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THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

MICHAEL ANTHONY NEWCOMBE

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	February 4, 2022
Additional written evidence and submissions:	February 22, 2022, March 4, 2022
Panel:	Thomas L. Spraggs, Chair Clarence Bolt, Public representative David Layton, QC, Lawyer
Discipline Counsel:	Barbara Lohmann
Counsel for the Respondent:	Grant J. Gray
Written reasons of the Panel by:	David Layton, QC

INTRODUCTION

[1] On September 21, 2021, we issued a decision on Facts and Determination (2021 LSBC 38) ("F&D Decision") in which we found that the Respondent committed professional misconduct in two discrete ways regarding a monetary judgment that was obtained against him in April 2018 and remained unsatisfied until early June of the same year.

[2] First, the Respondent committed professional misconduct by failing to notify the Executive Director of the Law Society in writing of the circumstances of this judgment and his proposal for satisfying it, contrary to Rule 3-50 of the Law Society Rules ("Rules").

[3] Second, the Respondent committed professional misconduct by making a representation to the Law Society in his 2018 Practice Declaration Form ("2018 Practice Declaration") that, during the reporting period, no judgment was rendered against him, which he knew or ought to have known was untrue, contrary to rule 7.1-1 of the *Code of Professional Conduct for British Columbia* ("*BC Code*").

[4] As a disciplinary action for these two instances of professional misconduct, the Law Society asks us to suspend the Respondent for one month. The Respondent submits that a one-month suspension would be justified if he had intended to mislead the Law Society on his 2018 Annual Declaration, but he contends that this misconduct was not deliberate and, thus, the appropriate penalty is a fine of between $5,000 and $7,000.

[5] As explained below, we conclude that the appropriate disciplinary action is a substantial fine because the Law Society has not met its onus of establishing that the Respondent deliberately provided misleading information on his 2018 Annual Declaration. While the Law Society's failure to prove this aggravating factor does not foreclose the possibility of a suspension, which would arguably not be an unreasonable outcome, we have concluded that a $12,000 fine is sufficient to protect the public and to maintain public confidence in the profession and the administration of justice.

[6] In coming to this decision, we have relied on the factual background and nature of the Respondent's professional misconduct as reviewed in detail in the F&D Decision. We have also considered the evidence from the disciplinary action phase of this matter, including the Respondent's professional conduct record ("PCR"), and his testimony at the hearing.

GENERAL PRINCIPLES

[7] The imposition of a disciplinary action for professional misconduct must be guided by the Law Society's statutory mandate to uphold and protect the administration of justice, key elements of which include protecting the public from professional misconduct and maintaining public confidence in the legal profession and the discipline process. See s. 3, *Legal Profession Act*; Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline*, at p. 26-1; *Law Society of BC v. Hill*, 2011 LSBC 16, at para. 3; *Law Society of BC v. Lessing*, 2013 LSBC 29, at paras. 54 and 55; *Law Society of BC v. Gellert*, 2014 LSBC 5, at para. 36.

[8] *Law Society of BC v. Ogilvie*, 1999 LSBC 17, at paras. 9 and 10, sets out a non-exhaustive list of factors that may be relevant in determining an appropriate disciplinary action. Some of these factors overlap. Not all of them come into play in every case. The weight to be given to each may vary in the circumstances. See *Lessing*, at para. 56; *Gellert*, at paras. 39 to 41.

[9] The factors mentioned in *Ogilvie* are often grouped under more general headings (*Law Society of BC v. Dent*, 2016 LSBC 5, at paras. 19 to 23). In this case, we have considered them under the following headings:

(a) nature, gravity and consequences of Respondent's misconduct;

(b) Respondent's character and PCR;

(c) Respondent's acknowledgment of misconduct and remedial action;

(d) impact of proposed penalty on the Respondent's clients and Legal Aid BC;

(e) range of sanctions in similar cases; and

(f) public confidence in the legal profession.

[10] Where a lawyer has committed professional misconduct in more than one instance, the usual approach is to impose a global sanction that suitably reflects the nature of all of the misconduct. See *Lessing*, at paras. 75 to 78; *Gellert*, at para. 37; *Law Society of BC v. Edwards*, 2020 LSBC 57, at paras. 16 and 17.

[11] Finally, in considering whether to impose a suspension, the salient features include: (i) elements of dishonesty; (ii) repetitive acts of deceit or negligence; and (iii) significant personal or professional conduct issues. See *Law Society of BC v. Martin*, 2007 LSBC 20, at para. 41.

