

[2] Allegation 1 of the citation provides:

> 1. In the course of acting for your client BD regarding an appeal of a provincial court family law matter, you misled your client by doing some or all of the following:
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> a. stating in an email dated September 28, 2015, that the written outline had been sent to the court for filing when it had not been;
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> b. (deleted);
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> c. failing to advise your client after June 14, 2016 that opposing counsel had filed an application for dismissal of the appeal;
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> d. telling your client by email dated June 29, 2016 that a hearing had been set for the end of July to "determine the issue of perfecting the appeal" and failing to tell your client that the date was set to hear the opposing party's application to dismiss the appeal; and
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> e. after the appeal was dismissed on July 28, 2016, failing to advise your client that the appeal had been dismissed because of the opposing party's application.

[3] Allegation 2 of the citation provides:

> 2. On July 28, 2016, in the course of acting for your client BD regarding an appeal of a provincial court family law matter, you represented to the court that you had instructions to bring an application to extend the time to perfect your client's appeal when you knew you did not have those instructions.

[4] Allegation 3 of the citation provides:

> 3. Between approximately August 2015 and August 2016, in the course of representing your client BD regarding an appeal of a provincial court family law matter, you failed to provide your client with the quality of service that is expected of a competent lawyer in a similar situation, contrary to one or more of rules 2.2-1, 3.1-2 or 3.2-1 of the *Code of Professional Conduct for British Columbia* by failing to do one or more of the following:
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> a. keep your client reasonably informed about the status of the appeal;

b. answer your client's reasonable requests for information and documents;

c. answer, within a reasonable time, communications from your client that required a reply;

d. ensure that the work on the appeal was done in a timely manner so that its value to your client was maintained;

e. provide your client with complete and accurate relevant information about his matter.

[5] Each allegation is stated to constitute professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

[6] The Respondent acknowledged service of the citation in compliance with Rule 4-15 of the Law Society Rules.

FACTS

[7] The Law Society prepared and served a comprehensive Notice to Admit pursuant to Law Society Rule 4-28. The Notice to Admit comprised 20 pages (without exhibits) and contained 111 paragraphs requiring denial or admission by the Respondent. The Notice to Admit appended 14 exhibits, in total comprising approximately 250 pages.

[8] The Respondent replied to the Notice to Admit essentially admitting all the allegations contained in it, with one exception, which we will identify in these reasons.

[9] The Panel was advised that the Respondent was a non- practising member as of November 26, 2018.

[10] On the basis of the Notice to Admit and the response of the Respondent, we provide the following summary of the facts underlying this citation.

[11] The Respondent was retained by BD to represent him in a family matter before the Provincial Court of British Columbia. An unfavourable final order in this family matter was issued by the presiding judge in June 2015.

[12] The Respondent was instructed by BD to appeal the final order, and on August 7, 2015, the Respondent filed a Notice of Appeal with the Supreme Court of British Columbia.

[13] The Notice of Appeal attached the Supreme Court Practice Direction, Standard Directions for Appeals from Provincial Court – *Family Law Act* (the "Standard Directions"). The

Respondent read and reviewed the Standard Directions at the time he filed the Notice of Appeal.

[14] The Standard Directions provide that, after filing a Notice of Appeal, the appellant must take the following steps:

(a) personally serve the Notice of Appeal on all parties to the proceedings in which the order of the Provincial Court was made, unless a judge of the Supreme Court orders otherwise;

(b) order and pay for a copy of the transcript of the oral evidence given at the hearing in the Provincial Court and the reasons for judgment of the Provincial Court;

(c) file a copy of the Notice of Appeal in the registry of the Provincial Court at the location where the order was made; and

(d) within 30 days after filing the Notice of Appeal, file an affidavit of service indicating that the Notice of Appeal has been served on the respondent and the required transcript has been ordered, and request a date for the hearing of the appeal from the Registrar.

