2008 LSBC 33
Report issued: October 06, 2008
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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 Benchers on Review

Review date: July 25, 2008

Quorum: **Majority decision**: Robert Brun, QC, Peter Lloyd, David Mossop, QC, Thelma O'Grady, David Renwick, QC
Minority decision: G. Glen Ridgway, QC, Chair, Joost Blom, QC, William Jackson, Bruce LeRose, QC

Counsel for the Law Society: Herman Van Ommen
Counsel for the Respondent: Terrence Robertson, QC

DECISION OF BENCHERS BRUN, LLOYD, MOSSOP, O'GRADY AND RENWICK

Application for Review

[1] We have had an opportunity to read the minority decision of the Benchers on Review (hereinafter referred to as "the Bencher Minority Decision") who have concluded that the identification of the Respondent is necessary in the circumstances. We are unable to agree with the Bencher Minority Decision and as such are providing our separate reasons.

The Standard for Review

[2] The standard of review on a Bencher Review is that of correctness. We therefore must ask ourselves whether the majority of the Hearing Panel was correct in determining that the grievous harm likely to be suffered outweighed the interest of the public and the Law Society in full publication.

[3] Rule 4-38.1(3) of the Law Society Rules provides that:

> (3) The panel may order that publication not identify the respondent if
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> (a) the panel has imposed a penalty that does not include a suspension or disbarment, and
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> (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.

[4] We respectfully adopt the summary of the Hearing Panel Decision under review contained at paras. [37] through [42] and [44] through [47] of the Bencher Minority Decision. For ease of reference for the reader we repeat those paragraphs here:

[37] The Respondent failed to keep an undertaking given in the course of a personal injury matter in which the Respondent acted for the defendant, referred to hereafter as the "Client" . The circumstances in which the undertaking was given and not kept are described in a Statement of Agreed Facts that is reproduced in para. [7] of the Hearing Panel's decision. The undertaking was to provide plaintiff's counsel with a copy of the reports of a physician who was to conduct an independent medical examination of the plaintiff. The physician was to make an interim report and then, after reviewing the plaintiff's records, a final report. The Respondent received the physician's interim report on February 10, 2004, but did not provide it to plaintiff's counsel until September 27, 2005. In the meantime the physician's final report, which the Respondent received on or about May 16, 2004, had been forwarded to plaintiff's counsel on May 21, 2004. The Respondent admitted that he had breached the undertaking and that his doing so constituted professional misconduct.

[38] The disciplinary action jointly proposed by the Respondent and the Law Society was a fine of $3,000 and payment of costs of $3,750. The Hearing Panel's reasons for accepting the proposed penalty are relevant to this Review because the Respondent's case for anonymous publication rested in part on the disproportion between the Respondent's misconduct and the effect that publication of his name in the disciplinary report might have.

[39] Mr. Getz gave the Panel's reasons on penalty. He said in part at paras. [10] and [11]:

> [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.
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> [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 …

[40] The other two Panel members also referred to the technical nature of the misconduct. Mr. Tretiak noted the Respondent's *viva voce* evidence "that he believed he had inadvertently breached the undertaking as he thought he had forwarded a preliminary report to opposing counsel," but went on to note that inadvertence was no defence to the allegation of misconduct

because both sides agreed that failure to keep an undertaking was an "offence" of strict liability. Dr. Vallance observed that, in his view, "the delict complained of this Respondent could readily have resulted in a Conduct Review rather than the citation ordered."

[41] The members of the Panel divided on the issue of whether the Respondent's name should be published, Mr. Getz holding that it should, and Mr. Tretiak and Dr. Vallance holding that the request for anonymous publication under Rule 4-38.1(3) should be granted. Mr. Getz did not think that the case for "grievous harm" was made out on the evidence and that, even if it was, the harm would not outweigh the public interest and the Law Society's interest in publication. The other two members of the Panel held that "grievous harm" had been shown and that it outweighed the public interest and the Society's interest in publication. We discuss the grounds for their decision below.

[42] We note at the outset that the issue in this case was particularly difficult because, as the Hearing Panel found, the Respondent's misconduct, though significant — a breach of undertaking always is — cast not the slightest doubt on his integrity or his competence. He was asked to give an undertaking in a situation where undertakings are not usually sought. He indicated his consent without adverting to the fact that counsel on the opposite side had put it in terms of an undertaking rather than just an informal assurance. The undertaking was to provide a document to the opposite side that he would normally have provided as a matter of routine and, in fact, mistakenly thought he had provided. His attention was focused on the physician's final report, which was promptly given to the other side, rather than the less important preliminary report. The breach, as Mr. Tretiak observed, was no more than inadvertence. That, as he also noted, does not excuse it. However, the label "professional misconduct", especially in the eyes of the general public, tends to carry a connotation of impropriety that breaches like this do not deserve. In such a situation, publication of a finding of professional misconduct — no matter how fully the circumstances are explained — may well risk doing damage to the lawyer's reputation that is out of proportion to the gravity of the wrong.

[44] The Rule states that the panel may order that publication not identify the Respondent if the penalty does not include a suspension or disbarment and "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."

[45] Both sides accepted before the Panel and at the hearing of this Review that the proper analysis of an application under Rule 4-38.1(3) is sequential, as set out in *Law Society of BC v. Doyle*, 2005 LSBC 24 at para. [25]:

> (a) Firstly, the member must not be subject to a suspension or 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.
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> (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.

[46] There is no question in this case that step (a) is satisfied, so our decision turns on the other two questions in (b) and, if relevant, (d).

[47] Question (b) is a composite of two questions: (1) What harm to the Respondent (no harm to another person is suggested in this case) has been proved, to the extent that future possibilities can be proved?; and (2) Does that harm qualify as grievous harm?

