2021 LSBC 31
Decision issued: July 22, 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

AHPING ADENA LEE

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	May 5 and 6, 2021
Panel:	Jennifer Chow, QC, Chair Karen Kesteloo, Public representative Bruce LeRose, QC, Lawyer
Discipline Counsel:	Michael D. Sherriff Greg Cavouras
Counsel for the Respondent:	Mary Clare Baillie

OVERVIEW

[1] In October 2018, the Respondent represented two individuals and a numbered company in an application to obtain payment out of funds held in court in a foreclosure proceeding. The Respondent filed her own affidavit of service stating that she had effected proper service of her clients' application on the parties. When she appeared in chambers, the Respondent advised the court in oral submissions that all parties had been properly served. The Respondent succeeded in obtaining an order from the court that paid out the requested funds to her clients.

[2] In fact, the parties had not been properly served. Whether the Respondent intentionally misled the court is the main issue before the Panel. The Respondent says she was mistaken about proper service. The Law Society says the Respondent ought to have known that the parties were not properly served. Although the

Respondent denies she intended to mislead, the Respondent agrees with the Law Society that her conduct is properly characterized as professional misconduct.

[3] The Respondent also admits that she failed to report two income tax-related matters to the Law Society. The Respondent and the Law Society agree that her conduct is properly characterized as breaches of the Law Society Rules that do not rise to the level of professional misconduct.

[4] Based on the parties' agreement and our review of the evidence presented at the Hearing, the Panel finds that the Respondent committed professional misconduct by her conduct in misleading the court about the parties being properly served. Further, the Panel finds that the Respondent committed breaches of the Rules when she failed to report two income tax-related matters to the Law Society.

THE CITATION

[5] The Citation was issued on February 7, 2020. It sets out five allegations against the Respondent. However, the Law Society is proceeding on only three of the five allegations.

[6] The Respondent admits that she was served with the Citation on February 7, 2020 in accordance with the Rules.

[7] The primary allegation concerns the Respondent misleading the court about proper service of her clients' court application. The other two allegations concern the Respondent's failure to notify the Executive Director of an income tax charge and an unsatisfied monetary judgment.

[8] The three allegations before the Panel are Allegations 1, 4 and 5 in the Citation. They are set out below:

> **Allegation 1**: Between approximately October 4, 2018 and October 10, 2018, in the course of acting for one or more of ZZ, YZ and [numbered company] in connection with an application in a foreclosure proceeding, you swore and filed an affidavit of service, and made representations to the court, in which you stated that one or more of DT, HX and Strata Plan [number] had been served with a notice of application and corresponding affidavit, when you knew or ought to have known that they had not or you did not know whether they had, contrary to one or more of rules 2.2-1, 5.1-1, and 5.1-2 of the *Code of Professional Conduct for British Columbia.*

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act.*

Allegation 4: In relation to a charge against you under s. 238(1) of the *Income Tax Act,* you failed to provide written notice to the Executive Director containing all relevant information as soon as practicable after one or more of the following events, contrary to Rule 3-97(2) of the Law Society Rules [then in force]:

(a) the laying of the charge on or about November 30, 2015;

(b) the disposition of the charge on or about January 14, 2016; and

(c) the sentencing in respect of the charge on or about January 14, 2016.

This conduct constitutes professional misconduct or a breach of the *Act* or Rules, pursuant to section 38(4) of the *Legal Profession Act.*

Allegation 5: On or about January 21, 2016, you failed to immediately notify the Executive Director in writing of an unsatisfied monetary judgment entered against you on or about January 14, 2016 in *R. v. Adena Ahping Lee*, Provincial Court of British Columbia, Vancouver Registry, No. [number], contrary to Rule 3-50(1) of the Law Society Rules.

This conduct constitutes professional misconduct or a breach of the *Act* or Rules, pursuant to section 38(4) of the *Legal Profession Act.*

PARTIAL AGREEMENT ON DETERMINATION

[9] A two-day hearing was held on May 5 and 6, 2021. At the Hearing, the Law Society and the Respondent advised the Panel that they had reached a partial agreement about the allegations:

(a) Allegation 1: The Respondent admits that her conduct regarding this allegation has been proven by the Law Society and that this conduct is properly characterized as professional misconduct. However, the Respondent asks that the Panel view her misleading conduct as being unintentional rather than intentional. The Respondent admits that she was negligent to the point of constituting professional misconduct; however, she denies intentionally misleading the court. The Law Society disagrees and submits that the Respondent intentionally misled the court; and

(b) Allegations 4 and 5: The Respondent admits that her conduct in the way she handled her tax issues was a breach of the Rules. The Law Society accepts that the Respondent's breaches of the Rules do not rise to the level of professional misconduct.

[10] The Panel heard testimony from the Respondent in relation to Allegation 1 and the steps that she took regarding service of her clients' application. The Law Society did not call any witnesses.

