2008 LSBC 06
Report issued: February 11, 2008
Citation issued: May 30, 2007

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Re: Lawyer 7

Respondent

Decision of the Hearing Panel

Hearing date: November 21, 2007

Panel: **Minority decision:** Leon Getz, QC, Chair **Majority decision:** Russell S. Tretiak, QC
Concurring decision: Dr. Maelor Vallance

Counsel for the Law Society: Maureen Boyd
Counsel for the Respondent: Terrence L. Robertson, QC

Background

[1] The citation against the Respondent was issued on May 20, 2007. It originally covered three distinct allegations, all arising out of the same matter. Subsequently, the Respondent proposed to the Discipline Committee that he would make a Rule 4-22 conditional admission of professional misconduct in respect of one of those allegations. At a meeting held on November 15, 2007, the proposal was accepted, and the Discipline Committee directed counsel not to proceed on the remaining allegations.

[2] The allegation in respect of which the Respondent has admitted professional misconduct is described in the citation in the following terms:

> 2. In acting for the defendant in a personal injury matter, you accepted and were bound by an undertaking contained in a letter from Ms. H, counsel for the Plaintiff, dated January 23, 2004. In the letter, Ms. H confirmed that her client will attend the Defence Medical Examination on June 26, 2004, on your undertaking:
>
> 1. To provide a copy of Dr. W's report as soon as it is available to our office ..."
>
> You became bound by that undertaking when you instructed your assistant to advise Ms. H that " you have our agreement to the terms set out in paragraphs 1 and 2 in your correspondence of today's date."
>
> You breached that undertaking when you failed to provide the report from Dr. W dated February 10, 2004 to Ms. H until on or about September 27, 2005, contrary to Chapter 11, Rule 7 of the *Professional Conduct Handbook.*

[3] The Respondent has agreed that, if his admission is accepted, he will pay a fine of $3,000 and costs of $3,750. We were advised that the amount of the costs represents substantially full indemnification

to the Law Society.

[4] The Respondent has also formally requested that, if his admission and the proposed discipline are accepted, it should be ordered pursuant to Law Society Rule 4.38.1 that the published version of the decision exclude his name.

[5] Counsel for the Law Society: (i) recommended acceptance of the conditional admission and proposed disciplinary action; and (ii) argued that anonymous publication of our decision should not be ordered.

[6] At the conclusion of the hearing, we unanimously decided, for reasons that are set out below, to accept the Respondent's admission of professional misconduct and the proposed disciplinary action. We reserved judgment on the application for an order that publication of our decision should be made without identifying the Respondent. These reasons also deal with that issue. As will be seen, I differ from my colleagues on that issue.

Statement of Agreed Facts

[7] We were provided with a Statement of Agreed Facts. It is as follows:[1]

1. The Respondent was called to the bar in the Province of British Columbia on September 11, 1978.

2. At all material times, the Respondent was practising with the firm [firm name omitted] in Surrey, British Columbia.

3. The Respondent acted for the Defendant, [client], in a personal injury matter arising from a motor vehicle accident. SH acted for the Plaintiff, MT (the " Plaintiff').

4. On January 6, 2004, the Respondent wrote to Ms. H, requesting that the Plaintiff attend an Independent Medical Examination (" IME") with Dr. W on January 26, 2004.

5. On January 13, 2004, Ms. H replied to the Respondent, stating that the Plaintiff would attend the IME with Dr. W upon the Respondent's undertaking to provide a copy of Dr. W's report as soon as it was available, to her office.

6. On January 14, 2004, the Respondent wrote to Ms. H stating that he was prepared to waive privilege over the IME report of Dr. W if Ms. H would agree to waive the privilege over all of the Plaintiff's expert reports.

7. Ms. H replied by letter dated January 23, 2004, confirming that the Plaintiff would attend the IME with Dr. W upon the Respondent's undertaking, as follows:

> To provide a copy of Dr. W's report as soon as it is available to our office or in the alternative, in the event that you do not request a written report, that you provide Dr. W's notes and records that record any history given to him by the Plaintiff at the examination, and any notes that record Dr. W's observations or findings on physical examination...
>
> To facilitate " cooperation" the Plaintiff will provide reports obtained to date and requests that you provide all medical legal reports that you have obtained to date ...

In the event that the above is not agreeable and confirmed in writing on today's date, I regret that MT will be advised not to attend the appointment with Dr. W.