ANALYSIS OF THE RELEVANT FACTORS IN THIS CASE

Nature, gravity and consequences of Respondent's misconduct

[12] As stated in *Gellert*, at para. 39, the nature and gravity of the misconduct is usually of special importance in determining the appropriate disciplinary action,

> … because it represents a principal benchmark against which to gauge how best to achieve the key objective of protecting the public and preserving confidence in the legal profession. Indeed, this key objective is the prism through which all of the *Ogilvie* factors must be applied …

[13] In this case, the Respondent's failure to report the unsatisfied monetary judgment as required by Rule 3-50 is serious because a failure to promptly satisfy a monetary judgement may be a sign of an underlying problem that renders a lawyer unable to properly perform their duties and be a risk to the public. If lawyers do not comply with Rule 3-50, the Law Society cannot fulfill its function of protecting the public. See F&D Decision, at para. 35.

[14] There is no evidence to suggest that the Respondent's misconduct caused or threatened to cause harm to any of his clients. Yet this is not the first time that the Respondent has failed to comply with Rule 3-50 regarding an unsatisfied monetary judgment. He previously neglected to report three such judgments, which resulted in a Conduct Review held on September 30, 2016. During that Conduct Review, the Respondent was told about the reason for Rule 3-50, and the importance of complying with it, and was informed that, under the principle of progressive discipline, a further breach of Rule 3-50 might result in a citation.

[15] The Respondent informed the Conduct Review Subcommittee that he would not transgress this rule again and that he understood the consequences were he to do so. Yet, less than 18 months later, he again breached Rule 3-50 by not reporting an unsatisfied monetary judgment, thereby failing to live up to his assurance of future compliance made to the Conduct Review Subcommittee. These circumstances increase the seriousness of the Respondent's professional misconduct.

[16] The Respondent testified that, while he took the Conduct Review seriously, he did not report the unsatisfied monetary judgement 18 months later because other things were on his mind, and he did not think to do so. While the Law Society did not concede that this testimony was accurate, it also did not press us to find that the Respondent consciously breached Rule 3-50, or was willfully blind or reckless in doing so (we use the term "reckless" in the subjective sense explained in F&D Decision, para. 50).

[17] Turning next to the Respondent's other instance of professional misconduct, as already noted, he failed to disclose this same monetary judgment to the Law Society on his 2018 Practice Declaration. Specifically, he provided a negative response to the following statement: "During the reporting period, I became insolvent or bankrupt or had a judgment rendered against me."

[18] Even though it caused no client any harm, this professional misconduct was also serious in nature. The Law Society must be able to rely on the accuracy of information provided by lawyers, otherwise its ability to regulate the profession is compromised and the public's confidence in the integrity of the legal profession is undermined (*Law Society of BC v. Botting*, 2000 LSBC 30, at para. 60). This was a straightforward question requiring a simple "yes" or "no" answer. The fact of the judgment should have been fresh in the Respondent's mind. It had been obtained against him just seven months earlier. It had caused him significant concern because it was registered on his Osoyoos property and, thus, jeopardized his ability to renew a mortgage on that property.

[19] At the hearing regarding disciplinary action, the parties disagreed as to whether the Respondent knowingly provided the false information on his 2018 Practice Declaration.

[20] This factor has potential relevance because, as noted in *Law Society of BC v. Lee*, 2022 LSBC 5, at paras. 14 and 17, a finding that a lawyer did not knowingly provide incorrect information to the court, or in our case the Law Society, is a mitigating factor when considering penalty, and may attract a fine instead of a suspension, although the absence of such knowledge is not a dispositive factor in deciding an appropriate disciplinary action. See also *Law Society v. BC v. Albas*, 2016 LSBC 36, at para. 14.

[21] The Law Society asked us to find that the Respondent intended to provide false information, because there was no ambiguity in the question, which required only a "yes" or "no" answer, and he surely had not forgotten about the judgment given the difficulties it had caused him in relation to his Osoyoos property. The Law Society submitted that it was open to us to conclude that the Respondent had lied about the judgment because, given the earlier Conduct Review, he knew that disclosure would likely lead to a citation for failing to comply with Rule 3-50.

[22] However, the Respondent testified that his professional conduct was not deliberate. Rather, he said that the fact of the judgment had slipped his mind when he filled out the 2018 Practice Declaration. He further intimated that the focus of this particular question had "slipped by" him because it asked about three different things, only the last of which involved judgments, and that as a result the question did not

"twig" his memory regarding the judgment. The Respondent also testified that he is a very busy sole practitioner. He says that he is a bit forgetful and sometimes forgets things. He explained that he was not motivated by a desire to avoid detection, because the Law Society had been going through his affairs for years, and judgments are public, and so he would not have thought that providing incorrect information would prevent the Law Society from finding out about the judgment.

[23] Having considered the evidence and arguments regarding the Respondent's state of mind, it is difficult to accept that even a forgetful lawyer in the same position could have forgotten about both the obligation to comply with Rule 3-50 during the period the judgment was unsatisfied, and the fact of the judgment when subsequently filling out the 2018 Practice Declaration. These were significant matters of real import to the Respondent's personal and professional life, as opposed to being generic and unmemorable aspects of a busy practice. In the circumstances, being a bit forgetful does not come close to reasonably explaining these two failures.

