2014 LSBC 09
Report issued: February 26, 2014
Citation issued: April 2, 2012

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

GARY RUSSELL VLUG

Respondent

CORRECTED DECISION: PARAGRAPH [83] OF THE DECISION WAS AMENDED ON AUGUST 26, 2014

Decision of the Hearing Panel on Facts and Determination

Hearing date: June 3 to 5, 2013
Panel: Tony Wilson, Chair, Clayton Shultz, Public representative, Gary Weatherill, QC, Lawyer

Counsel for the Law Society: Carolyn Gulabsingh
Appearing on his own behalf: Gary R. Vlug

Background

[1] This Panel was convened as a result of a citation authorized by the Discipline Committee of the Law Society in respect to the conduct of Gary Russell Vlug (the "Respondent") with respect to 11 allegations arising from three separate complaints, referred to in this decision as the ES matter, the PS matter and the MW matter.

[2] The Respondent was called to the Bar of British Columbia on August 28, 1992 and, since that time, has practised law as a sole practitioner in Vancouver in the areas of family law, motor vehicle litigation, administrative law, civil litigation, criminal law and wills and estates.

[3] The Respondent admits that, on April 3, 2012, he was served with a citation in accordance with requirements of Rule 4-15 of the Law Society Rules.

[4] This decision will be divided into four parts. Part 1 deals with allegations 1 to 6 relating to a child custody matter and the Respondent's conduct while representing his client ES, his conduct with opposing counsel, representations made before the Supreme Court and the Court of Appeal and representations made to the Law Society in the course of its investigation. Part 2 deals with allegations 7, 8 and 9, and the Respondent's conduct concerning the representation of his client PS. Part 3 deals with allegations 10 and 11, respecting the Respondent's representation of his client MW.

[5] In each Part, the Law Society argued with respect to some or all of the allegations that, if professional misconduct was not found by the Panel, in the alternative, the Panel should find that the Respondent's conduct amounted to incompetent performance of duties undertaken in the capacity of a lawyer. As will be seen, it was not necessary for the Panel to decide those questions.

[6] The last part of this decision deals with the Respondent's argument, raised during final submissions, that the Law Society had delayed its investigation and prosecution of the allegations against the Respondent, a matter on which the Panel decided the parties could provide written submissions after the conclusion of the oral hearing.

[7] Mr. Vlug was not represented by counsel. The Law Society was represented by Ms. Carolyn Gulabsingh.

PART 1 THE ES MATTER

Issues

[8] The factual issues to be determined with respect to the ES matter are specified in allegations 1-6 of the citation. Each contains an allegation that the Respondent's conduct regarding his representation of ES constituted professional misconduct. If a finding of professional misconduct cannot be supported under allegations 2, 3, 4 and 5, the Law Society alleges in the alternative that the conduct amounts to incompetent performance of duties undertaken in the capacity of a lawyer.

[9] With respect to allegations 1 and 6, the Law Society argues that the only issue to be determined is whether the Respondent's conduct amounted to professional misconduct. We are not asked to determine whether, in the absence of professional misconduct, a finding could be made for incompetent performance of duties.

Onus and Standard of Proof

[10] The onus of proof is on the Law Society in respect to all of the allegations raised in the citation.

[11] The standard of proof was articulated by the Supreme Court of Canada in *FH v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193, and adopted by Law Society hearing panels such as *Law Society of BC v. Shauble*, 2009 LSBC 11, and *Law Society of BC v. Seifert*, 2009 LSBC 17.

[12] In *Seifert*, the panel stated:

> ... the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities.

Law

[13] The test for professional misconduct is not defined in the *Legal Profession Act,* the Law Society Rules or the *Professional Conduct Handbook* (which was applicable at the relevant times), but the leading case is *Law Society of BC v. Martin*, 2005 LSBC 16. The test is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members." In that case, the panel stated the essential question this way:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[14] The panel decision in *Re: Lawyer 12*, 2011 LSBC 11 stated:

> … the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

[15] On Review the Benchers confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test expressed by the single-Bencher hearing panel.

Allegation 1(a) and 1(b)

[16] The facts with respect to the ES matter are complicated, and it is necessary to go through them in some detail so the circumstances surrounding the allegations can be put in perspective.

[17] Mr. Vlug represented ES in a child custody matter. ES and his wife married in Ireland and had one child in that country. They subsequently separated. At all material times, the child of the marriage was 11 years old. After the parties separated, an Irish court awarded joint custody of the child with primary residency to the mother, meaning that the child was to stay with the mother in Ireland. On a sworn undertaking to the Irish court to return the child to his mother at the end of July 2008, ES brought the child to Canada for a one-month holiday. However, instead of returning the child to Ireland pursuant to the order of the Irish court, ES took the position that the child did not want to return to Ireland and kept him in Canada against the wishes of the mother. The child's mother filed a petition in the Supreme Court of British Columbia alleging the wrongful retention of the child and sought an order to compel the child's return to her care in Ireland,

pursuant to The Hague Convention on the Civil Aspects of International Child Abduction. The wife was represented by Mr. William Storey.

[18] In proceedings before the Supreme Court on March 31, 2009, Madam Justice Martinson ordered a "Views of the Child Report" so that the child's opinions could be solicited as to whether he wanted to return to Ireland to his mother, or stay in Canada with his father. Counsel mutually agreed that Dr. E would prepare the Views of the Child Report, and Madam Justice Martinson's ruling provided that Dr. E should see all of the materials that were before the court to enable him to write his report.

[19] It is important to note that Madam Justice Martinson did not order who was to provide those materials to Dr. E; just that Dr. E should obtain and review the materials.

[20] There was a series of faxed communications between Mr. Storey, Dr. E and Mr. Vlug on April 1 and April 2, 2009 with respect to Dr. E's timing, his availability to write the report, and the logistics of delivering materials for him to review. On April 1, Mr. Storey wrote to Dr. E by fax and copied Mr. Vlug on his correspondence, also by fax. The letter states as follows:

> … by copy of this letter I will advise Mr. Vlug that my office will make copies of and deliver to [Dr. E] the Petitioner's Pleadings and Affidavits and I suggest that he do the same with the Respondent's Pleadings and Affidavits. In addition I will provide you with a copy of the draft of the order that was pronounced by the Hon. Madam Justice Martinson …

[21] Mr. Vlug admitted to the Panel that he received this letter on April 2, 2009.

