2012 LSBC 25
Report issued: July 11, 2012
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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

Daniel Markovitz

Respondent

Decision of the Hearing Panel on Disciplinary Action

Hearing date: February 20, 2012
Panel: Leon Getz, QC, Bencher Chair, Jennifer Chow, Lawyer, Dan Goodleaf, Public representative

Counsel for the Law Society: Thomas Manson, QC
Counsel for the Respondent: Daniel Le Dressay

introduction

[1] At the conclusion of a hearing held on December 20, 2011 we orally accepted the Respondent's admissions that he had engaged in conduct unbecoming a lawyer and had committed professional misconduct. Our reasons for doing so are explained in our decision on Facts and Determination issued March 7, 2012 and reported at 2012 LSBC 11 ("Decision on Facts"). We must now decide upon the consequences of that determination.

[2] The details of the Respondent's various and multiple transgressions are fully set out in the Decision on Facts. Briefly, on November 30, 2008 Mr. Markovitz refused to comply with a proper demand for a breath sample. This led to his being convicted on a plea of guilty to an offence under the Criminal Code. The Respondent admitted that his refusal amounted to conduct unbecoming a lawyer. He has also admitted to numerous failures to comply with an express undertaking that he gave to the Law Society and with the terms of various related agreements, all given or made in December 2008, and that these failures amounted to professional misconduct. In one form or another, his undertaking and agreements related to the monitoring of his consumption of alcohol and his undergoing treatment for alcohol abuse or dependency. For convenience, we refer to them as the "Underlying Obligations".

[3] At the conclusion of the hearing on December 20, 2011 the matter was adjourned, on certain terms, until February 20, 2012 so that we could receive any additional evidence that might be relevant to the determination of appropriate sanctions and hear such submissions on that subject as counsel might wish to make.

[4] The terms of the adjournment were memorialized in a letter agreement, referred to as an "Interim Process Agreement", dated December 21, 2011 (the "IPA"). By it, the Respondent agreed to take certain steps pending the resumption on February 20, 2012. These included that he would attend meetings of the Lawyers Assistance Program ("LAP") Accountability Group.

[5] At the resumed hearing on February 20, 2012 certain additional evidence, including the Respondent's

Professional Conduct Record, was received without objection. In addition, the Respondent testified. It is apparent from the additional evidence that he had failed in certain respects to comply with the IPA. In particular he did not, as he had promised he would, attend LAP Accountability Group meetings with the frequency or regularity contemplated by the IPA. While the IPA contemplated that the Law Society might seek further or additional sanctions from us in respect of a breach of any of its terms, it has not done so – at least, not before this Panel.

THE POSITIONS OF THE PARTIES

[6] The Law Society asks us to make orders:

(a) pursuant to section 38(5)(d)(ii) of the Legal Profession Act (the "Act") suspending the Respondent from practice until he has satisfied a board of examiners, appointed by this Panel, that his competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;

(b) pursuant to section 38(5)(c) of the Act imposing on the Respondent a condition that he enter into a monitoring agreement with a physician acceptable to the Law Society and on terms satisfactory to the Society including requirements for:

i. regular random blood and urine testing, for a period of two years;

ii. attendance at LAP meetings and confirmation to the Law Society of such attendance;

iii. attendance at AA and/or similar meetings and confirmation to the Law Society of such attendance;

iv. and a requirement that the Respondent comply with the terms of the monitoring agreement;

(c) that the Respondent be required to apply to the Discipline Committee for any variation of any of these orders, including any provision of the monitoring agreement required under paragraph (b) above;

(d) assuming the imposition of a suspension on the terms set out in paragraph (a), that the Respondent pay a fine of $3,000; and

(e) that the Respondent indemnify the Law Society in the amount of $7,000 on account of its costs.

[7] The Respondent's position is starkly different. He resists any form of suspension and says that a fine of $3,000, a requirement that he indemnify the Law Society in the amount of $7,000 on account of its costs and a condition that he abstain from alcohol is all that is necessary or appropriate by way of sanction.

ORDERS

[8] For reasons that we explain below, we decline to make any of the orders sought by the Law Society set out in paragraph [6] above. Instead, we order that the Respondent:

(a) pay a fine of $6,500 as sanction for the conduct unbecoming a lawyer and professional misconduct that he has admitted;

(b) indemnify the Law Society in the amount of $3,500 on account of its costs in connection with this matter.