[24] However, we are unable to reject the Respondent's testimony to the effect that he failed to appreciate the focus of this particular question. In this regard, we note that in cross-examination he was unshaken in his claim that his misconduct was not deliberate because it would make no sense for him to run the risk of the Law Society eventually finding out about the judgment. We remain suspicious regarding the Respondent's state of mind when he provided the inaccurate information on the 2018 Practice Declaration, and believe it reasonably possible that he was fully aware of the focus of the question and consciously decided to provide false information despite the risk of detection. But this suspicion falls short of proof on a balance of probabilities. Consequently, we conclude that the Law Society has not met its onus of establishing as an aggravating factor that the Respondent intentionally provided false information on his 2018 Practice Declaration.

Respondent's character and PCR

[25] At the time of the misconduct, the Respondent was an experienced lawyer who had been practising for about 30 years. The Law Society submits that, given his experience, the Respondent "should have known better", which weighs in favour of a more significant penalty

[26] We agree insofar as a 30-year call should be fully aware of the importance complying with the Law Society's regulatory requirements, and, in particular, of

the need to provide accurate information in a practice declaration. While even a new lawyer should know that practice declarations must be treated seriously, and need to be reviewed and answered with care, such is especially the case for experienced lawyers.

[27] The Respondent has a PCR that contains three entries:

(a) On September 30, 2016, the Respondent had the Conduct Review referred to above, which addressed his failure to comply with Rule 3-50 regarding three unsatisfied monetary judgments. This Conduct Review also addressed the Respondent's disclosure of his Juricert password to his assistant to permit her to access the Electronic Filing System to file documents at the Land Title Office, contrary to the Juricert Agreement, the *Land Title Act* and the *BC Code*, and to withdraw funds from trust and pay purchase taxes, contrary to the Rules. The Conduct Review Subcommittee's report noted that the disclosure of a Juricert password was not permitted because using a Juricert password is akin to swearing an affidavit, and that such improper sharing was becoming more frequent despite ample notification to lawyers about the obligation not to do so.

(b) On January 25, 2018, the Practice Standards Committee ordered a practice review of the Respondent, following which the Committee adopted a number of recommendations on July 12, 2018. In setting out its recommendations, the Committee noted: deficiencies in the Respondent's knowledge base regarding practice management; a lack of understanding of conflicts of interest; an inconsistent use of retainer agreements; deficiencies in client communications; an issue with setting and maintaining appropriate boundaries with clients; problems with a particular file that required specific remedial steps; and shortcomings in his knowledge of the law regarding wills and estates.

(c) On May 16, 2018, the Respondent provided an undertaking to the Law Society not to practice in the areas of wills and estates until released by the Practice Standards Committee. This undertaking is still in place.

[28] The Conduct Review regarding the Respondent's previous failures to comply with Rule 3-50 is particularly important in demonstrating a need for specific and general deterrence. Specific deterrence is needed because, despite the Conduct Review Subcommittee telling the Respondent why complying with Rule 3-50 was important and him promising to do so in the future, within 18 months he breached Rule 3-50 again. He was unable to provide any explanation as to how this subsequent breach occurred, other than that the obligation to comply with Rule 3-

50 had slipped his mind. The notion that an obligation given such significance at a Conduct Review could be entirely forgotten by a lawyer 18 months later is of considerable concern, and justifies a sanction that provides the public with confidence that the Respondent will not commit breaches of Rule 3-50 in the future.

[29] The Respondent argues that a fine in the amount of $5,000 to $7,000 will suffice in this regard, because this is only his second misstep regarding unsatisfied judgments and the proposed fine represents a significant increase in sanction from the Conduct Review, thereby adequately reflecting the notion of progressive discipline.

[30] It is true that this is only the Respondent's second breach of Rule 3-50. But he also provided inaccurate information on his 2018 Practice Declaration regarding the same judgment. The Respondent says these two instances of professional misconduct are so closely connected that they should be treated as a single failure or incident.

[31] We disagree. These are discrete instances of falling significantly short of the standards the Law Society expects of lawyers. The notion that a lawyer could forget about their obligations under Rule 3-50 after a Conduct Review addressing that very topic by itself causes significant concern regarding the Respondent's reliability in complying with important Law Society requirements. That concern is increased given his significant lack of care in filling out his 2018 Practice Declaration, which resulted in him providing false information to the Law Society that further hampered its ability to fulfill its regulatory function in the public interest.

Respondent's acknowledgement of misconduct and remedial action

[32] The Respondent has admitted to his misconduct, which is a mitigating factor.