[22] Mr. Storey wrote again to Dr. E on April 2, 2009 and enclosed eight documents for Dr. E's review to enable him to prepare his Views of the Child Report. Each of those eight documents referred to in this letter, by their very description, related to Mr. Storey's client and not Mr. Vlug's client. A copy of this letter was also sent by fax to Mr. Vlug. At the bottom of the letter appears "cc: G. Vlug (by fax)".

[23] On May 12, 2009, Mr. Storey and Mr. Vlug appeared before Madam Justice Martinson to deal with the Views of the Child Report prepared by Dr. E. However, it was revealed in court that Dr. E had only been provided information from Mr. Storey and had not been provided with any documentation by Mr. Vlug in respect to his client's position. Mr. Vlug represented to the court that he had spoken to Mr. Storey by telephone and that Mr. Storey had led him to believe that Mr. Storey had provided Mr. Vlug's client documents to Dr. E.

[24] Mr. Vlug stated to Madam Justice Martinson on page 22 of the transcript of the proceedings:

> Before I get started if we look at page 1 and 2 we find that Dr. E had the full benefit of the Petitioner's material and a complete absence of the Respondent's material. … Because I was provided a copy of the letter from Dr. E to my learned friend stating that he wanted all the documents.
>
> In a telephone call with my learned friend, I discussed that and was led to believe that materials had been transferred to Dr. E. What I now believe to be the case is that the Petitioner's materials had transferred to Dr. E.

[25] One of the determinations that must be made is in respect to Mr. Vlug's representation to the court; namely that he had a telephone call with Mr. Storey on the logistics of document delivery to Dr. E.

[26] Before Madam Justice Martinson, Mr. Vlug took the position that it was Mr. Storey's responsibility to deliver both of the petitioner's and the respondent's materials to Dr. E, and that Mr. Storey had deliberately sent only his client's materials and had not informed Mr. Vlug that he was not going to be sending Mr. Vlug's materials to Dr. E. In response to this allegation, Mr. Storey stated to the court:

> I have a copy of a fax in my file that I sent to my friend saying, "I'm sending the Petitioner's materials, you send your client's materials" - so I don't want there to be any suggestion that I did something underhanded here. This is not true.

[27] Mr. Storey subsequently complained to the Law Society. One of those complaints was that Mr. Vlug had represented to Madam Justice Martinson, in the Supreme Court of British Columbia, that there had been a telephone call between him and Mr. Storey to the effect that Mr. Storey had delivered all of the pleadings and affidavits to Dr. E, including those of Mr. Vlug's client.

[28] The Law Society takes the position that the Respondent's representation to the court and to the Law

Society about this telephone call amounted to professional misconduct because this representation was made when Mr. Vlug knew, or ought to have known, that it was not true.

[29] It is of fundamental importance that lawyers ensure that any representations that are made to a court or regulator are made so that the court or regulator need not have to make further inquiry. In *Law Society of BC v. Galambos*, 2007 LSBC 31, the hearing panel made a finding of professional misconduct in respect of a misrepresentation the respondent made to the court.

[30] In *Law Society of BC v. Samuels*, [1999] LSBC 36, the hearing panel considered misleading statements a lawyer made to the court and found professional misconduct in respect of those statements. The panel commented at paragraph 12:

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

[31] The law does not require us to find intentional misconduct. A determination of professional misconduct may be made even if the misrepresentation is not intentional. In *Law Society of BC v. Botting*, 2000 LSBC 30, the citation before the hearing panel alleged misrepresentations to the court and to the Law Society. The panel held at paragraph 60:

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

[32] With respect to the issue of filing affidavits with false or misleading statements, the hearing panel in *Law Society of BC v. Foo*, [1997] LSDD No. 197, commented on the importance for lawyers to ensure accuracy in documents that will be relied on by the courts or other litigants:

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

[33] There was conflicting evidence between the testimony of Mr. Storey and the testimony of Mr. Vlug with respect to the alleged telephone call. The Panel accepts the principles in *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA), that "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." These principles have been accepted by other hearing panels, including in *Law Society of BC v. Shauble*, 2009 LSBC 1.

[34] Mr. Storey has practised family law since 1982, has contributed to a number of publications, was involved with the new Family Law Act and has been a presenter to Continuing Legal Education on family law issues. His primary focus of practice is child custody and child abductions, and many of those cases require the preparation of a "Views of the Child Report". He indicated that it is his practice to copy other counsel when he writes to third parties so that other counsel can review his correspondence. He testified that he never had a problem with this procedure. Accordingly, it was Mr. Storey's view that Mr. Vlug would have been able to see his letters of April 1 and April 2 to Dr. E and to expect that Mr. Storey was only sending his client's materials.

[35] Mr. Storey testified that he had no record or recollection of a telephone call with Mr. Vlug regarding the logistics of forwarding documentation to Dr. E, although there may have been one with respect to a logistical matter concerning access to the child during the proceedings. Mr. Storey testified that he rarely communicated with Mr. Vlug by telephone and usually did so in writing, and that there were no notes to the file substantiating the alleged telephone call in his records, nor timesheet entries substantiating such call.

[36] Mr. Vlug also testified that he had no notes to the file or timesheet entries that could have substantiated the existence of the telephone call.

[37] As for the delivery of the documents to Dr. E, it was clear from Mr. Storey's letters that he would only be responsible for sending his client's materials to Dr. E and that Mr. Vlug would be responsible for sending his

client's materials to Dr. E. When asked why Mr. Storey would not have forwarded Mr. Vlug's client's documents, Mr. Storey indicated that there was no need, as the letter was clear that Mr. Storey was only sending his client's documentation, that he was not responsible for acquiring, photocopying and then sending opposing counsel's material to Dr. E. Put another way, the legal representation of ES was Mr. Vlug's job, not Mr. Storey's.

[38] In weighing the testimony of Mr. Vlug and Mr. Storey, the Panel believes that it made little sense for such a telephone conversation to have occurred when Mr. Storey's two letters specifically indicated what Mr. Storey was doing and what he was not doing. All Mr. Vlug had to do was to read the letters and he would know what Mr. Storey was sending.

[39] Mr. Storey had little or no interest in the outcome of the discipline proceedings against the Respondent, whereas Mr. Vlug had a substantial interest in the outcome of the discipline proceedings in terms of his reputation, and in terms of a finding of professional misconduct against him. Whether a witness has an interest in the outcome of the proceedings is a factor in assessing witness credibility enunciated within *Faryna v. Chorny*, (supra). That principle was adopted by the hearing panel in *Law Society of BC v. Shauble*, (supra).

