2021 LSBC 04
Decision issued: February 1, 2021
Citation issued: February 7, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JOHN MURRAY LOTT

RESPONDENT

DECISION OF THE HEARING PANEL

Written materials:	November 18, 2020
Panel:	Michael F. Welsh, QC, Chair Andrew Mayes, Lawyer Robert Smith, Public representative
Discipline Counsel:	Ilana Teicher
Counsel for the Respondent:	Lakhvinder Uppal

OVERVIEW

[1] The Respondent admits to five allegations of professional misconduct for the following issues: conflict of interest; poor quality of service; approaching a represented party; failure to withdraw when discharged by a client; and failure to respond to communications from another lawyer.

[2] The Respondent has made a conditional admission of professional misconduct and has consented to proposed disciplinary action, pursuant to Rule 4-30 of the Law Society Rules.

[3] The Panel accepts the Respondent's admission of professional misconduct, as well as the proposed disciplinary action that the Respondent pay a total sum of $21,000, in 14 monthly installments of $1,500, beginning on the first day of the month

following the hearing panel's decision. This consists of a $20,000 fine and costs of $1,000 (the "Proposed Disciplinary Action"). The 4-30 proposal also expressly acknowledges that publication of the circumstances summarizing this admission will be made pursuant to Rule 4-48, and that such publication will identify the Respondent. This shall be done.

PROCEDURAL HISTORY

[4] The Respondent is cited as follows:

Conflict of Interest

1. Between approximately September 2016 and May 2019, in the course of representing BS (the "Client") in estate law proceedings, you acted in a conflict of interest and in breach of your duty of undivided loyalty to your Client by acting as an advocate for and advisor to her daughter SS, when she and the Client had different interests and there was a dispute between her and the Client in relation to a withdrawal of $100,000 from the Client's bank account, contrary to one or more of rules 3.4-1 and 3.4-3 of the *Code of Professional Conduct for British Columbia.*

Quality of Service

2. Between approximately September 2016 and May 2019, in the course of representing BS (the "Client") in estate law proceedings, you acted in breach of your fiduciary duty or failed to provide the Client with the quality of service required of a lawyer, or both, contrary to rule 3.2-1 of the *Code of Professional Conduct for British Columbia,* by failing to do one or more of the following:

   (a) obtain and follow the Client's instructions, including with respect to a purported gift of $100,000 to her daughter, SS, as well as the revocation of SS's power of attorney and the Client's arrangements regarding her grandson, HS;

   (b) ensure, where appropriate, that all instructions were in writing or confirmed in writing;

   (c) answer reasonable requests from the Client for information, including requests for details with respect to your bills to her and

copies of documents and correspondence referenced in your bills; and

(d) provide the Client with complete and accurate information about her matter, including by excluding her from communications and withholding information from her regarding the Client's affairs, which you exchanged with her daughter, SS, and other members of the S family.

Approaching a Represented Party

3. In February 2019, you approached and communicated with BS after she had retained and was represented by new counsel, in the absence of her new counsel and without her new counsel's consent, contrary to rule 7.2-6 of the *Code of Professional Conduct for British Columbia.*

Failure to Properly Withdraw When Discharged by Client

4. In February 2019, you failed to properly withdraw from representation of your then client, BS, after that client discharged you and retained new counsel, contrary to one or more of rules 3.7-7, 3.7-8, and 3.7-9 of the *Code of Professional Conduct for British Columbia.*

Failure to Respond to Communications from another Lawyer

5. Contrary to rule 7.2-5 of the *Code of Professional Conduct for British Columbia*, you failed to respond promptly or at all to a letter dated February 13, 2019 from your former client BS's new counsel, David M. Simon, which letter:

   (a) enclosed a handwritten direction signed by BS terminating your services as her lawyer and requesting that you provide her original will, which you held, to Mr. Simon; and

   (b) included a request by Mr. Simon on BS's behalf that you provide full details, including time spent, of the services you provided to BS in support of your invoice to her of February 1, 2019, together with copies of any emails and documents referenced in your bill.

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

[5] An oral hearing was scheduled for five days, commencing November 23, 2020.

[6] At its meeting on October 29, 2020, the Discipline Committee considered and accepted a Rule 4-30 proposal dated September 29, 2020 (the "4-30 Proposal") made by the Respondent, and instructed discipline counsel to recommend its acceptance to the hearing panel established to conduct the hearing.

[7] As a result, both the Law Society and the Respondent consented to both the Facts and Determination and Disciplinary Action phases of this hearing proceeding solely on the written record, including written submissions to be circulated to the hearing panel in advance of the hearing. That 4-30 Proposal includes a statement that the Respondent consents to this matter proceeding by way of a hearing in writing pursuant to the Law Society's Practice Direction issued April 6, 2018.

[8] On request of the parties, by a consent order made November 23, 2020, this Panel exercised its discretion to adjourn the hearing, and ordered that this matter proceed in writing only.

AGREED STATEMENT OF FACTS

[9] The Respondent and the Law Society have signed an Agreed Statement of Facts dated October 13, 2020, which sets out the relevant facts and documentary evidence upon which the parties rely and which the Hearing Panel accepts. Counsel for the Law Society also provided an extensive written submission. The Respondent elected to make no submissions.

[10] In the Agreed Statement of Facts, and in accordance with the 4-30 Proposal, the Respondent admitted to all five allegations in the Citation, as noted earlier.

[11] As a prelude to the facts, the Panel notes that there is no issue with proper service of the Citation. That is admitted by the Respondent.

[12] The following factual narrative is based on the Agreed Statement of Facts. It is laid out chronologically and not necessarily in the order of the allegations in the Citation.