[33] However, he has not proposed any remedial action to ensure that he does not forget about the obligation to report unsatisfied monetary judgments or to disclose the existence of judgments in his annual practice declarations, other than a suggestion in a communication with the Law Society that, should he be the subject of another judgment in the future, he will "diarize immediately." Furthermore, he testified that, in 2021, an articled student showed him how to use Gmail calendar, which has been helpful in having him keep track of things.

[34] These steps – diarizing the fact of a judgment and using a calendar to keep track of practice matters – would not have avoided the professional misconduct in the case before us, because the Respondent claims to have forgotten about his obligations

under Rule 3-50 at the time the judgment was rendered against him. The problem is not that he forgot to meet a deadline. Rather, it is that he forgot about an obligation that should have been at the very forefront of any reasonable lawyer's mind on being the subject of a further judgment, and then, despite the importance of that judgment to his personal affairs, forgot about it because he took insufficient care in filling out his 2018 Practice Declaration a number of months later. In these circumstances, an informed and prudent member of the public would have limited comfort that these remedial measures will alone ensure that the Respondent will in the future remember his obligations to comply with Rule 3-50 and to submit accurate information on his annual practice declarations.

Impact of proposed penalty on the Respondent's clients and Legal Aid BC

[35] The Respondent indicated that a suspension may adversely impact his clients who have court dates in the next month or so because it may not be possible to adjourn those matters and the clients would thus need to find a new lawyer on short notice. His counsel, therefore, asked that, if a suspension is ordered, its commencement be delayed so that he will have time to minimize any adverse impact on his clients. The Law Society did not oppose this request, and suggested that a suspension could start, for example, four months after the decision is rendered, to permit the Respondent to appropriately manage his affairs.

[36] The Respondent also testified that he was the local agent for Legal Aid BC ("LABC") regarding family law referrals in Penticton and Kelowna, and suggested that, if he is suspended, the impact will be detrimental to individuals seeking funding for family law matters from LABC; to the intake workers who carry out LABC's work in these two locations; and to the LABC because it will need to make changes to accommodate his suspension. The Respondent's testimony on this point included the following points:

(a) He has separate contracts to act as local agent for LABC for Penticton and Kelowna. Penticton has one intake worker and Kelowna has two intake workers. Their job is to interview people looking for a legal aid lawyer to get those people "signed up", which we take to mean that the intake workers help people to make funding applications to LABC.

(b) The position of local agent is "theoretically" a paid position, but almost all of the money the Respondent receives goes directly to the intake workers, so this is not a particularly profitable venture for him. He fulfills this role as a public service and to help LABC keep good intake workers.

(c) He took on the Penticton contract because the last local agent retired and no other lawyer wanted to take on this role.

(d) If he were suspended, he could not act as local agent for the period of the suspension, but he did not know what other fallout might occur as a result. For instance, he did not know if he would lose the LABC contract for only the period of his suspension, as opposed to for good. He also did not know if another lawyer would step in to carry out this role. He did not know whether the intake workers, who are his employees, would be hired by a new local agent. He suggested that LABC might get rid of the local agent system entirely, and instead use a call centre as it does for smaller communities in the province. However, LABC had not told him how it intended to deal with his absence if suspended.

[37] During closing submissions, the Respondent's counsel indicated that he perhaps should have adduced evidence from LABC regarding the impact of a suspension on its operations in Kelowna and Penticton, and stated that he wished to re-open the Respondent's case to call further evidence on this point. He proposed obtaining a letter from LABC addressing what steps it would take if the Respondent was suspended for one month. The Law Society opposed permitting the Respondent to bring an application to file further evidence in this regard. However, we granted the Respondent's request, and set a schedule for him to apply to file further evidence regarding the impact of a suspension on his contracts with LABC as local agent in Penticton and Kelowna.

[38] On February 22, 2022, we received both the Respondent's Notice of Application to adduce as "further evidence" an email received from LABC addressing the impact of his suspension on its operations in Penticton and Kelowna, and the Law Society's written argument opposing that application. On March 4, 2022, we received the Respondent's reply to the Law Society's written argument.

[39] The LABC email was sent to the Respondent and his counsel by Gayle Myers, staff lawyer with LABC's Audit and Investigation Department. In the email, Ms. Myers states:

(a) If the Respondent is suspended "it would have a great impact on LABC, the services it provides and on its clients. If the Law Society imposes a fine [on the Respondent], it would be far less disruptive to LABC and the public we serve."

(b) The Respondent oversees LABC's local agent offices for Kelowna and Penticton, which includes being responsible for the staff, and is also on the duty counsel schedule for the next three months.