AGREED STATEMENT OF FACTS

[11] At the Hearing, the Law Society and the Respondent presented the Panel with an agreed statement of facts (the "ASF"). The following facts are taken from the ASF.

[12] The Respondent was called and admitted as a member of the Law Society of British Columbia in 1992.

[13] The Respondent initially practised at a firm in northern British Columbia for about five years. In March 1998, she joined her current law firm, Faley Law Corporation, which at that time was known as Benedict Lam Law Corporation. The Respondent is currently the only lawyer at Faley Law Corporation, where she has a mixed litigation and solicitor's practice ranging from family law to wills and estates and commercial matters.

The foreclosure proceeding

[14] In mid-August 2018, while acting as a practice supervisor for another lawyer, the Respondent learned that two potential clients, YZ and ZZ, needed to retain counsel to help them apply for payment out of funds held in court in a foreclosure proceeding.

[15] The other lawyer asked the Respondent if she would be interested in assisting YZ and ZZ with the application. The Respondent reviewed some documents from the foreclosure proceeding and eventually confirmed with YZ and ZZ that she agreed to act for them and would prepare and bring an application seeking payment out of the funds held in court.

[16] The Respondent initially agreed to charge YZ and ZZ a flat fee of $1,500 for this work. However, after it became clear that the file required more work than had been initially contemplated, a later agreement was reached for the Respondent to be paid by the hour for additional services.

[17] Based on her review of the documents that she was provided early in her retainer, the Respondent was aware that the following prior events had occurred:

(a) On August 17, 2015, YZ, ZZ and their numbered company had commenced a civil action against DT and HX (the "Civil Action");

(b) On February 5, 2016, the Toronto Dominion Bank ("TD") commenced a foreclosure proceeding with respect to a strata property in Richmond (the "Richmond Property") that was owned by DT and HX (the "Foreclosure Proceeding");

(c) On June 6, 2016, TD obtained an order of default of mortgage against DT and HX in the Foreclosure Proceeding, with a last date of redemption of December 6, 2016;

(d) On February 10, 2017, YZ, ZZ and their numbered company obtained a default judgment against DT and HX, with damages to be assessed, in the Civil Action (the "Default Judgment");

(e) On March 14, 2017, YZ, ZZ and their numbered company obtained an order for damages pursuant to the Default Judgment, which contained a monetary award of USD $200,000 plus interest against DT and a monetary award of CAD $281,680.00 against DT and HX;

(f) On May 8, 2017, the Richmond Property was sold by court order in the Foreclosure Proceeding;

(g) On April 10, 2018, TD's solicitors paid the remaining net sale proceeds of $277,823.14 from the Richmond Property into court in the Foreclosure Proceeding;

(h) On May 14, 2018, the Royal Bank of Canada ("RBC"), a judgment creditor of DT, filed a notice of application in the Foreclosure Proceeding seeking payment out of funds held in court pursuant to its judgment against DT;

(i) On July 19, 2018, RBC obtained an order in the Foreclosure Proceeding for payment out of $43,484.66 from the funds held by the court. After the payment, the sum of $234,925.39 remained held by the court;

(j) DT and HX did not file a response in the Foreclosure Proceeding or a response in the Civil Action.

[18] In late August 2018, the Respondent also received and reviewed a title search printout dated August 22, 2018 that showed that DT and HX's joint tenancy to title to the Richmond Property had been cancelled on May 30, 2017 and a title search printout dated August 22, 2018 that showed that title to the Richmond Property was then held in the names of third parties and that DT and HX were no longer the registered owners on title.

[19] After reviewing all of the underlying documents, the Respondent understood that there were funds still held in court and that her clients, YZ and ZZ, needed to bring an application seeking to have these funds paid out to satisfy the damages award that had been obtained by prior counsel on March 14, 2017.

[20] To facilitate such a payout, the Respondent prepared a notice of application and a joint affidavit of YZ and ZZ in the Foreclosure Proceeding seeking payment out of funds held by the court based on the Default Judgment and the damages award.

[21] On September 14, 2018, the Respondent emailed the unfiled joint affidavit to YZ and ZZ so that it could be sworn or affirmed with the assistance of the lawyer who had referred the clients.

[22] The Respondent filed the notice of application and the joint affidavit (the "Application Materials") on September 24, 2018.

[23] The Respondent then had to serve the Application Materials on the respondents and any interested parties. To this end, the Respondent sent copies of the Application Materials to several recipients, as follows:

(a) She mailed the documents by regular mail to counsel for TD at its address for service.

(b) She emailed the documents to counsel for QC, one of the respondents in the Foreclosure Proceeding, at her address for service.

(c) She mailed the documents by regular mail to the strata corporation for the Richmond Property (the "Strata Corporation"), which was not a party to the proceeding.

(d) She mailed the documents by regular mail to DT and HX at the address for the Richmond Property.

[24] On October 4, 2018, the Respondent swore an affidavit of service (the "Affidavit of Service"), which she filed with the court the following day, although it was not necessary that she do so. In the Affidavit of Service, the Respondent swore that she

had served the Application Materials on TD, QC, the Strata Corporation, DT and HX.