A THRESHOLD DISTINCTION – SANCTIONS AND REHABILITATION/TREATMENT

[9] All of the orders sought by the Law Society are provided for in section 38 of the *Legal Profession Act*. That section appears in Part 4 of the Act, which is headed “Discipline”. In one sense, that is unfortunate for it suggests that every order made under that section has as its object the imposition of one or more sanctions upon the lawyer in respect of acts of past misconduct. That would certainly be true of a fine or a suspension simpliciter or, in an appropriate case, disbarment. It is manifestly not true, however, in the case of the order sought by the Law Society under section 38(5)(c) of the Act and described above in paragraph [6](b). While the impetus for such an order may, as here, be some misconduct, its primary objective seems to be rehabilitation or treatment and not discipline.

[10] There are, of course, cases in which the object of an order under these provisions seems intended to address both objectives –for example that sought by the Law Society under section 38(5)(d)(ii) and described above in paragraph [6](a).

[11] The fact that the objectives sought differ suggests that it is important to keep in mind the distinction between discipline and treatment. First, some of the considerations referred to in the leading case of *Law Society of BC v. Ogilvie*, [1999] LSBC 17 – for example, the need for specific and general deterrence – though relevant to the imposition of sanctions, do not have any obvious bearing on the formulation of appropriate conditions under section 38(5)(c). Secondly, as we understand it, a person’s medical advisors are not in the ordinary course of events able to impose a course of treatment on a patient over the patient’s objection. For a hearing panel to require submission – the word is used deliberately – to a treatment regimen under section 38(5)(c) to address underlying medical issues could thus involve an intrusion into the personal life of the lawyer that is potentially far greater than the lawyer’s medical advisors could properly make. The purported justification for this has been explained in a number of cases – see, for example, *Law Society of BC v. Suntok*, 2005 LSBC 29, especially at paragraph [39] – and we have little to add to those explanations. But the very breadth of the power given to a hearing panel by that section bespeaks a degree of caution in its exercise.

SANCTIONS

General

[12] There is no magic formula that leads inexorably to a conclusion as to the appropriate sanction(s) for the Respondent’s transgressions. The possibilities extend from a reprimand, to a fine, to a suspension, to disbarment or some combination of these. We must balance an array of different considerations, some of the more important of which are identified in paragraphs 9 and 10 of the reasons of the hearing panel in *Ogilvie*, above. These have frequently been quoted and are well-known. Nothing is to be gained from quoting them yet again. We have tried to take account of those we have considered relevant.

[13] It was common ground that we should approach the determination of sanctions on a “global” basis, rather than attempting to determine separately an appropriate sanction for each of the instances of admitted misconduct. There is precedent for this approach – see *Law Society of BC v. Gellert*, 2005 LSBC 15 – and we accept it as appropriate here.

A Suspension Pending a Demonstration that the Respondent’s Competence to Practise Law is not Adversely Affected by Dependency on Alcohol or Drugs

[14] Section 38(5)(d) of the Act authorizes a hearing panel, having made an adverse decision about a respondent, to suspend the lawyer from the practice of law or from practice in one or more fields of law, among other things, for a specified period of time or until the lawyer complies with a requirement under

section 38(5)(f)(iii). The latter provision empowers a hearing panel to require the respondent to appear before a board of examiners appointed by the panel or by the Practice Standards Committee and satisfy the board that his or her competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs.

[15] The Law Society seeks an order under section 38(5)(f)(iii) suspending the Respondent from practice until he has satisfied a board of examiners appointed by this Panel that his competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs. What conditions must be satisfied for such an order to be made, and are those conditions satisfied here?

[16] On its face, section 38(5)(f)(iii) seems to require a finding (or an admission) that the lawyer's competence to practise law is adversely affected by dependency on alcohol or drugs. In this case the citation contains no allegation that the Respondent is not competent to practise law and that this is due to alcoholism; the Agreed Statement of Facts contains no admissions to this effect; we made no such findings when we accepted his admissions of professional misconduct (see generally, Decision on Facts); and there is little, if anything, in the evidence that we have to provide a foundation for such a finding.

