2019 LSBC 22
Decision issued: July 3, 2019
Citation issued: May 10, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MARK WILLIAM SAGER

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	March 19, 20 and 21 and April 24, 2019
Panel:	Nancy Merrill, QC, Chair Donald Amos, Public Representative David Layton, QC, Lawyer
Discipline Counsel:	Kieron G. Grady
Counsel for the Respondent:	Henry C. Wood, QC

INTRODUCTION

[1] On May 10, 2018, the Law Society issued a citation (the "Citation") alleging that the Respondent had committed professional misconduct in the course of representing an elderly woman named JB.

[2] JB was born on July 10, 1929 and died on January 21, 2016. The Respondent's mother was her very close friend for many years, and since childhood the Respondent and his sister had viewed JB as their aunt. JB attended their extracurricular events and supported their endeavours.

[3] In late 2012, JB fell in her home. She was a large woman, weighing about 300 pounds, and the injuries from the fall reduced her mobility and resulted in her staying in Lions Gate

Hospital in North Vancouver for a number of months, at which point she moved to a care centre in West Vancouver.

[4] The Respondent did not learn of JB's predicament until June 2013, when she called him expressing unhappiness with her situation at the care centre. He provided JB with a great deal of assistance in the months that followed, often to her benefit and enjoyment. During much of this period, the Respondent and his firm also acted as JB's lawyer in a number of matters, including preparing a power of attorney, drafting a new will, representing her in a divorce and handling the conveyance of her house.

[5] The Citation alleges two instances of professional misconduct against the Respondent in connection with his role as JB's lawyer.

[6] One allegation is that, in January 2014, the Respondent caused to be prepared for his client JB a will that gave him a testamentary gift from JB, contrary to rule 3.4-26.1 and/or rule 3.4-38 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*").

[7] Rule 3.4-26.1 prohibits a lawyer from performing any legal services if there is a substantial risk that the lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's interest in the subject matter of the legal services. Rule 3.4-38 provides that

> Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer ... a gift or benefit from the client, including a testamentary gift.

[8] The other allegation in the Citation is that the Respondent accepted gifts in the total amount of $100,000 from his client JB in July 2014 and December 2015, when JB had not received independent legal advice, contrary to rule 3.4-39 of the *BC Code*.

[9] Rule 3.4-39 provides that a lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

[10] The Respondent admits that he breached rule 3.4-38 by causing a junior lawyer in his firm to prepare a will for JB under which he was a beneficiary. He also admits that he breached rule 3.4-39 by accepting a gift of $75,000 from JB in July 2014, while she was his client and without her having received independent legal advice.

[11] But the Respondent contends that these two breaches do not constitute professional misconduct. The crux of his argument is that, during the time period in question, he was unaware of the prohibitions in rules 3.4-39 and 3.4-38, which had only come into force as part of the new *BC Code* on January 1, 2013. He says that his actions would not have constituted professional misconduct under the rules previously in force, and that lawyers

should be entitled to a reasonable amount of time to gain familiarity with new Law Society requirements.

[12] For the reasons set out below, we do not accept the Respondent's argument, and we conclude that the Law Society has met its onus of proving professional misconduct with respect to both of the allegations in the Citation.

RELEVANT FACTUAL BACKGROUND

[13] The parties called a number of witnesses at the hearing and also filed an Agreed Statement of Facts. The testimony of some of the witnesses differed on certain points, but by the end of the hearing, there were few disputes between the parties in terms of the material factual matters. The main area of contention was whether the facts justified a finding of professional misconduct regarding one or both of the allegations in the Citation.

[14] Unless otherwise stated, we accept the testimony of the witnesses provided in the factual review that follows.

The Respondent's legal practice – General overview

[15] The Respondent was called and admitted as a member of the Law Society on March 10, 1991. He had clerked at the Court of Appeal, and although still a relatively young man, had been active in municipal politics for almost 15 years. Indeed, at the time of his call the Respondent was the mayor of West Vancouver.

[16] After working for a couple of years at a well-known Vancouver law firm, the Respondent started his own firm in West Vancouver with another lawyer and a law professor called Sager Anderson Lawrence. The firm is now called Sager Legal Advisors LLP ("Sager LLP") and has six lawyers and two articled students. The Respondent testified that Sager LLP is his firm and he takes full responsibility for it.

[17] During the time period covered by the Citation, Owen de Vries worked as an associate at Sager LLP. Mr. de Vries had articled with the firm and was called to the bar in January 2012. He was therefore still a fairly junior lawyer. The Respondent was Mr. de Vries' principal and an important mentor for him at the firm.

[18] Mr. de Vries testified that, in January 2014, he conducted a fairly broad solicitor's practice, including business, property, wills and estates and a little litigation in connection with a litigator who had recently joined the firm. He had previously prepared some wills and was comfortable with the precedent used by Sager LLP for this purpose.

[19] Mr. de Vries testified that there were other lawyers at the firm who did wills and estates, including Bruce Leslie. The Respondent testified that Mr. Leslie was a senior lawyer with 35 to 40 years' experience who specialized in complex estate matters.

JB, her family and her relationship with the Respondent's family

[20] JB was born in the United Kingdom and came to Canada with her soon-to-be-husband SB in the 1950s. They eventually bought a house in North Vancouver. Both of them were registered owners. JB and SB separated in the 1980s but did not divorce. JB lived alone in the house until December 2012, when she suffered her fall and was forced to move out.

[21] CY was JB's younger sister by about 20 years and was seven years old when JB moved to Canada. CY also came to Canada as an adult, and she testified that, when CY first arrived, JB was very friendly with the Respondent's family and, in particular, with his mother. CY moved with her husband to a community on Vancouver Island in about 2006.

[22] CY testified that she and JB had another sister, two years younger than JB, who had remained in the United Kingdom.

[23] AY was CY's son and JB's nephew. He was an accountant and, at the material time, was in his early 30s, living in North Vancouver, about a ten-minute drive from JB's house. AY testified that, during the decade before JB's fall, he visited her house once or twice per year and that they would speak by phone about once per month. Prior to JB's fall, AY had heard about the Sager family business and the Respondent's mother, Mrs. Sager, but AY had never met the Respondent or heard his name.

[24] CY had a daughter named JY, AY's sister, who no longer lived in British Columbia.

[25] The Respondent and his sister, SZ, both testified that JB had been a very close friend of their mother and that they had also been close to her, to the point where they called her "Auntie J". The Respondent and his sister described JB as a source of support for them as children and young adults, attending their extracurricular events and providing them with encouragement or advice. They also described JB as having been involved with their own families, including with their children. The Respondent put into evidence photos of JB attending his call to the bar ceremony and his wedding, events that occurred in the early 1990s.

[26] The Respondent's father also testified that JB had a close relationship with the Sager family, although his advanced age made it difficult for him to provide any real detail. He did, however, testify that he and his wife made provisions for JB to be the guardian for their children, even though they both had siblings.

[27] Two other witnesses testified regarding JB's relationship with the Respondent and the Sager family during the 1970s and into the early 1990s. DJ was an old Sager family friend, who became JB's doctor about 14 months after her fall. DJ recalled meeting JB at the Sager residence in the early 1980s, when DJ was in her early 20s. BH was the Respondent's long-time friend, who worked in the Sager family business for a number of years after university. BH testified that the Sagers treated JB like family, and vice versa. DJ and BH both testified that the Sagers called JB "Auntie J", and so they did as well.

[28] All of the witnesses who dealt with the Respondent after JB's fall in late 2012, including AY, agreed that the Respondent always referred to her as "Auntie J."

[29] While the evidence of CY could be taken to suggest that JB was never particularly close to the Respondent, based on the evidence set out above, we conclude that the Respondent knew JB from a young age and that they were affectionate towards one another and justifiably viewed their relationship as akin to that of nephew and aunt. The Law Society did not challenge the Respondent or any of his witnesses on this point, nor did it argue otherwise in closing submissions.

[30] Much less clear on the evidence is the frequency of contact between the Respondent and JB in the years immediately preceding her fall. The Respondent's parents had moved to Salt Spring Island many years before, and then to Victoria in about 2000, where his mother eventually began to encounter serious health problems. SZ had lived on Salt Spring Island for some time, frequently travelled with her work, and bore the bulk of the responsibility in caring for her ailing mother. Face-to-face contact between JB and elements of the Sager family had therefore undeniably diminished by the early-to-mid 2000s.

[31] The Respondent and his sister nonetheless testified that they continued to have contact with JB. The Respondent testified that he saw her on important family occasions such as Christmas and birthdays. SZ testified that she would visit her parents in Victoria every Friday, unless she was travelling, and together they would speak to JB on the phone. She testified that this practice continued until her parents moved back to West Vancouver in late 2013.