[13] The Respondent was called and admitted to the bar on May 12, 1981.

[14] At all times material to this case, the Respondent practised as a senior lawyer at the firm Delta Law Office. According to his most recent practice declaration in 2020, the Respondent's practice consists primarily of wills and estates, with some real estate, corporate, motor vehicle (plaintiff) and civil litigation.

[15] All five allegations in the Citation concern the same client of the Respondent: BS (the "Client"), an elderly woman with complex medical issues.

[16] The matters that led to the Citation came to the attention of the Law Society when, on March 13, 2019, the Law Society received a complaint from KS, a son of the Client, regarding the Respondent's conduct with respect to his mother, followed by a complaint on March 18, 2019, from her grandson, HS. Both complaints contained multiple allegations, primarily about the Respondent acting in a conflict of interest.

[17] Turning back in time, the Client had executed her Last Will and Testament on March 5, 2010, and at the same time, appointed her daughters SS and AA as her attorneys under general powers of attorney.

[18] At the times material to this matter, HS, her grandson, lived in the Client's home and attended to her care.

[19] The Respondent was initially retained by the Client's daughter, SS, in approximately August 2015, at which time he opened an "elder law" file for the Client, although actually listing her daughter SS as the client. He did not meet with the Client and made no assessment of the capabilities of the Client. In 2016, on instructions of SS, he prepared a codicil and representation agreement for the Client.

Compensation of $100,000 taken by SS for care services

[20] In the fall of 2018, SS approached the Respondent regarding compensation for care services that she had provided to her mother.

[21] The Respondent did not contact the Client to discuss that SS had approached him regarding compensation for her care services.

[22] The Respondent reached the conclusion based on information given by SS, that the Client may have declining capacity from alcohol abuse.

[23] In an October 6, 2018 email to the Respondent, SS attached a sample of her expenditures in relation to her care of her mother and asked the Respondent to "please advise of what you think I should say to my mom."

[24] In his October 6, 2018 email reply to SS, the Respondent stated "that looks good" and expressed his view that her hourly rate may be controversial in terms of agreement from the family. He further said:

> Are you going to pitch this to your mom? Or do you want me to try? You just need to walk her through it. Why it has to be you and go through this one sheet in detail.
>
> I think it might also be hard to go back. That might be a bit much to start with. Maybe get her to agree to pay first. Then work on retro.
>
> Alternatively you could do a full estimate and then discount it significantly.

[25] About October 9, 2018, SS presented a blank cheque (#498) and a gift letter to the Client, who signed both documents.

[26] The gift letter reads, in part:

> It is my intention to gift my daughter [SS] money for the care she has given me. This amount is not part of her inheritance, it is to compensate for her involvement in my care over the last 3 years.

[27] The Respondent did not speak with the Client about the gift letter.

[28] In an email of October 10, 2018, the Respondent (as he admitted to the Law Society investigator), provided further legal advice to SS regarding her claim for compensation:

> [SS], to confirm our conversation, please remember that as the PoA for your mother you are prohibited by law from taking a benefit from her. So this needs to be done carefully or you will be exposed to claims of wrongdoing. …
>
> You must be careful to avoid being challenged for "undue influence" – talking your mother into something she would not have done willingly - or "lack of capacity" - that she did not really know what she was agreeing to. Again, if you are careful, you can minimize this risk.
>
> … I would do a spread sheet or a clear narrative setting out as much detail as you can around trips, mileage, frequency and duration of visits, expenses. …
>
> I would like to review that. Once it is done I think we should have a short agreement for your mother to sign saying, more or less, I have read this and it seems reasonable and I agree with the payment. I should get her to sign that without you being there. You should also send it to your sister

> and ask her if she is OK with it. I suspect she will be, and if she is you are free at least of any claim of undue influence. Capacity is an issue for sure, and again that is something I would assess when I see her.
>
> …
>
> OK keep in touch, and please remember, I am on you – and your mother's – side.

[29] On October 15, 2018, the Client's cheque dated October 13, 2018 payable to SS in the amount of $100,000 cleared the Client's account.

[30] The Client was unaware of the "gift" of $100,000 to SS at the time of signing the cheque and the gift letter and only became aware of the $100,000 to SS when her financial advisor called her. The Client told the Law Society investigator:

(a) SS had provided her with some blank cheques to sign for expenses, which she thought were to be used for "house bills".

(b) When she signed cheque #498, there was no amount written on the cheque, and she was not aware that it was for $100,000.

(c) Cheque #498 has the Client's signature on it.

(d) An individual from her investment dealer had telephoned her to tell her about the $100,000.

(e) When she found out about the $100,000 withdrawal, she was "pissed off" and thought it was "sneaky".

[31] The Respondent admits that he did not do any of the following:

(a) contact the Client to discuss the issue of compensation for SS;

(b) obtain the Client's instructions with respect to compensation for SS; or

(c) assess the Client's capacity to give instructions in October 2018.

[32] On November 19, 2018, the other daughter of the Client, AA, accompanied by her husband and brother, met with the Respondent at his office. A discussion took place about various issues, including the $100,000 compensation to SS for care services.

[33] That same day, the Respondent informed SS of her sister's visit to his office that morning, and they exchanged email messages with respect to the $100,000 in compensation. The Respondent stated, in part: "… there is no reason for your mother to be involved in this issue, she won't understand the dollars in question."

[34] Around November 27, 2018, the Client wrote the following signed note respecting the gift letter: "This was not intended as a gift nor any expectation of a gift."