[40] With respect to allegation 1(a), the Panel accepts the evidence of Mr. Storey. His evidence was clear, convincing and cogent. It was unreasonable to expect that a telephone conversation was necessary or reasonable in the circumstances, as it would not make sense for Mr. Storey to have to assure Mr. Vlug, by telephone, that only Mr. Storey's client's materials were sent to Dr. E. He had already confirmed this in writing in two separate letters. Accordingly, the Panel does not believe that a telephone conversation occurred, and we agree with the Law Society's position that Mr. Vlug made a representation in submissions to a Judge of the Supreme Court that he knew, or ought to have known, was not true.

[41] With respect to allegation 1(b), making a false representation to the Law Society in the course of its investigation, Mr. Vlug wrote to the Law Society on August 4, 2009 and represented that there was a telephone conversation between him and Mr. Storey:

> I asked him if he had sent all the materials to Dr. E. I asked because I wanted to know if Dr. E had the materials or whether there was something that had to be done. Rather than seize this opportunity to report that Dr. E needed my materials he stated to me, "the materials have been sent." When Mr. Storey denies this telephone conversation took place, he is lying.

[42] The Panel has concluded, based on the evidence discussed above in respect to allegation 1(a), that Mr. Storey's evidence is to be preferred to that of Mr. Vlug, and that, consequently, there was no telephone conversation between him and Mr. Story on this matter and that his representation to the Supreme Court to that effect was not true.

[43] As we have found that his representation to the Supreme Court with respect to the telephone call was untrue, we also find that his additional representations to the Law Society with respect to the existence of this telephone call are also untrue.

[44] We find, on the balance of probabilities, that there was no telephone conversation between the Mr. Vlug and Mr. Storey. Accordingly, to make representations before a Judge of the Supreme Court and to the Law Society that such a phone call occurred when Mr. Vlug knew or ought to have known it did not happen, constitutes professional misconduct because it is a marked departure from what the Law Society expects of lawyers. Lawyers cannot lie to a court or to the Law Society, or for that matter, their colleagues. Doing so is a marked departure and amounts to professional misconduct.

Allegations 2 and 3

[45] Allegations 2 and 3 also arise from the ES matter and relate to the Respondent preparing and commissioning two affidavits sworn by his client ES that represented to the Supreme Court and to the Court of Appeal that, "there was an active attempt by the Petitioner to deprive Dr. E of the Respondent's materials." It is the Law Society's position that the Respondent knew or ought to have known that the representation was untrue or that the affidavit was not competently drafted, pursuant to Chapter 3, Rules 1 and 3 of the *Professional Conduct Handbook*, as it contains statements that were not identified as being made on information and belief and the source of such information is not identified.

[46] Mr. Storey's letters of April 1 and 2, 2009, discussed at length above, are clear. Mr. Storey was sending

his client's materials to Dr. E so that Dr. E could prepare his report, and Mr. Vlug should have been sending his client's materials to Dr. E. That being so, the Panel believes that Mr. Vlug knew or ought to have known that the statement in the affidavit that there was "an active attempt by the Petitioner to deprive Dr. E of Mr. Vlug's materials" was not true. Indeed, how could there be an active attempt to deprive Dr. E of the respondent's materials when Mr. Vlug received Mr. Storey's April 2 letter, which indicated what documents Mr. Storey was sending to Dr. E.

[47] Affidavits that are based on information and belief must identify that they are being made on information and belief and the source of such information must be identified. Mr. Vlug's client, ES, testified on behalf of Mr. Vlug that he believed Mr. Vlug with respect to Mr. Vlug's assertion that Mr. Storey was trying to deprive Dr. E of the materials. Accordingly, the affidavit ought to have so disclosed.

[48] Based on the totality of the evidence, we find that the Respondent knew that there was not an active attempt by Mr. Storey to deprive Dr. E of Mr. Vlug's client's materials. Accordingly, preparing an affidavit with a statement to that effect for a client to swear is, in our view, a marked departure from that conduct the Law Society expects of lawyers and therefore amounts to professional misconduct. A lawyer must not prepare or take a client's oath on an affidavit that contains statements that the lawyer knows or ought to know are not true. Mr. Vlug received the April 2 letters from Mr. Storey, and any suggestion that Mr. Storey was attempting to deprive Dr. E of the materials is not worthy of belief.

[49] We find with respect to each of allegations 2 and 3 that the Respondent has committed professional misconduct.

Allegation 4

[50] The ES matter was appealed to the Court of Appeal and heard by the court on June 22, 2009. Allegation 4 is that the Respondent represented to the Court of Appeal that he had not received a letter sent by Mr. Storey in which Mr. Storey wrote that the Respondent was to provide his client's documents to Dr. E. The Law Society takes the position that this conduct is either professional misconduct or incompetent performance of duties.

[51] The transcript of the Court of Appeal proceeding was admitted as evidence, and on page 48, the following exchange occurs between the court and Mr. Vlug:

> The Court: Well did you not get correspondence from Mr. Storey saying, I propose to send my documents and you send yours?
>
> Mr. Vlug: No, I did not.
>
> The Court: You did not.

[52] In evidence, Mr. Vlug admitted that he had received Mr. Storey's letter of April 2.

[53] However, he took the position that he did not mislead the court because he did not receive a letter specifically directed to him as "addressee" and thus he did not receive correspondence from Mr. Storey with respect to the logistics of delivering the documents to Dr. E. He also took issue with the wording, "I propose to send my documents and you send yours," suggesting that the wording chosen by Mr. Storey in his April 2 correspondence was not the same as the question asked by the Court of Appeal.

[54] The Panel finds that Mr. Vlug intentionally made this statement to the Court of Appeal when he knew or ought to have known that the statement was untrue. He admitted receiving by fax the April 2 letter in which Mr. Storey indicated very clearly in his own words that he was going to send his client's documents to Dr. E and suggesting that Mr. Vlug do the same with his client's pleadings and affidavits. Indeed, Mr. Vlug admitted receiving another letter on April 2 with which Mr. Storey forwarded his client's documentation to Dr. E.

[55] The Canons of Legal Ethics, section 2(3) applicable at the time, states "A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law." We find the Respondent misstated facts that he knew or ought to have known were untrue.

[56] The transcript from the Court of Appeal is clear. A direct question was asked of Mr. Vlug: did he or did he not receive a letter from Mr. Storey to the effect that "you send your materials … I'll send mine." We find that he lied to a Judge of the Court of Appeal.