[15] The Standard Directions further provide that, if the appellant has not filed the required affidavit within 30 days of filing the Notice of Appeal, the appellant must apply to the court for an order extending the time for filing the affidavit. No date for hearing the appeal may be set, nor may any further step in the appeal be taken, until an order is granted extending the time for filing the affidavit. Once the affidavit is filed, the appellant may request a date for the hearing of the appeal from the Registrar, file a Notice of Hearing, and serve the Notice of Hearing on any person who has filed a Notice of Interest.

[16] The Standard Directions also state that, unless otherwise ordered, within 45 days after filing the Notice of Appeal, the appellant must file the original transcript with the court, serve a copy of the transcript on any person who has filed a Notice of Interest, and file a written outline setting out the grounds of appeal, the relief sought and the factual and legal basis on which the relief is sought.

[17] On August 7, 2015, the Respondent advised BD by email that the Notice of Appeal had been sent for filing and that he would “advise as to next steps in due course.”

[18] On August 7, 2015, the Respondent received an email from BD reminding him of the obligation to order the transcripts “as soon as possible.”

[19] On August 12, 2015, the Respondent provided his client with a copy of the filed Notice of Appeal and advised that "the next step is to serve [the other party] with a copy via process server." The Respondent was instructed to hire a process server.

[20] Several weeks later, in response to a request from his client, the Respondent advised that the Notice of Appeal had been filed but that he had not yet received the affidavit of service.

[21] On September 10, 2015, the Respondent received an email from his client reminding him that September 17 was the deadline for providing the grounds of appeal to the court and requesting a meeting to review and finalize the grounds.

[22] In a September 28, 2017 interview with a Law Society investigator, the Respondent explained that he understood that "grounds of appeal" referred to a written outline.

[23] On September 15, 2015, in an email entitled "Re: Request for reviewing Grounds of Appeal," the Respondent advised BD that he would have a complete draft of the written outline by the end of the week. On the same day, the Respondent received an email from BD asking that, if he had received the new transcripts, the files be forwarded to him.

[24] On September 23, 2015, the Respondent received an email from BD asking whether the written outline had been filed and, if it had, requesting a copy of the filed outline.

[25] On September 28, 2015, the Respondent emailed BD and advised that the "outline has been sent out for filing" and that he would "serve [opposing counsel] with a filed copy as well as the transcripts in due course."

[26] In fact, the Respondent had not filed a written outline with the Supreme Court, and he did not provide his client with the requested copy of the filed written outline.

[27] During the September 28, 2017 interview with the Law Society investigator, the Respondent stated the following with respect to filing a written outline:

> Investigator: And so you understood that filing a written outline was one of those steps which had to be taken 45 days after the filing of the appeal?
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> Respondent: Yes, but I also was mindful of the fact that there were preceding steps that had to be done within 30 days, and one of them was filing a Notice of Hearing, --
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> Investigator: Yes.
>
> Respondent: -- which I was not able to do because of – I was not able to secure a hearing date. So, the proceedings had not been taken. So, my

> understanding was that I hadn't complied with the proceeding step, so I couldn't file the outline, because I didn't have a Notice of Hearing. To correct the thing, in retrospect, would have been to apply for extension of time to dwell on this as I was able to, but I didn't.

[28] On October 13, 2015, the Respondent received an email from his client asking if the appeal hearing date had been scheduled and reiterating the request for a copy of the filed outline. The Respondent did not reply to this email.

[29] On November 2, 2015, the Respondent received a further email from his client asking for an update on the hearing of the appeal. The Respondent did not reply to this email.

[30] On November 9, 2015, the Respondent again received an email from his client seeking an update. The Respondent replied on November 12, 2015 advising that he was unable to "look into dates" for the hearing of the appeal until January because of the court hearing reservation system.

[31] On November 16, 2015, the Respondent received an email from BD in which BD explained that he had been advised by the court registry that the reservation system for February 2016 would start on December 8, 2015. BD also asked the Respondent to call the reservation system on December 8, 2015 and procure a date in February 2016 for the hearing of his appeal. On November 19, 2015, the Respondent emailed BD to advise that he could not set the hearing of the appeal in February 2016 because he had a trial scheduled that month and that his "aim was to set it down for some time in March/April."