[25] At the hearing of the application on October 10, 2018, at which no other party appeared, the Respondent advised the presiding master that "[a]ll parties in this matter were served."

[26] The Respondent's statements in the Affidavit of Service, and to the court on October 20, 2018, regarding service of the Application Materials on the Strata Corporation, DT and HX were not correct. The Respondent had properly served QC and TD with the Application Materials, but she had not properly served the Strata Corporation, DT or HX.

[27] Prior to appearing in court on the application, the Respondent:

(a) reviewed the court services online filings in the Foreclosure Proceeding, but failed to notice that the petitioner had obtained an order for alternative service in relation to the mortgagors (DT and HX);

(b) reviewed the notice of application filed by RBC on May 14, 2018 in the Foreclosure Proceeding and copied the list of parties that RBC had provided notice to for that application;

(c) did not verify if DT and HX had provided the Richmond Property as their address for service in the Foreclosure Proceeding;

(d) did not verify if DT and HX had filed a response in the Foreclosure Proceeding; and

(e) knew, at the time that she mailed the Application Materials to the address of the Richmond Property, that the Richmond Property had been sold in May 2017 in the Foreclosure Proceeding and that title was held by third parties and not by DT and HX.

[28] The Respondent was not aware at the time of the hearing on October 10, 2018 that orders for alternative service on DT and HX had previously been made in the Civil Action on July 8, 2016 and August 30, 2016 and in the Foreclosure Proceeding on April 5, 2016.

[29] At the conclusion of the hearing on October 10, 2018, Master Muir made an order for payment of funds out of court to YZ.

[30] The Respondent admits that she committed professional misconduct as set out in Allegation 1 of the Citation. The issue for the Panel is whether the Respondent was "intentionally" misleading when she made her submissions in court and in her sworn Affidavit of Service.

The tax issues

[31] On February 24, 2015, the Canada Revenue Agency (the "CRA") served the Respondent with eight notices requiring her to file personal income tax returns for the years 2004 and 2007 to 2013 within 90 days.

[32] On May 26, 2015, the Respondent filed her tax returns for 2007 to 2013, but she did not file her 2004 tax return.

[33] On November 30, 2015, the Respondent was charged with committing an offence, pursuant to section 238(1) of the *Income Tax Act*, by unlawfully failing to comply with the notice of requirement personally served on her on February 24, 2015 that required her to file a completed income tax return for the 2004 taxation year within 90 days, as required by section 231.2(1) of the *Income Tax Act*.

[34] The Respondent subsequently filed her 2004 tax return on or about January 3, 2016.

[35] On January 14, 2016, pursuant to a summons, the Respondent made her first court appearance. She pleaded guilty to the offence as charged and was sentenced to the mandatory minimum fine of $1,000, payable by January 1, 2017.

[36] The Respondent paid the $1,000 fine in two instalments on May 2, 2016 and September 30, 2016.

[37] The Respondent did not provide written notice to the Executive Director as soon as practicable after the laying of the charge on November 30, 2015; after the disposition of the charge on January 14, 2016; or after the sentencing in respect of the charge on January 14, 2016, contrary to Rule 3-97(2) of the Rules.

[38] The Respondent also did not immediately notify the Executive Director in writing of the circumstances of the sentencing order, seven days after the January 14, 2016 order was made or her proposal for satisfying it, contrary to Rule 3-50(1) of the Rules.

[39] In her annual practice declarations ("APD") submitted in 2016 to 2018, the Respondent provided the following responses to the question: "During the

reporting period, I became insolvent or bankrupt or had a judgment rendered against me":

(a) 2016 APD submitted on March 31, 2016: "CRA obtained a judgment against me for failing to file my 2004 income tax return on time – fine $1000 payable by January 1, 2017";

(b) 2017 APD submitted on April 12, 2017: "CRA obtained an order against me in January 2016 for failing to file my personal income tax return for 2004. The fine under that order had been paid in full"; and

(c) 2018 APD submitted on March 26, 2018: "CRA obtained an order against me for unpaid taxes in January 2017 [sic], which was paid in full as of December 2017 [sic]."

[40] In a letter dated August 16, 2019, the Respondent provided an explanation for not immediately reporting the November 30, 2015 charge and the fine ordered January 14, 2016 to the Law Society.

[41] When she filed her 2004 income tax return, the Respondent had no tax payable for the 2004 taxation year. Subsection 150(1.1) of the *Income Tax Act* exempts a taxpayer from filing a tax return if no Part 1 tax is payable in the year.

[42] The Respondent admits that she breached the Rules, as alleged in Allegations 4 and 5 of the Citation.

ADDITIONAL FACTS

[43] On October 4, 2018, the Respondent swore an affidavit that she served the Application Materials on the mortgagors and the Strata Corporation.