[57] A lawyer cannot play semantics with the court by alleging that a faxed copy of correspondence from a lawyer as a "cc" was not correspondence received from that lawyer, nor can the lawyer play semantics with the wording of the letter when answering a specific question posed to him or her by a judge. The Law Society must demand that lawyers are forthright and honest in all their dealings with the court, and following *Galambos* (supra), the court must be able to accept statements of counsel without having to make further inquiry; anything less would bring the administration of justice into disrepute. In our view, the Respondent's conduct in this regard brings the administration of justice into disrepute. We find that it amounts to professional misconduct.

Allegation 5

[58] Allegation 5 arises out of Mr. Storey's complaint to the Law Society that the Respondent allegedly made discourteous and unfounded statements about Mr. Storey regarding the logistics of the delivery of the pleadings and affidavits.

[59] Specifically, Mr. Vlug is alleged to have made discourteous and unfounded statements about Mr. Storey to the Court of Appeal when he said that Mr. Storey had "duped" him: Mr. Vlug's letter of December 2, 2009 to the Law Society in which he suggested that Mr. Storey's conduct was aimed at obtaining an advantage of some sort; and Mr. Vlug's December 13, 2009 letter to the Law Society in which he alleged that Mr. Storey's correspondence was created with the intention of causing a slip that would further the advantage of providing only the other party's pleadings and affidavits.

[60] Mr. Storey's correspondence of April 2 was straightforward and clear. It is also clear that these letters were forwarded to and received by Mr. Vlug.

[61] We find that the Respondent's position before the Court of Appeal and in correspondence to the Law Society that Mr. Storey had done something improper or was seeking to obtain an unfair advantage or was seeking to create a "slip" is disingenuous and untrue.

[62] We find that statements respecting Mr. Storey that Mr. Vlug made to the Law Society and in the pleadings to the court were discourteous and were unfounded. Mr. Vlug accused Mr. Storey of trying to dupe him, and accused him of lying. To accuse someone of "duping you" and being a "liar" is an accusation of deception. Indeed, the evidence clearly indicates that Mr. Vlug was the one who was lying; to the Court of Appeal, the Law Society, and to the Hearing Panel.

[63] Such statements made by the Respondent are damaging to the reputation of Mr. Storey. The Law Society requires lawyers to deal with each other with civility and integrity, and failing to do so is a marked departure from that conduct the Law Society expects of its members. The Respondent's conduct amounts to professional misconduct.

Allegation 6

[64] Allegation 6 arises out of the Respondent's legal representation of ES and his response to the Law Society respecting Mr. Storey's complaint against him. Allegation 6 asserts that the Respondent made a misrepresentation to the Law Society by claiming that the Court of Appeal had an "off record" discussion with Mr. Storey respecting Mr. Storey's apparent failure to deliver Mr. Vlug's client's affidavits and other materials to Dr. E in April, 2009.

[65] In a letter to the Law Society dated August 4, 2009 in response to complaints made by Mr. Storey, Mr. Vlug stated:

> In the Court of Appeal the court discussed how it is standard practice that when a lawyer seeks to vary from the normal procedure, the varying lawyer writes a letter to the other lawyer and informs him forthright. The Court of Appeal asked whether I had received such a letter and I said I had not.

[66] Mr. Vlug wrote the Law Society again on October 23, 2009 and indicated that he had ordered the transcripts of the appeal. He said that he had listened to the tape recording of the appeal, but he failed to indicate in his letter that there was an "off record" discussion between Mr. Storey and the Court of Appeal.

[67] Mr. Vlug obtained a copy of the Court of Appeal transcript and stated in a letter to the Law Society dated December 2, 2009:

> If the judge ordered all of the materials to be reviewed and your psychologist contacts you for all of the materials to be provided, why only provide your clients [sic] materials? What is the purpose of this departure? Having departed in such a fashion why wasn't there a letter directly to Mr. Vlug saying "I propose to send my client's materials and you send yours."
>
> This was the nature of the off the record Court of Appeal's inquiry into the peculiarity of Mr. Storey's actions that seemed to be aimed at obtaining an advantage of some sort.

[68] The allegation of an off record discussion between Mr. Storey and the Court of Appeal was made in another letter to the Law Society dated December 13, 2009. In correspondence to the Law Society dated May 5, 2010, Mr. Vlug alleged that Mr. Storey was "lectured to by the Appeal court judge." When the Law Society wrote to Mr. Vlug and asked him to clarify and confirm that Mr. Storey had been lectured to by the Court of Appeal, and that such comments did not appear on the transcript, Mr. Vlug replied that the critical comments were made "off record".

[69] In subsequent correspondence to the Law Society dated September 9, 2011, Mr. Vlug again stated that the "off record" discussions did not show up on the Court of Appeal transcript.

[70] Mr. Storey testified that no off the record discussion took place before the Court of Appeal. His evidence was that, in his experience before the Court of Appeal, he had not known the Court of Appeal to make off the record comments to counsel.

[71] Mr. Storey also testified that he had no recollection of having been "lectured to" or "chastised" by the Court of Appeal with respect to this matter. If he had been the subject of criticism from the Court of Appeal, he testified it would have been exceptional and he would have remembered it.

[72] Mr. Vlug testified that he recollected that the "off record" discussion occurred at a particular point in the Court of Appeal transcript. However, the Court of Appeal transcript does not reflect that the Court went "off record", nor does it reflect that the proceedings were adjourned briefly or the court reporting system was shut off.

[73] Mr. Vlug gave evidence that he did not take notes of the hearing at the Court of Appeal.

[74] The Panel prefers the evidence of Mr. Storey over the evidence of Mr. Vlug with respect to the alleged off record discussion. The point of transcripts is to show what was said to the court and what was said by the court in particular proceedings. The Court of Appeal transcript contains numerous entries where there was an adjournment for morning recess (19 min.); once for the noon recess (1 hour 29 min.); and once for the afternoon recess (5 min.), but no notation of an "off record" conversation and no record of a chastisement of Mr. Storey.

[75] The Panel believes that, if there was any chastisement of Mr. Storey by the Court of Appeal, it would have been captured by the court reporter and reflected in the transcripts. If there had been an off record discussion, especially one in which a lawyer was criticized, there would have been an indication of an off record discussion. There is not, and Mr. Storey, ostensibly the victim of this apparent off record chastisement, has no recollection of it.