[32] On November 19, 2015, the Respondent received an email from BD that conveyed BD's unhappiness with the delay and asked that the Respondent share his plans with BD in advance. In response to this email, the Respondent emailed BD and indicated that he was "not intentionally delaying the process" but that "these things are purely a matter of scheduling and coordinating different parties' availabilities."

[33] On November 19, 2015, the Respondent received an email from opposing counsel that stated:

> … I have not heard back from you for weeks since you requested my available dates for the appeal your client filed to the above referenced decision of Judge Challenger. I am concerned that many of the dates sent to you back then are no longer available anymore. Also, it is not clear to me that your client is proceeding with his appeal or whether it should be considered abandoned? Please advise.

[34] The Respondent did not respond to opposing counsel's November 19, 2015 email.

[35] On November 20, 2015, the Respondent received an email from BD pointing to inconsistencies in the reasons offered for the delay in getting a date for hearing the appeal and wondering when the appeal would be scheduled given that his child, the subject of the appeal, was aging as the delay continued. The Respondent did not respond to this email.

[36] On February 15, 2016, the Respondent received an email from BD stating that BD had not heard from the Respondent since November 2015 and asking for an update on the appeal. The Respondent did not respond to this email.

[37] On February 22, 2016, the Respondent received an email from BD stating that he was still waiting for a reply to his earlier email. On February 25, 2016, the Respondent emailed BD and explained that he had not yet been able to secure a hearing date for the appeal because of the reservation system. The Respondent also explained that the court was "more or less not in session for the latter half of December, which made for a busy January and February." The Respondent indicated that he would try again in March on the designated call date.

[38] On February 25, 2016, the Respondent received an email from BD that listed his concerns and unhappiness regarding the delays in having his appeal heard. On March 3, 2016, the Respondent wrote to BD to schedule a meeting in order to address BD's concerns.

[39] On March 4, 2016, the Respondent received the following email from opposing counsel:

> I have heard nothing from you for months, and nothing from you since my last email on November 19, 2015 that requested you advise me whether your client had abandoned his appeal. Could you please either respond or withdraw this case forthwith? If I do not hear from you by Friday, March 11, 2016 by 4:00 pm, then I will file an application to have the appeal dismissed and seek costs against your client.

[40] On March 14, 2016, the Respondent replied to opposing counsel, apologized for the delayed response and requested counsel's available dates for the hearing of the appeal.

[41] On March 14, 2016, the Respondent received an email from opposing counsel that stated:

> Under the Standard Directions for Appeals from Provincial Court under the Family Law Act, your client had 45 days after filing the Notice of Appeal to file the original transcript with the court and serve a copy on my office, as well as file a written outline setting out the grounds of appeal, the relief sought and the factual and legal basis on which the relief is sought (including a list of authorities to be relied upon).

> I have not received any transcript. Has the original transcript been filed with the court? Have you filed your Written Outline?
>
> Please advise me as soon as possible whether you have complied with the Standard Directions. If not, then my client will be opposing any application for an order to extend that time limits [sic] …

[42] On March 17, 2016, the Respondent met with BD who asked the Respondent to schedule a hearing date for the appeal.

[43] On May 18, 2016, the Respondent received an email from BD that noted that it had been two months since their meeting and that the Respondent was supposed to do a number of things, including schedule the appeal. BD also asked the Respondent to provide a time frame and to update him with the status of the appeal.

[44] On May 30, 2016, the Respondent replied to BD's email and advised that he was "in the midst of lengthy court appearances and trials and tied up for another 10 days" and that he would follow up with BD the next week.

[45] On June 10 and 16, 2016, the Respondent received emails from BD reminding him that he was still waiting for an update.