[32] However, the Respondent was unable to produce any confirmatory evidence regarding his contact with JB in the years immediately preceding her fall. SZ testified that she had lost all of her digital photos through a technological mishap. The Respondent testified that he had not looked for more recent photos, but his family was more partial to real photo albums, and with the advent of digital technology, they did not have as many photos. Witnesses such as DJ and BH could not speak to the closeness of the relationship between JB and the Sagers in more recent times.

[33] Of particular significance in this regard, after JB fell and was admitted to hospital, she contacted AY, who visited her the same or the next day. AY provided her with assistance in the months that followed, including retrieving items for her from her house and looking after her bills after obtaining a power of attorney. Sager LLP had prepared JB's will in 2003, but they did not prepare this power of attorney.

[34] By contrast, the Respondent admits that JB did not contact him until early June 2013, which was six months after her fall. He accepts that, up to that point, he was unaware of JB's predicament. SZ learned of JB's fall and subsequent travails only from the Respondent.

[35] The Respondent and his sister testified that the complete absence of any contact between them and JB during the six-month period after her fall was an aberration – he described it as "highly unusual."

[36] SZ explained that, during this period, she had many demands, including travelling as part of her craft business in the weeks before and after Christmas 2012, planning her daughter's wedding for the summer of 2013, and dealing with her mother's significant health decline. She was often rushing to Victoria to help her parents. SZ testified that her life was also made more complicated by the fourth-stage lung cancer of her future son-in-law's mother.

[37] For his part, the Respondent testified that, although JB spent Christmas with his family "every year" and "most years", in 2012 his family went to Hawaii for the holidays and he had not called to wish her a merry Christmas. In cross-examination, the Respondent agreed that, in a Law Society interview, he had said that he dropped by JB's home about once per month. He explained that he had not done so between October or November 2012 and early June 2013, when JB contacted him, because he was working on large projects and was travelling. He added that he was dealing with his mother's health issues and his daughter's move to New York City. But, as already noted, SZ testified that she bore the bulk of the responsibility in caring for her mother, who was living in Victoria. We accept that evidence, and indeed in chief the Respondent testified that his sister bore the "lion's share" of assisting with his mother because she did not live as far away. He appeared to be unaware of certain significant physical difficulties his mother was encountering. He offered that his sister was good at keeping these details from him.

[38] The Respondent testified that he never asked JB why she did not contact him until June 2013, but surmised that she had called AY, and not him, because she did not want him to see her in a wheelchair. SZ testified that JB had told her that she did not want to bother them with her troubles because she knew they were very busy.

[39] It is not necessary to determine the precise extent of contact that JB had with the Respondent and his sister in the years immediately preceding her fall. But we find that the

contact was much less frequent than it had been in past times for two main reasons. First, JB contacted AY and not the Respondent for assistance after her fall. Second, both the Respondent and SZ went for six months or so without attempting to make any contact with JB.

[40] For these two reasons alone, we do not accept the evidence of the Respondent and SZ regarding the extent of their contact with JB in the years immediately preceding her fall. But we also find it unlikely that JB would have decided not to contact the Respondent and/or SZ simply because she did not want them to see her in a wheelchair, or because she believed them to be very busy, if she had been in regular contact with them in the months prior to her fall. Plus, SZ did not explain why, if she was often rushing to Victoria to help with her parents during the period from December 2012 to June 2013, she did not continue (or at least attempt to continue) participating in the phone calls with JB that she had testified routinely occurred when she visited her parents. The reliability of the Respondent's testimony on this point is also adversely affected by the inconsistent statement he made to the Law Society about the frequency of his visits with JB.

JB's fall and events prior to the preparation of her new will

[41] On December 4, 2012, JB fell in her home and suffered injuries to her hip and perhaps also to her knee. She was taken to Lions Gate Hospital in North Vancouver, where she remained for a number of months.

[42] AY testified that JB was still at the hospital on March 27, 2013 when she executed the power of attorney. He used the power of attorney for day-to-day banking on her behalf, to the point where the staff at the bank became familiar with him and no longer asked him for identification.

[43] AY testified that, at JB's request, he visited JB's house about a week after her fall to pick up mail and her purse. He described the house as very dusty and messy. There was "stuff everywhere", to the point where it was difficult to manoeuver, although a path was clear from the den, where JB watched television, to the kitchen. AY was not challenged on this evidence in cross-examination. Rather, counsel for the Respondent elicited from AY that, based on previous visits, he had known that JB was "a bit of a hoarder."

[44] AY testified that he and his wife did some cleaning of the house with a view to making it safe for JB if she was able to return home. This work included moving some items into piles. AY testified that, even had the house been fully cleaned up, it was hard to say whether it would have been safe for JB to move back. This had simply been the goal, or the hope, early on.

[45] AY testified that JB was transferred to the West Vancouver Care Centre (the "Care Centre") about four to five months after her fall. JB wanted to return to her house, but because of her mobility problems she required full-time assistance, which the Care Centre provided. The witnesses who saw her in the Care Centre, CY, AY and the Respondent, all agreed that she used a wheelchair for a considerable period of time while at the Care Centre.

[46] The Respondent testified that JB contacted him in early June 2013, and from that point onwards he visited her frequently. She was unhappy about being in the Care Centre and wanted to return to her home. But after speaking to the nurses, the Respondent realized that JB would only be able to leave the Care Centre if she was able to move without a wheelchair. He encouraged her to work towards this goal, and she made improvements.

[47] The Respondent testified that, by August 2013, JB's mobility, while "not fabulous", had improved to the point that she could use a walker. In September he took JB to visit her home. The Respondent testified that JB believed that CY, AY and AY's wife had been going through her things, as evidenced by boxes in the living room, and that she was upset.

[48] Following the visit, the Respondent took JB to her bank so she could view her accounts. There had been some withdrawals, but nothing significant, and JB admitted to the Respondent that she had told AY that he could take money out for his birthday, dinners and so on. She wanted to revoke AY's power of attorney, but the Respondent convinced her not to do so and she decided to give the Respondent a power of attorney as well. JB also added the Respondent to one of her chequing accounts, although the Respondent testified that he never regarded the money in the account as his.

[49] The Respondent arranged for Mr. de Vries to attend at the Care Centre to assist JB in executing the power of attorney.

[50] Mr. de Vries testified that the Respondent told him that JB was recovering from a hip injury at the Care Centre and that her nephew AY was helping with her affairs, but that she had concerns about a lack of transparency and autonomy, and she wanted a power of attorney for the Respondent so she could get her finances under control. Mr. de Vries did not recall having previously heard about JB from the Respondent. Because the Respondent always called her "Auntie J", Mr. de Vries believed that JB was his biological aunt.

[51] Mr. de Vries met JB at the Care Centre on September 13, 2013. He applied the criteria in s. 12(2) of the *Power of Attorney Act*, RSBC, c. 370, making sure that there were no concerns about JB's capacity by conversing with JB about matters such as her assets and their approximate value, the nature of a power of attorney, the risk that a person with a power of attorney could misuse it, and so on. JB responded to his questions in a

meaningful, business-like, but kind manner, after which she executed the power of attorney.

[52] With JB now able to use a walker, in the fall of 2013 the Respondent assisted her in looking for an independent living facility, taking her to visit various potential buildings. Most had wait lists, but a new facility operated by Kiwanis (the "Kiwanis building") was nearing completion and had availability. The Respondent testified that he did not press her to move there, but she loved a particular suite and, in October or November 2013, she decided to move to the building.

[53] Given JB's health problems, her estranged husband SB concluded that she would unlikely be returning to the house. He wanted a divorce and to sell the house, and he retained counsel to commence divorce proceedings. By the late summer or very early fall of 2013, the Respondent was acting for JB as counsel in the divorce matter, as evidenced by an email sent to him by counsel for SB. The Respondent filed pleadings for JB in the divorce and, in associated correspondence, referred to JB as his client.

[54] The Respondent testified that the divorce was an emotional and difficult matter for JB and that he conducted negotiations with counsel for SB that allowed her to buy out SB's interest in the house instead of selling the house and splitting the proceeds. This strategy had several benefits for JB. It allowed her more time to sort through her possessions in anticipation of the move into the Kiwanis building. It afforded the Respondent time to prepare the house for sale by making various improvements, such as cleaning and tidying, painting, new carpeting and yard work. And it gave JB the benefit of any appreciation in the value of the house that occurred during the intervening time period.

[55] The Respondent supervised the work undertaken to prepare the house for sale. He hired various friends or acquaintances to do the work, including SM, who testified as a witness for the Respondent and described meeting JB at the house. The Respondent assisted in this preparatory work. He also rented a storage locker, which was used to store the possessions that JB wanted to keep but was not taking with her to the Kiwanis building.

[56] The Respondent engaged DA, who had been working part-time organizing his own house, to attend at JB's house with JB to identify and pack items to be moved into the Kiwanis building. DA testified as a witness for the Respondent regarding her interactions with JB, which started about six to eight weeks before the move and involved several trips to the house.