[17] The only suggestion in the evidence that comes close to a determination about the Respondent's competence to practise law and a possible connection with alcoholism is contained in the report of a Conduct Review Subcommittee in May 2009, included in his Professional Conduct Record. The Subcommittee described the complaints and concerns that led to its appointment as relating to "the improper/inadequate representation and service to clients resulting, in part, from poor office systems, delay, inactivity and failure to respond to communications and correspondence, [and] failure to meet practice obligations." The Subcommittee said, among other things, that "alcohol seems to have had a significant part in each of the complaints," that the complaints were a "symptom of the alcoholism" and that "the root of his problem is alcoholism." It concluded its Report on an optimistic note based, in part, on the Respondent's "resolution to be sober," and recommended that no further action be taken.

[18] We do not think that the Subcommittee's language can reasonably be construed as, or as implying, a finding that the Respondent was incompetent to practise law, whether due to alcoholism or otherwise. Even if we are wrong about this, however, we have no evidence of any such incompetence since May 2009. In these circumstances, if we were to make the order proposed by the Law Society we would be proceeding on the basis of assumed facts. That would be improper and, in any event, beyond our powers under sections 38(5)(d)(ii) and 38(5)(f)(iii) of the Act.

[19] Mr. Manson, counsel for the Law Society, suggested that we could make the order sought on what he described as an "anticipatory" basis, and in this connection he referred to the decision in *Law Society of BC v. Short*, 2009 LSBC 12. We cannot find any language in section 38(5)(f)(iii) that supports that view; and we do not think the *Short* decision does so either. The order made in that case was based on what was, in effect, a joint submission to which the respondent agreed. That is not the case here. Secondly, the condition imposed there was attached under the provisions of section 38(7) of the Act, which is not relied on here.

[20] In summary, therefore, the evidence here does not justify the making of an order pursuant to section 38(5)(f)(iii) suspending the Respondent from practice on the basis proposed by the Law Society, and we accordingly decline to make such an order.

[21] This does not, however, conclude the question as to the appropriate sanctions to impose in respect of the Respondent's breaches of undertaking – and in particular, whether it is appropriate to suspend him without the condition specified in section 38(5)(f)(iii) or adopt some other form of sanction. We consider these questions below.

An Unconditional Suspension or a Fine

[22] Each of the three "categories" of professional misconduct identified in paragraphs (b), (c) and (d) of the citation and acknowledged by the Respondent relates to his failure to perform the Underlying Obligations. Each of them involves repetitive and sustained breaches of his promises. See Decision on Facts, paragraph [7] sub-paras. 19 through 36. It is clear that in assuming the Underlying Obligations the Respondent was acting as a member of the legal profession, albeit in relation to his personal conduct.

[23] The Law Society argues that the breaches were serious in themselves. That is because the giving and fulfillment of undertakings are a cornerstone of the legal profession. Moreover, as the Law Society's counsel put it, breach of an undertaking to the Law Society "strikes at [the] heart of the ability of the Law Society to regulate the profession." Counsel for the Respondent conceded that breaches of undertaking are serious, and he was right to do so. The courts and hearing panels of the Law Society have repeatedly stressed the importance of meticulous compliance with undertakings, and hearing panels have marked their view of the seriousness of a failure to do so by the severity of the sanctions they have imposed – commonly, if not invariably, a suspension from practice for some period.

[24] The appropriateness of an "unconditional" suspension or a fine, or both, depends, among other things, on such factors as what the Respondent did or failed to do; his reasons for doing or not doing them; the purpose of suspending him in the circumstances; and our assessment of the prospect that any of these sanctions will achieve its purpose.

Some Background to the Respondent's Assumption of the Underlying Obligations

[25] In September 2005 a Practice Review report apparently recommended that the Respondent attend either the Lawyers' Assistance Program ("LAP") or Interlock for assistance in dealing with "the stresses in his life". Although these were not particularized, we infer that among them were issues related to alcoholism. It seems that the Respondent did indeed attend LAP several times, but did not find it helpful. In November 2007, however, he completed a ten day rehabilitation program and in August 2008 a five-day follow-up program. See generally Decision on Facts, paragraph [7] sub-paras. 3 through 6. As we understand it, these attendances were entirely voluntary.