[44] The Respondent used the address for the Richmond Property as the address for service for the mortgagors when in fact, the mortgagors no longer resided there. By August 2018, new owners resided at the Richmond Property.

[45] On October 10, 2018, when speaking to her clients' application in chambers, the Respondent stated that "[a]ll parties in this matter were served."

[46] The Respondent testified that, at that time:

(a) she knew nothing about the nefarious activities of her clients when she agreed to represent them on the application for payment out;

(b) she looked to RBC's application materials that led to counsel successfully obtaining an order for payment of funds out of court in satisfaction of its second mortgage just months before she prepared a similar application. She trusted that RBC counsel would have handled such an application correctly. She over-focused on the RBC precedent, which channeled her thought processes;

(c) she noted the individuals served by RBC and followed its method to effect service, other than service on the mortgagors;

(d) RBC's application materials did not provide an address for service regarding the mortgagors. The Respondent noted that. She attempted to contact RBC's counsel to ask how service was effected on the mortgagors. She looked at the record relating to RBC's application on Court Services Online;

(e) the Respondent deputized her articled student to search for affidavits of service at the court registry. She also asked the solicitor (from whom she was referred) if her clients had current information of the mortgagors' address. The Respondent testified that she was focused on obtaining the most recent information with a view to serving the mortgagors with her clients' Application Materials;

(f) the Respondent was likely influenced by her experience of being consulted by defaulting mortgagors whom she always advised to file a response so that they would stay informed of what was happening with their valuable properties;

(g) the Respondent proceeded to mail the Application Materials to the mortgagors at the Richmond Property. If that address was no longer functional, Rule 4-2(7) entitled her to mail her court application to the mortgagors' last known address, which was the Richmond Property;

(h) the Court Services Online record showed that RBC did not make application for alternative service or file any document suggesting that it had served the mortgagors other than by ordinary service;

(i) RBC's notice of application indicated that it served the strata corporation by mail;

(j) the three orders for alternative service of the related documents, which are noted at para. 20 of the ASF, relate to service of originating processes.

The petition for foreclosure, the Amended Notice of Civil Claim and the Further Amended Notice of Civil Claim in the Civil Action do not permit ordinary service. Had the Respondent been aware of those documents, the fact that alternative service orders had been sought would not necessarily have served as a red flag. That is because the mortgagors would normally file responses *after* being served with the originating process, whether personally or alternatively;

(k) the Respondent did not need to file an affidavit of service; and

(l) there is no evidence that the Respondent might benefit or stand to gain anything by what she did and did not do in relation to her clients' application.

[47] The Respondent testified that the only doubt she had at the time she served her materials and appeared in chambers was whether the Application Materials had actually reached the mortgagors but she was confident at that time that she had properly served the mortgagors.

[48] The Respondent testified that, had she turned her mind to the matter of whether there had been any responses, she would have checked further for addresses for service. If there had been none, the Respondent testified she would have looked into serving the mortgagors personally or obtained an order for alternative service had that not been feasible. The Respondent stated under cross-examination that she would never skimp on process; if something had to be done a certain way, she would do it.

[49] The Respondent testified that she had no inkling that she had handled the matter of service improperly until the Law Society interviewed her on July 10, 2019. The Respondent did not understand that her handling of service of the application was an issue until then, even after the Law Society had written two letters to her about the matter.

[50] The Law Society cross-examined the Respondent extensively on her assumptions and beliefs. The Law Society challenged the Respondent on why she did not rely on the various documents to which she had access after she was retained. The Law Society submitted that the Respondent constructed her own incorrect assumptions at that time to avoid properly reviewing relevant court documents such as the following:

(a) a notice of civil claim filed by her clients' former counsel on August 17, 2015;

(b) an order of default of mortgage made June 6, 2016;

(c) a default judgment obtained by her clients' former counsel made February 10, 2017;

(d) a damages award in favour of her clients made March 10, 2017;

(e) an order directing the sale of the Richmond Property made May 8, 2017;

(f) a notice of application filed by RBC filed May 14, 2018;

(g) an order in favour of RBC made July 18, 2018;

(h) a title search printout dated August 22 2018 showing that the mortgagors' joint tenancy title to the Richmond Property was cancelled on May 30, 2017; and

(i) a title search printout dated August 22, 2018 showing that third parties TK and EK had become the registered owners of the Richmond Property.

[51] The Law Society cross-examined the Respondent extensively on RBC's application. Cross-examination focused on the following:

(a) The RBC application offered no guidance on which of the parties filed a response to the application.

(b) The Respondent could not determine from the RBC application which of the parties met the definition of "party of record" required by the Supreme Court Civil Rules.

(c) The RBC application did not show whether the parties themselves provided those addresses as addresses for service.

(d) The RBC application materials also did not show how the parties were actually served.

(e) The addresses for service did not confirm actual manner of service.

(f) RBC's notice of application did not include any address for the mortgagors or the Strata Corporation. That meant there was no address for the Respondent to rely on for the mortgagors or the Strata Corporation and she was required to take further steps to determine proper addresses for service.