[57] The Respondent testified that JB was one of the first residents to move into the Kiwanis building and that she moved there on January 1, 2014. He engaged the people who helped JB's move to her new suite, a process that started before January 1, 2014 due to arrangements made by the Respondent.

[58] Following this move, the Respondent arranged for DA to continue to help JB with household tasks such as shopping, laundry and light cleaning. DA attended at JB's suite about once per week. The Respondent also arranged for a home care service called Proof of Care to assist JB. The owner of Proof of Care, TS, testified as a witness for the Respondent about the nature of the care and her interactions with JB.

[59] The Respondent testified that, during the period that JB was at the Kiwanis building, he would stop by for a visit most days on his way home from work, except for Tuesdays, because, if AY was going to visit, he usually did so on that day. The Respondent and JB would chat, and sometimes he would stay for dinner.

[60] As already noted, JB's sister CY lived on Vancouver Island. CY testified that she made two or three visits to JB at the Kiwanis building. She had also visited JB a couple of times at both the Lions Gate Hospital and the Care Centre.

[61] AY testified that he visited JB at least once a week at the Kiwanis building. He continued to pay some bills for her, but not all of them. AY knew that the Respondent had arranged for DA to assist JB and also for the Proof of Care service and that the Respondent had taken the initiative in preparing the house for sale. AY knew that the Respondent looked after payments for these services, as well as for anything else that he arranged.

[62] AY testified that, once the Respondent became involved with JB, he and the Respondent got along for the most part and fell into a pattern where they shared tasks. The Respondent kept him apprised of various matters, such as the steps taken to prepare the house for sale.

[63] CY also knew that the Respondent was helping JB while she was in the Care Centre and at the Kiwanis building. In cross-examination CY agreed that she was happy that the Respondent "was in charge" because JB did not listen to CY.

[64] AY described JB's mobility when she lived in the Kiwanis building as poor, saying that he never saw her get up out of her chair. This testimony was generally supported by the evidence of the other witnesses.

[65] DA testified that JB was mostly sedentary in her chair, although she could get up using a walker, and that, before Proof of Care began providing assistance, she would make her own sandwiches.

[66] SM visited JB about ten or 15 times at the Kiwanis building. He testified that she would not get up to greet him, but rather her mobility was limited, and she would sit in her chair. However, he recalled that he, JB and the Respondent went out for dinner for her birthday in July 2014, and she used a walker to get around.

[67] Proof of Care owner and registered nurse TS testified that her company began providing services to JB in July 2014 and continued to do so for about 18 months, including when JB was in a hospice at the end of her life. Proof of Care charged JB for 917 hours of work in total. TS, who personally spent about 30 to 40 hours with JB, testified that JB had mobility problems but that, when Proof of Care first started visiting, JB could open the door and could go to the washroom or the kitchen, albeit not quickly. TS testified that the Respondent had got JB a chair that could lift her up to a standing position and that JB's mobility got a little better after Proof of Care began providing foot care. It later declined due to problems with her knees, but this decline was not out of the ordinary for an obese senior.

[68] DJ was JB's physician beginning in late February 2014. She testified that the referral probably came from the Respondent. She could not recall why JB wanted a new doctor, but it might have been that she was unhappy with her old doctor or her old doctor would not make house calls to the Kiwanis building. DJ's records showed two visits to JB at the Kiwanis building, on February 28, 2014 and on June 3, 2015. DJ testified that, although JB was obese, on the first visit JB was mobile within her suite.

Preparation of new will in January 2014

[69] In 2003, JB had executed a will in which CY and her two children, AY and JY, would each receive one-third of the estate. The executor of the will was CY's husband. The Respondent and his sister received nothing under this will, nor did JB's husband, SB. The will was prepared by one of the founding members of the Respondent's law firm, who appears to have been practising on her own by that point.

[70] The Respondent testified that JB told him that she wanted to make a new will because she was unhappy with CY's husband and also because she had just gotten divorced. However, as the Respondent's counsel then pointed out to him in chief, the divorce was not entered until August 2014. This was many months after the new will was prepared. Plus, SB was to receive nothing under the 2003 will. We therefore do not accept the Respondent's evidence as to what he says JB told him about her reasons for wanting to make a new will. We are not suggesting that the Respondent was intentionally untruthful on this point. But his answer reflects a degree of carelessness or lack of reliability in his account of the events surrounding the making of the will, a subject that we will return to below.

[71] The parties generally accepted Mr. de Vries' evidence regarding the new will, which was given by way of a recounting of the events in his oral testimony, and also through his adoption for its truth of a detailed written narrative he had given the Law Society in October 2017.

[72] Mr. de Vries testified that, at 9:31 am on January 8, 2014, he received an email from the Respondent's assistant LM, which he may have seen only in passing in the morning. This email was entered as an exhibit. Attached to it was a draft will. In the email, LM told Mr. de Vries that the draft will was for the Respondent's "aunt" JB. She indicated that the residual percentages for the beneficiaries were still to be established. LM advised Mr. de Vries that he was to visit JB in the "nursing home", for which LM had yet to obtain the address, to determine the percentages and so advise her, upon which LM would bring Mr. de Vries a final version of the will to be executed.

[73] The draft will that was attached to LM's email stated that the Respondent was to be appointed as executor, and listed five people as beneficiaries: AY, CY, the Respondent, the Respondent's sister SZ and JB's other sister SC. The percentage of the estate to go to each beneficiary was marked with an "X". The draft will referred to the Respondent and his sister as JB's nephew and niece.

[74] Mr. de Vries testified that the Respondent dropped by his office at about 4:00 pm the same day and said that Mr. de Vries would have to "step in" regarding his Auntie J's will, because she wanted to make the Respondent a beneficiary and he was thus "conflicted out." Mr. de Vries understood that the Respondent and JB had already discussed the will, at which point it had come out that she wanted him to be a beneficiary. Mr. de Vries testified that he felt surprised and annoyed when the Respondent knocked on his door and asked him to act, from which we infer that Mr. de Vries had not yet reviewed the draft will attached to LM's email and had thus been unaware that the Respondent was listed as a beneficiary.

[75] Mr. de Vries testified that he and the Respondent had a ten-minute discussion regarding whether Mr. de Vries was also conflicted out. The Respondent told Mr. de Vries that he had no expectation regarding whether he would receive anything under the will, and that he did not want Mr. de Vries to report back to or tell him anything about the final contents of the will. At the end of the discussion, Mr. de Vries believed that he could act in the matter and that he faced no pressure from the Respondent or the firm as to the contents of the will. Mr. de Vries felt that he had a good understanding of what constituted a conflict of interest, although they did not consult the *BC Code* and he did not seek the opinion of anyone else in the firm who did wills, such as senior counsel, Mr. Leslie.

[76] It was only after the fact that Mr. de Vries learned that there was a provision in the *BC Code* addressing testamentary gifts to a lawyer.

[77] Immediately after his discussion with the Respondent, Mr. de Vries met with JB at the Sager LLP office. The meeting lasted about 30 minutes and they went over the draft will that LM had prepared. Mr. de Vries testified that the draft already had some handwritten notes on it. The parties agreed that some of the handwriting belonged to the Respondent,

namely: (i) he had written in JB's correct address and her phone number; and (ii) he had written out the name of JB's sister, SC, although SC's name was already in the typed version.

[78] At this meeting, Mr. de Vries told JB that he was taking over the preparation of the will because she was leaving something to the Respondent and that the Respondent would not be involved and would not be told anything about the will. Mr. de Vries advised JB that the will should reflect her wishes and that its contents were nobody's business but her own.

[79] As already noted, JB's existing will, which was made in 2003, left the entire residue of her estate to CY, AY and JY in equal shares. But JB told Mr. de Vries that she had grown distant from CY and JY, because they lived in different cities and she did not feel connected to their lives. She also mentioned that CY and her other sister SC were both happily married and had plenty of money. JB felt closer to AY, who lived in the area and had been helping to manage her affairs since her fall. She expressed some unhappiness regarding AY not keeping her informed about banking transactions and sorting through her personal property, but she believed that he needed the money more than some of her other relatives. JB spoke warmly of the Respondent and his sister, SZ, and she said that she felt close to them. She therefore wanted to divide her estate amongst AY, the Respondent and the Respondent's sister SZ.

[80] Mr. de Vries advised JB to think about to whom she wanted to leave the residue of her estate and in what percentage. JB said that she did not want to leave the decision too long, and she agreed to consider the matter overnight. They arranged to meet the next day at her suite in the Kiwanis building to finalize the will.

[81] The next day, Mr. de Vries met with JB at her suite for about 90 minutes and took further instructions. JB had decided not to leave anything to her sister SC, who she said was married and did not need the money. But JB still wanted to leave a little something for CY. JB confirmed that she wanted to remove JY from the will entirely, as they had almost completely lost touch. JB had also decided to leave something to a friend, MB, and to MB's daughter CB. JB initially wanted to leave 30 per cent of the estate each to AY, the Respondent and SZ, but after discussion with Mr. de Vries, concluded that the remaining 10 per cent was too small to be split amongst CY, MB and CB. She ultimately settled on 30 per cent to AY, 24 per cent to the Respondent, 24 per cent to SZ, 15 per cent to MB, 5 per cent to CY and 2 per cent to CB.