[76] The Panel finds that alleging an "off record" discussion between the Court of Appeal and Mr. Storey in which the court chastised Mr. Storey for withholding documents from Dr. E was a statement that the Respondent knew or ought to have known was false. There is no evidence in the Court of Appeal transcript supporting the existence of an "off record" discussion criticizing Mr. Storey, and Mr. Storey has no recollection of being criticized by the Court of Appeal; something that a lawyer would recall. Making a false representation to the Law Society is a marked departure from that conduct the Law Society expects from its members. It also displays gross culpable neglect of a lawyer's duties. Accordingly, such conduct amounts to professional misconduct.

[77] We find with respect to allegations 1 to 6 that the Respondent has displayed culpability grounded in a fundamental degree of fault.

PART 2 – THE PS MATTER

[78] Allegations 7, 8, and 9 concern a family law matter in which the Respondent represented PS, the Plaintiff in a matter unrelated to the other allegations.

Background and evidence

[79] On October 30, 2008, Mr. Vlug filed a Writ of Summons - Family Law Proceeding ("Writ") and a Statement of Claim - Family Law Proceeding ("Claim") (collectively the "New Westminster Filing") in the New Westminster Registry of the British Columbia Supreme Court. The New Westminster Filing showed PS's Canadian name, the same name shown on the marriage certificate verifying the parties' marriage in December 2006. It was amended and annotated February 10, 2009 to insert the Defendant's Chinese name, which was omitted in paragraph 3 of the initial Claim. The only relief sought in the New Westminster Filing was "divorce". The Plaintiff in both was identified as PS by his Canadian name.

[80] The reason that the filings were made in the New Westminster Registry rather than the Vancouver Registry, which was much closer to Mr. Vlug's office, was that MT, Mr. Vlug's paralegal assistant who was responsible for Registry filings, frequently delegated the delivery to the Registry to her son. At the time, he was attending Douglas College in New Westminster, a Registry more convenient for him.

[81] MT had worked for Mr. Vlug for 10 years. Her responsibilities included: handling uncontested divorces for Chinese clients, obtaining marriage certificates, and translating oral and written communications between Mr. Vlug and his many Chinese clients. She was called as the Law Society's witness; her testimony was fluent and unequivocal. She testified that PS gave her the marriage certificate, that it was included in the New Westminster filing on October 30, 2008, and that she had kept a copy.

[82] MT said that Mr. Vlug had two employees: herself and an administrative assistant who did the bookkeeping and some other duties, but she was unsure as to what those duties were. Apparently there was minimal interaction between the two regarding the running of the law practice.

[83] On February 5, 2010, Mr. Vlug filed another Writ and Claim, but this time, with the Vancouver Registry (the "Vancouver Filing"). The Vancouver Filing identified the Plaintiff by his Chinese name and expanded the Relief claimed from "divorce" only, as set out in the New Westminster Filing, to include "division of the family assets" and "other relief". The "other relief" that PS claimed was "that the Defendant be restrained and enjoined from disposing of, encumbering, assigning or in any similar manner dealing with family assets … without the consent in writing of the Petitioner [PS] or without further Order. …".

[84] MT testified that, after the New Westminster Filing but before the Vancouver Filing, PS had attended on Mr. Vlug to express his concern about a massage parlour that had been sold. MT was the interpreter at that meeting. All issues, including property, were settled by agreement between the parties on January 17, 2011.

[85] In the Vancouver Filing, Mr. Vlug asserted on behalf of his clients that "it is impossible to obtain a certificate of the marriage or a certificate of the registration of the marriage because there is an emergency need to for [sic] a Certificate of Pending Litigation … a copy of the Marriage Certificate will be provided shortly."

[86] On January 27, 2010 Mr. Vlug signed a Requisition for an Order for Divorce in the Canadian name of PS, which was filed in the New Westminster Registry on February 5, 2010, almost one year after the Vancouver Filing. On March 16, 2010 the divorce order was granted and entered on March 19 in the New Westminster Registry. In a March 25, 2010 letter to the Defendant's lawyer, Mr. Vlug described the Requisition as "inadvertent".

[87] MT testified that, after the Vancouver Filing was made, Mr. Vlug instructed her to "do nothing"; she said that he did not inquire as to whether the New Westminster action had been discontinued. Mr. Vlug and MT had a "very serious" discussion after which she filed a Notice of Discontinuance in the New Westminster Registry on March 22, 2010.

[88] The Claim in the Vancouver Filing included the following:

> PART D: OTHER PROCEEDINGS AND AGREEMENTS
>
> There has been no other proceeding between or any agreement between the parties with respect to a separation between the parties or to the support or maintenance of a party or a child of a party, or with respect to the division of property of the parties (ASF 56 at paragraph 14).

Expert testimony

[89] The Law Society called Mr. Dinyar Marzban, QC, to give expert testimony. Mr. Marzban, who was

called to the Bar in 1982, has extensive experience in matrimonial disputes; he is widely published on the topic and is currently a member of the Supreme Court Rules Committee. He is also a member of the International Academy of Matrimonial Lawyers.

[90] Mr. Marzban tendered a written report on June 25, 2012 and also testified in this hearing. His testimony is summarized as follows:

> (a) The Central Registry of Divorce Proceedings ("CRDP") exists to identify and prevent multiple divorce proceedings between the same parties. A clearance certificate from the CRDP, indicating that there are no other divorce proceedings pending between the same parties, must be in the hands of the court before a divorce can be granted. A "proceeding" includes an uncontested divorce.
>
> (b) There is no impediment to a lawyer's commencing a second action in the same or another Registry claiming property relief pursuant to the *Family Relations Act* ("FRA") [now the *Family Law Act*], provided that the existence of a pre-existing proceeding is disclosed in the second action.
>
> (c) Any lawyer who is competent to practise family law in British Columbia would know that an action claiming property relief under the FRA must always be accompanied by a claim for divorce, and that such a lawyer would have known "that he or she could not issue two divorce proceedings for the same client, against the same spouse, without discontinuing the first one."

[91] The Law Society filed an affidavit sworn August 1, 2012 from Ms. Michelle McMillan, Program Manager for the CRDP. Ms. McMillan's evidence is summarized as follows:

> (a) The reason for the existence of the CRDP is to "detect and prevent duplicate divorce proceedings in different courts across Canada for the same marriage … the registry is used to avoid or resolve jurisdictional disputes that may arise under the *Divorce Act*."
>
> (b) The registry is also "designed to keep a record of dismissal or discontinuance of all divorce proceedings as well as all divorce judgments rendered by a Canadian court."
>
> (c) If a duplicate divorce proceeding or an actual divorce judgment is detected for the same parties, both courts are advised; the decision as to how to proceed is in the hands of the two courts.
>
> (d) The CRDP relies on information provided to the court registrar concerning "surname at birth and full given name." This data is used by the registry to perform its searches. Ms. McMillan is "unfamiliar with any ordinary or standard convention for naming parties in a divorce proceeding."