[52] The Law Society also cross-examined the Respondent on the assumptions she made by pointing out that, since the mortgagors had never appeared in the Foreclosure Proceeding, the Respondent was required to ensure that the mortgagors were personally served with the Application Materials. The Respondent admitted that she did not appreciate that fact at the time.

DISCUSSION

Onus of proof

[53] The Law Society bears the onus of proving the allegations in the Citation. The Law Society must show on the civil standard of balance of probabilities, with sufficiently clear, convincing and cogent evidence, that the Respondent committed the misconduct alleged.

Test for professional misconduct

[54] The well-known test for professional misconduct is whether the lawyer's conduct is a marked departure from the conduct the Law Society expects of lawyers (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171). The "focus must be on the circumstances of the respondent's conduct and whether that conduct falls markedly below the standard expected of [lawyers]." (*Law Society of BC v. Lawyer 12*, 2011 LSBC 35 at paras. 7 and 8; *Law Society of BC v.* Harding, 2014 LSBC 52 at paras. 68 to 79).

A**LLEGATION 1: MISLEADING THE COURT**

Regulatory framework

[55] Lawyers must act honourably and with integrity when dealing with their clients, opposing counsel, the public and the court. All lawyers have a duty to provide full, accurate and complete information to the court. This is set out in very clear terms in the *Code of Professional Conduct for British Columbia* (the "*Code*"). Lawyers are required to treat the courts with the highest level of candour. The obligations in the *Code* set out the minimum standards of conduct expected of lawyers.

[56] Section 2.2-1 of the *Code* requires lawyers to act honourably and with integrity to among others, the courts:

> **2.2 Integrity**

2.2-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

[1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

[2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

[57] Section 5.1-1 and 5.1-2 of the *Code requires* counsel, when acting as advocates, to represent their clients honourably and to treat the court with candour, fairness, courtesy and respect. In other words, counsel must not mislead the court:

Advocacy

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

5.1-2 When acting as an advocate, a lawyer must not:

(g) (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(g) knowingly assert as fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal;

Jurisprudence regarding duty of candour

[58] Lawyers who rely on improperly commissioned affidavits or make false representations to the court adversely affect the administration of justice. Lawyers who mislead the court erode the public interest as well as the public confidence in the legal profession.

[59] In *Law Society of BC v. Nejat,* 2014 LSBC 51 at para. 37, the hearing panel stated:

> As officers of the court, lawyers have an overriding duty to ensure that they provide accurate information to the court, opposing counsel and self-represented litigants. When lawyers fail in this duty, the integrity of the profession and the administration of justice are compromised. It is no excuse that a lack of candour may inure to a client's benefit. A legal system in which the courts and other actors cannot trust a lawyer to be accurate in his or her representations cannot hope to achieve justice or maintain the respect of the public.

[60] In *Law Society of BC v. Batchelor*, 2014 LSBC 11, the respondent relied on two improperly commissioned affidavits. He also made a representation to the court that the exhibits to the affidavit were properly commissioned when he knew or ought to have known that that representation was false. The hearing panel explained at paras. 14 and 20:

> In our view, the Respondent's conduct is without a doubt a marked departure from the standards that the Law Society expects of its members. Members of the profession are officers of the court and as such the defenders of the Rule of Law, which is inherent in the office and in their duties. Confidence in the court's ability to fairly and judiciously view and receive evidence is eroded when sworn affidavits are falsified.
>
> Practising law is an honour and a privilege afforded to a very small percentage of society, and with it comes significant responsibilities. Three of the most serious responsibilities are managing trust funds, providing undertakings and upholding the duty to the court. Lawyers are officers of the court, and as officers of the court, lawyers make representations to the court on which the Judges and Registry staff must be able to rely. Our court system functions only because lawyers are officers of the court and the court can rely on the representations they make. Those representations are the foundation of the important decisions the judiciary makes that directly impact the lives of those members of the public involved in the

> court process. There is no room for a cavalier attitude, sloppy practice, or dishonesty when it comes to these hallmarks of our legal system.

[61] In *Law Society of BC* v. *Albas,* 2016 LSBC 18, the respondent failed to disclose material facts in a notice of motion and supporting affidavit and to correct the record during the course of a foreclosure proceeding. The hearing panel determined that the respondent had committed professional misconduct. The hearing panel explained that, when a lawyer fails to meet his or her duty of candour and integrity, that failure has the potential to mislead the court and other interested parties (*Albas,* para. 103*).*

[62] In *Law Society of BC* v. *Samuels,* 1999 LSBC 36, the hearing panel found that the respondent had committed professional misconduct by making misleading statements to the court. The hearing panel explained at para. 12:

> **It is an essential cornerstone of our system of justice that counsel's submissions reflect the actuality. Any departure is an assault on the integrity of that system.**

[63] In *Law Society of BC* v. *Botting,* 2000 LSBC 30, the hearing panel held at para. 60:

> While there is no specific prohibition in the Canons or the *Handbook* this Hearing Panel has no doubt that a lawyer has an obligation not to make misrepresentations to the court or the Law Society. Clearly, **the justice system would fall into dispute and the ability to properly regulate the members of the profession would be seriously compromised if** members did not have an unequivocal obligation to take care to be truthful in all written and oral representations to the Courts and the Law Society.