8. On January 23, 2004, the Respondent wrote to Ms. H and stated:

This will confirm your advice to me that you are willing to have your client attend the IME with Dr. W on the basis that we will provide you with a copy of Dr. W's report in exchange for all reports you have to date ... These terms are acceptable to me, and I trust that your client will be attending the appointment with Dr. W.

9. Later that day, the Respondent sent another letter to Ms. H and stated:

Earlier today, I wrote to you accepting the terms of your proposal as left for me on my voice mail. Since then, your secretary has telephoned my office in an apparent attempt to impose further terms.

Please be advised that the arrangements are complete and I expect your client will be attending as arranged...

10. The Respondent's assistant, [name omitted], also wrote to Ms. H on January 23, 2004:

Further to our telephone conversation of this afternoon, I confirm having spoken with the Respondent and am pleased to advise that you have our agreement to the terms set out in paragraphs numbered 1 and 2 in your correspondence of today's date.

11. The Plaintiff attended the IME on January 26, 2004. The Respondent received an initial report dated February 10, 2004 from Dr. W shortly after February 10, 2004.

12. On February 27, 2004, the Respondent wrote to Ms. H and stated:

Subsequent to that we had an exchange of correspondence regarding the terms upon which your client would attend the IME with Dr. W. One of the terms was that we would provide you with a copy of Dr. W's report when we received it. We will not be receiving this report until such time as we have the updated medical records of your client's family physician, which I had requested from you on February 4.

The Respondent believed that the interim report of Dr. W had been provided to Ms. H when he wrote the letter of February 27, 2004 to Ms. H. The report he was referring to was the final report of Dr. W after he reviewed the Plaintiff's records.

13. On March 11, 2004, RP, legal assistant to Ms. H, wrote to the Respondent inquiring whether he was in receipt of the IME report of Dr. W. RP notes in her letter that she had left three messages for the Respondent's assistant regarding that report.

14. On March 22, 2004, the Respondent replied to RP, stating:

> With respect to the issue of Dr. W's report, may I refer you to page two of my letter of February 27, 2004 in which I indicate that Dr. W will not be providing a copy of his report until such time as we have the updated medical records of the Plaintiff's family physician.

15. On April 6, 2004, the Respondent wrote a further letter to Ms. H in which he wrote:

> You are well aware that I do not have any report from Dr. W, and would not have any until such time as we got the records from the family physician. I received them from you late last week, and they have been forwarded to Dr. W.

The Respondent was referring to the report expected from Dr. W after reviewing the Plaintiff's records.

16. On or about May 16, 2004, the Respondent received a second report from Dr. W. On May 21, 2004, the Respondent wrote to Ms. H, enclosing one final copy of the report dated May 16, 2004.

17. On September 27, 2005, the Respondent wrote to Ms. H, enclosing for service pursuant to Rule 40A of the Rules of Court a copy of the Report of Dr. W dated February 10, 2004. Until this date, he believed the preliminary report had been delivered to Ms. H.

18. Ms. H sought an explanation as to why Dr. W's first report had not been previously disclosed to her. On October 4, 2005, the Respondent wrote to Ms. H stating that he had " agreed (but did not undertake) to provide you with a copy of this report on certain terms."

19. The Law Society received a complaint from Ms. H on June 14, 2006.

20. On August 4, 2006, the Respondent wrote to the Law Society stating, " I have no explanation as to why Dr. W's initial report was not provided to Ms. H as I had agreed to do. The only explanation I can offer is that this was an oversight..." .

21. The Respondent's counsel wrote to the Law Society on January 29, 2007, stating that:

> I am instructed by the Respondent that it was his intention to serve the initial report when he received it and that he believed that he had done so at the time of his letters of February 27 and March 22, 2004. His reference to Dr. W's pending report in these letters was, I am instructed, to the anticipated second report from Dr. W.

22. The Respondent admits that when he instructed his assistant to advise Ms. H by letter dated January 23, 2004 that " you have our agreement to the terms set out in paragraphs 1 and 2 in your correspondence of today's date," he was bound by the undertaking in Ms. H's letter of January 23,2004.

23. The Respondent admits that he breached the undertaking contained in Ms. H's January 23, 2004 letter when he failed to provide the report of Dr. W dated February 10, 2004 to her until on or about September 27, 2005, contrary to Chapter 11, Rule 7 of the *Professional Conduct Handbook*.

Should the Conditional Admission and the Proposed Discipline be Accepted?