[35] On February 21, 2019, the Respondent, without notice to the Client, went with SS to the Client's home, at which time the Client stated that SS "took" her money and that she had a problem with the amount of money taken. The Respondent advocated on SS's behalf, justifying the money taken by SS. We will address in more detail the reason for and discussions in this meeting later in this decision.

[36] As noted in more detail later, in an email sent on February 24, 2019 to both the daughters, SS and AA, as well as the Client, the Respondent stated that he had "counselled SS regarding her claim for compensation" and thought that her "charges are properly documented and reasonable."

Revocation of power of attorney

[37] On December 12, 2018, the Client attended at the Royal Bank of Canada ("RBC") and signed a document dated that same day entitled "Termination of Power of Attorney SLS" (the "POA Termination"). The Client stated that she did not want SS to have power of attorney on any of her banking "because she'd stolen from me once and was she gonna do it again?"

[38] The Client stated that she signed the POA Termination "because I didn't want her touching my money, what was left of it."

[39] In an email to the Respondent and AA dated December 15, 2018, SS stated, in part: "I would like to bring to both of your attention that I have been removed from Mom's bank account as POA. This was done on Dec 11th when [HS] took her to the bank after her dentist appointment." She further stated that the Client had apparently reactivated her bank card, and that "… Mom informed me that she will be looking after her own finances as she expects to return home within the next week or two ... ."

[40] A file note dated December 31, 2018 indicates that the Respondent had a conversation with SS and AA about various issues, including the Client's health and access to her accounts by HS. The Respondent's notes of that day include the

entry: “Legally: she is competent: going home is high risk, that’s been explained, she gets to decide.”

[41] The Respondent did not contact the Client to verify the facts set out in the email from SS or to ask for her explanation of the events. In particular, the Respondent did not:

(a) assess the Client’s capacity at the time of the POA Termination;

(b) contact the Client to discuss the POA Termination; or

(c) contact the Client to obtain her instructions regarding a reinstatement of power of attorney to SS.

[42] Nevertheless, the Respondent took steps that same day (December 31, 2018) to request a meeting with a branch manager at RBC to discuss access to the Client’s accounts and money by HS. He followed up that request on January 2, 2019, and a meeting was set for the next day.

[43] In his January 2, 2019 email to SS and AA, the Respondent stated, in part: “Shall I proceed with the plan we discussed? My next step would be to meet with [the branch manager of RBC] and explain the situation *and see how far we can go to control mom’s money outlays.*” [emphasis added]

[44] On January 3, 2019, the Respondent informed SS and AA that he had met with the branch manager of RBC that day and that he had confirmed the Client had cancelled the power of attorney to SS.

[45] The Respondent did not obtain an authorization from the Client to make enquiries with her bank and obtain information regarding her accounts.

[46] In his January 3, 2019 email to SS and AA, the Respondent stated:

> I am going to make up a new one for both of you on one document – it will clarify that either of you can act – and get mom to sign that. Makes no sense to have [AA] the only PoA from Chicago.

[47] The Respondent drafted a new power of attorney in favour of SS. He did not seek or obtain instructions from the Client prior to doing so.

[48] During his interview with the Law Society investigator, the Respondent stated that he drafted a new power of attorney in favour of SS “of his own volition” and

without instructions, as he believed the situation was “improper” and that the Client was “susceptible to the influence of her family.”

[49] In particular, the Respondent had concluded that the Client was the subject of elder abuse by HS, who may have been taking money from her account. This was based on information he had received from SS. He entered into a secret plan with the daughters to meet with HS, to essentially offer him money in return for his entering into a “transition plan” to leave the Respondent’s home. They all agreed that this was to be kept from the Client. The Respondent suggested a script for use by the daughters, where HS would be told “it would be upsetting to mom if we talk to her about this before we have a plan in place.”

[50] The Client, in her interview, confirmed not only that she was never contacted for instructions on a new power of attorney but also that she in fact did not want SS to have her power of attorney. She denied any abuse or advantage being taken of her by HS.

Respondent’s invoices and associated communications

[51] On November 26, 2018, the Respondent issued an invoice for $1,344. He later issued another invoice dated February 1, 2019 for $1,747.20.

[52] The first invoice includes the following entry: “Oct/10/18 Numerous emails and telephones [sic] with [SS] regarding compensation for care services.” It does not reference any direct communications between the Respondent and the Client. In fact, the Respondent did not communicate directly with the Client between October 10, 2018 and February 5, 2019.

[53] The Client received the Respondent’s second invoice by mail on February 6, 2019. She emailed the Respondent on the same day stating, in part: “… I saw that you referred to ‘clients’ in the plural when I am your sole client. If I am paying for someone else who is a client of yours, I would like to know.” She also requested “paper copies of all relevant emails, texts, scripts, and a summary of teleconferences, and a detailed breakdown of legal services rendered and billing hours.”

[54] The Respondent replied the same day, saying that he would like to meet with the Client and he could bring copies of his bills and communications. He further stated: “If I say ‘clients’ it is a slight misstatement but I think understandable: your daughters [SS] and [AA] are your representatives under Power of Attorney, and I communicate with them as such.”

[55] The Client replied by email the next day advising, among other things, that she wished to review the supporting documentation for his invoices and "confer with [her] daughters" before meeting with the Respondent.