[82] Having obtained these instructions, Mr. de Vries phoned LM with the information regarding the beneficiaries and percentages. LM created a new version of the will and brought it to the Kiwanis building. Mr. de Vries reviewed the key components of the document with JB. After confirming that the will accurately reflected her intentions and instructions, she executed it.

[83] The will referred to the Respondent and SZ as JB's nephew and niece, which was consistent with Mr. de Vries' understanding of their relationship to JB.

[84] Mr. de Vries only discovered that the Respondent and SZ were not related to JB in 2016 when a petition was brought challenging the will. He admitted, however, that he had asked JB about her family history for *Wills Variation Act* purposes, and that she had given him the names of her siblings and their children. Mr. de Vries conceded that this information necessarily revealed that the Respondent was not legally related to JB, but he said that it did not set off any alarm bells. By that point it was engrained in his mind that JB was the Respondent's aunt. To the extent he considered it at all, Mr. de Vries thought that he had assumed that JB was the Respondent's aunt by marriage. Regardless, Mr. de Vries believed there was no conflict of interest, although as already noted, he was unaware of the *BC Code* rule regarding testamentary gifts to lawyers.

[85] Mr. de Vries testified that, given JB's age, he was aware of the need to ensure that she had the capacity to make the will and that, in meeting with JB, he took steps to satisfy himself on this point. For instance, he confirmed that JB had an appreciation of the claims of those who might consider themselves entitled to her estate, namely, her sisters and nieces and nephews, and an ability to rationally balance the competing claims. He also ascertained that she had an accurate notion of the nature of her estate, including how much her house was worth, her share of the house and the fact that it had not yet been sold. Mr. de Vries detected no difference in JB's demeanour or capacity since he had met her to execute the power of attorney in September 2013. He testified that she was easy to converse with and seemed pretty sharp.

[86] LM also testified regarding the preparation and execution of JB's will. Apart from a couple of years off when having children, and five years spent running a business, LM had been a legal assistant since 1974. She testified that, on the morning of January 8, 2014, the Respondent instructed her to draft the will for JB, which she did, and that he gave her the information regarding the beneficiaries and asked her to send the draft to Mr. de Vries to complete the process. In providing her with these instructions, the Respondent referred to JB as "Auntie J", which was what he always called her. This led LM to assume that JB was his biological aunt. LM recalled no reason for any rush, but the Respondent typically liked to get things done promptly. She sent the email to Mr. de Vries, with the draft will attached. LM did not recall meeting JB in the office on that day or on any other occasion.

[87] LM testified that, on January 9, 2014, she received information from Mr. de Vries by phone regarding the percentages for the beneficiaries. She inputted the information and brought the completed draft to JB's residence. She chatted with JB for about 20 minutes and was "absolutely" of the view that JB was competent to execute the document.

[88] On January 10, 2014, LM wrote a memo to file stating that JB was the Respondent's aunt and that he had taken instructions from JB regarding the will, but that, when she wanted him to be executor, he assigned the file to Mr. de Vries. LM's memo also stated that: (i) a draft will had been prepared, and Mr. de Vries attended at the client's home to discuss it and take further instructions regarding the residue provisions, which were then conveyed to LM; and (ii) LM drove to the client's home and was present when the client executed the will.

[89] LM testified that it was not her practice to write such memos, but she did so in this case because "it was unusual" and she "wanted something to document it" in case no other notes were made. More specifically, LM testified that she was uncomfortable about the bequests made in the will. When asked to elaborate, she said that her discomfort arose because there were family members who were not being provided for "as well as", at which point her answer trailed off and she did not finish her sentence. When again asked to look at the beneficiaries listed in the will and to comment, she paused and then responded, "I just felt uncomfortable."

[90] In cross-examination, LM agreed that she did not mention her discomfort to the Respondent and that she was not involved in any discussion between the Respondent, Mr. de Vries or anyone else about why JB had excluded anyone from the will.

[91] The Respondent testified that, at the time the will was prepared and executed, he was unaware of the rule that prohibited a lawyer from preparing or causing to be prepared an instrument giving the lawyer a gift or benefit from the client, including a testamentary gift. His understanding was that a lawyer could not produce a will pursuant to which the lawyer would receive a benefit but that it was permissible to have another lawyer in the same firm produce the will. The Respondent testified that, in his view, Mr. de Vries was independent of him and would take instructions from the client and that JB's needs would therefore not be negatively impacted by his interests.

[92] As to the events surrounding the preparation of the will, the Respondent testified that JB had met him in his office and had told him that she wanted him and his sister to be beneficiaries. His recollection was that he immediately left the room, telling her that they could not have this discussion. He then went to Mr. de Vries' office and instructed Mr. de Vries to prepare the will and never to mention the will to him. He also told JB never to discuss the will with him. The Respondent accepted that Mr. de Vries' testimony regarding their conversation regarding the will was correct.

[93] The Respondent testified that, while he did not insert the words "nephew" and "niece" in the will to refer to him and his sister, the language did not surprise him as that was how JB thought of them, and it never dawned on him that anyone would interpret this wording in a negative way.

[94] The Respondent further testified that the draft will that LM prepared for Mr. de Vries was based on instructions that LM had received from JB and not on any instructions from him. He denied looking at this draft will, except for the purpose of: (i) handwriting JB's address and phone number on the first page; and (ii) handwriting the name of JB's sister in the United Kingdom at the bottom of the second page, beside the typed version of her name already included in the draft. The Respondent testified that he made these handwritten notations because, as he was walking by LM's desk, she asked him to check the spelling of the name of JB's sister in the United Kingdom, who was listed in the draft as a beneficiary. The Respondent testified that he did not look at the third page of the draft will, which listed the remaining beneficiaries including him and his sister.

[95] There is a material discrepancy in the evidence of LM and the Respondent regarding who provided LM with the names of the beneficiaries to include in the draft will. Having considered the evidence relevant to this point, we find that the Respondent instructed LM to prepare the draft will that she emailed to Mr. de Vries on the morning of January 8, 2014 and that he instructed her regarding the names of the beneficiaries to include in the draft. We also find that the Respondent instructed LM to send the email to Mr. de Vries, with the draft attached, so that Mr. de Vries could determine the percentages. And we do not accept the Respondent's testimony that it was JB who provided LM with the names of the beneficiaries for inclusion in the draft will. We come to these conclusions for two main reasons.

[96] First, the Respondent says that he met with JB in the morning to discuss the will and, as soon as she mentioned making him and his sister beneficiaries, he left the room and spoke to Mr. de Vries about taking over the preparation of the will. LM's email to Mr. de Vries attaching the draft will was sent at 9:21 am that morning. Yet Mr. de Vries testified that he spoke to the Respondent about the will at around 4:00 pm that afternoon, whereupon he met with JB at the Sager LLP office. Mr. de Vries further testified that the draft will that he used at this meeting with JB already contained handwritten notations. The Respondent's version of events appears improbable, given the timing of LM's email and the number of hours that passed between that email being sent and Mr. de Vries' meeting with JB.

[97] Second, and much more importantly, the Respondent sent a letter dated October 4, 2017 to the Law Society that contains material inconsistencies and omissions regarding his interactions with JB and Mr. de Vries concerning the January 2014 will. These prior inconsistent statements significantly detract from the Respondent's reliability regarding his narrative of the meeting with JB and how LM came to prepare the draft will that was emailed to Mr. de Vries.

[98] The material inconsistencies or omissions contained in the Respondent's October 4, 2017 letter are as follows:

(a) The Law Society had asked the Respondent what steps he had considered in determining whether it was appropriate that he be named as trustee and beneficiary in JB's will. The Respondent replied that he was unaware until opening the will after JB's death that he was a beneficiary, although she had told him that she wanted him to be executor, and he had told her that he would take on this role.

(b) The Law Society had asked the Respondent what factors he had considered in determining whether it was appropriate for his colleague, Mr. de Vries, to draft JB's will, given her instructions to name him as a beneficiary. The Respondent replied that he was not involved in any discussion with Mr. de Vries about who would be JB's beneficiaries and that he had told Mr. de Vries never to discuss the matter with him. In recounting the relevant events earlier in the same letter, the Respondent said that, sometime around the signing of her divorce, JB had asked if Mr. de Vries could assist her with her will, that he had asked Mr. de Vries to take on this task, that Mr. de Vries had agreed to do so, and that he had expressly told Mr. de Vries that at no time did he want to know the contents of the will.

(c) The Law Society had asked the Respondent why his firm did not send JB out for independent legal advice prior to the execution of the will. The Respondent replied, "I was not involved in any discussions regarding me being a beneficiary," and "I suspect that Mr. de Vries would in the future send someone out for independent legal advice should I be named as both an Executor and Trustee [sic] in a will."