The Admission

[8] At the conclusion of the hearing, we advised that, having considered the circumstances set out in the Statement of Agreed Facts, the Respondent's oral testimony and the submissions of counsel, we accepted the Respondent's admission and found him to have committed professional misconduct.

Disciplinary Action

[9] We also accept the proposed disciplinary action consisting of a fine of $3,000 and costs of $3,750.

[10] On this aspect of the matter, we have tried to weigh a number of considerations. First, and most obviously, honouring undertakings is, as was emphasized in *Law Society of BC v. Heringa*, 2004 BCCA 97, " fundamental to the practice of law and it follows that serious and diligent efforts to meet undertakings will be an essential ingredient in maintaining public credibility and trust in lawyers." Failure to do so is a serious matter. On the other hand, there was uncontradicted evidence before us that the imposition of an undertaking in the circumstances was highly unusual and a departure from the customary practice in those circumstances. In this instance, that departure may have been attributable to some tension, which we were led to believe had developed between the Respondent and counsel for the plaintiff in the proceedings. Further, there seems to have been some misunderstanding on the part of the Respondent as to which medical report the undertaking related to and, in fact, by September 27, 2005 - some nine months before the complaint about this matter was filed with the Law Society - it had been fully complied with. There is no evidence that anyone suffered any prejudice as a result of the Respondent's admitted misconduct. Finally, aside from this single incident, the Respondent's Professional Conduct Record over a period of almost 30 years is unblemished; and he seems well regarded among his peers, not only for his skill, but also for his adherence to high professional standards.

[11] Cumulatively, these considerations suggest that the Respondent's breach was relatively technical - an uncharacteristic aberration, the product, perhaps, of a misapprehension concerning the facts. Counsel for the Law Society referred us to decisions of several other hearing panels (*Law Society of BC v. Virk*, 2006 LSBC 26; *Law Society of BC v. Jeletsky*, 2004 LSBC 17, 2005 LSBC 02; *Law Society of BC v. Shojania*, 2004 LSBC 25; *Law Society of BC v. Hill*, 2007 LSBC 25; *Law Society of BC v. Epp*, 2006 LSBC 05, 2006 LSBC 21; *Law Society of BC v. Hall*, 2004 LSBC 34) dealing with circumstances that, in one or more respects, can fairly be regarded as similar to those before us. Little is to be gained from a detailed critical examination and analysis of those decisions. It is sufficient for our purposes to note that they illustrate a range of fines between $2,000 and $5,000 in analogous circumstances.

[12] These are the considerations that led us to conclude that the proposed disciplinary action was appropriate and should be accepted.

[13] We accordingly direct the Executive Director to record the admission on the Respondent's Professional Conduct Record, to impose the disciplinary action and to inform the Respondent and the complainant of the disposition.

[14] Nothing we have said should be understood as a retreat in even the smallest measure from the importance of lawyers not giving undertakings lightly or as undermining the proposition that undertakings, once given, must be meticulously observed. It is also perhaps worth emphasizing that there is no particular magic in the word " undertaking" . *Cf.* Statement of Agreed Facts, paragraph 18.

[15] This brings me to the second issue identified in paragraph [4] above, namely whether publication

of this decision, which is required, should be made, as the Respondent has requested, without identifying him.

Publication

The Background

[16] Law Society Rule 4-38 says that the Executive Director must " publish and circulate to the profession a summary of the circumstances and of any decision, reasons and action taken when an admission is accepted," as we have done, under Rule 4-22. Rule 4-38.1(1) says that a publication under Rule 4-38 " must identify the respondent."

[17] Rule 4-38.1(3) says, however, that a Panel may order that publication " not identify the respondent" if two conditions are met. They are:

(a) the penalty imposed does not include a suspension or disbarment, and

(b) publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication.

[18] The first condition is obviously satisfied. The parties disagree, however, on whether the second condition is met.

Grievous Harm

[19] In *Law Society of BC v. Doyle,* 2005 LSBC 24, a Bencher Review Panel outlined (at paragraph 25 of its decision) the analysis that must be undertaken in these cases:

> In analyzing whether the member is entitled to an order that his name not be identified the correct analysis required to be undertaken by the Panel is the following:
>
> (a) Firstly, the member must not be subject to a suspension or a disbarment. In other words, by necessary implication, the impugned behaviour must not be so serious as to have attracted penalties from the draconian end of the spectrum.
>
> (b) Secondly, the Panel must analyze what harm the member says he or another identifiable individual may suffer if his name were to be published. The harm must be so severe as to be characterized as grievous harm.
>
> (c) If the harm is found not to be grievous, that ends the matter.
>
> (d) If the harm in publishing the name is found to be grievous, only then does the Panel move on to weigh that grievous harm in publishing the name against the public interest and the Law Society's interest. Only if the grievous harm outweighs those two interests should the Panel exercise its discretion to grant an order directing that the member's name not be disclosed.