[56] On February 8, 2019, the Respondent forwarded this email exchange to both daughters stating that:

(a) his staff had sent his Statement of Account directly to the Client, which was not his intention;

(b) the Client was a victim of elder abuse by HS;

(c) he needed to meet with HS and with the Client "separately, then together";

(d) with respect to the Client's request for documents:

> First I want to assure you that I have no intention of complying with the request for documents. Those are mostly my emails and notes of meetings with you and [SS] about how to resolve the untenable situation that has arisen with your mother. … It is my general practice to involve seniors as much as possible in deciding their own fate, thus my proposal to meet with her. But in the circumstances I think it is appropriate that you and [SS] have spoken to me about your concerns, *and I don't think it appropriate or necessary that your mother have access to those records*.
>
> [emphasis added]

[57] Despite her request, the Respondent did not provide the Client with any details of his Statements of Account or copies of supporting documents and correspondence. AA did provide the Client with a copy of the Respondent's February 8, 2019 email, which prompted the Client to ask her to set up a meeting with another lawyer.

[58] When the Respondent met with the Client on February 21, 2019 (again, a meeting to which we will return in more detail later), he did not bring copies of his billing or communications.

[59] The Respondent issued a third and final invoice in April, 2019, the details of which are noted later in this decision. It also was not sent to the Client, but instead to her daughters.

Refusing to withdraw as lawyer

[60] On February 9, 2019, AA contacted a lawyer, David Simon, to arrange a meeting with the Client. According to Mr. Simon, AA had explained to him the concerns surrounding the $100,000 in compensation taken from the Client's account and how SS had her mother sign on the back of the cheque that it was gift and not an advance on inheritance. She also raised concerns about the Respondent's allegations of elder abuse by HS.

[61] On February 13, 2019, Mr. Simon met with the Client at her home. Mr. Simon was of the view that the Client presented as lucid and in control of her faculties. She did not appear to be under influence from anyone. Mr. Simon stated that the Client "… understood what I was telling her and what we discussed and other than her concern about [SS's] reaction, she did not seem to be someone who was being taken advantage of."

[62] Mr. Simon's account of his February 13, 2019 meeting with the Client includes the following:

(a) When he arrived, HS let him in the house and brought him to the Client. After a few moments, HS went to his room in the basement.

(b) Mr. Simon was alone with the Client for the rest of the meeting until he called HS back.

(c) The Client stated that she never agreed to give SS $100,000.

(d) She took issue with the Respondent's allegations of elder abuse against HS and told him that the Respondent "should be disbarred" for suggesting that HS was abusing her.

(e) She wanted full details of the Respondent's billings as she did not recall any specific contact with him.

(f) She no longer wanted the Respondent to be her lawyer.

(g) She signed a retainer agreement with Mr. Simon.

[63] Mr. Simon wrote and the Client signed a termination note dated February 13, 2019 terminating the Respondent as her lawyer (the "Termination Note").

[64] On February 13, 2019 the Respondent's office received a letter from Mr. Simon of same date enclosing the signed Termination Note.

[65] In his February 13, 2019 letter, Mr. Simon requested:

(a) the Client's original will and powers of attorney; and

(b) full details of the Respondent's February 1, 2019 invoice, with supporting documentation, noting she would not pay them until the Respondent provided this documentation.

[66] The Respondent did not respond to Mr. Simon's February 13, 2019 letter. When asked by the Law Society investigator why, he stated:

> First of all, the fact that I didn't respond, what that letter was doing was asking me for copies of documents and that, those documents are, are [the Client's] confidential information and I knew that she hadn't done this on her own volition. I believed that KS [a son of the Client] or someone else was involved, someone that wasn't entitled to those documents and I was not prepared to release without further investigation. …

[67] Mr. Simon confirmed that he "never heard anything" from the Respondent.

[68] On February 14, 2019, the Respondent forwarded Mr. Simon's February 13, 2019 letter to SS and AA. The Respondent stated in his February 14, 2019 forwarding email:

> 1. There is no reason for your mother to terminate her relationship with me, and none is given. There is something else going on.
>
> 2. I can't very well send my notes – it would disclose my conversations with both of you, and that would not be best here.…
>
> … I need to meet with your mother, preferably without [HS], and I need both of you to cooperate to make that happen. … I suggest that we arrange a teleconference for next week, and it should be obvious that time is of the essence here, I can't just ignore this letter.

[69] The Respondent did not make enquiries of Mr. Simon as to the Client's mental capacity.

[70] In explanation to the Law Society investigator, the Respondent stated:

> Mr. Simon's letter is peculiar in the extreme, in my opinion. … It's a common part of elder abuse that you, you keep people from their advisors and you influence people to change their lawyers when you don't like

> what's happening, and I had every reason to believe that that was going on. So that's why I decided to talk with [the Client] first of all and try and figure it out. …
>
> … I believe that there was a great amount of dissension within the family, there were people trying to pressure her to do things, someone was keeping her from, she was in and out of capacity. Mr. Simon, from what I could tell, knew nothing about any of that. I had a great deal of suspicion about her, whether her firing of me was informed, voluntary and with capacity, a great deal of suspicion about that, that's why I chose to investigate. And I believe my investigation determined that. She had been influenced in some fashion.

[71] The Respondent did not withdraw from representation of the Client after she discharged him and retained her new counsel. Instead, he continued to act in concert with the daughters.

[72] In his February 17, 2019 email to SS, the Respondent took issue with AA providing his emails to the Client, referring to it as a "breach of confidentiality." He further stated in his February 17, 2019 email:

> We may be at the point where you need to consider an application for sole committeeship of your mother.
>
> This would require two doctors to opine that she is incapable of managing her personal/financial affairs. I don't know that you would get this. But you might, combining the evidence of financial abuse, medical frailty, alcoholism and other factors.

[73] In her February 18, 2019 reply to the Respondent, SS informed him that the Client was "exceptionally offended" that he accused HS of elder abuse. She further stated, in part: "My mother did comment after you were accusing [HS] of elder abuse, that she was going to 'fire you' as she didn't like you."