(c) "If suspension is imposed there would be quite a disruption to client services, community groups, and the courts. Changes would be required for service delivery hours, location, staff, websites, email addresses and IT support. We would have to get coverage for upcoming court dates, local agent offices and duty counsel shifts which are in person. This would take some time to organize. It is not that easy to get a lawyer to take over the local agent's role. If there is a suspension, further down the calendar, that would provide LABC more time to find coverage for clients and the office."

[40] As noted, the Law Society opposes the admission of the email from LABC. It does so on the basis that the Respondent has not met the test for adducing fresh evidence on appeal as set out in *R. v. Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, and adopted by review panels in cases such as *Law Society of BC v. Kierans*, [2001] LSDD No. 22, para. 25; *Law Society of BC v. Goldberg*, 2007 LSBC 55, at paras. 43 and 44; *Law Society of BC v. Perrick*, 2016 LSBC 43, at paras. 41 and 42; *Law Society of BC v. Faminoff*, 2017 LSBC 04, at para. 43, affirmed 2017 BCCA 373, at paras. 31 and 38; *Law Society of BC v. Sas*, 2017 LSBC 08, at paras. 18 to 21; and *Law Society of BC v. Vlug*, 2018 LSBC 27, at paras. 20 and 21.

[41] *Palmer* sets out the following four-part test for the admissibility of fresh evidence on the appeal or review of a decision by a court or other adjudicative body of first instance:

(a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;

(b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue at trial;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced in the proceedings, be expected to have affected the result.

[42] The *Palmer* test is also understood as implicitly requiring that the fresh evidence be admissible under the usual rules of evidence, because as stated by Justice Watt in *R. v. Arabia*, 2008 ONCA 565, at paras. 71, 78 and 80, evidence that is inadmissible could not reasonably be expected to have affected the result. See also *R. v. O'Brien*, 1977 CanLII 168 (SCC), [1978] 1 SCR 591 at 602; *R. v. Aulakh*, 2012 BCCA 340, para. 68(1); *R. v. Lopez*, 2015 BCCA 294, at para. 57; *R. v. Tyers*, 2015 BCCA 507, at para. 45; *R. v. Ball*, 2019 BCCA 32, at para. 100; *R. v. Moazami*, 2021 BCCA 328, at paras. 68 to 70). But compare *R. v. Davies*, 2022 BCCA 103, at paras. 31 to 36.

[43] In his Notice of Application accompanying the LABC email, the Respondent did not suggest that he needed to meet any particular standard in order to be permitted to tender the email as evidence in support of his case. However, in his reply to the Law Society's written argument, he says the *Palmer* test is inapplicable because it only applies where a party seeks to adduce fresh evidence on appeal or, in the discipline context, on review of a panel's decision, whereas here he is simply seeking to re-open his case to call additional evidence. The Respondent neither referred us to any case law in support of his position, nor did he indicate what test, if any, applies when a party seeks to re-open their case to tender further evidence.

[44] We agree with the Respondent that the demanding *Palmer* test only applies where the panel has already rendered its decision regarding facts and determination or, as in this case, the appropriate penalty, and does not apply where a party seeks to re-open their case prior to a panel rendering its decision. Limiting the *Palmer* test in this way is justified because the interests in finality increase substantially once a tribunal has rendered its decision in a matter.

[45] On the other hand, a party is not subject only to the usual rules of admissibility when seeking to re-open their case to adduce evidence after the proper time for doing so has passed. To the contrary, the jurisprudence in the administrative, criminal, and civil contexts establishes that in such cases a party must seek leave of the tribunal to do so, because the late introduction of evidence can cause unfairness to the opposing party and undermines the orderly and expeditious conduct of the proceeding. See *Law Society of BC v. Harding*, 2013 LSBC 10, at para. 9; *Law Society of Ontario v. Ciarallo*, 2021 ONLSTH 143, para. 49; *Law Society of Ontario v. Ejidike*, 2018 ONLSTH 128, at paras. 5 and 6; *Vander Ende v. Vander Ende*, 2010 BCSC 597, at para. 84; *Woodward & Company Lawyers LLP v. The Tsilhqot'in National Government*, 2021 BCSC 16, at para. 92; *R. v. Hayward*, 1993 CanLII 14679 (ONCA), (1993), 86 CCC (3d) 193, at pp. 197 "d" to 198 "c"; *R. v. E.S.*, 2017 BCCA 354, at paras. 12 to 14 and 24 to 32; *McWilliams' Canadian Criminal Evidence*, 5th ed. ("*McWilliams'* "), at §21:70:10.