The Respondent's submission

[92] The Respondent, in his opening statement, submitted that there was nothing to be gained by filings being active in the two jurisdictions because the Vancouver Filing would have been denied. He says that he had a "slight mix-up".

[93] The Respondent indirectly addressed the statement at paragraph 14(a) of the Claim filed at the Vancouver Registry, which asserts that no other proceeding was extant at February 5, 2010, the time of the Vancouver Filing. He apparently relied on the communication between him and MT, wherein he told her to "stop the file," and his belief that her reporting to him that "the Requisition was filed" might have been an innocent misunderstanding on his part. She meant the "Requisition for Divorce," but she testified at the hearing that she was not sure that the Respondent understood that.

[94] Although acknowledging that the New Westminster action should have been discontinued, the Respondent opined in his opening statement to the hearing that "the deal" had broken down and "why not do it all at once?" The fact that the Vancouver application would have ultimately been denied is not adequate justification for failing to follow CRDP requirements to refrain from duplicate active filings in respect of the same parties.

The Law Society's submission

[95] The Law Society says that the Respondent's description of the parties in the style of cause in the Vancouver action was a misrepresentation and therefore constitutes professional misconduct. It relies on

Law Society of BC v. Botting [2001] LSBC 30, to assert that a misrepresentation need not be intentional in order to constitute professional misconduct. In the alternative, the Law Society submits that, if the Panel does not find that the description of the parties in the style of cause was an intentional misrepresentation, then it displays incompetence with regard to allegation 7.

[96] The Law Society submits that, if Mr. Vlug intentionally omitted describing the New Westminster action in paragraph 14 of the Vancouver Claim, that omission is professional misconduct. In the alternative, if the Panel finds that Mr. Vlug was not aware of his obligation to describe any action between the parties, then the appropriate adverse determination is incompetence in respect of allegation 8.

[97] With regard to Mr. Vlug's statements at paragraph 22 of the Vancouver Claim relating to the "impossibility" of providing a marriage certificate: if the Vancouver Filing was made intentionally, a finding of professional conduct is warranted. Otherwise it is open to the Panel to make a finding of incompetence with respect to allegation 9.

[98] We accept Mr. Marzban's opinion that no lawyer competent to practise family law in British Columbia would be unaware of the process of obtaining leave to file the Statement of Claim without the Certificate of Marriage. If Mr. Vlug was not aware of this process, then incompetence is the appropriate adverse determination in respect of this allegation.

Discussion

[99] As the Respondent stated in his opening, family law is a highly emotional area of the law. For the clients, divorce is a traumatic experience. As this case demonstrates, it is also procedurally exacting. Mistakes and oversights cause delays, increase costs, and add to clients' stress. Sole practitioners who have busy family law practices should have office procedures in place that facilitate the professional's ability to check the status of their files reliably and routinely, including outstanding documentary requirements. Staff should routinely interact with one another and with the responsible professional to ensure that essential procedures are followed and nothing is overlooked.

[100] In Mr. Vlug's situation, such processes are especially relevant because he relies on MT's translation of the written and oral communications from his large Chinese clientele.

[101] With respect to allegation 7, the Panel believes MT, who testified that she had seen the Canadian marriage certificate, included it with the New Westminster Filing, and made a copy. The certificate was or should have been in Mr. Vlug's file. There is no plausible excuse for filing in Vancouver without the marriage certificate and under a wrong name. We do not accept Mr. Vlug's explanation for his conduct. He either knew or ought to have known that the documents he prepared and caused to be filed in Vancouver were improper and misleading. This was a marked departure from the standard of conduct of a lawyer and in our view constitutes to professional misconduct.

[102] With respect to allegation 8, there is no acceptable excuse for misrepresenting the existence of the then active New Westminster proceeding. The Notice of Discontinuance is a simple, one-page filing that does not require the consent of either the court or the defending party. It should have been filed in New Westminster before the filing in Vancouver. It is no excuse that the Respondent believed that his staff member had discontinued the file; he would have had to sign the Notice. Again, the Respondent's conduct was a marked departure from the standard expected of a lawyer practising in family law and in our view, constitutes professional misconduct.

[103] Allegation 9 is closely related to allegation 7. We find as a fact that the marriage certificate was provided to the Respondent's office by PS; there was no need for the Respondent to avail himself of the relief provided by paragraph 22 of the Vancouver Claim. Given our finding, having done so the Respondent has made an untrue statement to the court. This too was a marked departure from the standard expected of a lawyer practising in family law and in our view, constitutes professional misconduct.

PART 3 – THE MW MATTER

Allegations 10 and 11

[104] Allegations 10 and 11 relate to the Respondent's representation of his client ("MW") in a family law matter. The Law Society alleges that, during the course of that representation, Mr. Vlug added documents to a previously prepared and sworn to Form 89 Financial Statement (allegation 10) and prepared and

commissioned an affidavit on behalf of his client that contained a statement that he knew was false (allegation 11).

[105] In 2009, MW retained Mr. Vlug to apply to vary a 2006 order for child and spousal support. In due course and in support of the application, Mr. Vlug prepared and had MW swear a financial statement containing 28 pages of financial information. ("Financial Statement One"). By swearing Financial Statement One, MW confirmed that "the information set out in this financial statement is true and complete to the best of my knowledge." 2009 tax information was not attached. Mr. Vlug agrees he was responsible for the preparation of Financial Statement One and commissioning MW's oath on it on March 19, 2010.

[106] Unfiled copies of a Notice of Motion, Affidavit of MW and Financial Statement One were served on MW's wife, AW, on March 28, 2010.

[107] On April 7, 2010, these documents were served by Mr. Vlug on AW's counsel, Mr. Shantz.

[108] Mr. Shantz took the position that MW had not provided sufficient financial disclosure, in particular, his 2009 tax return or evidence of his 2009 income.

[109] On September 13, 2010, Mr. Vlug wrote to his client requesting that he provide, inter alia, the 2009 tax information and other financial records. MW provided those documents to Mr. Vlug soon after.

[110] On February 23, 2011, Mr. Vlug met with MW and had him swear an affidavit in response to the affidavit of AW that had been earlier provided. At paragraph 5 of that affidavit, MW deposed that his 2009 Notice of Assessment was attached to his Financial Statement. As of February 23, 2011, the only Financial Statement that MW had prepared was Financial Statement One which, at that point, did not include his 2009 Notice of Assessment. Mr. Vlug agrees that he was responsible for preparing this affidavit and commissioning MW's oath on it.