[99] In our view, these responses by the Respondent leave a strong, and inaccurate, impression that JB never told the Respondent of her desire to name him as a beneficiary in her will.

[100] The Respondent attempted to explain his responses in his testimony before us, but his explanations are not convincing.

[101] To begin with, the Respondent said that he was not represented by counsel when he wrote the letter. Yet the absence of counsel does not detract from a lawyer's obligation to provide a careful, candid and complete response to inquiries from the Law Society regarding a complaint.

[102] The Respondent also testified that, in his letter to the Law Society, he had meant to say that he had informed Mr. de Vries that JB wanted him and his sister to be beneficiaries. However, we cannot accept that a mere slip or oversight caused the Respondent to fail to

include this information in his letter. The information was obviously highly material to the Law Society's investigation and was also a central component of the Respondent's testimony before us as to why he handled the matter in the way that he did at the time.

[103] Finally, the Respondent explained his failure to inform the Law Society that JB had told him that she wanted to make him a beneficiary by saying that he did not know that she had in fact done so until he opened the will after her death, and that expressing a desire to make someone a beneficiary, on the one hand, and actually doing it, on the other, are very different things. This explanation falls flat because the Respondent's letter to the Law Society, reasonably read, presents a version of events under which he was unaware that JB had ever expressed a desire to leave him a share of her estate.

[104] We therefore conclude that the Respondent's letter to the Law Society contains inaccurate and incomplete statements that are evasive and that undermine the reliability of his testimony before us regarding the events surrounding the preparation of JB's will, except insofar as his testimony is confirmed by reliable evidence from other sources, such as the testimony of Mr. de Vries. This conclusion leads us to prefer LM's evidence over that of the Respondent on the issue of whether he provided her with the names of the beneficiaries for inclusion in the draft will to be emailed to Mr. de Vries.

AY learns of JB's new will

[105] AY testified that he saw JB's new will at her suite at the Kiwanis building and that he was shocked to see that his sister was excluded as a beneficiary. He testified that he mentioned this to JB, who said it must be a mistake. AY further testified that he told the Respondent that the exclusion of his sister must be wrong but that he did not recall the Respondent's response.

[106] The Respondent testified that AY was upset because his sister was not in the will whereas the Respondent's sister was included as a beneficiary. The Respondent told AY that this had nothing to do with him and to take the matter up with JB. The Respondent further testified that AY reported having raised the same complaint with JB, who responded by saying that AY had been put at the "top of the will." The Respondent testified that he never raised the issue of AY's complaint with JB.

[107] We attach no importance to the fact that AY and the Respondent have slightly different recalls of their conversation regarding JB's new will. Given the passage of time, these differences can be attributed to fading memories, and they are not material to the issues in dispute in this matter.

[108] Furthermore, we do not infer any deficiency in JB's cognitive abilities from her comment to AY to the effect that there must be a mistake regarding the exclusion of JY from her

will. Given the other evidence regarding her mental functioning, which is summarized at paragraphs 134-136 below, it is more likely that JB made this comment to AY in order to avoid a conversation that she felt would be difficult or upsetting.

House sale, ensuing gifts, finalization of divorce and Sager LLP's last account

[109] JB and SB reached a settlement in the divorce action in April 2014, and the Respondent signed a Certificate of Independent Legal Advice attached to the settlement agreement.

[110] The divorce settlement stipulated that SB would be paid a lump sum for his share of the house, based on a listing price of about $900,000 that SB had obtained from a real estate agent. As noted above, buying SB out of his interest in the house in advance of the sale was the Respondent's suggestion and, among other things, ensured that JB enjoyed the benefit of any increase in the value of the house. The Respondent arranged for short-term financing, secured by a mortgage on the house, so that SB could be paid. Mr. Leslie of Sager LLP issued an account to JB for the mortgage and the transfer to her of SB's interest in the house. The fees component of this account was $375.

[111] The house sold on June 9, 2014 for substantially more than the listing price. The Respondent testified that it had been listed at $900,000 but sold for about $250,000 above asking, and he was not challenged on this evidence in cross-examination. Mr. Leslie handled the conveyance on behalf of JB.

[112] Following the sale, JB gave the Respondent a gift of $75,000 and AY a gift of $80,000. AY testified that the Respondent had informed him of JB's intention to make these gifts, as well as some gifts to several other people. AY associated these gifts with the sale of the house.

[113] The Respondent testified that JB decided to bestow these gifts because she had made a large windfall with the sale of the house. JB asked to meet with the Respondent's wife, who JB knew very well. She held a senior position at Wood Gundy. They developed a financial plan for JB to invest $500,000, which is what she required for her own needs, and to give away the balance. The Respondent did not know whether his wife earned any commission from assisting JB in managing JB's assets.

[114] The Respondent testified that he had not wanted to accept the gift from JB but that his wife had convinced him that sometimes accepting a gift is the right thing to do for the giver. He testified that he had a policy of not accepting gifts from clients but that he did not think of JB as his client. He further testified that he was unaware of the rule in the *BC Code* preventing a lawyer from accepting a gift that was more than nominal from a client unless the client has received independent legal advice.

[115] The Respondent testified that JB made other gifts after the sale of the house: to DA ($1,000); to SM ($5,000); and to another person who had helped prepare the house for showing ($2,000). JB was aware of the windfall that she had received through the sale and of the work that the Respondent and his friends had put in to prepare the house for showing. The Respondent testified that he discussed the gifts with AY, who believed the gifts to be appropriate except the proposed gift to SM. The Respondent therefore reduced his own gift by $5,000, which explains why he received $75,000 but AY received $80,000. The Respondent further testified that AY viewed the Respondent's gift as being payment for his services in relation to the sale, but the Respondent never saw the gift in this way.

[116] The funds for the gifts were transferred out of a bank account held in the names of JB and the Respondent on July 3, 2014. The balance of the proceeds from the sale of JB's house, amounting to about $500,000, was deposited into a Wood Gundy investment account.

[117] Also on July 3, Sager LLP issued an account to JB, signed by Mr. Leslie, for services related to the payout and discharge of the mortgage and the sale of the house. The fees component of this account was $650.

[118] The Respondent testified that his $75,000 gift from JB was used to support his daughter's training as an opera singer in New York, which he and his wife felt was appropriate because JB had encouraged his daughter when, as a young girl, she had announced her dream of pursuing this career.

[119] The final order for JB's divorce was issued on August 6, 2014. The Respondent signed the order as JB's lawyer.

[120] Sager LLP issued an invoice dated November 19, 2014 to JB, for Mr. de Vries' fees regarding the power of attorney and the will, as well as for the fees of another associate who had assisted in the divorce. The last legal service listed on this account was provided on September 2, 2014, and the fees component of the account was $2,044.50.

[121] The Respondent continued to hold a power of attorney for JB, but he did not view this as constituting a legal service.

[122] The Respondent did not bill for any of his time spent on JB's legal matters. In his view, JB was a member of the family, and it would have been inappropriate to bill her for his services.

Further gifts and other material events prior to and following JB's death in January 2016

[123] On February 16, 2015, JB made AY a gift of $25,000. He could not recall having received this gift, but on being shown the cheque, agreed that he did so. AY bought a townhouse in

May 2015, and he testified that this money may have been used as part of the down payment.

[124] JB's doctor, DJ, testified that, in late February 2015, JB was admitted to Lions Gate Hospital for several weeks because of falls and mobility problems.

[125] DJ testified that, on October 18, 2015, JB was again admitted to Lions Gate Hospital because of mobility issues. JB was not able to return to her apartment, and on November 27, 2015, she moved to the Evergreen Care Centre in North Vancouver.

[126] In December 2015, JB gave AY and the Respondent further gifts of $25,000 each. AY testified that he had "begged" JB for $10,000 because his car had broken down and that she agreed. He conveyed this information to the Respondent, who subsequently told him that JB wanted to gift each of them $50,000. AY felt that this was too much and they decided to reduce the amount to $25,000. The Respondent then provided him with two cheques totaling $25,000.

[127] The Respondent testified that he did not believe himself to be providing legal services to JB at the time he received this gift. He said that JB provided these gifts because AY had asked for money. JB proposed $50,000 and she felt that the Respondent should receive the same amount. The Respondent felt this number was too high. He spoke to AY, who agreed. He and AY further agreed that, if JB felt that a gift of $50,000 was appropriate, they should each receive $25,000.

[128] We do not view the slight difference in the testimony of AY and the Respondent regarding the December 2015 gifts, or their conversation on the topic, as material to the issues in dispute in this matter.

[129] JB's sister, CY, testified that, before JB died, she learned from AY that JB had given gifts of money to the Respondent, but that she did not discuss this with JB.

[130] JB died on January 21, 2016. The Respondent was executor of her will.