[5] In addition, we wish to provide the following points, which we believe are salient to our analysis and conclusion:

(a) Although the evidence may not have been as clear as it could have been, the Respondent is very familiar with the corporate culture of the client and provided examples of zero tolerance for acts of indiscretion, including the review of clinical records by an in-house staff member who should not have read them (Transcript, pp. 40-41), misconduct relating to alcohol (Transcript, p. 41) and recent dismissals (Transcript, pp. 41-42). These examples suggest that the client's concern about public image is paramount and a reasonable inference that can be drawn is that any indiscretion, by staff or counsel, will not be tolerated.

(b) Again, although the evidence on this point is somewhat speculative, a logical inference to be drawn from the Respondent's failure to be hired by a lawyer, to whom he had disclosed the fact that he had been cited for breach of an undertaking and who initially suggested that that would not be a problem but ultimately decided not to hire the Respondent, is because of this matter (Transcript, pp. 44-45). This also suggests the harm that the Respondent has personally experienced once this fact was made known to a fellow lawyer.

(c) On one occasion a senior employee of the client called the Respondent and told him that he was "quite miffed" by the fact that nobody had told him that this was going on (Transcript, p. 48).

(d) The client has been informed throughout of the progress of the disciplinary case. The Respondent also advised the Benchers on Review that before the Review hearing the client had been advised of the status of the case.

(e) The breach was not reported by the opposing lawyer for some ten months after it became apparent that the Respondent had breached his undertaking. The rationale for the late reporting of the breach was not adequately explained.

What is Grievous Harm?

[6] In *Re: Lawyer 5*, 2005 LSBC 11, a single Bencher Panel, Dirk Sigalet, QC, ordered anonymous publication in a citation where the allegations of fact were:

1. That you took $15,000 from your client, DH, in 1997 without documentation that these funds were gifted to you.

2. That you received funds from your client, DH, but did not deposit them forthwith into a pooled or separate trust account, contrary to Rule 803.

3. That you failed to record each trust transaction regarding your client, DH, within seven (7) days after the transaction, contrary to Rule 844 and Canon 3(8) of the *Professional Conduct Handbook*.

4. That you failed to record each non-trust transaction regarding your client, DH, within thirty (30) days after the transaction, contrary to Rules 825, 843 and 844 and Canon 3(8) of the *Professional Conduct Handbook*.

5. That you commingled money belonging to your client, DH, with your own money in a bank account contrary to Canon 3(8) of the *Professional Conduct Handbook*.

6. That you failed to preserve adequately and keep safe valuables belonging to your client, DH, by failing to maintain with your accounting records a complete listing of the valuables of this client in your custody, contrary to Chapter 7.1, Ruling 5 of the *Professional Conduct Handbook*.

7. That you accepted gifts totaling $30,000 from your client, DH, in 1996 and 1997 when you knew that all or part of these gifts were derived from the funds which you caused to be removed from the Estate of JMH for the use of your client, DH, contrary to Chapter 2, Ruling 1, and Chapter 6, Rulings 1 and 2 of the *Professional Conduct Handbook*.

[7] In *Re: Lawyer 5*, (*supra*) the lawyer was given a reprimand, fined in the amount of $3,500 and assessed costs in the amount of $2,500.

[8] Mr. Sigalet reviewed the relevant jurisprudence and applied the appropriate test, namely, whether the Panel could first conclude that grievous harm would occur if the Respondent's name was identified and, if that was the case, then secondly, did the grievous harm in publishing the name outweigh the interest of the public and the Law Society.

[9] Mr. Sigalet stated at para. [13] as follows:

> [13] *Defining of Grievous Harm* – Dictionary definitions merely restate the obvious by using such words as "serious" or "severe" . Certainly the nature of the harm must be much more than a one time snub or exaggerated civility from a colleague or from persons in the Respondent's general community of friends. Grievous harm, given the lack of limiting words in the Rule, must mean any one, some or all of the following:
>
> - · deliberate withdrawal of professional courtesy
> - · loss of clients
> - · judicial mistrust
> - · colleague mistrust
> - · loss of personal friends
> - · the Respondent's associates or family being the subject of adverse remarks
> - · medical effects – psychological or psychiatric or both

- loss of self worth and confidence
- loss of reputation

> [14] Grievous harm need not be limited to these previous examples of harm. There may well be situations where publication may only cause one or two of the preceding or something not mentioned.
>
> [15] *Determination if publication will cause grievous harm* – the medical effects of grievous harm deserve further mention. The consequence of the legal profession having a familiarity with using medical-legal expert evidence could be the ready acceptance of medical evidence as the effects of grievous harm for all Non-Identity Applications. Consequently the medical affidavit evidence would be seen as the norm. Or, the lack thereof be seen that no grievous harm occurred. The application of this Rule must not be a battle of expert's medical affidavits. The medical evidence could become trivialized to the point that only evidence of debilitating psychiatric illness or suicide would be viewed as grievous. This would be a deplorable application of the Rule. What is one Respondent's mental pain and outward symptoms of emotional or mental distress that allegedly would arise from the publication process may well be another Respondent's outward stoic acceptance yet in either case the harm may well be grievous.
>
> [16] *Instead, the determination of grievous harm of any nature, would be the test of a reasonable and informed member of the public applying her or his own experiences to the offence and to the situation of a Respondent. If there is a possibility of grievous harm in the context of a Respondent's own representations then that reasonable and informed member of the public can find that publication will cause grievous harm.*
>
> [emphasis added]

[10] On review by the Benchers, the majority affirmed the decision of Mr. Sigalet, holding that on the balance of probabilities, the publication of the Respondent's name would create a significant risk of grievous loss. The Benchers on Review noted at para. [19] of *Re: Lawyer 5*, 2005 LSBC 50:

> [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.