[20] The condition set out in paragraph (a) above being clearly met, I move to the second stage of the analysis.

[21] The Review Panel in *Doyle* noted (at paragraph 27 of its decision) that:

The jurisprudence regarding identification of a member' s name in discipline matters prior to the enactment of the present Rule in 2003, required that the effect on the member of identification must cause that member special or undue prejudice (see *Bell* No. 02/11, Oct. 2002). This Review Panel finds that the introduction of the word " grievous" in the 2003 amendment to the Rule was designed to convey that the harm that flows from identification must be significantly more serious in order to outweigh the obligations of the Law Society to be open and transparent.

[22] As to the meaning of " grievous harm" , the Review Panel in *Doyle* observed (at paragraph 26):

> What is grievous harm and when can it occur? *This Review Panel finds that grievous harm can only occur in rare and exceptional circumstances, taking it out of the ordinary, or beyond what one would reasonably expect in the circumstances.* The focus is on the member's personal circumstances. *In order to be grievous, the harm must be exceptional, unusual, onerous, and injurious to a member, and cause a member to experience catastrophic loss both personally and professionally.* The harm must involve significantly more than damage to the member's reputation or embarrassment that would normally be expected to flow from being found guilty of professional wrongdoing.
>
> (emphasis added)

[23] This description was accepted by a different Bencher Review Panel in the later case of *Re: Lawyer 5*, 2005 LSBC 50. In both cases, also, it seems to have been accepted that the likelihood of grievous harm occurring must be established on a balance of probability. As it was succinctly put by Mr. LeRose in his Dissent in *Re: Lawyer 5*, at paragraph [64], it must be shown that " it is more likely than not" that the Respondent will suffer grievous harm; in other words, we must make a prediction or state our subjective belief, based on evidence, that such harm will virtually inevitably ensue from identifying the Respondent.

What is the Evidence for " Grievous Harm" in this Case?

[24] The Respondent's apprehension of grievous harm is based on two main considerations. By way of background, his practice consists almost exclusively of personal injury defence work. He has been engaged in this sort of work for the greater part of his life as a lawyer. The field is dominated by a single public sector corporation. This, accordingly, has been one of the most significant, if not the most significant, of his clients.

[25] One of the matters invoked by the Respondent is that he wishes to broaden the scope of his practice in the insurance field and has recently been approached by an insurance broker representing a widely known general insurance syndicate with the potential to become a significant source of work. The object of the approach was to determine whether he would be available to undertake work on behalf of this insurer. In the words of his counsel, the Respondent:

> is of the view that the publishing of his name will have a serious detrimental effect on his ability to develop a solicitor and client relationship with the broker and the [syndicate] as well as his continuing relationship with [client].

[26] I deal with the latter aspect below. As to the former, I do not think it is evidence of " significantly more than damage to the member' s reputation or embarrassment that would normally be expected to flow from being found guilty of professional wrongdoing." See *Doyle*, (*supra*), at paragraph [26]. In any event, it is at best a speculation.

[27] I turn, then, to the impact of identification upon the Respondent's principal client, [client]. This was his major concern. He testified that this client has what he described as a " zero tolerance" policy in respect of professional or personal misconduct on the part of its employees or outside counsel. He said that it will be " very concerned" if it becomes generally known through publication that one of its counsel has admitted to professional misconduct in failing to comply with an undertaking. Although the Respondent did not say so explicitly, he certainly suggested that, if this were to happen, he would be at grave risk of losing this major client.

[28] The Respondent was for some 25 years a member of the legal staff of his major client, and his evidence about its attitudes seems likely to be well informed and reliable, and I accept it at face value. His account of the policy was couched in the most general of language, however, and he did not testify to any instances of its application to circumstances comparable (or even not comparable) to those here. It is as if " zero tolerance" speaks for itself. [2] In the absence of such information, however, " zero tolerance" is little more than a slogan, largely empty of relevant meaning. In a sense, it is a substitute for evidence rather than evidence itself.