Meeting with the Client after she had retained another lawyer

[74] In early February 2019, the Respondent accepted an invitation from SS to visit the Client at her residence and, on February 21, 2019, exchanged emails setting out a proposed "script" for a meeting with the Client. That same evening, the Respondent met with SS and the Client at the Client's home. He had not let the Client know he was coming, leaving that to SS.

[75] Again, the Respondent was concerned about elder abuse by the grandson and wanted to meet with the Client about it, believing she was being prevented from seeing him and that the change of lawyer was part of that prevention. He also wanted to arrange to go over his billings to her.

[76] The Client stated to the Law Society investigator that she felt mad, intimidated and uncomfortable with the Respondent in her home.

[77] The Respondent surreptitiously taped the meeting with the Client and SS on his mobile phone. The following is a brief summary of the taped conversation.

[78] There was an extensive discussion on a number of topics, including the $100,000, the relationship of the Client and her grandson, HS, and whether to arrange to go over the Respondent's billings. At one point, the other daughter, AA, joined by phone. In the course of that discussion, SS and the Respondent were asked to leave the room to enable a private discussion between AA and the Client. The Respondent left the phone behind and continued to record the private conversation. HS was not part of the discussions.

[79] The Respondent proposed a further meeting with the Client to go over his invoices and SS's calculations for compensation. He advocated on behalf of SS to the Client that her charges for care services were reasonable when, as he has admitted:

(a) the Client and SS had different interests; and

(b) there was a dispute between them in relation to the withdrawal of the $100,000 from the Client's bank account.

[80] The Client informed Mr. Simon of this meeting. Mr. Simon advised the Law Society investigator that:

> … Mr. Lott never contacted me, either before his going there, or after to tell me he had been there. I do not recall exactly what [AA] told me her mother had told her but the gist of what I got was that [SS] had convinced her mother to continue with Mr. Lott and that [the Client] felt she had no choice.

Actions of the Respondent following the meeting with the Client

[81] By an email of February 24, 2019 to the Client and both her daughters, SS and AA, the Respondent stated in relation to the termination of his services by the Client:

> I am your mother's lawyer, and have been for many years. … She is of course free to dismiss me, but that can only be done when she is not confused or influenced. *Neither of those conditions existed when she purported to retain another lawyer.* … I asked your mother at the beginning of our meeting last week if she wished to dismiss me, and she said "no". And frankly there is no reason for her to do so.
>
> [emphasis added]

[82] The Respondent went on to say that there had been "an incomplete and ineffective attempt" to cancel the power of attorney to SS, reiterated his allegations of elder abuse by HS. With respect to the claim of SS for $100,000 in compensation for caring for her mother, he said:

> There may be a perception that I am [SS's] lawyer. … *I counselled [SS] regarding her claim for compensation for her work on behalf of your mother.* I think her charges are properly documented and reasonable. …
>
> [emphasis added]

[83] AA decided that the Respondent was not acting in her mother's best interests and wrote him by email on February 25, 2019 to say so. She noted that her mother expressed unhappiness with him, that there had been little communication between them, and that she wanted more details of the services for which he had billed.

[84] About a month later, the Respondent made plans with SS for another unannounced meeting with the Client. He sent an email to SS attaching an agenda for a proposed meeting on March 28, 2019. SS replied that she was not telling AA about the meeting and sought guidance on what she should say to her mother.

[85] That meeting never occurred as the Client was admitted to hospital on March 28, 2019.

[86] On March 29, 2019, the Respondent sent a lengthy email to both daughters, in which he referred to "things spiraling out of control for your mother." He continued that, once the Client's condition had stabilized, he would attempt to meet with her to discuss immediate issues.

[87] In early April 2019, several email communications took place between the Respondent and SS about some immediate and emergent issues regarding the Client's health situation. Notably, on April 1, 2019, the Respondent wrote to both daughters:

> I think as a general rule all communication from me should go to all siblings. … In future I will be careful to say where I think confidentiality is required. … I remind you that *I consider the two of you* – in your capacity as personal representatives for your mother – *to be clients along with her*, though my primary responsibility is to her.
>
> [emphasis added]

[88] In an April 2, 2019 email to the daughters, the Respondent stated that it was "not satisfactory that [the Client] purported to cancel the PoA to [SS]," and that the power of attorney needed to be restored to her.

[89] When he heard that the Client's condition had improved, the Respondent attempted to set up a meeting with her at the hospital. He did not contact the Client to arrange the meeting but instead tried to do so through the daughters. The Client, having heard about his coming, wrote a note: "No Murray at meeting tomorrow" and SS informed him of this direction. He responded that he would have to "sit back and wait for developments."

[90] On April 11, 2019, the Respondent issued his third and final billing for $5,420.80. It contained amongst its entries a February 4, 2019 telephone call with SS and "instructions to staff re a new PoA." On that same day, he emailed all three billings to SS and to AA, with the time entries broken out.

[91] On April 12, 2019, SS informed the Respondent that she had retained her own lawyer, Jeffrey Bryant, and requested that the Respondent provide Mr. Bryant with information, including an update on the status of her power of attorney.

[92] In an April 23, 2019 reply to SS and Mr. Bryant, the Respondent set out his concerns about the Client's cancellation of the power of attorney, stating: "I have been carrying around a new PoA (to [SS]) for months, and had planned to recommend that [the Client] sign this as soon as we were able to have a substantive meeting."

[93] SS told the Respondent that she might seek sole committeeship through her new lawyer, and the Respondent gave her advice about this. In a letter dated May 29, 2019, he recommended she proceed to become sole committee of her mother's person and finances and said with respect to HS: "I think he has to be controlled. There should be an application on behalf of your mother to exclude him from the house."