[11] These comments apply equally to the present case. The Respondent worked for over 14 years with the client and, since leaving, has worked for the client as counsel for nearly nine years. He is in a very good position to be able to comment on the client's corporate culture and provide his assessment of the risks associated with the publication.

[12] In the Hearing Panel decision under review, Mr. Tretiak, speaking for the majority, quoted para. [26] from *Law Society of BC v. Doyle*, (*supra*) at para. [52]:

> [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. 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.

[13] Mr. Tretiak then repeated the admonition found in *Law Society of BC v. Doyle* (*supra*) that publication must be the norm at para. [42]:

> [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 the publication of the disciplined lawyers'names.

[14] Mr. Tretiak wrote at paras. [55] to [59]:

> [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 [the 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.

[15] Mr. Tretiak concluded at para. [61] that the evidence established on the balance of probabilities that the Respondent would suffer grievous harm and it would be inappropriate to allow the delict complained of to destroy the Respondent's career and to subject him to onerous financial circumstances.

[16] Dr. Vallance wrote brief concurring reasons that will be repeated in full as contained in paragraphs [75] through [78]:

> [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.
>
> [emphasis added]

[17] It is perhaps worthy of note that in considering the risk of grievous harm to the individual, Dr. Vallance, apart from being a valued lay Bencher, is also a renowned psychiatrist.

[18] While recognizing that anonymous publication is reserved to the rarest of cases, so as to protect the interests of the public and the Law Society, any assessment of grievous harm requires consideration of the particular circumstances of the member.

[19] It may be worthwhile to recall Iago's oft quoted speech in *Othello* that reminds us of the value of a good reputation:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash; "tis something, nothing;
> "Twas mine, "tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.
>
> Act 3, scene 3, lines 155 – 161

[20] At the hearing of this matter, counsel for the Respondent, Mr. Robertson, urged the Benchers to give deference to the findings of the majority of the Hearing Panel as to the finding of grievous harm. Reliance was placed on the Bencher Review decision in *Law Society of BC v. Hops*, [1999] LSBC 29, [2000] LSDD No. 11, at paras. 10 through 13, wherein the Benchers concluded:

> 10. The scope of a Bencher Review with respect to the finding of proper standards of professional and ethical conduct is perhaps best set out by the Honourable Mr. Justice Branca in *Re Prescott* (1971), 10 D.L.R. (3d) 446, at 452, where he said:
>
> > The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition, in my judgment, shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interest of the

public or legal profession" . The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men who enjoy the full confidence and trust of the members of the legal profession of this Province.

11. In that the Benchers, rather than the Panel, are the ultimate arbiters of what constitutes (in this case) professional misconduct, the scope of review of the Benchers with respect to the Panel's finding of professional misconduct is one of correctness.

12. On the other hand, the Benchers see no support in the above quotation for the proposition that the Benchers should deviate from the standard scope of review adhered to by our Court of Appeal when that review relates to findings of fact by a tribunal before whom viva voce evidence was given. *The standard set by the Court of Appeal in reviewing a trial judgment in respect to the findings of fact by that tribunal is most commonly stated in terms that the Appeal Court only interferes with clear and palpable errors in findings of fact of the Trial Court. There seems to be no authority for the principle that the Benchers should arrogate to themselves a greater ability to review or reassess findings of fact of a tribunal of first instance than that of our Court of Appeal.*

13. It is obvious that if a Panel makes a finding of fact based on no evidence, the Benchers have the clear power and obligation to interfere with that finding. On the other hand, if a Hearing Panel draws an inference of fact from the evidence which is not clearly and palpably wrong, the Benchers should not interfere with that finding. *The observation available to the Panel of the Witness's physical demeanor and inflection of speech may have legitimate effect on the inferences drawn by a Panel which would not flow through a written record to the Benchers reviewing the decision.*

[emphasis added]

[21] Mr. Robertson also relied on the Bencher Review decision in *Law Society of BC v. Hordal*, 2004 LSBC 36, which states at paras. [11] to [12] as follows:

[11] There is a clear caveat articulated in the authorities to the general application of the correctness test in cases where the Hearing Panel has had the benefit of the *viva voce* testimony of witnesses and have had the opportunity to assess the credibility of those witnesses by observing their demeanor in the proceedings. *In those cases the Benchers ought to accord some deference to the Hearing Panel on matters on fact where determinations have been made by a Hearing Panel on factual matters in dispute.*

[12] No such deference issues arise on this review as the Panel was not required to make any findings of fact in respect of controversial matters as the hearing proceeded on an Agreed Statement of Facts. In those circumstances, this quorum of Benchers is equally capable of determining an appropriate outcome without being required to defer to the Hearing Panel on findings of fact. This is not to say that we should randomly substitute our judgment for that of the Hearing Panel, but that we must do so if in our view the disposition made by the Hearing Panel, in all of the circumstances, is incorrect.

[emphasis added]

[22] The Bencher Minority Decision provides that deference to the Hearing Panel is not appropriate since the Benchers on Review, on the current facts, were in as good a position as the Hearing Panel to reach a conclusion on the main issue. With that finding we must respectfully disagree. The Benchers on Review are not free to substitute their findings of fact for the majority below in the absence of clear and palpable errors in findings of fact.

[23] The Respondent did not give evidence at the Bencher Review; however, he did address the Benchers on one issue relating to notice of the citation given to his client. In addressing the Benchers on Review, he appeared to be under enormous personal stress, yet spoke with noteworthy candour to ensure that the Benchers were not left with a misapprehension as to some evidence that might have favoured his position.