[64] In *Law Society of BC* v. *Foo,* 1997 LSDD No. 197, the hearing panel explained the importance of lawyers ensuring the accuracy of documents that will be relied on by the courts or other litigants:

> This matter of members of the Law Society causing documents which would be relied upon by other litigants and Courts, to be filed, is a very serious matter where the member permits this to be done knowing that the documents filed either contain errors or contain falsehoods. Next to defalcation of trust funds by a lawyer, knowingly taking a false affidavit is about as serious a breach of professional conduct as can occur.

[65] Assumptions and speculation are not "appropriate evidence in an affidavit." (*J.W. Bird and Company Limited* v. *Allcrete Restoration Limited,* 2019 NSSC 311 at

para. 63) The Supreme Court Civil Rules do not "permit affiants to give statements of assumption, conjecture or opinion." (*Hui v. Hoa*, 2014 BCSC 778 at para. 23).

[66] Lawyers are held to a high standard when they present evidence and submissions in court. Lawyers should not cause documents containing errors or lies to be placed before the court. Additionally, when lawyers swear their own affidavits and present their own evidence in court, they take on an additional duty to take any additional steps to satisfy themselves that their statements are truthful and accurate. That is because the court will likely place more trust on the evidence contained in a lawyer's affidavit since the court will likely assume that a lawyer will not mislead the court.

Jurisprudence regarding intention

[67] In *Law Society of BC v. Vlug*, 2014 LSBC 09, the hearing panel explained that the law does not require the hearing panel to find intentional misconduct. A determination of professional misconduct may be made even if the misrepresentation is not intentional.

[68] In *Law Society of BC v. Antle*, 2005 LSBC 45, the hearing panel found that the failure of the respondent to fully disclose to the court was not a deliberate attempt to mislead. As the hearing panel explained at para. 4:

> It is accepted that he honestly intended to discharge his duty. While he did not intend to mislead, he did mislead, and his conduct amounts to professional misconduct.

See also *Nejat*, at para. 40.

THE PARTIES' POSITIONS

[69] The parties do not dispute that, in order to obtain an order for payment of funds to her clients, the Respondent was required to serve the Application Materials on every party of record and on every other person who may be affected by the order sought (Rule 8-1(7) of the Supreme Court Civil Rules).

[70] In relation to Allegation 1, the Respondent admits that she was negligent in her preparation of her clients' application for payment of funds out of court. She admits that she did not verify whether the mortgagors and the Strata Corporation were parties of record in the Foreclosure Proceeding or had otherwise provided an address for service which would have enabled her to serve them by ordinary service. Instead, the Respondent admits she proceeded unconsciously to make

assumptions that resulted in her swearing and filing a false affidavit of service on October 4, 2018. In so doing, the Respondent admits she misrepresented to the court that the parties had been served.

[71] The Respondent admits that proper service of individuals in relation to court applications cannot be based on assumptions. In these circumstances, the Respondent submits that she failed to turn her mind to elements of the Supreme Court Civil Rules regarding service of applications and whether they permitted her to proceed in the manner she did. The Respondent denies intentionally misleading the court.

[72] In the Panel's view, resolving the issue of whether the Respondent intentionally misled the court requires us to rule on her credibility.

[73] The Law Society submits that the Respondent's testimony was not credible. In a nutshell, the Law Society submits that it is very difficult to reconcile the Respondent's testimony that she believed she had properly served the parties. Given her knowledge and experience, the Law Society submits that the Respondent should have taken further steps to investigate the addresses for service. Further, the Respondent should have known that she had not taken the proper steps to investigate the parties' addresses for service. The Respondent chose to rely on various mistaken assumptions in determining her method of service rather than taking actual steps to verify those assumptions to be true.

[74] The Law Society's main arguments are as follows:

(a) The Respondent's assertions that she had an honestly-held belief that service had occurred is not credible in the circumstances, and it would not be reasonable for the Panel to make such a finding in light of the surrounding circumstances.

(b) The Respondent knew, at the very least, when she swore her affidavit and appeared in court that she could not honestly assert as a "fact" that service of the Application Materials had occurred. Her belief that service occurred, to the extent that she had one, rested entirely on speculation. She knowingly presented to the court her speculation, which was admittedly based on two layers of assumptions, without qualification and as if it were a fact.

(c) Underlining the two points above, the information available to the Respondent clearly suggested instead that service had in fact not occurred.

[75] The Law Society further submits that the Respondent's evidence about the Richmond Property should cause the Panel some considerable challenges in terms of accepting the notion that she believed she had properly served the mortgagors. For example:

(a) The Respondent should have been aware that the Richmond Property had been sold in the Foreclosure Proceeding in May 2017.