Re: Lawyer 5

[29] The Respondent placed a great deal of weight on the case of *Re: Lawyer 5*. That was a case in which the respondent had admitted to a relatively technical breach of the Society's accounting rules, committed some eight years earlier. Aside from that breach, that respondent had an unblemished Professional Conduct Record over a period of some 41 years. He had gained no benefit from the breach and neither the client in respect of whose affairs the breach occurred, nor the public, was ever at risk.

[30] There are thus significant resemblances between the circumstances of that case and those before us. Moreover, they do not end there, for it seems that that respondent, as this, also had one significant client, also a " public body" , which accounted for substantially all of his fee income.

[31] A majority of the Review Panel in that case concluded that the respondent would suffer " grievous harm" if his identity were revealed. It reached this conclusion on the basis of its review of the affidavit evidence tendered by the respondent before the original Hearing Panel. Unfortunately, neither the reasons of the Hearing Panel nor those of the majority of the Review Panel disclose what that evidence was. The dissenting reasons of Mr. LeRose, however, indicate that the respondent's contention was not that his principal client would terminate its long-standing arrangement with him, but rather that " if his name is published, the public scorn will be such that the [client], a public body, may be compelled by this scorn to end this long-standing relationship." See *Re: Lawyer 5,* 2005 LSBC 50 at paragraph [69]. Finally, it should be noted that the client in that case was aware of the citation and the decision of the Hearing Panel and that counsel for the respondent had committed on his behalf to provide the client with a copy of the decision of the Review Panel. See paragraphs [24] and [27].

[32] The majority decision in *Re: Lawyer 5* does not establish any new principle. It is little more than an illustration of a set of circumstances that one Panel of the Law Society considered sufficient to establish the probability of grievous harm being suffered by the respondent.

[33] There is no evidence here, as there apparently was in *Re: Lawyer 5*, that if the identity of the Respondent were known, this would give rise to a wave of public sentiment exposing the client to such scorn that it would almost certainly feel impelled to terminate its relationship with him. Instead, as noted above, we are invited to rely on the client's zero tolerance policy.

[34] We are not required to reach the same conclusion on the facts in this case simply because there are some resemblances between it and *Re: Lawyer 5*. We must come to our own conclusion on the

evidence before us. In my opinion, this evidence falls far short of the standard required to warrant the conclusion that the client in this case will, upon learning the Respondent's identity, more likely than not terminate its relationship with him and that he will, therefore, suffer grievous harm. To hold otherwise requires us to believe that the client, informed of the facts *and our view of those facts*, will cleave unwaveringly to its so-called zero tolerance policy and cut loose a long-term professional advisor with a completely unsullied record. I find this impossible to credit and think that a " reasonable and informed member of the public" (see *Re: Lawyer 5*, 2005 LSBC 11 at paragraph [15]) would find it equally so.

[35] I am not persuaded that the case for " grievous harm" is made out on the evidence.

Weighing the Harm to the Respondent against the Public Interest and the Law Society's Interest

[36] My conclusion on the subject of grievous harm makes it strictly unnecessary to embark upon a process of weighing the harm to the Respondent from being identified against the public interest and the Law Society's interest in transparency.

[37] Nonetheless, in view of the decision of the majority of this Panel, I proceed now to undertake that weighing process.

[38] The governing approach to this process is best described in the following passages from the reasons of the Review Panel in *Doyle* (*supra*):

> [41] This Review Panel agrees with the Panel below that the clear intention of Rule 4-38 and 4-38.1 is that the public should know who did what and that only in exceptional circumstances where full public disclosure will cause grievous harm to the member or another identifiable individual will that right be abrogated.
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> [42] A fair, large and liberal construction of Section 3 of the *Legal Profession Act* and Rule 4-38 and 4-38.1 instructs the Benchers that it is not individual lawyers' interests or lawyers' interests as a group that ought to serve as the focus of any inquiry regarding non-identification. It is a question of how lawyers fit in to the larger public society. The discipline activities of the Law Society of British Columbia and the results of its hearings, where adverse to members, are of large interest and instruction and even occasional notoriety. Nonetheless justice must be done and equally importantly, must be seen to be done. This can best occur only with publication of disciplined lawyers' names.