[24] As noted at para. [12] above, in *Doyle* the Benchers considered what constitutes "grievous harm" and concluded at para. [26] as follows:

> … 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]

[25] Since the focus is on the individual it must be determined whether the harm is *exceptional, unusual, onerous and injurious* to a member, and would cause the 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 normally would be expected to flow from being found guilty of professional wrongdoing. In our view, the Benchers on Review, who must rely on transcripts of the evidence, are not in as good a position to weigh the evidence as would be the Hearing Panel members who heard the witnesses in chief and in cross-examination. The Hearing Panel members would be in a far better position to determine if publication would cause catastrophic personal and professional losses.

[26] By way of example, in the transcript of the evidence in chief of the Respondent, he testified that this citation had bothered him on a daily basis. There was then the following exchange in his testimony:

> Q Is your reputation in terms of other members of the bar generally important to you?
>
> A Yeah.
>
> Q Okay.
>
> A -- could I have five minutes please?
>
> The Chair - Of course.

[27] As Benchers on Review, what are we to make of this evidence? Did the Respondent have to answer his cell phone? Did he want a washroom break? Or, was he completely overcome by the

nature of the question and the answer such that an adjournment was required so he could compose himself? We suspect the latter, but from a review of the transcript, this cannot be determined.

[28] In the result, on the fundamental question of whether there was evidence of grievous personal or professional harm, we are of the view that we should defer to the decision of the majority of the Hearing Panel. The majority below did not make clear and palpable errors in findings of fact. While it is clear that Mr. Getz, in dissent, had misapprehended the evidence of notice to the client, the majority made no such error.

[29] We conclude that the Hearing Panel majority was correct in determining that the Respondent would suffer grievous harm from the publication of his name.

Balancing the Interests of the Member Against the Interests of the Public and the Law Society

[30] Having concluded that the Hearing Panel majority decision that grievous harm would result from publication was "correct," we must next balance grievous harm against the public interest and the Law Society's interest.

[31] In our respectful view, the Hearing Panel majority decision on this point is also correct.

[32] As Mr. Tretiak stated at para. [62] to[66] of the decision:

> [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.
>
> [emphasis added]

[33] Dr. Vallance agreed with Mr. Tretiak and observed that "the mischief that results from this Respondent being cited and publication made exceeds disproportionately the error made by him."

[34] Having determined that the Hearing Panel is in the best position to decide if publication would result in grievous harm, it follows that the Hearing Panel is also in the best position to properly weigh that harm against the interests of the public and the Law Society of British Columbia.

[35] For the reasons set out above, we would dismiss this review.

MINORITY DECISION OF BENCHERS RIDGWAY, BLOM, JACKSON AND LEROSE

Application for Review

[36] The Hearing Panel, in its decision of February 11, 2008 (cited as 2008 LSBC 06), unanimously accepted the Respondent's admission of professional misconduct and also accepted the proposed disciplinary action. The Panel, by a majority, made an order under Rule 4-38.1(3) that the publication of its decision required by Rule 4-38 should not identify the Respondent. The Law Society has applied for a review by the Benchers of the order for anonymous publication.

Decision of the Hearing Panel

[37] The Respondent failed to keep an undertaking given in the course of a personal injury matter in which the Respondent acted for the defendant, referred to hereafter as " the Client" . The circumstances in which the undertaking was given and not kept are described in a Statement of Agreed Facts that is reproduced in para. [7] of the Hearing Panel's decision. The undertaking was to provide plaintiff's counsel with a copy of the reports of a physician who was to conduct an independent medical examination of the plaintiff. The physician was to make an interim report and then, after reviewing the plaintiff's records, a final report. The Respondent received the physician's interim report on February 10, 2004, but did not provide it to plaintiff's counsel until September 27, 2005. In the meantime the physician's final report, which the Respondent received on or about May 16, 2004, had been forwarded to plaintiff's counsel on May 21, 2004. The Respondent admitted that he had breached the undertaking and that his doing so constituted professional misconduct.

[38] The disciplinary action jointly proposed by the Respondent and the Law Society was a fine of $3,000 and payment of costs of $3,750. The Hearing Panel's reasons for accepting the proposed penalty are relevant to this review because the Respondent's case for anonymous publication rested in part on the disproportion between the Respondent's misconduct and the effect that publication of his name in the disciplinary report might have.

[39] Mr. Getz gave the Panel's reasons on penalty. He said in part at paras. [10] and [11]:

> [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 …

[40] The other two Panel members also referred to the technical nature of the misconduct. Mr. Tretiak noted the Respondent's *viva voce* evidence "that he believed he had inadvertently breached the undertaking as he thought he had forwarded a preliminary report to opposing counsel," but went on to note that inadvertence was no defence to the allegation of misconduct because both sides agreed that failure to keep an undertaking was an "offence" of strict liability. Dr. Vallance observed that, in his view, "the delict complained of this Respondent could readily have resulted in a Conduct Review rather than the citation ordered."

[41] The members of the panel divided on the issue of whether the Respondent's name should be published, Mr. Getz holding that it should, and Mr. Tretiak and Dr. Vallance holding that the request for anonymous publication under Rule 4-38.1(3) should be granted. Mr. Getz did not think that the case for "grievous harm" was made out on the evidence and that, even if it was, the harm would not outweigh the public interest and the Law Society's interest in publication. The other two members of the Panel held that "grievous harm" had been shown and that it outweighed the public interest and the Society's interest in publication. We discuss the grounds for their decision below.