[131] CY testified that she was upset when she learned that her daughter JY had been excluded from JB's will. In March 2016 she filed a Notice of Dispute regarding the will, but she withdrew the Notice of Dispute in May 2016. CY had legal advice when she filed and withdrew the Notice of Dispute.

[132] JB's will was probated in November 2016, and in December approximately $425,000 was paid into the Respondent's trust account as executor of the estate. The estate was distributed to the beneficiaries in early 2017. The Respondent signed a trust cheque payable to himself as beneficiary for $96,000, commensurate with his 24 per cent share of the residue of the estate. His sister would have received the same amount, while AY

would have received a larger payment because he was entitled to 30 per cent of the residue of the estate.

[133] CY made a complaint to the Law Society about the Respondent in May 2017.

JB's mental capacity at the relevant times

[134] CY and AY both testified that JB at times appeared to believe that events far in the past had happened only recently. CY referred to JB talking about recently painting the trim on her house when, in fact, this had happened years ago. AY testified that, by late 2013, JB's memory was not very good and she would confuse dates and times, although in cross-examination he said that her mental deficits would not be apparent to someone who spoke to her for only an hour and who had not known her for a long time. AY also testified that he believed that JB knew what she was doing when she gave him the gift in December 2015.

[135] On the other hand, Mr. de Vries made specific inquires of JB in September 2013 and January 2014 to satisfy himself that she was mentally competent to execute the power of attorney and the will. Moreover, a number of witnesses called by the Respondent testified that they had occasional or frequent contact with JB, spanning from 2013 until shortly before her death in early 2016, and described her as alert, engaged with those around her and demonstrating no mental deficits. These witnesses included caregivers DA and TS, acquaintance SM and JB's doctor DJ. It is true that all of these witnesses were associated with the Respondent in one way or another – none can be viewed as fully independent. Nonetheless, given the cumulative effect of these witnesses' testimony, we see no basis on which to reject their evidence on this issue.

[136] Indeed, in closing submissions counsel for the Law Society conceded that, taken as a whole, the evidence did not establish any reason to doubt JB's competency when she executed her will in January 2014 or made the cash gifts to the Respondent in July 2014 and December 2015. We come to the same conclusion based on the evidence before us.

LEGAL TEST FOR PROFESSIONAL MISCONDUCT

[137] Professional misconduct is established where the facts disclose conduct that falls markedly below the standard the Law Society expects of lawyers (*Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171; *Re Lawyer 12*, 2011 LSBC 35, at para. 8). Such conduct displays culpability that is grounded in a fundamental degree of fault but need not constitute intentional malfeasance – gross culpable neglect of one's duties as a lawyer also satisfies the test (*Martin*, at para. 154; *Law Society of BC v. Gellert*, 2013 LSBC 22, at para. 67).

[138] The onus is on the Law Society to prove professional misconduct on a balance of probabilities. The evidence "must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*Law Society of BC v. Schauble*, 2009 LSBC 11, at para. 43).

ANALYSIS OF ALLEGATION REGARDING TESTAMENTARY GIFT

[139] The Citation alleges that the Respondent committed professional misconduct by causing to be prepared for his client JB a will that gave him a testamentary gift, contrary to rules 3.4-26 and/or 3.4-38 of the *BC Code*.

[140] We will begin our analysis of this allegation by addressing whether the Respondent committed professional misconduct by breaching rule 3.4-38, which states:

> Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

[141] The Respondent admits that he breached rule 3.4-38. We agree. The evidence clearly establishes that the Respondent caused his associate, Mr. de Vries, to prepare a will for JB under which the Respondent was a beneficiary and that JB was not a member of the Respondent's family. The Respondent therefore contravened rule 3.4-38.

[142] The Respondent nonetheless argues that this breach does not constitute a marked departure from the standard the Law Society expects of lawyers and so does not amount to professional misconduct. In support of this argument, he says that his breach of rule 3.4-38 was inadvertent, the result of a genuine lack of familiarity with a substantial rule change, which itself was immersed in a major overhaul of the ethical rules that occurred when the *BC Code* replaced its predecessor, the *Professional Conduct Handbook* (the "*Handbook*"), on January 1, 2013. The Respondent argues that lawyers should be permitted a reasonable amount of time to gain familiarity with such changes. In this regard, he relies on a number of cases in which dispensation of this sort was accorded to lawyers who breached a rule found in the Law Society Rules that limits the amount of cash a lawyer can receive from a client. The Respondent also contends that his breach caused no harm and that its seriousness is further reduced because he attempted to address the conflict issue by having Mr. de Vries prepare JB's will.

[143] We agree with the Respondent that not every breach of a rule in the *BC Code* constitutes professional misconduct (*Martin*, at para. 144, quoting with approval from Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Carswell, 1993) §26.7, at what is now p. 26-20.1). We nonetheless find that, in

the circumstances of this case, the Respondent's breach of rule 3.4-38 was a marked departure from the standard that the Law Society expects of lawyers and thus amounts to professional misconduct. We come to this conclusion for the following reasons.

[144] First, the Respondent's breach of rule 3.4-38 occurred over the course of January 8 and 9, 2014, which is slightly more than a year after the *BC Code* came into effect. This is not a situation where a rule of very recent vintage caught a lawyer by surprise.

[145] Second, the cases cited by the Respondent for the proposition that lawyers should sometimes be given a reasonable amount of time to familiarize themselves with rule changes involve lawyers who were ignorant of one of the Law Society Rules limiting the amount of cash that can be received from a client. The Respondent's ignorance of rule 3.4-38 of the *BC Code* is of a different magnitude. The *BC Code* sets out the core rules of professional responsibility that govern the profession. All competent lawyers know that the *BC Code* contains extensive provisions relating to conflict of interest. These provisions are easily accessible online or, if a lawyer prefers, can be kept and periodically updated in hard copy format. Yet the Respondent did not consult the *BC Code* in this case, and he offered no explanation for his failure to do so.

[146] The Respondent's conduct in this regard is thus distinguishable from that of the lawyer in *Law Society of BC v. Chan*, 2009 LSBC 20, which is the case on which the Respondent's counsel placed the greatest emphasis in closing submissions. In *Chan*, by a narrow six to five majority, the Benchers on review concluded that the lawyer's breach of the cash receipt provision in the Law Society Rules did not amount to professional misconduct. In reaching this conclusion, the majority held that, among other mitigating factors, the lawyer had researched his professional duties by looking at and following the *Handbook* provisions requiring the exercise of due diligence to avoid becoming a tool for a client's dishonesty or fraud (*Chan*, at para. 18(c)). In our case, the Respondent did no research into his professional duties as set out in the *BC Code*, which as noted contains the key guidance regarding conflicts of interest and is the successor to the *Handbook*.

[147] As an aside, for many years prior to the *BC Code* coming into force, the Canadian Bar Association *Code of Professional Conduct* (the "*CBA Code*") has prohibited a lawyer from preparing an instrument giving a lawyer or associate a substantial gift from the client, including a testamentary gift (Chapter VI, Conflict of Interest Between Lawyer and Client). While never governing the conduct of lawyers in this province, until recently the *CBA Code* was often looked to by lawyers for additional guidance on ethical matters. The long-standing *CBA Code* provision addressing testamentary gifts to a lawyer is therefore some indication that rule 3.4-38 of the *BC Code*, which is similar in nature albeit not exactly the same, did not create an ethical obligation that was previously completely alien to lawyers in this province. In the same vein, see our comments at paragraph 151 below,

as well as *Lawyers and Ethics: Professional Responsibility and Discipline*, §22.3, as it read in 2012, at p. 22-13 (now p. 22-11), noting that lawyers who have drafted wills in which the lawyer is named as beneficiary without at least insisting that the client obtain independent legal advice have been found guilty of professional misconduct (citing unreported Ontario disciplinary decisions from 1985 and 1991).

[148] Third, while the Respondent discussed the conflict of interest issue with another lawyer, that other lawyer, Mr. de Vries, was a very junior associate who reported directly to the Respondent. The Respondent did not consult with the senior counsel at Sager LLP who was particularly experienced in estate matters, or with any other senior lawyer in the firm. Nor did he seek advice from a Law Society practice advisor, a bencher or a senior and respected colleague from another firm. It is worth adding that the Respondent raised the conflict issue with Mr. de Vries only after JB had arrived at the office to discuss the will, which would have placed some pressure on Mr. de Vries, as a junior lawyer, to agree to act for JB.

[149] Fourth, there was no unavoidable rush to prepare JB's will. The Respondent was therefore not subject to pressure beyond his control that made it harder to exercise due diligence to ensure that he complied with the applicable rules in the *BC Code*. In this respect, his case is different from *Law Society of BC v. Adelaar*, 2008 LSBC 18, at paras. 22-32, one of the cash receipt rule cases mentioned by the hearing panel in *Law Society of BC v. Chan*, 2008 LSBC 30, at para. 17(e). The lawyer in *Adelaar* breached the cash receipt rule in response to a dilemma, created by circumstances not of his own making, which required an immediate resolution and appeared to be almost insoluble (*Adelaar*, at paras. 22-31).