[94] The Respondent concluded that letter by indicating that he would end his involvement at that point "unless and until" he received support from AA.

[95] The Respondent's membership with the Law Society was suspended pursuant to Rule 3-6(1) on June 20, 2019, for one day.

ISSUES

[96] Based on these admitted facts, the issues we must determine are:

(a) whether the actions of the Respondent constitute professional misconduct; and

(b) whether the proposed $20,000 fine and order for payment of $1,000 in costs is the appropriate sanction in all of circumstances.

DISCUSSION

[97] As the Law Society admits in its submissions, even in a conditional admission situation, the onus of proof lies with the Law Society. It quotes from *Law Society of BC v. Schauble*, 2009 LSBC 11 at para. 43:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "... evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But … there is no objective standard to measure sufficiency."

[98] It further notes that this onus and standard of proof has been confirmed by our Court of Appeal in *Foo v. Law Society of BC*, 2017 BCCA 151 at para. 63.

[99] Counsel for the Law Society then refers to the seminal case of *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171 on the test for professional misconduct, namely "… whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members." "Members" means lawyers practising in British Columbia. *Martin* goes on to say that a finding of professional misconduct does not require a finding of behaviour that is disgraceful or dishonourable:

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

[100] The *Martin* test, having been affirmed by a review panel in *Re: Lawyer 12*, 2011 LSBC 35, and the Court of Appeal in *Foo*, is binding on this Panel.

[101] Consequently, this Panel must analyze the facts before us and determine whether they establish professional misconduct; whether or not the Respondent's conduct on the admitted facts is, in all the circumstances, a marked departure from the standard of conduct expected of lawyers.

[102] Based on the admitted facts, we have no trouble forming this conclusion on all the allegations in the citation. It is abundantly clear that the Respondent, as he admits:

(a) Allegation 1: Advocated for and provided legal advice to SS on the $100,000 she took and on reinstating her role as an attorney for her mother, when her interests were in conflict with those of his client, her mother.

(b) Allegation 2: He failed to provide the quality of service to the Client and breached his fiduciary duty to the Client by not only failing to obtain or follow her instructions, but in participating with SS (and to an extent AA) in hiding from the Client what was being done by him purportedly on her behalf. He also failed to comply with her reasonable requests for information and documentation, including information and documents on his accounts.

(c) Allegation 3: Knowing the Client had obtained new counsel, he ignored that fact and met with the Client. Aggravating this is that he did it again while keeping her in ignorance of the facts, including not notifying her that he was coming to her home and he did not inform, let alone get permission from, her new lawyer, about the meeting.

(d) Allegation 4: Concurrently with and subsequent to the clandestine meeting, he then sought to continue to represent the Client who had discharged him, ignoring her wishes and instructions, and instead worked with the daughters to remain in the picture as her lawyer.

(e) Allegation 5: He completely ignored the new lawyer, Mr. Simon, and his requests in the correspondence sent, and the handwritten direction of the Client also sent, to provide the will and powers of attorney to Mr. Simon or the details and documentation of his accounts and time spent working for the Client. From the admitted facts, we find that the Respondent made no response of any nature, oral or written; as if Mr. Simon's involvement as the new lawyer for the Client were an irrelevancy.

[103] While the agreed facts indicate that the Respondent acted from good intentions, this still forms egregious professional misconduct. His actions are deeply troubling given his decades of practice experience that includes a focus on wills and estates matters. He clearly was unable to step back and be objective. As a professional, that was part of his obligations.

APPROPRIATE DISCIPLINARY ACTION

The significance of a proposed conditional admission and disciplinary action

[104] We now turn to the appropriate disciplinary action, bearing in mind what is essentially a joint submission of the Law Society and the Respondent on this aspect of the decision we must make. The Discipline Committee has instructed counsel for the Law Society to recommend the Proposed Disciplinary Action to this Panel. Deference should be given to that recommendation if the Proposed Disciplinary Action is within the range of a "fair and reasonable disciplinary action in all of the circumstances." Rule 4-22, which allows the Discipline Committee and a respondent to agree on a specific disposition, has the salutary effect of promoting settlements by providing a degree of certainty in the outcome. That is one of the general benefits of settlements and one of the reasons parties enter into them. This should generally be encouraged, not discouraged.

[105] However, as noted in the decision *Law Society of BC v. Rai*, 2011 LSBC 02 at paras. 6 to 8, the conditional admission provisions contain a "safeguard" in that the "proposed admission and disciplinary action do not take effect until they are 'accepted' by a hearing panel." As *Rai* notes, this provision exists to protect the public in that the panel must be satisfied that both the proposed admission as to the substantive conduct is appropriate and that the proposed disciplinary action is "acceptable."

[106] What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question that the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"

[107] In fulfilling this limited role, we must use as our compass section 3 of the *Legal Profession Act* by which the Law Society has a statutory mandate to protect the public interest in the administration of justice, in particular by "ensuring the independence, integrity, honour and competence of all lawyers."

[108] In doing so, hearing panels refer to what are generally called the 12 *Ogilvie* factors from *Law Society of BC v. Ogilvie*, 1999 LSBC 17, endorsed in the more recent review board decision of *Law Society of BC v. Lessing*, 2013 LSBC 29 as a general "roadmap" for hearing panels in disciplinary action decisions.

[109] We will not set out all the factors noted in *Ogilvie*, as they have more recently been "boiled down" to a more manageable number in the decision of *Law Society of BC v. Dent*, 2016 LSBC 05, since, as was also noted in *Lessing*, not all 12 apply in every case.