(b) The Respondent should have known that, at the time she swore her affidavit, the mortgagors had not owned the Richmond Property for about 17 months.

(c) The Respondent admitted under cross-examination that she had no reason to believe that the Richmond Property had ever been used as an address for service in either legal proceeding and she had not taken any steps to investigate the issue.

(d) Any reasonable lawyer, particularly one of the Respondent's experience, would have known that service had not been properly effected.

[76] The Law Society submits that, when the Supreme Court Civil Rules are examined regarding the requirements for ordinary service, it should have been obvious to the Respondent that she could not serve the mortgagors or the Strata Corporation by ordinary service. That is because the Respondent did not have an address for service for the mortgagors. Additionally, she did not know if either had responded to RBC's application as a party of record. The Law Society submits that, in these circumstances that the Supreme Court Civil Rules clearly required personal service.

[77] The Law Society further submits that it would not be reasonable for the Panel to conclude that the Respondent had any genuine belief that she had actually effected proper service on the mortgagors or the Strata Corporation. The Law Society further submits that there are no facts or circumstances that could reasonably ground an honestly-held belief by the Respondent that she had effected proper service. The Law Society submits that the Respondent must have actually known that the steps she took towards service were inadequate.

[78] The Respondent, on the other hand, submits that the Law Society did not impugn her testimony or call her credibility into question. The Respondent testified that she did not know that she had not properly served the mortgagors or the Strata Corporation at the date she swore her affidavit and appeared in court. The Respondent submits her testimony was not impeached in cross-examination.

[79] The Respondent submits that, if the facts she assumed were correct were in fact correct, then service by mail on the mortgagors would have constituted valid service pursuant to Supreme Court Civil Rule 4-2(2), even if the mortgagors had moved.

[80] Even if the mortgagors had moved such that they were no longer at the Richmond Property, the Respondent incorrectly assumed that they were parties of record, which would have entitled her to serve them by mailing the Application Materials to the Richmond Property as a last-known address pursuant to Supreme Court Civil Rule 4-2(7).

[81] The Respondent acknowledges that her failure to turn her mind to whether or not responses had been filed in the Foreclosure Proceeding was unacceptably below the standard of practice expected of an advocate in that area. She admits that she ought to have known that she had not properly served the mortgagors or the Strata Corporation and that, in the result, the court was misled.

[82] The Respondent submits that she did not say to herself, "well, I could look further to see if responses were filed, but I choose not to do that." She admits she proceeded thoughtlessly. The Respondent submits that was the point she was making in her unimpeached testimony. The Respondent further challenges the Law Society's argument that she made unreliable "assumptions". Rather, the Respondent submits that she did not, at the critical time, have knowledge or recognition of the fact that she had not properly investigated the matter.

DISCUSSION

[83] Misleading the court amounts to professional misconduct. The jurisprudence confirms this conclusion. Our court system functions, in part, because lawyers are officers of the court and the court is able to rely on the representations made and court documents prepared by lawyers.

[84] Lawyers' representations in affidavits and submissions may form the foundation of the important decisions the judiciary makes that directly impact the lives of members of the public involved in the court process and the administration of justice generally. The Panel disapproves of lawyers taking cavalier attitudes, adopting sloppy practices, or promoting dishonesty in terms of their representations to the court. This concern applies equally to sworn statements in an affidavit.

[85] The provisions of the *Code* are clear regarding a lawyer's duty to act honestly and with integrity. Counsel must be candid and forthright in all dealings with the court.

These ethical duties are fundamental. The administration of justice depends upon lawyers, at all times, displaying a high degree of trustworthiness and integrity. Any failure to comply with these duties is a serious transgression.

[86] At the Hearing, we had the opportunity to observe the Respondent while she testified in direct and cross-examination. We found the Respondent to be a credible witness. Her testimony was consistent with the evidence. She admitted to serious shortcomings in her handling of the file and her knowledge at the time. She did not minimize the seriousness of her actions and omissions. She testified in a straightforward manner. When she was presented with a difficult truth, she admitted her culpability without excuse.

[87] To be clear, the Panel finds that the Respondent did not knowingly attempt to deceive the court in her clients' application.

[88] Allegation 1 of the Citation does not require the Panel to find that the Respondent intentionally misled the court to find that her conduct as alleged amounts to professional misconduct. The conduct of misleading the court is sufficient to ground a finding of professional misconduct, and we so find.

DETERMINATION ON ALLEGATION 1

[89] Based on our discussion above, the Panel finds that the Respondent has committed professional misconduct as alleged in Allegation 1 of the Citation.

ALLEGATIONS 4 AND 5: RULE BREACHES

The parties' positions

[90] The parties have agreed that Allegations 4 and 5 of the Citation may be characterized as breaches of the Rules that do not rise to the level of professional misconduct.