[39] There is one key relevant difference between the circumstances in *Re: Lawyer 5* and those here. The client in that case was aware that the respondent had admitted to and been disciplined for " conduct unbecoming" . In this case, it seems, the Respondent's client is ignorant of the admission and the discipline. In substance, therefore, the Respondent's request for anonymity invites us to acquiesce in concealing from the client something which, on the Respondent's own account of the client's policy, is of significant interest to it - in other words, to put it bluntly, to deceive the client. It is perhaps worth adding that, if the client were shown to be aware of the admission and discipline - as seems to have been true in *Re: Lawyer 5* - there would seem, at least on these facts, little to be said for the request for anonymity. I express no opinion on the view apparently taken by the Review Panel in that case of the risk that public opinion would become inflamed by disclosure and thus cause the client to terminate its relationship with the lawyer.

[40] In my opinion, for the Law Society to do this, or to connive in its being done, would be unconscionable and indefensible and seriously undermine any moral claim to exercise its regulatory

authority. That would disserve the public interest and discredit the Society. No lawyer's interest can be sufficient to justify it.

[41] I would accordingly reject the Respondent's request for anonymous publication.

Majority Decision of Russell Tretiak, QC

[42] This writer has had the advantage of reading the draft decision of Leon Getz, QC concerning anonymous publication.

[43] Although that decision is extremely well written, this writer regrets that he has to disagree with the conclusion reached therein concerning publication.

[44] To Mr. Getz's recitation concerning all matters, the writer feels constrained to add but one additional fact.

[45] That fact is that the *viva voce* evidence of the Respondent was that he believed he had inadvertently breached the undertaking as he thought he had forwarded a preliminary report to opposing counsel.

[46] In answer to a query from the Panel, counsel for the Law Society and the Respondent both indicated that they were of the view the offence was one of strict liability.

[47] Accordingly, inadvertence would not be a defence to the allegation.

[48] The writer agrees, as well, with Mr. Getz's recital of the significance of the applicable authorities.

[49] Unfortunately, of course, this writer cannot agree with the learned Mr. Getz's reasoning as to how those authorities apply to the case at hand.

[50] It should be mentioned that, prior to 2003, the Rule regarding anonymous publication was founded on different principles and decisions based on that language are otiose.

[51] The primary decisions are *Law Society of BC v. Doyle*, 2005 LSBC 24 and *Re: Lawyer 5*, 2005 LSBC 50.

[52] The new principle is detailed in *Doyle* (*supra*). It is repeated here:

> [26] What is grievous harm and when can it occur? This Review Panel finds that grievous harm can only occur in rare and exceptional circumstances, taking it out of the ordinary, or beyond what one would reasonably expect in the circumstances. The focus is on the member's personal circumstances. In order to be grievous, the harm must be exceptional, unusual, onerous, and injurious to a member, and cause a member to experience catastrophic loss both personally and professionally. The harm must involve significantly more than damage to the member's reputation or embarrassment that would normally be expected to flow from being found guilty of professional wrongdoing.

[53] Subsequently, in *Re: Lawyer 5* (*supra*) the Benchers said the following on Review:

> [16] This Review Panel finds that grievous harm, as interpreted in *Re: Doyle (supra)*, would occur if the Respondent's name was publicized. The Panel reaches that decision on the basis of its review of the Affidavit of the Respondent and the other findings of fact set out in the decision under review.
>
> [17] The Respondent is 67 years of age, having practised law in British Columbia for 41 years with no history of discipline, with the exception of the decision under review. He is the sole source of

support for his wife. They are not wealthy and maintain a mortgage and other expenses. In addition, his wife suffers multiple sclerosis and requires extra medication paid for by the Respondent for eight months a year. His principal, and essentially only client, is the [client], at a fixed retainer of $90,000 per year.

[18] On the evidence contained in the Affidavit and in the decision under review, the Panel concludes, on a balance of probability, and despite the fact that the breaches giving rise to the finding of " conduct unbecoming" occurred approximately eight years ago, the publication of the Respondent's name would create significant risk of the loss of this client.

[19] The Review Panel is of the view that it would not be possible to provide more cogent evidence of the risk associated with respect to the potential loss of a client than that provided by the Respondent. For example, it does not appear reasonable to expect to obtain an Affidavit from a public body or other evidence to the effect that upon the publication of the Respondent's name, it would terminate the solicitor/client relationship.

[20] The Respondent has been involved in public life and worked with public bodies for a major portion of his professional career and is in a position to appropriately inform this Panel of the risks associated with publication.

[21] The next issue, having found that the harm is grievous, is to weigh the grievous harm of publishing the name against the public's and the Law Society's interests.

[22] This Panel has concluded that the grievous harm outweighs these two interests for the reasons that follow.