[110] The "consolidated *Ogilvie* factors" set out in *Dent* are:

(a) the nature, gravity and consequences of the conduct;

(b) the character and professional conduct record of the respondent;

(c) any acknowledgement of the misconduct and remedial action taken; and

(d) public confidence in the legal profession, including public confidence in the disciplinary process.

[111] All are applicable to some extent here:

(a) The misconduct is grave and strikes at the heart of the solicitor-client relationship and a lawyer's duty to his client and it clearly caused stress for the client.

(b) The Respondent is a veteran lawyer who should have known better but, despite four decades of practice, clearly did not. That he has not provided any explanation for his actions and inactions adds an aggravating effect.

(c) His entering into this conditional admission and proposed disciplinary action is a mitigating factor and signifies that the Respondent has some realization of how wrongly he acted. It also avoids what was to be a five-day hearing with numerous witnesses. He also obtained no personal benefit from his actions and inactions beyond billing the client. However, whether or not his intentions were good, they were extremely misguided and inappropriate.

(d) Lastly, we must always have regard for general deterrence and whether the penalties we impose will instill public confidence in our profession and this disciplinary process. This last factor, as has been said in many cases, is the over-arching one.

[112] Considering that there are five distinct findings of professional misconduct in this case, there is a question of whether the sanction should be global, looking at the cumulative nature of the Respondent's misconduct. Counsel for the Law Society submits that the sanction should be global, referencing *Law Society of BC v. Gellert*, 2014 LSBC 05; *Law Society of BC v. Harding*, 2015 LSBC 25; and *Law Society of BC v. Lowe*, 2019 LSBC 37. These are all decisions involving multiple findings of misconduct where a global sanction was determined appropriate.

[113] The Panel accepts that a global sanction is appropriate here. There is a single factual matrix leading to the five findings of professional misconduct, rather than independent factual situations with each allegation, as are seen in some cases. A single overall disciplinary action is warranted.

Significance of the nature of this lawyer-client relationship

[114] In determining if the proposed disciplinary action falls within an accepted range, the fact that the Respondent opened his file as an "elder law" file and that he knew and apparently acted on the basis that his client was potentially vulnerable, makes his actions particularly troubling.

[115] As counsel for the Law Society notes in its submissions:

> Elder law, in particular, is fraught with ethical challenges which the elder law lawyer ignores at his or her peril. It is imperative to determine whom the client is. The general public may not know the conflict of interest rules which govern the provision of legal services.
>
> Lawyers must make it clear that they are acting for the elder client only, if that is the case, and solely upon their instructions. The family may feel decisions made by a parent are "family business" but the parent may not. This problem was demonstrated in *McMullen v. Webber*, 2006 BCSC 1656, a case in which an elderly man's attorneys attempted to use their POA to (in their view) protect him, as he had depleted his investments and gifted money to a new acquaintance. The Court commented, at para. 68:
>
> > Mr. McMullen may be making improvident decisions, according to his family, but the law entitles him to do so, provided he is capable of making financial decisions and does not harm others. … *unless and until Mr. McMullen is declared incapable of managing his financial affairs, his attorneys are not entitled to step in and make decisions for him without his knowledge and consent.* … [emphasis added]

> As the Respondent's client in this case, [the Client] was entitled to expect undivided loyalty, full disclosure, and candid advice from the Respondent. The Respondent failed his client in that respect. The Law Society needs to send a clear and unequivocal message to members of the public and profession that failures such as those demonstrated by the Respondent in the circumstances of this case will not be tolerated.

[116] The Panel agrees. Elder law is an area of growth in our profession as our population ages and as our awareness of how the elderly can be and are abused by family and "friends." Lawyers who act in this area must have their focus clear. They must know whether the client is capable and if so, they cannot be swayed by what those family or friends think best or what the lawyers themselves think best. They must do their duty to, and take their instructions from, their client and no one else. The Respondent lost that focus. He never made any proper assessment of the Client's capability and, from the start, took his instructions elsewhere. Yet the facts show she was capable. He abused his role as her lawyer as he did not protect her interests or respect her wishes.

The Respondent's professional conduct record

[117] Of some significance is the professional conduct record of the Respondent. He has a discipline history consisting of two recent conduct reviews that include similar misconduct. His professional conduct record is:

(a) conduct review ordered January 30, 2020, with respect to his conduct while representing JB. by:

(i) placing himself in a position of conflict by providing legal advice to, and taking instructions from, one of his client's attorneys over the other;

(ii) informing others about the Law Society complaint and disclosing records that formed part of the investigation without obtaining the prior consent of the Executive Director or the complainant; and

(iii) communicating with Law Society staff in a manner that was uncivil and displayed a lack of respect for the Law Society's staff and processes;

(b) conduct review ordered July 11, 2019, regarding his conduct while acting for his clients with respect to an estate matter, in threatening to report

alleged criminal activities of the opposing party to the authorities in order to secure a benefit for his clients; and

(c) administrative suspension for one day in June 2019, under Rule 3-6(1), for failure to produce requested information and documents during the course of this investigation.

[118] Notably, the Respondent's most recent conduct review, held May 15, 2020, involved similar conflict of interest issues in an estate law matter, with respect to an elderly client with possible capacity issues. In that case, the Respondent had placed himself in a position of conflict by providing legal advice to, and taking instructions from, one of his client's attorneys over the other.

[119] The subcommittee report for the May 15, 2020 conduct review indicates that the Respondent stated that he now understands the importance of identifying who is his client at the commencement of his retainer, so as to not place himself in a position of conflict of interest. He agreed to take various steps to guard against repeating his mistakes.