[46] On June 17, 2016, the Respondent emailed BD and explained that he had been out of town dealing with a family emergency. The Respondent indicated that he would "look into actively moving it along" after June 28, 2016, once a trial was finished.

[47] On June 14, 2016, opposing counsel filed a Notice of Application to dismiss BD's appeal, returnable June 30, 2016.

[48] The basis of the application was a failure to follow the Standard Directions by failing to file or serve transcripts, file a written outline and set a hearing date.

[49] On June 17, 2016, the Respondent received an email from BD stating that he was "very dissatisfied with the delays and [the Respondent's] responses" and that, if he did not receive an update by June 30, 2016, he would follow up with the Law Society.

[50] On June 29, 2016, the Respondent received an email from opposing counsel that indicated that he had not received a response regarding his client's Notice of Application to dismiss the appeal and enquired whether the Respondent was still acting for BD and whether he had received any instructions in this regard.

[51] On June 29, 2016, the Respondent emailed opposing counsel and advised that he had just received the application materials, which had been delivered to his office in his absence.

The Respondent requested an adjournment of the application to dismiss the appeal, saying he needed to meet with BD to discuss the application and obtain instructions.

[52] On June 29, 2016, opposing counsel consented to an adjournment of the matter to July 28, 2016.

[53] On June 29, 2016, the Respondent provided opposing counsel with his available dates and noted that the adjournment would enable him to provide "sufficient/required notice of [his] client's application as well, if he decides to bring it."

[54] On June 29, 2016, the Respondent sent BD an email stating "[opposing counsel] and I have set a hearing for the end of July to determine the issue of perfecting the appeal and hopefully we could establish a timeline then to get the appeal heard and dealt with." The Respondent did not advise BD that the hearing date was set to hear opposing counsel's application to have the appeal dismissed.

[55] On July 21, 2016, the Respondent received an email from BD asking to schedule a meeting to discuss his concerns prior to taking any further steps. On July 25, 2016, the Respondent replied to BD and agreed to meet with him on the afternoon of July 28, 2016.

[56] On July 25, 2016, the Respondent emailed opposing counsel and requested an adjournment of the application to dismiss the appeal. The Respondent indicated that he was "in the process of withdrawing as counsel of record" but that he did "have instructions now to continue to represent him with respect to the appeal matter." He also stated that he would be meeting with BD that week to put together response materials and an application for an extension of time.

[57] The only meeting between the Respondent and BD scheduled that week was the one requested by BD. The Respondent and BD did not have plans that week to put together response materials or an application for an extension of time.

[58] When the Respondent advised opposing counsel that he had instructions to continue with the appeal, he implied that he had new instructions when he did not have any new instructions.

[59] During the September 28, 2017 interview with the Law Society investigator, the Respondent agreed that, when he implied that he had new instructions, he was misleading opposing counsel.

[60] Opposing counsel did not consent to a further adjournment of the application to dismiss the appeal, and on July 28, 2016, the Respondent and opposing counsel appeared in the Supreme Court of British Columbia before the Honourable Mr. Justice Smith.

[61] At that hearing the Respondent did not have any written materials prepared, either in support of an application for an adjournment or in response to the application for dismissal of the appeal.

[62] The Respondent made several misleading submissions to explain his lack of preparation. The complete lack of preparation for the hearing and the circumstances leading to the hearing resulted in the Court refusing the adjournment application and dismissing the appeal, with costs against BD.

[63] There is a dispute on the evidence as to whether the Respondent advised BD that his appeal had been dismissed on July 28, 2016. BD is categorical that he was not advised of this outcome, and the Respondent is equally adamant that he advised BD of the dismissal. We will address this discrepancy later in these reasons.

[64] The Respondent did not provide BD with copies of the opposing party's materials in support of her application to have BD's appeal dismissed. The Respondent did not advise BD that costs had been ordered against him.

[65] Following the dismissal of the appeal, BD retained a new lawyer to represent him in an application to set aside the July 28, 2016 order and reinstate the appeal.