Analysis

[42] We note at the outset that the issue in this case was particularly difficult because, as the Hearing Panel found, the Respondent's misconduct, though significant — a breach of undertaking always is — cast not the slightest doubt on his integrity or his competence. He was asked to give an undertaking in a situation where undertakings are not usually sought. He indicated his consent without adverting to the fact that counsel on the opposite side had put it in terms of an undertaking rather than just an informal assurance. The undertaking was to provide a document to the opposite side that he would normally have provided as a matter of routine and, in fact, mistakenly thought he had provided. His attention was focused on the physician's final report, which was promptly given to the other side, rather than the less important preliminary report. The breach, as Mr. Tretiak observed, was no more than inadvertence. That, as he also noted, does not excuse it. However, the label "professional misconduct", especially in the eyes of the general public, tends to carry a connotation of impropriety that breaches like this do not deserve. In such a situation, publication of a finding of professional misconduct — no matter how fully the circumstances are explained — may well risk doing damage to the lawyer's reputation that is out of proportion to the gravity of the wrong.

[43] That said, in this case we have an admission and a finding of professional misconduct and the question for us is whether Rule 4-38.1(3), fairly construed and applied, authorizes us to grant the Respondent's request for anonymous publication. In disagreement with the majority of the Review Panel, we think it does not.

[44] The Rule states that the panel may order that publication not identify the respondent if the penalty does not include a suspension or disbarment and "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" .

[45] Both sides accepted before the Panel and at the hearing of this Review that the proper

analysis of an application under Rule 4-38.1(3) is sequential, as set out in *Doyle*, (*supra*) at para. [25]:

> (a) Firstly, the member must not be subject to a suspension or 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.

[46] There is no question in this case that step (a) is satisfied, so our decision turns on the other two questions in (b) and, if relevant, (d).

[47] Question (b) is a composite of two questions: (1) What harm to the Respondent (no harm to another person is suggested in this case) has been proved, to the extent that future possibilities can be proved? and (2) Does that harm qualify as grievous harm?

What harm to the Respondent has been proved?

[48] The principal harm to which the Respondent testified before the Panel was the risk that the Client would no longer use his services. The Respondent was in-house counsel at the Client for about fourteen years, and in the nine or so years since leaving the Client he had continued to act as counsel for the Client. Currently, the Client remains one of the most significant, if not the most significant, of his clients. At his current firm he is expected to attract the kind of legal work that the Client has been giving him.

[49] Before the Hearing Panel his counsel asked the Respondent whether the Respondent had been "aware of what's referred to as the zero tolerance policy at the Client in terms of their employees and staff" (transcript at p. 40). The Respondent answered (at pp. 40-41) that one in-house staff lawyer was "dismissed because she had read some records [that were sent to her by mistake] when she knew she shouldn't have read them." His counsel then asked him whether the Respondent was aware of the Client's policy with respect to impaired driving convictions of their employees. The respondent answered that the Client "certainly take[s] a very dim view of any kind of personal misconduct" (at p. 41), and was very strict about tobacco and alcohol on its premises. The next question and answer were, so far as relevant (at pp. 41-42):

> Q: In the event that your name is published with respect to a breach of undertaking, do you foresee any risk or problem in terms of your continuing relationship with the Client?
>
> A: I am very concerned that it is going to affect . . . my entitlement to do work for them. Now, I do have a long history of having done work for [the Client]. All I can say is that it is no secret that just in the last few months there has been a house cleaning, an internal house cleaning, because there has been a change of policy in [the Client], and a very senior

> [managerial employee] with 21 years experience was invited into his boss'office, and this was two o'clock in the afternoon, and he was told to be out of the office by four. And a lawyer in the special counsel's office was dismissed after I think it was 14 or 15 years of service. If I am cut from the team, I don't think that anyone is going to speak up . . . so I am very concerned.

[50] That was all the testimony relating to the potential reaction of the Client to publication. Both at the hearing and at this Review, counsel for the Law Society accepted that the Respondent's evidence was an honest statement of what the Respondent, someone with long experience of the corporate culture of the Client, saw as the potential consequences if his name is published in connection with the finding of professional misconduct.

[51] The Respondent also testified to the threat that publication would pose to his ability to attract other clients. He gave two instances of such potential clients, one being a [company] underwriter whom he met while acting for the underwriter's daughter, and the other being a lawyer at another law firm that did work for the Client and had talked about having the Respondent "on his team" (transcript at 44). Discussions about potential work never commenced with the underwriter, because the Respondent felt it would be unwise to discuss that possibility while this disciplinary matter was still ongoing. He did discuss potential work with the other lawyer and disclosed the fact that he had been cited for breach of an undertaking. The other lawyer said it didn't matter, but later he informed the Respondent that he had hired somebody else. The Respondent wondered whether the disciplinary matter might have influenced the lawyer's decision after all.

[52] The Respondent's testimony as to the Client could, as became apparent at this Review, be taken as envisaging either of two scenarios. One is that publication would disclose *to the Client* that the Respondent had been disciplined for professional misconduct and that it would, on that account, cease using his services. The other is that the Respondent would disclose the finding to the Client — he testified before the Panel that he had kept the Client staff member with whom he dealt fully informed about the proceedings, and that the Client's special counsel at the time knew of the citation (transcript at p. 48) — but the Client, as a public body, would feel unable to keep him as their lawyer because *the public* would be aware that he had been disciplined by the Law Society.

[53] In the Hearing Panel's decision, Mr. Getz, who dissented from the decision to order anonymous publication, clearly took the Respondent's argument to be the former. He said at para. [39] that, in substance, "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" . Mr. Tretiak, with whose conclusions Dr. Vallance agreed, noted (at para. [69]) Mr. Getz's concern at the possible result "that the Respondent's client will not become aware of his error", and answered the concern by saying that the Benchers must "balance the competing considerations of the Respondent, the public and the Law Society" (at para. [70]), that "not all three of the interests will be perfectly balanced" (para. [71]), and that, even if "Mr. Getz's discomfort results from an imperfect Rule" he (Mr. Tretiak) was "satisfied that the proper balancing of all considerations requires an anonymous publication order." Mr. Tretiak's reasons are at least open to the construction that he, too, took the Respondent to be arguing that anonymous publication might keep the Client from learning of the outcome, but was willing to accept that possibility after balancing the competing interests at stake.