[120] The Law Society concedes that, given that the misconduct in issue in that conduct review occurred at approximately the same time as the conduct that gave rise to the Citation in issue, the Respondent may not yet have had the opportunity to apply what he learned from the most recent conduct review. Given that concession and the recent date of the conduct review, the Panel lessens the weight to be attached to it accordingly. Were it not for this timing, it would be a very troubling repetition of the conduct leading to this decision.

Similar disciplinary action sanctions

[121] We turn to similar cases where global penalties were imposed. We have been provided with a significant number of cases, from which we find the following most relevant.

[122] In *Law Society of BC v. Laughlin*, 2019 LSBC 42, the respondent lawyer breached his duty of loyalty, acted in a conflict of interest, and acted against a former client. The respondent was corporate counsel for O Ltd. He also acted for a director/shareholder of O Ltd. in a divorce action, who had drug addiction issues ("Director 1"). The respondent suggested that the other director/shareholder ("Director 2") purchase Director 1's shares to finance addiction treatment and facilitate the division of family assets. The respondent appeared to be taking instructions from Director 2 and protecting his interests. The respondent withdrew

as counsel for Director 1 due to unpaid fees without taking the steps required for withdrawal.

[123] The panel in *Laughlin* noted that the respondent was well-intentioned and showed the compassion expected of lawyers towards Director 1 in providing assistance. However, he proceeded in a manner that led to a conflict of interest. He did not gain financially, and the parties did not suffer any financial damage. He had a prior conduct record including four conduct reviews and had been previously warned to watch for potential conflicts. The hearing panel, at first instance, ordered a $5,000 fine; however, on a review of that decision brought by the Law Society, the review panel accepted and ordered a $12,000 fine in accordance with the parties' joint submissions.

[124] In *Law Society of BC v. Rutley*, 2013 LSBC 32, the respondent lawyer acted against a former client through the improper use of a power of attorney in two separate but related incidents. She represented MB for the purpose of acting against the interests of her former client, PB, by assisting MB to use his power of attorney to transfer his interest in shares and the matrimonial house to MB. She assisted MB to breach her fiduciary obligations under that power of attorney. The respondent said she was influenced by her relationship with MB and that she allowed her personal feelings and personal relationship with MB to affect her professional judgment. The panel found that she violated her duty of loyalty to PB, who had been her client, and facilitated MB's improper use of the power of attorney. She had no professional conduct record. The panel accepted her admissions of professional misconduct and ordered a $7,500 fine.

[125] In *Law Society of BC v. McLellan*, 2011 LSBC 23, the respondent lawyer was retained by an executrix to pursue an action against a beneficiary. He commenced an action but then failed to advance the claim and communicate with the client over a period of seven years. He also failed to keep the client reasonably informed, answer reasonable requests from the client for information, and make all reasonable efforts to provide prompt service to the client and/or disclose all relevant information to the client. He had a prior discipline record including two conduct reviews and a citation. The hearing panel accepted his admission of professional misconduct and ordered a $5,000 fine.

[126] In *Law Society of BC v. Epstein*, 2011 LSBC 12, the respondent lawyer failed to (a) keep the client reasonably informed; (b) answer within a reasonable time communications from the client that required a response; and (c) to do the work that the respondent had been engaged to do promptly and accurately. He had a

prior disciplinary record. The hearing panel accepted his admissions of professional misconduct and ordered a $4,500 fine.

[127] In *Law Society of Upper Canada v. Good*, 2016 ONLSTH 134, the respondent withdrew funds from his trust account as payment for fees prior to delivering an account to the client, communicated directly with his client when he knew she was represented by new counsel, and failed to comply with an order that he make a payment to his client. The hearing panel accepted his admissions of professional misconduct and ordered a six-week suspension and costs.

[128] In *Law Society of BC v. Chaisson*, 2014 LSBC 32, the respondent lawyer failed to take any substantive steps to advance his client's claim and failed to answer reasonable requests from his client for information. After being fired by the client, he continued to act on the client's behalf without communicating with her. He also improperly withdrew trust funds in a contingency arrangement. There was no evidence of any intention to be dishonest or misleading. The respondent's professional conduct record consisted of a conduct review and referral to Practice Standards. The hearing panel accepted his Rule 4-22 (now 4-30) admissions of professional misconduct and ordered a $4,500 fine.

Conclusion on proposed disciplinary action

[129] The cases summarized, while they involve a number of instances of professional misconduct, do not cover as large a number as does this case. However, the sanctions involved in those other cases are also less than what is proposed here. The Panel finds that the proposed sanction of a fine of $20,000 is within an appropriate range of a fair and reasonable disciplinary action. It is at the higher end, but that is fitting in the aggravating and mitigating circumstances noted earlier.

[130] The award of costs of $1,000 is also appropriate. The costs agreed to are consistent with item 25 of Schedule 4 - Tariff for Discipline Hearing and Review Costs. Under item 25 of Schedule 4, the range is $1,000 to $3,500 for a Rule 4-30 hearing.

[131] Finally, we find it appropriate that the $21,000 be paid in instalments as proposed.

DECISION ON FACTS AND DETERMINATION, DISCIPLINARY ACTION AND COSTS

[132] In summary, the Panel accepts the proposed conditional admission and proposed disciplinary action and makes the following orders:

(a) The hearing is conducted in writing;

(b) Pursuant to section 38(5)(b) of the *Act*, the Respondent must pay a fine of $20,000;

(c) Pursuant to Rule 5-11, the Respondent must pay costs of $1,000;

(d) These sums, totalling $21,000, must be paid in 14 monthly instalments of $1,500 each, commencing March 1, 2021.