[66] On August 11, 2016, the Respondent emailed BD's new lawyer and confirmed that the written outline and the transcripts had not been filed with the court, that a hearing date had not been procured, and that a Notice of Hearing had not been filed.

[67] Following these events and in response to questions from new counsel for BD and the Law Society, the Respondent restated his position that nothing could be done in the appeal process until a hearing date was booked. He restated his belief that the process to obtain a hearing date is very cumbersome and difficult to manage.

[68] In a March 6, 2018 email to the Law Society, the manager of Vancouver Supreme Court Scheduling wrote:

> As you have noted it is difficult to obtain dates particularly due to the ongoing high vacancy rate within the court. However, scheduling will accommodate any request for hearing dates for an appeal even if the schedule is full although it is not always possible within 30 days. In those instances counsel usually set the matter for hearing on the general list for directions and then adjourn the hearing to the date that has been set with scheduling.
>
> All of this is dependant [sic] upon counsel or their office providing the appropriate information. If they simply seek a one or two day hearing without

identifying the need, they may well be told that there are no dates available and be referred to the scheduling memorandum for the next booking day.

[69] We find that the Respondent did not make appropriate efforts to secure a hearing date for the appeal.

BURDEN OF PROOF

[70] The burden of proving the allegations in the citation on the balance of probabilities rests with the Law Society. The significant admissions provided by the Respondent in response to the Notice to Admit have effectively eliminated all but one of the matters where a consideration of the extent to which the Law Society has discharged the burden upon it is required. The single factual matter in dispute will be addressed in these reasons.

ISSUES AND ANALYSIS

[71] There are numerous circumstances throughout the facts of this case where the Respondent misled his client and opposing counsel. We believe that no useful purpose is served by repeating the numerous examples of the misleading behaviour. For that reason we have recited the facts in full to provide a complete picture of the circumstances of the citation.

[72] Allegation 1 of the citation alleges that the Respondent misled his client specifically in four instances.

[73] The first three instances where the Respondent is alleged to have misled his client are summarized as follows: by stating that an outline had been filed when it had not been filed; by failing to advise his client that opposing counsel had filed an application seeking a dismissal of the appeal; and by mischaracterizing the hearing scheduled on July 28, 2016 as a hearing to "determine the issue of perfecting the appeal" when, in fact, it was a hearing to dismiss his client's appeal.

[74] The necessary facts in each of these circumstances have been admitted by the Respondent, and we confirm that this allegation is made out as to each of these three instances.

[75] The fourth instance alleged in allegation 1 is more difficult. This is the single contentious question of fact in this case. Simply put, the Respondent says that he advised his client on July 28, 2016 that the appeal had been dismissed. BD swore an affidavit in the family proceedings that he learned that the appeal had been dismissed only when he searched the court file the next day in his frustration with the Respondent and the lack of meaningful progress. In that affidavit he specifically denied that the Respondent told him on July 28, 2016 that the appeal had been dismissed.

[76] Counsel for the Respondent argued that the Panel had not received cogent and compelling evidence on this issue. It is the position of the Respondent that he did tell his client following the hearing on July 28, 2016 that his appeal had been dismissed.

[77] The Panel considered this isolated conflict in the evidence and determined that the Law Society has not met the burden upon it. BD swore an affidavit to the effect that the Respondent did not tell him on July 28 that the appeal had been dismissed. However, BD's affidavit was not admitted in these proceedings for the truth of its content. BD was not called as a witness in these proceedings and, therefore, did not face cross-examination on the issue. We find that the Law Society has not discharged its onus to prove allegation 1(e). There is no clear and cogent evidence before us upon which we are able to make a determination that BD failed to tell his client on the afternoon of July 28, 2016 that his appeal had been dismissed.

[78] Allegation 2 of the citation alleges that the Respondent misled the court when he represented that he had instructions to bring an application to extend the time to perfect the appeal when he did not have those instructions.