[111] Following this meeting, Mr. Vlug wrote a letter to MW to confirm the status of the file. In that letter, Mr. Vlug wrote:

> We last met February 23, 2011. At that time I reviewed with you the emails that I had been sending you about missing documentation. We then reviewed the missing documentation. We also drafted and executed an affidavit in answer to the past affidavits of your ex.
>
> …
>
> We discussed the difference between T1 Generals, Tax Returns and Notices of assessments. I said that I needed all 3 documents for each year. You had said that you would locate all 3 documents for each year. Were you able to locate the 3 different tax documents for each year?
>
> …
>
> You have recently sent me your 2009 tax return (I had asked for a 2010 tax return or T1 general) and a signed financial statement. I need to see you sign the document in front of me before I can notarize it, thus I was unable to notarize it. Since I was unable to notarize it, I am unable to use it.
>
> When we last spoke you had indicated that you were going to search through your available records and to visit with your accountant and obtain the missing tax documents and financial records. Please advise as to how well that has gone. We can then discuss the next step.

[112] On July 14, 2011, Mr. Vlug filed MW's first affidavit sworn March 19, 2010, the February 23, 2011 affidavit and Financial Statement One which by this time had an additional 26 pages appended to it ("Financial Statement Two"). These additional 26 pages included MW's Notice of Assessment for 2009 (dated July 29, 2010), his 2009 T1 General and other financial records prepared and received after the date Financial Statement One was prepared and sworn.

[113] These now-filed documents were served on Mr. Shantz on July 20, 2011. It is clear, and Mr. Vlug admits, that he attached 26 additional pages to Financial Statement One after it was sworn to by MW. He admits that he never contacted Mr. Shantz to advise him that he was adding financial records to the already sworn Financial Statement One.

[114] On July 26, 2011, Mr. Shantz complained to the Law Society. An investigation ensued. In response to a question posed to him by the Law Society asking him to confirm that Financial Statement One did not contain MW's 2009 Notice of Assessment at the time it was sworn, Mr. Vlug replied, "I can only deduce that

the documents were obtained by MW after March 9, 2010." In other words, after Financial Statement One was sworn.

[115] An explanation was requested, to which Mr. Vlug replied:

> At the time that MW swore his statement it was a true statement. In the end the court will view the issue as being: either it has the document or it does not, the rest is irrelevant. The idea of suggesting anything outside of whether the court has the document or not, never crossed by mind.

[116] Subsequent to the filing of Financial Statement One on July 14, 2011 and subsequent to Mr. Shantz's complaint, Mr. Vlug prepared and commissioned a further affidavit of MW. This affidavit was sworn on October 4, 2011 in response to a Notice of Application filed by AW's counsel, Mr. Shantz, which stated in part:

> The Defendant filed his March 19, 2010 Financial Statement on July 14, 2011 with different attachments, including documents that were created after the Affidavit was sworn.

[117] The October 4, 2011 affidavit deposed at para. 2:

> As counsel for the Claimant is raising controversy over the attachments to my March, 2010 financial statement, a copy of those attachments is now marked as exhibit "A" and attached to this my affidavit. With the inclusion of this exhibit to this affidavit there is will be [sic] no need to refer to the March 2010 financial statement as I have already sworn a more updated financial statement on August 17, 2011. There are attachments to my August 17, 2011 Financial Statement as well.

and at para. 18:

> Counsel for the Receiver complained to the Law Society that my lawyer had included too much financial disclosure to my financial statement.

[118] By "counsel for the Receiver", Mr. Vlug meant AW's lawyer, Mr. Shantz. The words "too much financial disclosure," he says, came from MW. The October 4, 2011 affidavit was subsequently filed in court.

[119] In cross-examination by Ms. Gulabsingh for the Law Society, Mr. Vlug agreed that AW's lawyer never complained to the Law Society that Mr. Vlug had included too much financial disclosure in MW's financial statement.

[120] Mr. Vlug's position throughout the Law Society's investigation and at the hearing was essentially that there is nothing wrong with adding financial records to previously sworn to Financial Statement One. He maintains that the most important thing is to ensure financial disclosure, and as long as it has been disclosed to the court, it matters not how it gets there. In his view, it is perfectly fine to attach documents of this nature to a previously sworn to financial statement.

[121] During his testimony and his submissions, Mr. Vlug seemed to be bewildered that a complaint had been launched in the first place and that the Law Society had followed it up with a citation.

[122] When asked why he didn't simply have MW re-swear a new financial statement, he said he didn't recognize it as an issue and simply wanted all the financial records in one place.

[123] The lack of concern he displays over the preparation and commissioning of affidavits and attaching documents to a previously sworn financial statement is troubling.

[124] The preparation and swearing of affidavits on behalf of clients was discussed and dealt with in *Law Society of BC v. Foo*, [1997] LSDD No. 197. The preparation and commissioning of an affidavit containing a statement known by the respondent to be false and stating that a document was attached to an affidavit when that document was not yet in existence, was found to constitute professional misconduct. The panel observed:

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

[125] The Law Society submits that Mr. Vlug's conduct in attaching financial records to a previously

commissioned affidavit constitutes professional misconduct. They argue that Mr. Vlug's position that, in effect, no harm was done by his conduct, ought not to be condoned and that such behaviour compromises the integrity of the administration of justice.

[126] The Panel agrees with the Law Society's submission. The Panel is deeply concerned about the Respondent's somewhat casual and indifferent approach to the drafting and commissioning of affidavits and sworn Financial Statements. An affidavit is a sworn document. It is no different than a person testifying under oath in court. It is the responsibility of a lawyer creating and commissioning an affidavit to ensure it is an accurate statement of the deponent, to the best of the lawyer's knowledge. An affidavit or sworn statement cannot have documents attached to it after it is commissioned. A lawyer cannot prepare and commission an affidavit for a client containing a statement of facts of which the client does not have knowledge.

[127] Mr. Vlug prepared and commissioned an affidavit sworn by MW that contained a statement the he knew or ought to have known was not true. Mr. Shantz's complaint was not about "too much financial disclosure." It was about Mr. Vlug attaching 28 additional pages to Financial Statement One after it was sworn. Mr. Vlug knew that was the case and that the allegation in the October 4, 2011 affidavit was false. The Respondent's conduct constitutes professional misconduct.