[46] Although some of the authorities in the preceding paragraph describe the test to re-open in slightly different terms, its main components are uncontentious. First, in deciding whether to allow a party to re-open its case to adduce additional evidence, the tribunal is exercising a discretion in the interests of justice (*E.S.*, at paras. 12 and13; *Hayward*, at p. 197 "e"; *McWilliams'*, at §21:70:10). Second, the tribunal must have some understanding of the nature of the proposed evidence in order to weigh the factors relevant to the exercise of this discretion (*E.S.*, at paras. 29, 35 to 38). Third, those relevant factors include:

(a) the probative value of the proffered evidence on the matters in dispute (the higher the probative value, the more likely the interests of justice favour its receipt) (*E.S.*, at para. 31; *McWilliams'*, §21:70:10);

(b) the reason why the evidence was not led as part of the party's case (while the evidence is unlikely to be excluded solely because of a lack of due diligence by counsel, if it was not called earlier due to a tactical decision the application to re-open is less likely to be granted) (*E.S.*, at para. 32; *McWilliams'*, at §21:70:10);

(c) whether the opposing party would be prejudiced if the proceeding was reopened to permit the evidence to be called, and if so whether and how such prejudice could be alleviated (*E.S.*, at para. 30; *McWilliams'*, at §21:70:10); and

(d) the effect of reopening on the orderly and expeditious conduct of the proceeding, which includes a consideration of how much time has passed since the party's case was closed, whether the evidence can be called immediately, the time needed to call the evidence, whether the opposing party will likely call further evidence in response, and whether additional closing arguments will be required (*E.S.*, at para. 30; *McWilliams'*, at §21:70:10).

[47] Having considered the principles set out in the preceding two paragraphs, we dismiss the Respondent's application to re-open his case to adduce the LABC email, because the email does not impact our ultimate decision, and thus has no significant probative value regarding the issues in dispute.

[48] This is not to say that the adverse impact on the LABC of a one-month suspension as proposed by the Law Society and on the local agent system, including on individuals who may apply to LABC for funding, is completely irrelevant in determining the appropriate sanction. But such an impact cannot override the need to protect the public and maintain its confidence in the legal profession and the

disciplinary process, including by furthering the principles of specific and general deterrence. Furthermore, measures may be available to minimize the adverse impact of a suspension on a lawyer's existing clients, for instance by delaying the start of the suspension or adopting locum or custodianship arrangements. See *Law Society of BC v. Buchan*, 2020 LSBC 7, paras. 52 to 64; *Law Society of BC v. Yen*, 2021 LSBC 30, paras. 52 to 54; *Law Society of BC v. Seifert*, 2009 LSBC 17, para. 50; *Law Society of BC v. Kirkhope*, 2013 LSBC 35, para. 17; *Law Society of BC v. Boles*, 2007 LSBC 43, paras. 14 and 22; *Law Society of BC v. Martin*, 2006 LSBC 15, para. 48, reversed on other grounds, 2007 LSBC 20.

[49] In the Respondent's case, the LABC email itself appears to recognize that the possibility of adverse impact on the local agent system can be substantially mitigated by adjusting the timing of his suspension, an option that, as noted at paragraph 36 above, has already been proposed by the parties as a means of alleviating the harm that a suspension may cause to the Respondent's clients. Accordingly, if admitted into evidence the LABC email would make no difference to our decision whether to suspend the Respondent for one month as requested by the Law Society. As the email carries no real probative value on the issues in dispute, it does not meet the test for re-opening a case to adduce fresh evidence after the proper time for doing so has passed.

[50] Alternatively, were we to permit the Respondent to re-open his case to adduce the LABC email, we would ascribe it little weight in determining the appropriate disciplinary sanction for these exact same reasons.

[51] In short, on either view of the matter, the LABC email has no material bearing on the outcome of this case.

Range of sanctions in similar cases

[52] The Law Society has referred us to a number of past penalty decisions where the professional misconduct involved a failure to comply with Rule 3-50 and/or to provide accurate information to the Law Society. While the Respondent did not reference any additional decisions in his submissions, he nonetheless commented on a number of the decisions mentioned by the Law Society.

[53] In *Law Society of BC v. Lo*, 2020 LSBC 09, the lawyer committed professional misconduct by failing for several years to ensure that his firm remitted payroll deductions, GST and PST to government agencies; misrepresenting to the Law Society in his annual trust reports that he had done so in full; and, in one instance, failing to obtain the information required to verify a client's identity. He had provided the incorrect information on his annual trust reports because his business

partner, who was not a lawyer, had advised that the remittances had been made. The panel accepted that this misconduct was not deliberate, but held that it constituted a marked departure from the standard expected of lawyers because the lawyer ought to have made his own inquiries given his awareness that the firm had not met important financial obligations in the relevant time period. The panel held that it was mitigating that the lawyer had no prior PCR, had made changes to correct the administrative failings that led to the failings, and had repaid all of the debts in question. It accepted the lawyer's conditional proposal for a disciplinary action of a $15,000 fine.