[79] This misrepresentation occurred in the context of the July 28, 2016 hearing for which the Respondent was completely unprepared, and this statement emerged in the Respondent's attempt to convince the court to grant his adjournment request.

[80] The fact of the misrepresentation is admitted by the Respondent, and the allegation is made out.

[81] Allegation 3 of the citation alleges that the Respondent failed to provide his client with the quality of service expected of a competent lawyer by failing:

(i) to keep his client informed of the status of the matter;

(ii) to answer requests for information and documents;

(iii) to respond to communications from his client;

(iv) to ensure that work was done on the appeal to preserve its value to his client; and

(v) to provide complete and accurate information to his client about the matter.

[82] Our extensive recitation of the facts in this matter demonstrates each of the incidents noted in this allegation. In many instances, the impugned behaviour is repeated. Each of the factual instances described in our summary of the facts has been admitted by the Respondent. Accordingly, we find that allegation 3 has been made out.

PROFESSIONAL MISCONDUCT

[83] The Respondent admits that his conduct in relation to allegations 1(a) through (d) and allegations 2 and 3 constitutes professional misconduct. We agree.

[84] The test for professional misconduct is becoming increasingly clearly stated as decisions following *Law Society of BC v. Martin*, 2005 LSBC 16 and *Re: Lawyer 12*, 2011 LSBC 35 are considered and commented upon. In this case, counsel for the Respondent took no exception to the articulation of the test by counsel for the Law Society. The Law Society summarized the history leading to the present understanding of the test and concluded with an excerpt from a recent panel decision.

[85] In the recent decision of *Law Society of BC v. King*, 2019 LSBC 07, at para. 36, a hearing panel cited with approval the following excerpt:

> In *Law Society of BC v. Kaminski*, 2018 LSBC 14, the panel considered the meaning of 'professional misconduct' and stated, at para. 43:
>
> > What constitutes professional misconduct is not defined in the Act or the Rules or described in the *Code of Professional Conduct*. Since the decision by the hearing panel in *Law Society of BC v. Martin*, 2005 LSBC 16, the vast majority of panels have adopted as a test for professional misconduct whether the conduct of the lawyer in question exhibited a "marked departure" from the standard of conduct the Law Society expects of lawyers. This is a subjective test that must be applied after taking into account decisions of other hearing panels, publications by the Law Society, the accepted standards for practice currently accepted by the members of the legal profession in British Columbia and what, at the relevant time, is required for protection of the public interest.

[86] We have adopted this approach in our determination of this case. In our consideration of this matter, we have reviewed the summary of facts that the Respondent has admitted. It is an astounding history of misbehaviour by a lawyer. While there may be an explanation for the events, there can certainly be no excuse.

[87] The conduct of this Respondent reflects badly on the profession as whole. We each bear the stain that behaviour such as this reflects upon the profession. In that result, there can be no misunderstanding that we have determined that the impugned behaviour clearly and emphatically constitutes a marked departure from conduct the Law Society expects of lawyers.

DECISION

[88] With the exception of item (e) of allegation 1, which we dismiss, we find that, in the circumstances made out in each of the three allegations of the citation, the Respondent has committed professional misconduct.

NON-DISCLOSURE ORDER

[89] The Law Society requested an order under Rule 5-8(2) of the Rules that portions of the transcript and exhibits that contain confidential client information or privileged information not be disclosed to members of the public.

[90] In order to prevent the disclosure of confidential or privileged information to the public, we order under Rule 5-8(2) that, if a member of the public requests copies of the exhibits or transcripts in these proceedings, those exhibits and transcripts should be redacted for confidential or privileged information before being provided to the requester.

[91] We additionally order that, if a member of the public requests copies of the transcripts in these proceedings, the submissions of counsel for the Respondent be redacted from any such transcripts. We make this order because it would be premature at this time for information provided in the course of submissions by counsel for Respondent to be released to the public. We will have more to say on this issue in our reasons for Disciplinary Action, but until then, the substance of submissions by the Respondent must remain confidential.