[26] On December 8, 2008 the Respondent self-reported to the Law Society that he had been arrested on November 30, 2008 and faced various charges under the *Criminal Code*, to one of which he subsequently pleaded guilty and, among other things, was prohibited for one year from operating a motor vehicle. See generally Decision on Facts, paragraph [7] sub-paras. 7 through 11.

[27] Over a period of days beginning on December 8, 2008, the day he self-reported, the Respondent almost immediately entered into the various agreements that together embody the Underlying Obligations: Decision on Facts, paragraph [7] sub-paras. 7 through 13. So far as the evidence goes, he was not ordered by anyone to enter into these agreements. It seems that he may have done so at the suggestion of Mr. Derek La Croix, QC, the Executive Director of LAP.

[28] The Respondent testified that, at the time he assumed the Underlying Obligations, he was unfamiliar with the various programs to which they related; did not understand what they entailed; and did not have any advice. He said that he agreed to them because he was concerned that, if he did not do so, the Law Society might suspend him, thus impairing his ability to meet his financial obligations and that he might lose custody of his son – something that had apparently been threatened by his former wife.

The Respondent's Initial Compliance and Subsequent Default in Complying with the

Underlying Obligations

[29] Initially, the Respondent complied with the Underlying Obligations. In the months after August 2009, however, and in particular from about March 2010, he began to default in various respects. The details of these defaults are set out in the Decision on Facts at paragraph [7] sub-paras. 17 through 36, and it is not necessary to repeat them here.

[30] The Respondent attributes his decision to cease attending meetings of AA as required by the Underlying Obligations to his conviction that the program rests on a religious foundation requiring him to "submit to a higher power". He explained that he is an atheist and does not believe in a higher power. We note that certain addiction specialists whose reports are in evidence do not share his view. Despite this, we do not for a moment doubt that the Respondent's belief about the nature of AA, whether or not well-founded, is entirely genuine. We note, however, that in his oral evidence on February 20, 2012 the Respondent testified that he had recently been attending AA meetings, though not within the framework of the Underlying Obligations. We say more about this below.

[31] The Respondent explains some of his other defaults – for example, his failure to provide urine verification of his abstinence from alcohol when this was demanded and to attend the required weekly number of mutual support meetings – on a variety of grounds, among them the financial burden that compliance entailed, particularly in view of his various financial obligations to his former wife and the fact that he was the sole support of his second wife and minor child, and to the logistical difficulties of getting to the prescribed locations at prescribed times, particularly when he had obligations to clients for attendances in court, given that for at least part of the period involved he was subject to a driving ban.

[32] As explanations, we readily accept all of this. What we find difficult to accept, however, is that any of it provides a justification or excuse for the Respondent's defaults. The appropriate response to all of these difficulties and inconveniences was not to simply ignore the Underlying Obligations, but rather to seek to have them modified.

[33] The Respondent did, to be sure, approach the Law Society in February 2010 seeking relief from the requirement to undergo random urine and breath tests on the ground that they imposed an extremely burdensome financial obligation – though we note that this was more than a year after he assumed the Underlying Obligations and some eight months after the pattern of defaults began. The request was apparently referred to the Practice Standards Committee, which in March 2010 wrote advising that it had rejected the request and was referring some of his other defaults to the Discipline Committee. We note, as well, that at this time he did not raise his concerns about the requirement to attend meetings of AA. It was not until September 30, 2010 when, apparently in response to a letter from the Law Society that is not in evidence, the Respondent confirmed the reasons for his unhappiness with the requirements that he had agreed to, including his unwillingness to attend AA meetings, to provide the breath and urine tests as and when required or to attend LAP meeting as agreed.

[34] The proper professional response to the rejection of his attempts to secure a modification of his undertakings was not, as he did, to repudiate them entirely as emotionally, physically or financially inconvenient. It was, rather, to accept that they continued to be binding on him and to comply with them, meticulously and carefully. That is what the giving of an undertaking requires.

[35] In all of the circumstances we have been unable to persuade ourselves that the Respondent's repeated and considered breaches of undertaking should be considered less serious than they appear to be on their face. The question before us in this respect is, therefore: what is the appropriate sanction for repetitive and seemingly deliberate breaches of undertaking simpliciter? That, as we have tried to explain, is not the same as the question as to the appropriate regulatory response, if any, to his seeming failure to acknowledge and

secure appropriate treatment for his substance abuse. The fact that the Underlying Obligations may have arisen out of concerns related to the Respondent's problems with alcohol does not create an analytical connection between that precipitating cause and the subsequent breaches of undertaking. In any event, there is not a scintilla of evidence that the Respondent's failure to perform his Underlying Obligations was in any respect attributable to alcoholism.