[54] The Law Society says *Lo* is distinguishable because the lawyer did not knowingly provide misleading information, had no prior PCR, and had made changes to his practice to avoid the problems from arising again. Also, the penalty was imposed in the context of a conditional proposal, a process that is no longer available but under which the panel was obliged to accord the penalty proposed by the parties a degree of deference roughly comparable to that now given to joint submissions (*Law Society of BC v. Clarke*, 2021 LSBC 39, at para. 71).

[55] In *Law Society v. BC v. Hu*, 2010 LSBC 10, the lawyer had, in his 2007 and 2008 annual trust reports, incorrectly stated that he had complied with various rules governing trust accounts. He knew that some of these answers were false. However, the panel concluded that this professional misconduct fell at the lower end of the spectrum of misleading conduct because the lawyer did not intend to deceive the Law Society. Rather, when he filed the 2007 report, he knew his accounting system was inadequate, had obtained new accounting software, and had believed that his deficiencies would be corrected soon. And when he filed the 2008 report, a Law Society auditor had already discovered and discussed with him the various deficiencies, and was thus aware of the true state of affairs. The lawyer had taken a poor course of action because he anticipated his records would be put into order soon. He had no prior PCR, had obtained no financial benefit from his misconduct, and had admitted his error and made progress (albeit not fully) in achieving compliance. He was well aware of the need for accuracy in providing information to the Law Society and that the audit process meant that noncompliance or misrepresentation would likely be discovered. The panel accepted the lawyer's conditional proposal for a fine of $7,500.

[56] The Law Society submits that *Hu* is distinguishable because the lawyer had no prior PCR.

[57] In *Law Society v. BC v. van Twest*, 2011 LSBC 09, and 2011 LSBC 20, the lawyer wrongly believed that the Rules permitted him to accept up to $10,000 in cash from

a client, when in fact the limit was $7,500. He therefore accepted $9,000 in cash from a client as part of the funds used to purchase a property. A Law Society audit revealed the error, and the audit report and the Law Society both brought the relevant rule to the lawyer's attention. The lawyer wrote back to the Law Society indicating that he was now aware of the rule, and would maintain a cash receipt book, as required, in the future.

[58] However, one week later, he submitted his annual trust report in which he answered in the negative a question as to whether he had accepted cash over $7,500 during the year in question and answered in the affirmative that he maintained a cash receipt book. In answering a different question, he referred to the same letter in which he had given the Law Society the correct information.

[59] In finding that the lawyer's actions constituted a breach of the rules, but not professional misconduct, a majority of the panel concluded that he had not meant to mislead the Law Society in his trust report, nor was his answer reckless or the result of willful blindness. Rather, the close proximity of his letter to the Law Society and the report, and his reference in the report to the letter, supported the conclusion that the inaccurate answers in the report were an oversight. The panel imposed a $2,000 fine as disciplinary action for the two breaches of the Rules. There is no indication in the decision that he had a prior PCR.

[60] In *Law Society of BC v. Liggett*, 2012 LSBC 07, the lawyer committed professional conduct by providing a Notice of Trial to a bencher considering his adjournment request for a discipline hearing, knowing that the second of the two trial dates referenced in the Notice had since been cancelled. The panel concluded that this misrepresentation was reckless, as opposed to a deliberate attempt to mislead. The lawyer had a prior PCR that demonstrated a clear pattern over time of overextending his workload and practice management skills. The panel held that a one-month suspension was required to impress on the profession and the public that a lawyer's obligations to the Law Society must be approached with utmost integrity and good faith, and that falling below this standard will result in serious consequences.

[61] The Law Society argues that the circumstances in *Liggett* are similar to those in this case because it involved a misrepresentation in circumstances where it was important to emphasize to the profession, and especially to the lawyer, the need for lawyers to fulfill their obligations to the Law Society as regulator. The Respondent says that *Liggett* is different from his case because the lawyer knew the information provided was incorrect, and, indeed, it was hard to see how the panel could conclude that the lawyer did not intend to mislead.

[62] In *Lessing*, the lawyer breached Rule 3-50 by failing to report eight judgments to the Law Society. Because the seventh and eighth failures occurred after he had learned of his obligation to make such a report, they were held to constitute professional misconduct. The lawyer committed further professional misconduct by breaching three court orders made against him in a matrimonial proceeding, which in one instance led to a finding of contempt that was later purged. The lawyer had a PCR comprising four Conduct Reviews and a Practice Review, although expert evidence established that a major reason for his misconduct in failing to comply with the court orders was depression and the effects of post-traumatic stress disorder. A review board replaced a $22,000 fine imposed by the panel with a one-month suspension, holding that breaching a court order and being held in contempt should in most cases result in a suspension, and that a more severe penalty would have been imposed but for the lawyer's mental health issues.