[150] Fifth, the Respondent instructed his legal assistant LM to prepare a draft will for Mr. de Vries that listed himself as a beneficiary and to forward this draft to Mr. de Vries for the latter's use in taking instructions from JB. Although Mr. de Vries told JB that the decision regarding the beneficiaries should reflect her wishes and that the contents of the will was nobody's business but her own, in his first meeting with JB he reviewed with her the draft will that the Respondent had prepared. The Respondent thus had some preliminary involvement in the preparation of the will after he had learned that JB wanted to name him as a beneficiary. As explained above, we reject the Respondent's evidence that he did not instruct LM to prepare this draft and that she instead obtained the names of the intended beneficiaries directly from JB.

[151] Sixth, the seriousness of the conflict that arises when a lawyer is asked to prepare a will in which the lawyer is to receive a substantial benefit is patently obvious. The lawyer is in a fiduciary relationship with the client and must be unremittingly loyal to the client's best interests (rule 3.4-1, Commentary 5, *BC Code*; *R. v. Neil*, 2002 SCC 70, [2002] 3 SCR 631 at paras. 16, 25-26). This duty of loyalty is necessarily threatened where a lawyer is to be

a beneficiary in a will that the lawyer is tasked with preparing for the client. There is a real possibility that the lawyer's duty to act as the client's loyal adviser will be negatively impacted by the lawyer's own interest in obtaining a benefit under the will. This concern is particularly acute where the client is elderly and infirm, and thus vulnerable, which we find as a fact was the case with JB. Even where the lawyer does not act improperly, the mere spectre of undue influence may cause harm to the client's best interests by triggering a challenge to the will or causing disharmony in the client's family. The risk of such harm is particularly acute where the introduction of the lawyer as beneficiary concomitantly works to reduce or eliminate the share of the estate left to other family members under a previous will.

[152] It is true that the Respondent tried to address the conflict by having Mr. de Vries prepare the will and telling Mr. de Vries not to inform him of its contents. But this solution was unsatisfactory. The imputation of a disqualifying conflict of interest to the affected lawyer's partners and associates is a concept that should be familiar to all lawyers. It is discussed in well-known cases such as *Neil*, at para. 29, *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at p. 1262 and *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, at para. 19, with respect to conflicting duties owed to different clients. A conflict can also be imputed to other firm members where a lawyer's personal interest conflicts with the duty owed to a client, as noted in Commentary 8(d), rule 3.4-1 of the *BC Code*. This is because lawyers who practise in the same firm are typically "bound together … by ties of finance, friendship and loyalty" (*Lawyers and Ethics: Professional Responsibility and Discipline*, §5.10, as it read in 2012, at p. 5-20.14 (now p. 5-20.15)). Mr. de Vries was a very junior lawyer in the Respondent's firm. He worked for and reported directly to the Respondent. We therefore conclude that the Respondent's conflict of interest was imputed to Mr. de Vries and that the Respondent should have known that transferring the file to his junior would not cure the conflict.

[153] Seventh, as explained at paragraphs 97-104 above, the Respondent's written response to the Law Society's request for information regarding the circumstances under which JB's will was prepared, contained in his letter dated October 4, 2017, left the strong and inaccurate impression that JB never told him of her desire to name him as a beneficiary in her will. The Respondent's lack of candour in this regard further distinguishes this case from *Chan*, which as mentioned is the decision upon which the Respondent's counsel placed particular emphasis in closing submissions. In *Chan*, one of the factors that led the majority to conclude that the breach of the cash receipt provision in the Law Society Rules did not constitute professional misconduct was the lawyer's "prompt and forthright" dealings with the Law Society after his breach came to light (*Chan*, at para. 18(f)).

[154] Eighth, although the Law Society has not proven that, but for the Respondent's breach of rule 3.4-38, JB would likely have distributed her estate differently, we find that this breach

created a realistic risk of serious harm to JB's interests. When a lawyer unnecessarily creates such a risk by breaching the *BC Code*, public confidence in the profession suffers. In this respect, it is important to appreciate that rule 3.4-38 is prophylactic in nature. It aims to protect the public against actual harm caused by conflict of interest by prohibiting lawyers from putting themselves in situations where there is a realistic risk that such harm might arise.

[155] This same prophylactic philosophy heavily informs the general rule regarding conflict of interest as set out in *Neil*, at para. 31, *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 SCR 177, at para. 56, and the *BC Code*, at rule 3.4-1 read together with rule 1.1 (Definition). If there is a reasonable possibility (rather than a probability) that the lawyer's loyalty to or representation of a client's interests will be materially and adversely affected by the lawyer's duty to another client or the lawyer's own interests, as a general rule the lawyer must not act (*Strother*, at para. 61).

[156] It is therefore not surprising to find discipline cases in which a lawyer has been found to have breached the *Handbook*, and thereby committed professional misconduct, by assisting a client in preparing a will under which the lawyer is to receive a testamentary gift, despite the absence of any evidence that the lawyer pressured the client or that the testamentary gift represented anything other than the client's true wishes. See for example *Law Society of BC v. Lloyd*, 2002 LSBC 14, and *Law Society of BC v. Albas*, 2015 LSBC 21. In both *Lloyd* and *Albas*, the lawyer was found to have committed professional misconduct because he failed to ensure that the client received independent legal advice before executing the will, and thereby breached the prohibition in Chapter 7, Rule 1 of the *Handbook* against performing legal services where the lawyer has a direct or indirect financial interest in the subject matter of the legal services except as otherwise permitted by the *Handbook.*

[157] The decision in *Lloyd* is especially apposite. The client, who appears to have been a vulnerable individual, viewed the lawyer as a father. The client insisted that the lawyer receive one-half of the residue of his estate in order to distribute it to charities to be selected by the lawyer. He rebuffed the lawyer's request to select the charities himself. The lawyer drafted a codicil to the client's will as instructed and, after the client's death, used the $300,000 that he received to make a gift to a school in the client's memory and to settle a claim brought against the estate. The lawyer was found to have committed professional misconduct, contrary to Chapter 7, Rule 1 of the *Handbook*, because he did not insist that his client obtain independent legal advice and had received an indirect benefit in the form of a substantial income tax deduction for making the gift. In coming to this conclusion, the hearing panel observed that, "whenever a lawyer is to obtain a benefit, direct or indirect, the lawyer's conduct must be beyond reproach and incapable of

question." This sentiment applies equally in the Respondent's case, even though the facts in *Lloyd* were somewhat different.

[158] Ninth, we reject the Respondent's implicit suggestion that a just determination of his case would be to conclude that he has not committed professional misconduct but at the same time to make clear to the profession that similar breaches may be treated differently in the future. In support, he cites *Law Society of BC v. Geller*, 2018 LSBC 40, at para. 95. In *Geller*, it was alleged that a British Columbia lawyer had breached what is now Rule 2-24(4) of the Law Society Rules by practising law in Yukon while he was neither a member of the bar nor in possession of a certificate permitting him to practise in Yukon. The hearing panel determined that the lawyer had not committed professional misconduct, in part because there was potential ambiguity as to the meaning of the phrase "the practice of law" (see, e.g., *Geller*, at paras. 41-45, 88, 93). In the passage relied on by the Respondent, the panel in *Geller* nonetheless noted that, now that the issues had been clarified, in the future a similar breach of the rule in question may amount to professional misconduct.

[159] We do not find *Geller* to be applicable on the facts of this case. Unlike the provision from the Law Society Rules that was in issue in *Geller*, no clarification is required regarding the parameters of rule 3.4-38 of the *BC Code*. Rule 3.4-38 unambiguously prohibited the Respondent from causing his junior associate Mr. de Vries to prepare a will for JB under which the Respondent was to receive a substantial testamentary gift. Though of much lesser importance, we also note that the decision in *Albas*, referenced above at paragraph 156, was released on May 13, 2015, about 16 months after Mr. de Vries had prepared JB's will and about eight months before JB passed away. Although the result in *Albas* does not turn on an application of rule 3.4-38 of the *BC Code*, the decision certainly highlights the existence of rule 3.4-38. Arguably, the release of the decision in *Albas* constituted some notice to lawyers in this province that rule 3.4-38 was in force and must be obeyed.

[160] For these reasons, we conclude that the Respondent's breach of rule 3.4-38 constituted a marked departure from the standard that the Law Society expects of lawyers and therefore amounted to professional misconduct. Given this conclusion, it is strictly speaking unnecessary to address the Law Society's contention that the Respondent also breached rule 3.4-26.1, and that this separate breach, whether taken alone or in conjunction with the breach of rule 3.4-38, further justifies a finding of professional misconduct.