[23] The activity which gave rise to the finding of conduct unbecoming occurred in 1997, some eight years ago. The Panel below describe [sic] the circumstances as follows:

> 21. Before the offence occurred, the Respondent's Law Society record was unblemished. The Panel concludes that the Respondent offered, with integrity, to the public, legal services that were honourable and competent. He contributed to his community and was Mayor of a small urban community at age 28. The Respondent met Dr. H as a colleague of the local Hospital Board. Over time the friendship of this meeting extended to the spouses and, as couples, their friendship and trust developed from the 1970's onward. It was only natural that Dr. H appoint the Respondent executor with the particular task of administering the life estate for Mrs. H. This description establishes the height from which a fall from grace could occur if this Non-Identity application were not successful.
>
> 22. The offence itself is set in the context of this friendship. The offence was a one time occurrence of Accounting Rules which did not in any manner benefit the Respondent. The Respondent's client was never at risk and nor was the public. All funds were accounted for. Throughout the Law Society's investigation the Respondent remained cooperative, helpful and open. The Law Society, for no adverse reason to the Respondent, took eight years to bring this matter to a hearing. During the eight year period, this 67 year old Respondent continued providing with integrity, the same honourable and competent legal services. The Respondent's 41 year practice has now developed to a point where he enjoys the retainer of one significant client for most of his fees.

23. The Respondent contritely admitted his wrong doing, was accordingly humbled and is obviously the wiser. If this Non-Identity Application is unsuccessful, then likely grievous harm, being loss of reputation, especially the possible loss of a major client, is certainly not a deserving ending to the Respondent's respected legal career.

[54] We remind ourselves of the words of the learned Benchers in *Doyle* (*supra*):

[42] A fair, large and liberal construction of Section 3 of the *Legal Profession Act* and Rule 4-38 and 4-38.1 instructs the Benchers that it is not individual lawyers' interests or lawyers' interests as a group that ought to serve as the focus of any inquiry regarding non-identification. It is a question of how lawyers fit in to the larger public society. The discipline activities of the Law Society of British Columbia and the results of its hearings, where adverse to members, are of large interest and instruction and even occasional notoriety. Nonetheless justice must be done and equally importantly, must be seen to be done. This can best occur only with publication of disciplined lawyers' names.

[55] Although this writer agrees with the above and Mr. Getz's comments in paragraphs [24] through [27] and the first sentence of paragraph [28], his view is different, with respect, based on the facts of this case. For the ease of the reader, Mr. Getz's comments in the aforementioned paragraphs are repeated here:

[24] The Respondent's apprehension of grievous harm is based on two main considerations. By way of background, his practice consists almost exclusively of personal injury defence work. He has been engaged in this sort of work for the greater part of his life as a lawyer. The field is dominated by a single public sector corporation. This, accordingly, has been one of the most significant, if not the most significant, of his clients.

[25] One of the matters invoked by the Respondent is that he wishes to broaden the scope of his practice in the insurance field and has recently been approached by an insurance broker representing a widely known general insurance syndicate with the potential to become a significant source of work. The object of the approach was to determine whether he would be available to undertake work on behalf of this insurer. In the words of his counsel, the Respondent:

> is of the view that the publishing of his name will have a serious detrimental effect on his ability to develop a solicitor and client relationship with the broker and the [syndicate] as well as his continuing relationship with [client].

[26] I deal with the latter aspect below. As to the former, I do not think it is evidence of " significantly more than damage to the member' s reputation or embarrassment that would normally be expected to flow from being found guilty of professional wrongdoing." See *Doyle*, (*supra)*, at paragraph [26]. In any event, it is at best a speculation.

[27] I turn, then, to the impact of identification upon the Respondent's principal client, the public sector corporation. This was his major concern. He testified that this client has what he described as a " zero tolerance" policy in respect of professional or personal misconduct on the part of its employees or outside counsel. He said that it will be " very concerned" if it becomes generally known through publication that one of its counsel has admitted to professional misconduct in failing to comply with an undertaking. Although the Respondent did not say so explicitly, he certainly suggested that, if this were to happen, he would be at grave risk of losing this major client.

> [28] The Respondent was for some 25 years a member of the legal staff of his major client, and his evidence about its attitudes seems likely to be well informed and reliable, and I accept it at face value. His account of the policy was couched in the most general of language, however, and he did not testify to any instances of its application to circumstances comparable (or even not comparable) to those here. It is as if " zero tolerance" speaks for itself. In the absence of such information, however , " zero tolerance" is little more than a slogan largely empty of relevant meaning. In a sense, it is a substitute for evidence rather than evidence itself.