[63] The Law Society argues that *Lessing* is akin to the case before us because there was a failure to report unsatisfied judgments, albeit no mental health issues. However, it must be pointed out that, as noted by the review board, the mental health issues in *Lessing* did not contribute to the breach of the Rule 3-50. Furthermore, the prime driver of the suspension in *Lessing* appears to have been the breach of the three court orders, not the professional misconduct that arose from the failure to comply with Rule 3-50.

[64] In *Law Society v. BC v. Galambos*, 2007 LSBC 31, the lawyer committed professional misconduct by telling the court that the opposing party had been served with the notice of motion and supporting affidavit for an application, even though he had not previously determined whether this was true. An aggravating factor was that a junior associate, who had watched the application, afterwards told the lawyer that the information he had provided was wrong, but he did not return to court to correct the misrepresentation. The panel imposed a one-month suspension.

[65] The Law Society says that *Galambos* is similar to this case because the Respondent made a misrepresentation, albeit to his governing body, not the court, and this misrepresentation was preceded by the failure to comply with Rule 3-50 regarding the unsatisfied judgment.

[66] In *Botting*, the lawyer committed professional misconduct by: (a) providing incorrect information to the court regarding the position taken by opposing counsel, namely, that counsel was consenting to the relief sought, despite lacking a reasonable basis for concluding that the information was true; and (b) denying to the Law Society that he had given the incorrect information to the court. Notably, the lawyer had proceeded with the court hearing despite having set the matter down

for a date on which opposing counsel was unavailable and having been told by opposing counsel that she could not attend and that, in any event, he was required to file a notice of change of solicitor before acting. Furthermore, the lawyer did not tell opposing counsel that the hearing had taken place when he spoke to them about the case later that day. The panel held that, while the lawyer's statements to the court and the Law Society might not be characterized as lying, his conduct nonetheless displayed gross negligence, recklessness, and a casual disregard for the truth. The lawyer had a PCR that included a Practice Review and two Conduct Reviews. He also contested the citation and did not acknowledge his misconduct until the day of the penalty hearing. The panel suspended him for 90 days.

[67] Having reviewed the cases referred to by the parties, it appears that a moderate-to-substantial fine may be an appropriate disciplinary action where a lawyer has for a second time failed to comply with Rule 3-50 and has a prior PCR. A suspension will usually be the correct disposition where the lawyer's failure to provide accurate information to the Law Society is deliberate. However, the failure to provide accurate information to the Law Society may on occasion justify a short suspension even where there is no intent on the part of the lawyer to mislead.

Public confidence in the legal profession

[68] We conclude that the goal of maintaining public confidence in the administration of justice and the regulation of the profession justifies a substantial fine, in the amount of $12,000. The factors favouring this disciplinary action include:

(a) The Respondent committed professional misconduct in two discrete ways, namely, by failing to report the unsatisfied monetary judgment as required under Rule 3-50, and by not reporting the existence of that judgment in his 2018 Practice Declaration.

(b) He failed to live up to these obligations despite a 2016 Conduct Review, at which he was told about the importance of reporting unsatisfied monetary judgments as required by Rule 3-50.

(c) His PCR includes not only the 2016 Conduct Review, but also other instances of conduct not meeting the requirements expected of lawyers in this province.

(d) While the Law Society has not established that the Respondent's misconduct was deliberate, his behaviour nonetheless exhibits forgetfulness and carelessness. A substantial disciplinary action is needed to ensure that the Respondent does not repeat such misconduct

and, thus, to maintain public confidence in the administration of justice. The decision promotes both specific and general deterrence.

(e) The Respondent has taken no remedial steps to ensure that such forgetfulness and carelessness does not recur. However, he testified that the financial problems that led to his past failures to comply with Rule 3-50 are well in the past, and he does not expect them to arise again. Moreover, given the nature of the misconduct, the best guarantor of future compliance with Rule 3-50 and the requirement that practice declarations contain accurate information is to impose a significant penalty that firmly reminds the Respondent of his obligations. A one-month suspension would not, in our view, be an unreasonable means of meeting this goal, and, thus, protecting the public and its confidence in the administration of justice. However, we have concluded that a fine of $12,000 will achieve the same result and is the appropriate disciplinary action in the circumstances of this case.

COSTS

[69] The Law Society seeks an order for costs of $5,714.16. The Respondent does not take issue with this amount.

[70] Applying Rule 5-11, we conclude that the amount of costs sought accords with the tariff in Schedule 4 to the Rules and is reasonable in the circumstances. The Law Society should, therefore, receive costs of $5,714.16.

CONCLUSION

[71] We order that the Respondent be fined in the amount of $12,000, payable within six months of the date of this decision or such other date as agreed to by the parties in writing.

[72] We further order that the Respondent pay costs to the Law Society of $5,714.16, also payable within six months of the date of this decision or such other date as agreed to by the parties in writing.