[161] We nonetheless find that the Respondent breached rule 3.4-26.1(b), which prohibits a lawyer from performing any legal services if there is a substantial risk that the lawyer's duty of loyalty to or representation of the client will be materially and adversely affected by the lawyer's interest in the subject matter of the legal services. This rule is simply an articulation of the general test for conflict of interest in the context where the lawyer's own

interest holds the potential to undermine the duty of loyalty to the client. As explained at paragraph 155 above, under rule 3.4-26.1, a disqualifying conflict will exist if there is a reasonable possibility that the lawyer's personal interest will have such an affect.

[162] Such a reasonable possibility arose in the Respondent's case with respect to the preparation of a will for JB in which he was to be a beneficiary. The Respondent's response to JB announcing that she wished to make him a beneficiary fell far short of what the Law Society expects of lawyers in the ways described at paragraphs 148-157 above. Moreover, rule 3.4-26.1 cannot be said to set out an ethical standard that was unknown to lawyers in this province prior to the introduction of the *BC Code* on January 1, 2013. To the contrary, it essentially tracks the language used by the Supreme Court of Canada to define conflict of interest in the leading cases of *Neil* in 2002 and *Strother* in 2007. We therefore conclude that the Respondent's breach of rule 3.4-26.1 constituted a marked departure from the standard that the Law Society expects of lawyers and therefore amounted to professional misconduct.

ANALYSIS OF ALLEGATION REGARDING THE TWO CASH GIFTS

[163] The Citation alleges that the Respondent committed professional misconduct by accepting one or more gifts from his client JB that were more than nominal, in July 2014 and/or December 2015, when JB had not received independent legal advice, contrary to rule 3.4-39 of the *BC Code*.

[164] Rule 3.4-39 of the *BC Code* provides that a lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

[165] The Respondent admits that he breached rule 3.4-39 by accepting a gift of $75,000 from JB in July 2014 while she was his client and had not received independent legal advice. But he argues that JB's gift to him of $25,000 in December 2015 was made after their solicitor-client relationship had ended and thus was not prohibited by rule 3.4-39.

[166] We agree that the Respondent's acceptance of the gift of $75,000 from JB in July 2014 breached rule 3.4-39. The gift was more than nominal, and JB was the Respondent's client at the time. In fact, the gift was made on the same day as Sager LLP issued JB an account for fees and disbursements incurred in connection with the sale of the house, and the Respondent was still acting for JB regarding her divorce. JB did not receive independent legal advice before making this gift.

[167] By contrast, the gift of $25,000 was made in December 2015, 13 months after the last account rendered to JB by Sager LLP, and 15 months after the last legal service provided to her by the Respondent or any member of his firm. The fact that the Respondent and members of his firm had provided various legal services to JB over a year before does not

establish that they were still in a solicitor-client relationship when JB made her gift to the Respondent in December 2015. There is no evidence of a continuing retainer. The Respondent's continued association with JB is explained by virtue of his relationship with her as a long-standing family friend whom he viewed as an aunt.

[168] Given these circumstances, we find that the Law Society has not met its burden of establishing that JB was the Respondent's client when the second gift was made. Accordingly, his acceptance of the gift from JB in December 2015 did not breach rule 3.4-39.

[169] The question remains as to whether the Respondent's breach of rule 3.4-39 in accepting the gift of $75,000 from JB in July 2014 constitutes professional misconduct.

[170] The Respondent argues that the standard required to establish professional misconduct has not been met, essentially for the same reasons that he advanced in support of his argument vis-à-vis his breach of the *BC Code* in relation to JB's will. He says that he was unaware of rule 3.4-39 and that his breach was inadvertent. He argues that lawyers should be given a reasonable amount of time to gain familiarity with new Law Society requirements. And he points out that he did not importune the gift, which was given to him by JB as a sign of genuine affection and appreciation.

[171] In our view, however, the Respondent's breach of rule 3.4-39 constitutes a marked departure from the standard that the Law Society expects of lawyers and thus amounts to professional misconduct. We come to this conclusion for a number of reasons.

[172] To begin with, rule 3.4-39 is in place to counter the risk of harm that arises where a client makes a gift to a legal adviser. There is a very real concern that, because of the power imbalance that often exists between lawyer and client, the gift may be tainted by overreaching, manipulation or undue influence on the part of the lawyer. This concern long predates the introduction of rule 3.4-39 as part of the new *BC Code* on January 1, 2013. See *Lawyers and Ethics: Professional Responsibility and Discipline*, §22.3, as it read in 2012, at p. 22-13 (now p. 22-11), which states that, at common law, undue influence is presumed where a client makes a gift to a lawyer during the currency of the client-lawyer relationship. See also *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 369-370; *Georgialee Lang & Associates v. Wigod*, 2003 BCSC 1178, at para. 40.

[173] Moreover, the fact that a lawyer is genuinely the client's friend, or enjoys a relationship with the client that is akin to that of nephew and aunt, does not render rule 3.4-39 inapplicable. See *Law Society of Upper Canada v. Ludwig*, 2006 ONLSHP 65, at para. 14, although the facts in *Ludwig* were very different.

[174] While the Respondent did not importune the gift, JB was an elderly client who, because of her physical limitations, was vulnerable and had become quite dependent on him. We agree with the Law Society's submission that, in all the circumstances, there was "a clear inequality in the power dynamic between the Respondent and JB." Moreover, the gift that the Respondent received from JB was not merely "more than nominal" – it was very substantial. In circumstances such as this, compliance with rule 3.4-39 is especially important as a means of countering any risk or appearance of overreaching or undue influence on the part of the lawyer.

[175] Also relevant is the fact that the Respondent was an experienced lawyer who testified that he had a policy of not accepting gifts from clients. We therefore infer that he was aware of the concern that arises where a client seeks to bestow a gift upon a lawyer. Yet he failed even to suggest to JB that she obtain independent legal advice, which while insufficient by itself to avoid a breach of rule 3.4-39, would arguably have made the breach less serious. The Respondent's contention that he did not view JB as a client is an unsatisfactory response, given that he and his firm had acted for JB in several matters and was still acting for her regarding her divorce.

[176] The Respondent also failed to exercise due diligence in determining whether the fact that he had a relationship with JB that was akin to that of nephew and aunt could properly render accepting the gift unproblematic. In particular, he failed to consult the *BC Code* to see whether there was a rule bearing on this issue, or to seek advice from a Law Society practice advisor or from a senior colleague at Sager LLP or another firm. And there were no time pressures outside of the Respondent's control that made it harder for him to exercise due diligence in this regard.

[177] Of further concern, the gift was closely related to the very matters with respect to which the Respondent had acted for JB as her counsel, namely, her divorce from SB and sale of her house. JB had received the windfall that sparked her desire to make the gift in large part because of the Respondent's negotiating strategy in arranging for JB to buy SB's half interest in the house when the market was rising.

[178] It is also worth noting that, while there appear to be no precedents where a lawyer has been disciplined for receiving a gift from a client in breach of a rule in the *BC Code* or the predecessor *Handbook*, similar results have been reached in other jurisdictions. See, for example, *Nova Scotia Barristers' Society v. Romney*, 2004 NSBS 7; *Nova Scotia Barristers' Society v. Savoie*, 2005 NSBS 6.

[179] Finally, the Respondent's breach of rule 3.4-39 occurred more than a year after the *BC Code* came into effect. We also adopt our reasons at paragraphs 145-146 above, regarding the distinction between a breach of the cash receipt provision in the Law Society Rules and violation of a rule contained in the *BC Code*. Our comments at paragraph 154 are equally

applicable, insofar as rule 3.4-39 is a prophylactic rule intended not only to prevent the risk of harm to clients, but also to maintain public confidence in the legal profession by avoiding even the appearance of impropriety.

NON-DISCLOSURE ORDER

[180] As permitted by Rule 5-8(2) of the Law Society Rules, on our own motion we conclude that any information regarding JB's solicitor-client relationship with the Respondent that is covered by the duty of confidentiality or solicitor-client privilege should not be disclosed to the public. To this end, no copies of the transcripts or exhibits are to be released to any member of the public unless they have been redacted for confidential or privileged information.

[181] Given that they have not done so to date, the parties are free to make submissions regarding the appropriateness of a non-disclosure order, if they so wish, at the hearing on the disciplinary action phase of this matter.

CONCLUSION

[182] The Respondent has committed professional misconduct by causing to be prepared for his client JB a will that gave him a testamentary gift from JB, contrary to rules 3.4-26 and 3.4-38 of the *BC Code*.

[183] The Respondent has also committed professional misconduct by accepting a gift that was more than nominal from his client JB namely, a gift of $75,000 in July 2014, when JB had not received independent legal advice, contrary to rule 3.4-39 of the *BC Code*. However, the allegation that the Respondent committed professional misconduct by accepting a further gift in December 2015 is dismissed.

[184] No copies of transcripts or exhibits from this matter are to be released to any member of the public unless they have been redacted for confidential or privileged information arising from JB's solicitor-client relationship with the Respondent.