An Exacerbating Consideration

[36] One of the requirements of the Underlying Obligations was that the Respondent "remain abstinent" from alcohol. The evidence indicates that he did not do so and that he did in fact consume liquor, albeit perhaps only occasionally, on special occasions and in relatively small amounts. In the present context it is not so much the fact that he did not comply that is important, but the explanation that he offered for this. In his oral testimony the Respondent sought to contend that all that he had undertaken to do was be abstemious, not abstinent, i.e. that he had not promised to cease and desist from all consumption of alcohol but only that he would consume alcohol on rare occasions, and then only in moderation. In our view that understanding of the meaning of "abstinent" is simply unsustainable as a matter of language. The Respondent is no fool. That he would advance such a contention is suggestive – we put it no higher than this – of a somewhat nonchalant approach to the performance of the obligations that he undertook. It is a suggestion that derives some support from the fact that while these proceedings were still in progress, he failed to honour certain undertakings that he had given in the IPA. See above, paragraph [5].

Conclusion as to a Suspension or Fine

[37] *Law Society of BC v. Goddard*, 2006 LSBC 12, was also a breach of undertaking case. The single Bencher panel drew a distinction between:

> [8] … those lawyers who professionally misconduct themselves because they are careless by reason of incompetence, laziness or they are just cavalier about the requirements of practice. The other category of cases where misconduct occurs is when a lawyer becomes overwhelmed with personal circumstances beyond his or her control, which then leads to a breach of his or her professional responsibilities. …

The panel considered that the facts in that case fell within the second of these categories. It continued:

> [10] Balanced against the need to consider the Respondent's personal circumstances is … the need to show the public that there are consequences when a lawyer breaches his or her responsibility.
>
> [11] The Law Society of BC has recently taken a much sterner approach to breaches of undertaking … It must be clear to the Law Society's members that if they breach their undertakings, there will be serious consequences. …

In that case the panel imposed a two-month suspension. In other cases, also involving breaches of undertaking, lengthier suspensions have been imposed.

[38] The consequences for the Respondent of a suspension, however short, are extremely serious. He is a husband and a father of two relatively young children. One of them is the child of a previous marriage that ended in divorce. He has financial obligations both to the child and his former wife. He is also, of course, responsible for the maintenance and support of his present family. His present wife works at home raising their child. He has had a history of financial difficulties, including a period of personal bankruptcy from which he has been discharged but which impairs his ability to obtain credit. For the greater part of his professional

life he has been a sole practitioner doing criminal defence work. His practice income is relatively precarious, not least because he is not permitted to maintain a trust account and so cannot accept retainers from clients accused of crime. In effect he must extend them credit.

[39] A suspension, thus, is no small matter for the Respondent. It is also no small matter, however, that his breaches of undertaking have over several years been persistent, repetitive and knowing and that, as some of the matters to which we have referred above indicate, he appears not yet to fully accept the importance, to himself, to the Law Society and to others, of honouring his promises. In our view a sharp reminder of this seems necessary. We are not persuaded, however, that this can only be achieved by suspending him from practice.

[40] We think the objective would be equally well served by fining the Respondent for his breaches of undertaking and we think that, in all of the circumstances, a fine of $6,500 will achieve the desired objective. We so order.

[41] In coming to this conclusion we have not given any special or discrete consideration to the implications of the Respondent's admission of conduct unbecoming a lawyer. It does not add anything to a consideration of the overall seriousness of his misconduct, considered on a global basis.

REHABILITATION/TREATMENT

Introduction

[42] As we have indicated, the Law Society has asked us to make an order pursuant to section 38(5)(c) of the Act requiring the Respondent to enter into a monitoring agreement with a physician acceptable to the Law Society and on terms satisfactory to the Society including requirements for:

i) regular random blood and urine testing, for a period of two years;

ii) attendance at LAP meetings and confirmation to the Law Society of such attendance;

iii) attendance at AA and/or similar meetings and confirmation to the Law Society of such attendance,

iv) and a requirement that the Respondent comply with the terms of the monitoring agreement,

and a provision that no variation of any provision of the monitoring agreement should be made except with the approval of the Discipline Committee.