Regulatory framework

[91] Rules 3-49 and 3-50 apply to Allegations 4 and 5:

> **Standards of financial responsibility**
>
> **3-49** Instances in which a lawyer has failed to meet a minimum standard of financial responsibility include, but are not limited to, the following:

(a) a monetary judgment is entered against a lawyer who does not satisfy the judgment within 7 days after the date of entry;

Failure to satisfy judgment

3-50 (1) A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately notify the Executive Director in writing of

(a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and

(b) the lawyer's proposal for satisfying the judgment.

Jurisprudence

[92] A breach of the *Act* or the Rules does not constitute professional misconduct unless the conduct amounts to a marked departure from the conduct expected of lawyers (*Law Society of BC v. McLean*, 2015 LSBC 39 at para. 34; *Law Society of BC v. Tak*, 2014 LSBC 27 at paras. 156 and 158).

[93] In *Tak* at para. 206, the hearing panel explained the importance of reporting criminal charges to the Law Society:

> The Law Society's mandate to protect the public is a paramount duty. As a regulator, the Law Society attempts to ensure that its members at all times remain of good character and repute, act with honour and integrity, and remain competent. Failure to report criminal charges promptly prevents the Law Society from taking steps necessary to protect the public from a member in free fall. Failure to file income tax returns, GST returns, and to pay the taxes due under the Canadian legislative system is not an honourable act. The Respondent is deemed to have admitted the truth of the relevant allegations, and we accept that admission and find that the Respondent's failure to report charges to the Law Society promptly, or at all, amounts to professional misconduct.

[94] In *Law Society of BC v. Spears*, 2017 LSBC 29 at paras. 69 and 70, the hearing panel also explained the importance of reporting unsatisfied monetary judgements to the Law Society:

> This Rule forms part of the "financial responsibility" requirements set out in Part 3, Division 6 of the Law Society Rules. It is particularly designed

> to protect the public's funds being held by lawyers in their trust accounts and rightly so.
>
> If lawyers are having financial difficulties, often evidenced by outstanding judgments against them, the Law Society as regulator should be concerned about whether client funds are adequately protected.

[95] There is precedent for a finding of a Rules breach rather than professional misconduct when a lawyer fails to report judgments or charges to the Law Society. In *Law Society v. Hart*, 2020 LSBC 51 at para. 157, the hearing panel found that the respondent had committed a breach of the Rules when he failed to report two unsatisfied judgments to the Law Society. The hearing panel explained:

> … the Respondent was unaware that he had to report the certificates to the Law Society. When he was advised of the obligation to report the judgments, he did so. The Respondent also submits that he has been communicating and cooperating with the CRA and, to the best of his knowledge, his tax liabilities have since been paid. In the totality of the circumstances, the Law Society submits that the breach was not sufficiently serious to warrant a finding of professional misconduct, and seeks a finding of a breach of the *Act* or Rules. The Panel accepts that submission.

THE PARTIES' POSITIONS

[96] The Law Society submits that the factors outlined in *Law Society of BC v. Lyons*, 2008 LSBC 09— the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides* and the harm caused by the respondent's conduct, all point to the conclusion that the appropriate finding is a breach of the Rules and not professional misconduct.

[97] The Respondent submits that the circumstances giving rise to her summary conviction in Provincial Court on January 14, 2016 were at the lower end of the spectrum of wrongdoing.

[98] The Respondent submits that section 150(1.1) of the *Income Tax Act* only requires the filing of a T1 return when a person has Part I tax payable. The Respondent had no Part I tax payable. Many people choose to file regardless because it fixes their RRSP contribution limits and establishes their eligibility for certain social benefits, among other more technical advantages, but it is not mandatory.

[99] Under section 150(2), the CRA can demand that a person file a return regardless of whether they have Part I tax payable. Section 231.2(1) is the more general provision and the provision relied upon by the CRA in relation to the Respondent. It creates a strict liability offence, with due diligence defences available. The Respondent submits that a call to the auditor who issued the requirement under section 231.2(1) to inform the CRA that the Respondent had no Part I tax payable for the 2004 taxation year probably would have ended the whole thing there, long before the matter reached the court.

DISCUSSION

[100] There are few decisions addressing the failure of a lawyer to notify the Law Society about unsatisfied monetary judgments or charges.

[101] Based on the jurisprudence, it is clear that a failure by a lawyer to meet obligations is an issue that may harm the public interest and public confidence in the legal profession. The Law Society's financial reporting requirements in the Rules are an important part of the Law Society's mandate to protect the public interest.

[102] The Panel notes that the Respondent disclosed the salient information in her annual practice declarations for 2016, 2017 and 2018. The Panel accepts that the Respondent's failure to comply with the reporting requirements of Rules 3-50(1) and 3-97(2) was likely an oversight.

DETERMINATION ON ALLEGATIONS 4 AND 5

[103] The Panel finds that the Respondent's conduct as alleged in Allegations 4 and 5 breaches Rules 3-50 and 3-97 but is not conduct that rises to the level of professional misconduct.