[54] At this Review, the Respondent's counsel stated that Mr. Getz, if not the other two Panel members, had misunderstood the Respondent's argument. The Respondent was not saying that the Client should be kept in the dark. On the contrary, as already noted, he had testified before the

Panel that the Client's special counsel was already aware of the commencement of the disciplinary proceeding. It stood to reason that the special counsel would inquire about the outcome. The Respondent's counsel informed us at the Review that the Respondent had, two days before the Review hearing, informed the Client, through its new special counsel, of that outcome. Counsel for the Respondent also advised us that the Respondent had kept the the Client staff member, with whom he mainly dealt, informed of the progress of the disciplinary case throughout. There was therefore no question of the Client not knowing about the finding of professional misconduct. The concern was that the Client might feel unable to retain the services of a lawyer whose reputation had been damaged within the profession and among the broader public by the publication of that finding.

[55] We therefore return to the question, what harm to the Respondent has been proved? While agreeing with the Law Society that the standard of a Bencher Review is correctness, the Respondent urged us to give deference to the findings of the majority of the Hearing Panel as to this question. He relied on the proposition that a hearing panel's findings of fact, made on *viva voce* evidence, are entitled to deference upon a Bencher Review, as stated in *Law Society of BC v. Hops*, 1999 LSBC 29 at para. [12], and *Law Society of BC v. Hordal*, 2004 LSBC 36 at para. [11].

[56] We do not think this principle applies here. The rationale for the principle is that the Review Panel are not as well placed as the Hearing Panel to judge the witnesses'demeanour, mode of expression and other factors that only those who hear the evidence first-hand can perceive. Here, however, the Panel's critical findings were not as to the credibility of the Respondent's assertions of fact, but as to how compelling his predictions as to the Client's future behaviour were. At no stage did the Law Society take issue with the relevant facts, namely, that the Respondent had long acquaintance with the Client's corporate culture, that he therefore had a basis for his statements as to what the Client might do if the disciplinary decision is published, and that the statements reflected his sincerely held apprehensions as to the Client's potential response. The issue is not as to those facts but as to the whether the Respondent's evidence as to what the Client might do was enough to amount to proof of harm. We think the Benchers on Review are in as good a position as the Hearing Panel to reach a conclusion on that question.

[57] A second reason for not giving deference to the Panel's findings as to proof of harm is that, even if we considered them findings of fact, they related — certainly, in the case of Mr. Getz, possibly, in the case of Mr. Tretiak and Dr. Vallance — to a scenario that turns out not to be an issue, namely, the Client being kept in ignorance of the outcome of the Respondent's case. If the Panel may not have been directing its mind to the correct future scenario, its findings of fact as to that scenario logically cannot be entitled to deference.

[58] For both these reasons, we must make our own evaluation of whether the Respondent has proved harm, and whether that harm is "grievous", based upon the Respondent's evidence at the Panel hearing as explained to us at the Review. We do not comment further on the Panel's discussion of these points except to say that we agree with the position taken by the Law Society at the Review, and Mr. Getz in the Panel's decision, that a client always has the right to know if his or her lawyer has been the subject of a disciplinary finding. It is a fact that is potentially relevant to the client's decision to seek or continue to use the lawyer's services. The member's wish to keep a client from learning of that fact — no matter how draconian the client's response to the knowledge might be — plainly cannot be a reason for ordering anonymous publication.

[59] We turn, then, to consider the evidence as to harm. The Respondent asks us to find that there is a likelihood, or at least a serious possibility, that the Client will stop using him as lawyer if

the profession and the general public learn that he has been found by the Law Society to have committed professional misconduct, namely, a breach of undertaking. The Respondent, as noted earlier, also testified as to the effect that publication might have on his ability to attract new clients, but it was on the potential reaction of the Client (the "Client factor") , that his case for anonymous publication principally rests. The disadvantage that publication might pose for attracting new clients was put forward as a possibility, but the Respondent's evidence as to that possibility was tentative and, in our view, cannot tip the scales in favour of anonymous publication if the Client factor on its own is not enough.

[60] The main precedent that was relied on for giving decisive weight to the Client factor as proof of harm was *Re: A Lawyer*, 2005 LSBC 50, the decision of the Benchers on a s. 47 Review. The Respondent in that case was a 67 year old lawyer who, like the Respondent in this case, had an unblemished professional record. He admitted to conduct unbecoming a member of the Law Society in relation to various dealings with a client who was a long-time friend. The client had a life interest in assets of the estate of her husband, who also had been a long-time friend of the lawyer and had appointed him executor of the estate. The conduct included accepting a gift from the client without documenting that it was a gift; failing to deposit trusts funds belonging to the client into a trust account; failing to record certain trust and non-trust transactions with the client; commingling the client's money with his own money in a bank account; failing to maintain a complete list of valuables belonging to the client that were in his custody; and accepting gifts from the client knowing that all or part of the gifts were derived from funds that the lawyer caused to be removed from the estate for the use of the client. The Benchers on Review, by a majority of 6 to 2, upheld the Hearing Panel's order for anonymous publication.