[43] Section 38(5)(c) allows us to make such an order or something like it. Similar orders have been made in other cases – see, for example, *Law Society of BC v. Short*, 2009 LSBC 12.

[44] The following seem to be the facts that are relevant to whether an order along the lines proposed by the Law Society should be made with a view to addressing the Respondent's underlying medical issues:

(a) He has acknowledged in the Agreed Statement of Facts that "he has encountered problems with alcohol abuse." Decision on Facts, paragraph [7] sub 2.

(b) In October/November 2007 and again in August 2008 he voluntarily undertook alcohol rehabilitation programs. Decision on Facts, paragraph [7] sub-paras. 4 and 5.

(c) Between January 2009 and December 2011 two medical practitioners qualified to opine on addiction and the diagnostic criteria for alcohol dependence, expressed the opinion that the Respondent met those criteria. A third practitioner, a psychiatrist, expressed the opinion in a report dated September 6, 2011, that the Respondent met the diagnostic criteria for alcohol abuse. Each of

these specialists recommended, in one form or another and with variations that for the moment are immaterial, that the Respondent continue with the activities that he had agreed to in the Underlying Obligations. Two of them emphasized the need for “complete abstinence”.

(d) One of the medical practitioners referred to above, Dr. Ray Baker, noted in his report in January 2009 that certain laboratory test results “suggest excessive alcohol consumption.” A second, Dr. Donald Hedges, referred in December 2011, to laboratory results that, in his opinion, “strongly suggest very significant and recent alcohol–induced liver toxicity.”

(e) On February 3, 2012 Dr. Hedges advised the Law Society that, at a meeting on February 1, 2012, the Respondent reported “abstinence from alcohol and compliance with the other terms of his Monitoring Agreement.” In an email to the Law Society on February 10, 2012 the Respondent’s counsel advised that had been told by his client that: (i) he would be contacting LAP with a view to arranging to attend meetings of the Personal Accountability Group (“PAG”), and (ii) he attended AA meetings in the period following the original hearing on Facts and Determination in December 2011 but not through LAP. In his testimony before us on February 20, 2012 the Respondent confirmed his attendance at AA and his abstinence. As to the former, while there is no detail in evidence, there is no evidence to the contrary; nor is there any evidence, one way or the other, about his attendance at PAG meetings under the auspices of LAP.

(f) On February 15, 2012 Dr. Hedges reported to the Law Society on the results of a random urine drug screen completed on February 9, 2012, in accordance, as we understand it, with the requirements of the IPA. Commenting on one of the results, Dr. Hedges observed that, although not conclusive, it “strongly suggests” the recent use of alcohol despite the Respondent’s commitment to complete abstinence.

(g) In January 2012, as he had agreed in the IPA (above, paragraph [4]), the Respondent underwent a further independent medical examination, this time with Dr. Clifford Chan-Yan. Dr. Chan-Yan was asked specifically to opine whether certain laboratory tests and other examinations performed by him, “indicate it is more likely than not that Mr. Markovitz has recently, or is, consuming alcohol heavily?” He was provided with copies of the reports of the three medical specialists referred to in paragraph [44](c) above. In his report dated February 15, 2012, Dr. Chan-Yan noted that he had been told by the Respondent that “he quit drinking hard liquor … but continues to consume an occasional glass of wine only on festive or special occasions.” This is consistent with other evidence before us. Dr. Chan-Yan concluded:

> In my professional opinion, the liver enzyme abnormalities are suggestive of and compatible with recent and ongoing heavy consumption of alcohol but alone, are not diagnostic. Physical examination and other tests do not provide additional evidence to suspect ongoing heavy alcohol consumption. The recent liver ultrasound reveals impressive clearing of fatty liver which would be surprising and unlikely if heavy alcohol consumption was ongoing. Therefore, although it is possible, I cannot conclude that it is more likely than not that Mr. Markovitz has recently, or is, consuming alcohol heavily.