[56] It is trite to say that the evidence is the evidence, and this writer cannot accept, in the absence of some foundational basis that does not appear to exist here, that it is correct to reject the " zero tolerance" evidence that was the only significant evidence proffered to the Panel.

[57] That evidence, although rejected by Mr. Getz, in a raw measurement of evidence, was the only significant evidence.

[58] In other words, the Panel, it is submitted, has no right to reject the only evidence on the point of " grievous harm" by preferring some other indeterminate and illusionary form of evidence.

[59] Put yet a different way, this writer finds that there was no other compelling evidence that would allow him to come to a different conclusion than that testified to by the Respondent and described in paragraph [28] of Mr. Getz's reasons.

[60] The weight of the evidence was canvassed in paragraph [19] of *Re: Lawyer 5* (*supra*). With the greatest of respect, the matter that troubles Mr. Getz was canvassed there in paragraph [19].

[61] This writer's view is that the evidence of " grievous harm" as defined in the authorities falls squarely within the facts in *Re: Lawyer 5*.

[62] On the balance of probabilities on the evidence tendered, this writer finds that the Respondent will suffer " grievous harm" and that it would be inappropriate to allow this delict to likely destroy the Respondent's career, and subject him to onerous financial circumstances.

[63] Therefore, after my assessment of the tests set out in the authorities, it is the view of this writer that the harm to the Respondent outweighs the public interest and the Law Society's interest.

[64] Considering the inadvertent nature of the offence, being also the only conclusion possible on the evidence, the application of the Rule otherwise would be draconian.

[65] If these facts do not generate such a finding, then this Rule is without conscience, and it could not have been the intention of the drafters to so narrow the anonymous publication Rule.

[66] Accordingly, this writer would allow the application for anonymous publication and, if permitted, award costs to the Respondent for this portion only of the hearing.

[67] It would not do to not deal with the issue that troubles our colleague, Leon Getz, QC.

[68] It is contained in his paragraph [39] that is reproduced here for the ease of the reader:

> [39] There is one key relevant difference between the circumstances in *Re: Lawyer 5* and those here. The client in that case was aware that the respondent had admitted to and been disciplined for " conduct unbecoming" . In this case, it seems, the Respondent's client is ignorant of the admission and the discipline. In substance, therefore, the Respondent's request for anonymity invites us to acquiesce in concealing from the client something which, on the Respondent's own account of the client's policy, is of significant interest to it - in other words, to put it bluntly, to deceive the client. ...

[69] Mr. Getz is offended by what appears to be a possible result of the anonymous publication order, which is that the Respondent's client will not become aware of his error.

[70] The difficulty with that is that the Rule calls upon the Benchers to balance the competing considerations of the Respondent, the public and the Law Society.

[71] It is implicit in finding that equilibrium that not all three of the interests will be perfectly balanced.

[72] It might be that the learned Mr. Getz's discomfort results from an imperfect Rule, but I am satisfied that the proper balancing of all considerations requires an anonymous publication order.

[73] I agree with Dr. Vallance's reasoning below.

[74] The application for anonymous publication is allowed. If this writer had jurisdiction, he would have awarded costs to the Respondent, to be set-off against the Law Society's costs awarded by the Panel and described in the reasons of Leon Getz, QC in accepting the conditional admission. However, as Law Society Rule 5-9 may not allow such costs, it would be incorrect to do so. Counsel however, should have liberty to make written submissions on the point should they care to.

Concurring Decision of Dr. Maelor Vallance

[75] I have read Mr. Tretiak's disposition of this matter and agree with his conclusions.

[76] In my view, the delict complained of this Respondent could readily have resulted in a Conduct Review rather than the citation ordered.

[77] Also, in my view, the mischief that results from this Respondent being cited and publication made exceeds disproportionately the error made by him.

[78] For the reasons expressed by Mr. Tretiak, and these reasons, I would allow the application for anonymous publication.

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[1] In view of the majority decision, the Statement of Agreed Facts has been edited only to the extent necessary to omit certain references to annexed supporting documents and to preserve the anonymity of the Respondent.

[2] Somewhat analogous to the doctrine of " res ipsa loquitur" , of which the distinguished American torts scholar William Prosser is alleged to have asked: " But what does it say?"