[61] The harm found in *Re: Lawyer 5*, (*supra*), was the Respondent's potential loss of his principal client. The single Bencher Hearing Panel (2005 LSBC 11) did not describe in any detail the evidence the Respondent put forward to show this potential loss of this client. The Panel referred to the lawyer's public profile, noting (at para. [21]) that the lawyer "contributed to his community and was Mayor of a small urban community at age 28." The friendship with the client's late husband had begun on the local hospital board. The Hearing Panel said at paras. [22] to [24]:

> [22] The offence itself is set in the context of this friendship [with the client and her husband]. 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 [sic] 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.
>
> [24] This is a situation where a reasonable member of the public, now duly informed, would decide that publication could cause grievous harm to the Respondent.

[62] The majority of the Review Panel discussed the Respondent's affidavit and other evidence in that case as follows (at paras. [19] and [20]):

> [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 that 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.

[63] The Review Panel referred to ***Doyle***, (***supra***), in which anonymous publication was refused. The misconduct in ***Doyle*** was failing to remit PST and GST over a 12-year period. The Benchers distinguished ***Doyle***, saying at paras. [27] and [28]:

> [27] That offence was an ongoing offence over a twelve year period. In contrast, the Respondent engaged in some accounting breaches flowing from his close relationship with his client, some eight years ago. There cannot, in this Panel's view, be an ongoing public need to know the name of the Respondent, given the nature of the offence, the passage of time and the commitment to provide copies of the decisions to the main client of the Respondent. In addition, the public will know that the member was sanctioned for the accounting errors some eight years ago but that subsequently the Respondent has continued to practice in an exemplary way.
>
> [28] In the view of this Panel, an eight year period between the offence and the decision, with exemplary practice during that period is another cogent reason not to publicize the Respondent's name.

[64] ***Re: Lawyer 5***, (***supra***), clearly turned on very special facts. Not all of these are described in detail in the decision, presumably because, if more details had been included, the client and the lawyer could have been identified. However, we infer from the decisions of the Hearing Panel and the Review Panel that two factors were seen as especially compelling. First, the Respondent apparently had a significant public profile, stemming from his long-time involvement in the public affairs of his community. And, second, the principal client was apparently a public body (see the reference to obtaining an affidavit from a public body in para. [19] of the Review Panel's decision, quoted at para. [62] of this decision). It can be assumed that some kinds of public body will be very sensitive to the potential reaction by members of the public if a lawyer who works almost entirely for that body, and who himself has some public prominence, is revealed to have been disciplined by the Law Society. In ***Re: Lawyer 5*** the Respondent's own evidence as to the client's potential reaction was seen as compelling by the Hearing Panel and the Review Panel (see para. [20] of the Review Panel decision, quoted at para. [62] of this decision).

[65] The facts in the present case relating to the proof of harm are not like those in ***Re: Lawyer 5***. The Respondent here has (like the Respondent there) an unblemished professional reputation but he is not a public figure to the degree that the Respondent in the earlier case apparently was. The amount of publicity and the strength of public reaction to be expected, if the Law Society's disciplinary decision is published in full in this case, is accordingly less. The Client, like the client in the earlier case, is a public body, but public bodies are of different kinds. We do

not know the nature of the public body that was the client in *Re: Lawyer 5*. All we know is that the evidence of the Respondent in that case satisfied the Hearing Panel and the Review Panel that, if the disciplinary decision against the Respondent was published, there was a substantial risk that the public reaction, and the client's sensitivity to that reaction, would have led the client to discontinue using the Respondent's services.

[66] By contrast, we do not find compelling the Respondent's evidence in this case as to what the Client might do if the decision in his disciplinary case is published. All the specific examples of the Client's "zero tolerance policy" that he mentioned in his evidence to the Hearing Panel concerned the Client's in-house staff, and they all concerned actual violations of Client policy (reading documents they should not have read, being convicted of driving offences, having tobacco or alcohol on Client premises). With the possible exception of convictions for driving offences, the strict attitude that the Respondent described on the Client's part is not obviously explained by a sensitivity to public opinion as distinct from simply an insistence on high standards of conduct among the Client's staff.

[67] It is possible that the corporate culture of the Client is in fact highly sensitive to the risk that some members of the profession or the general public may think it inappropriate for the Client to retain the services of a lawyer whose professional reputation has been blemished in any way. It is possible that the Client may think that publication of the decision will attract a significant amount of attention among the profession or the public, and that this will blemish the Respondent's reputation, notwithstanding that anyone who read the details would realize that the Respondent's integrity and competence were in no way in question. It is possible that, for these reasons, the Client may stop retaining the Respondent when, but for the publication of the Respondent's name in the disciplinary decision, the Client would have continued to use his services. However, the evidence before the Hearing Panel and before us falls well short, in our opinion, of establishing this scenario as a substantial likelihood. It cannot be ruled out as a possibility, but at the same time it is unsupported by directly relevant evidence.

[68] We emphasize that we accept fully the Respondent's honestly held fear that publication may trigger a decision by the Client to cease using his services. However, for the purpose of a request for anonymous publication, the question is whether the risk of it happening is supported by adequate evidence. The policy in favour of full publication, as shown by the terms of Rule 4-38.1(3), is too strong to be set aside on the basis of what might possibly happen. There must be a demonstrated, substantial likelihood that it will happen. We do not think that the Respondent's evidence demonstrates a substantial likelihood that the scenario just described will come to pass. We therefore conclude that the Respondent has not proved that publication of the disciplinary decision to the general public — as distinct from the Client, which already knows about it — will lead to harm.

Does the harm qualify as grievous harm?

[69] Even if we thought that the potential loss of the Client as a client had been sufficiently proved, we do not think this qualifies as "grievous harm" in the context of Rule 4?38.1(3). The requirement in paragraph (b) of that sub-rule is that "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." The Review Panel in *Doyle*, (*supra*), rightly, in our view, treated the question whether the harm is grievous as distinct from the question whether it outweighs the interest of the public and the Society in full publication (see point (d) in the quotation at para. [45] above). The Review Panel said at para. [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.