(h) Subsequent to Dr. Chan-Yan’s report, Dr. Hedges reported that he was “in complete agreement with” the former’s observations and conclusions but cautioned that “keeping in mind the diagnosis of (untreated) alcohol dependence and in the absence of convincing evidence of an alternative cause” for the indicia noted by Dr. Chan-Yan, “it remains my opinion that the most likely explanation … remains alcohol-related liver toxicity, probably from relatively recent significant alcohol consumption.” In our view the medical opinions provide only limited and somewhat qualified and inconclusive evidence to

support the order sought by the Law Society.

(i) The Respondent testified before us that:

i. he is not dependent on alcohol;

ii. he has been abstinent or, more accurately in view of his evidence about recent occasional drinking, abstemious, for the past several years; and

iii. he has participated in an on-line course involving, as we understand it, personal goal setting.

[45] What are we to make of all this? In particular, does it cumulatively suggest grounds for making the order sought by the Law Society and requiring the Respondent to submit to a monitoring agreement of the sort proposed?

[46] Counsel for the Law Society referred us to a number of previously decided cases in which issues of this kind have been considered. We have not, with respect, found them especially helpful, either because they differ significantly on the facts or because they fail, in our respectful view, to recognize appropriately the difference between imposing a sanction and prescribing a treatment regimen.

[47] In some of them – for example, *Law Society of BC v. Gellert*, 2005 LSBC 15, *Law Society of BC v. Morrow*, [1995] LSDD No. 253 and *Law Society of BC v. Dobbin*, [2002] LSBC 16 – there was a finding that the member's professional misconduct was attributable to an underlying medical condition such as depression, in *Gellert* and *Dobbin*, and alcoholism in *Morrow*. This also seems to have been the case in *Law Society of BC v. Barton*, 2004 LSBC 20. In some of these, moreover – and others, the member had agreed to submit to treatment regimens of one sort or another.

[48] In the case of Mr. Markovitz, however, there is simply no demonstrable connection between his professional misconduct and alcoholism. The unbecoming conduct to which he has admitted in response to the first allegation in the citation was, of course, directly related to his consumption of alcohol, but that was some four years ago.

[49] The Respondent denies that he currently has any problems with alcohol consumption, though we understand that denial is one of the symptoms of an untreated alcoholic. He denies that, except on a few specified and relatively special occasions, he has consumed any alcohol for the last few years. We acknowledge that there is a debate among certain highly regarded and qualified medical doctors as to whether the latter denial is sustainable or at least convincing and that they, and other qualified people, have recommended that Mr. Markovitz undergo a course of treatment for his past (and possibly present) problems with alcohol.

[50] The medical specialists have done what they are expected to do – give their best advice as to what the Respondent should do. None of them, we note, has said, either expressly or by implication, that unless he follows their recommendations the Respondent constitutes a present, a foreseeable or even a remote, risk of harm to clients, the public or the legal profession. Cf. *Law Society of BC v. Watt*, [2001] LSBC 16 at paragraph [24].

[51] In our respectful opinion no grounds have been shown to exist that would justify the making of an order imposing a monitoring agreement upon the Respondent, with all or any of the conditions proposed by the Law Society. We decline to make any such order.

COSTS

[52] The Law Society has sought an award of costs in its favour in the amount of $7,000, including fees and

disbursements. This represents approximately 33 per cent of the costs actually incurred – a ratio consistent with the usual method employed in these cases. See *Law Society of BC v. McRoberts*, 2011 LSBC 4, at paragraph [43]. We have been referred in this connection to the decision in *Law Society of BC v. Racette*, 2006 LSBC 29 in which, at paragraph [13], the panel set out certain factors to be taken into account in determining the reasonableness of an award of costs.

[53] What distinguishes this case from others in which the subject of costs has been considered is that here, although the Law Society has been successful in the sense that it has persuaded us that the Respondent's misconduct deserves sanction, it has been unsuccessful in the sense that we have declined to make substantially any of the orders that the Society has sought. In our view this must also be taken into consideration. In the result, while the Law Society is entitled to some indemnification on account of its costs, we do not think that the amount claimed is reasonable in the circumstances. Our order, therefore, is that the Respondent pay the Law Society $3,500 by way of indemnification for its costs.

TIME TO PAY

[54] In all of the circumstances we consider that the Respondent should be given time to pay both the fine and the costs awarded. He must pay the costs of $3,500 at the rate of $700 per month commencing on August 1, 2012; and the fine of $6,500 at the rate of $650 per month commencing on December 1, 2012.