[70] We agree with the Review Panel in *Doyle* that "grievous" must indicate harm wholly out of the ordinary. It is significant that the rule does not simply refer to "harm" that outweighs the interest in publication, but "grievous harm" . Even if there is "harm", and even if the harm in and of itself outweighs the interest in publication, that is not enough. The harm must be "grievous" . The intent of the rule is clearly to set the bar for obtaining anonymous publication very high. That conclusion is reinforced, as pointed out in *Doyle* at para. [27], by the fact that the "grievous harm" requirement replaced an earlier Rule referring to "special or undue prejudice" .

[71] Grievous harm therefore cannot include harm that is commonplace in any system in which disciplinary decisions are published that identify the lawyer. The Respondent's argument for saying that the harm is grievous is based, not on the adverse reaction of a major client to a finding of professional misconduct -which clearly is commonplace — but on the particular sensitivity of a major client to adverse *public* reaction to such a finding. In our view, that in itself still does not raise the harm to the level of "grievous" . The harm being relied upon is still, albeit indirectly, the result of the general effect on the lawyer's reputation when a disciplinary finding is published. The negative reaction, reasonable or not, of the client to the disciplinary finding does not qualify as grievous harm. Nor, we think, does the reaction of the client to the actual or potential negative reaction of others. It is the kind of ripple effect that can be expected to occur in a system in which the lawyers are identified when disciplinary decisions are published.

[72] The harm might be "grievous" if it were exceptional in the sense of stemming from the unique personal circumstances of the Respondent (or, as Rule 4-38.1(3) contemplates, someone else). However, there is nothing extraordinary in the personal circumstances of the Respondent, his relationship with the Client, or [client's] possible reaction to the publication of the Respondent's name in the disciplinary decision. Similarly, in *Doyle*, at paras. [32] to [34], the Review Panel refused to characterize as "grievous" the harm to Mr. Doyle in that he might lose his favourable office sharing arrangements or lose the chance to become an associate with a particular firm.

[73] The harm to the Respondent might also be "grievous" if it were exacerbated by exceptional circumstances relating to the disciplinary proceeding itself. This was an important aspect of the facts in *Re: Lawyer 5*. In finding that "grievous harm" had been shown, both the Hearing Panel and the Review Panel, 2005 LSBC 11 and 50 respectively, clearly attached great weight to the fact that, through no fault of the lawyer, eight years — a sizable portion of a career, even one as long as the lawyer's in that case — had elapsed between the "conduct unbecoming" and the disciplinary decision. There is no equivalent factor here.

[74] We therefore conclude that, to the extent that "harm" has been established, it is not "grievous harm" so as to justify anonymous publication under Rule 4-38.1(3).

Interest of the public and the Law Society in full publication

[75] Having concluded that harm has not been proved and that, even if proved, it is not grievous harm, it is not strictly necessary for us to consider whether the grievous harm, had we found it proved, would outweigh the public interest and the interest of the Law Society in full publication. However, it seems to us that, if we had reached this stage of the analysis, the Respondent's argument would have come up against a fundamental difficulty.

[76] The entire premise for the Respondent's argument for anonymous publication is that members of the profession and the general public may think less of the Respondent if his name is published. This could be so only if an appreciable number of members of the profession or the public take in the bare fact of his having been disciplined for professional misconduct without appreciating that, as we have already noted, the finding of misconduct casts no doubt whatever on his ability or his ethical standards as a lawyer. In other words, the fear is that those who learn of the Respondent's being disciplined may not read or fully understand the Hearing Panel's reasons, and so infer wrongly that the Respondent has been found wanting in terms of his competence or his ethics. It is the fear of this public misperception, the Respondent argues, that may lead the Client to cease retaining the Respondent's services.

[77] The basis for the Rule of full publication is that it is in the interest of the profession and the general public that (as was said in *Doyle*, 2005 LSBC 24 at para. [39]) they know "with whom they are dealing" . Rule 4-38.1(3) reflects the fact that, in some circumstances, this interest may take second place, for the sake of fairness, to the need to protect the lawyer or another person from grievous harm. But we find it difficult to imagine a case in which the interest of the profession and the public in having full access to the facts about a lawyer would be outweighed by the apprehension that they may not judge those facts fairly. It is the responsibility of the Law Society to express disciplinary decisions as fully and accurately as possible. That done, it seems to us that the professional colleagues of the lawyer who is disciplined, as well as members of the general public, must be assumed to examine those decisions carefully and fairly. To say otherwise would contradict, in our view, the logical underpinning for the rule of full publication. The Law Society has recognized that the public have the presumptive right to the full story. By the same token, it seems to us, the Society has recognized that the public must be trusted to understand the full story and to form their opinion of the lawyer reasonably on the basis of the full story.

[78] There is one respect in which the Society's obligation to express its decisions fully and accurately would have had a bearing on this case if the Respondent's name were published. As already noted, some if not all of the Hearing Panel's reasons on the issue of anonymous publication assumed that, as Mr. Getz put it at para. [39], the Respondent was seeking "to deceive the client" by concealing from the Client the fact of his being disciplined. This assumption, as was made clear to us, was incorrect. Reading the Hearing Panel's reasons alone could, therefore, leave people with an inaccurate impression that might harm the Respondent's reputation. We would therefore have made publication of the Hearing Panel's reasons subject to the requirements that: (a) the present reasons on Review be published in the same document or web page; and (b) the Hearing Panel's reasons be prefaced by a note that its reasons on the issue of identifying the Respondent have been superseded by the present reasons.

Conclusion

[79] We would therefore have decided in favour of full publication of the Hearing Panel's decision of February 11, 2008, including the identity of the Respondent.