PART 4 – DELAY

[128] At the conclusion of final submissions, after all evidence had been entered, and all witnesses had been heard by the Panel, the Respondent argued that the April 1, 2012 citation against him should be dismissed in its entirety due to delay by the Law Society in its investigation and prosecution of the ES matter and that he would be unfairly prejudiced by such alleged delay. In the interest of fairness, the Panel permitted the Respondent to make written submissions and the Law Society to respond in writing to the Respondent's written submissions.

[129] In written submissions following the oral hearing, the Respondent provided greater specificity to his argument on his allegation of delay:

1. Delay issues relate to the fact pattern involving Mr. Storey.

2. Submissions are twofold: that the delays affected the Respondent unfairly in a specific manner and that the delays affected the Respondent in a general manner.

3. The delays affected the Respondent unfairly in two specific ways: the Respondent's recollections, and the recollections of PS.

4. The delays affected the Respondent unfairly in a general sense in that quality of evidence of all witnesses had deteriorated by the time four years had passed.

[130] Essentially, the Respondent's argument is that, because of alleged delays by the Law Society in proceeding against him, the recollection of both ES and the Respondent may have been impaired and the Respondent's position prejudiced.

[131] The Respondent's written submission only makes reference to the fact pattern in relation to the ES matter, which amounts to allegations 1 to 6. It does not speak to the PS matter or the MW matter, indicating that the delay argument has no bearing on the Panel's finding with respect to the PS matter or the MW matter.

[132] The Respondent argues that delay by the Law Society in investigating and prosecuting allegations 1 to 6 prejudices him and compromises the ability of ES (who was one of the Respondent's witnesses) and indeed, the Respondent himself, to recall matters that transpired in 2009 regarding the ES matter.

[133] Specifically, the Respondent argues that both he and ES were asked to give evidence in June, 2013 on a matter that occurred between April and July of 2009, and both individuals' memories may not have been as accurate as they would have been earlier in time. He argues that delay by the Law Society and the deterioration of recollection by witnesses by the passage of time have an effect on his credibility and the credibility of his witnesses.

[134] The Respondent presented no evidence with respect to the possible deterioration of his memory or the memory of ES during the hearing.

[135] The Respondent also argues that ES should have been consulted by the Law Society at an earlier

time and that ES's evidence should have been provided earlier.

[136] The Respondent claims the delays were none of his making and that he was only aware of the Law Society's case against him in December 2010.

[137] He makes note of other delays:

> (a) From December 13, 2009 (when the Mr. Vlug wrote his letter), to December 14, 2010 there is a delay (1 year delay);
>
> (b) From February 8, 2011 to until [sic] August 11, 2011 there is a delay (6 month delay);
>
> (c) From September 9, 2011 until April 2, 2012 there is a delay (7 month delay);
>
> (d) From April 2012 until the hearing June 3, 2013 there is another delay (14 month delay).

[138] To summarize the Respondent's position:

> The passage of time should not become an interference with the Respondent being able to defend himself. The Respondent's inability to remember or any mistake or contradiction that was caused by the passage of time should not be held against him. It is the Respondent's future that is at stake here, so any problems in reconstruction would only affect the Respondent in the end. The adverse effect would be on the right to make answer and defence, which is a fundamental unfairness. Through no bad faith from anyone, the delays involved interfered with recollection and plausible reasonable reconstruction of events.

[139] From the submissions, the Panel is unclear whether or not the Respondent is arguing an abuse of process.

[140] The Law Society takes the position that the Respondent's application should be dismissed for the following reasons:

> (a) there was no inordinate delay by the Law Society in its investigation or prosecution of this matter;
>
> (b) the Respondent did not demonstrate prejudice to the fairness of the hearing by an inability to make full answer and defence due to faded memories;
>
> (c) there was no abuse of process by the Law Society warranting a stay of proceedings or dismissal of the citation.

[141] The Law Society submits that it is unclear from the Respondent's submissions that the delay has resulted in a breach of natural justice, a breach of procedural fairness, an abuse of discretion, an abuse of process or a violation of his rights under the *Charter*.

[142] Procedurally, the Law Society took issue with the Respondent having made the delay argument at the end of the submissions after all evidence of been heard by the Panel:

> The Respondent seeks the remedy of a dismissal of the citation, rather than a stay of proceedings. Seeking a remedy of a stay of proceedings is impractical and untenable in this case because the issue of delay was first raised by the Respondent at the conclusion of his closing submissions at the Facts & Determination hearing, when all of the evidence had already been provided to the Panel.

[143] The leading administrative law case dealing with an application for a stay of proceedings due to delay is *Blencoe v. British Columbia (Human Rights Commission)*, [2000] SCJ No. 43, in which the Supreme Court of Canada indicated that delay may warrant a stay where the delay impairs the respondent's ability to make full answer and defence thereby prejudicing the fairness of the hearing, and where the respondent has suffered prejudice in the form of significant duress and stigma from an unacceptable delay such that it amounts to an abuse of process, even when the fairness of the hearing has not been compromised.

[144] We agree with the Law Society that delay on its own is not sufficient to warrant a stay of proceedings and that the Respondent must demonstrate that the delay was inordinate and unacceptable and provide evidence of prejudice of such magnitude of the fairness of the hearing was impacted by the unacceptable delay. He did not.

[145] Mr. Vlug took two and a half months to provide a substantive response to the Law Society's September 28, 2009 letter. After the exchange of more correspondence, the Law Society wrote to Mr. Vlug on December 14, 2010 with further inquiries arising from his correspondence. It took Mr. Vlug nearly two months to provide a substantive response to that letter.

[146] Affidavit evidence sworn June 12, 2013 by Chrysta Gejdos, Discipline Assistant with the Law Society, indicates that much of the delay was also caused by Mr. Vlug after the issuance of the citation. Ms. Gejdos deposes that:

> (a) three and a half weeks after the issuance of the citation, Mr. Vlug applied for anonymous publication of the citation, but he did not follow proper procedures for such application and was subsequently directed by the Law Society to do so. He followed those instructions, but did not support the application with written submissions;
>
> (b) Mr. Vlug subsequently applied to sever the ES matter from the other matters specified in the citation, but later abandoned the application;
>
> (c) there were two prehearing conferences, the first of which could not be scheduled until five and a half months after the issuance of the citation because of scheduling conflicts and the time it took Mr. Vlug to respond to the hearing administrator;
>
> (d) at the first prehearing conference, Mr. Vlug argued that he should be able to call Justices from the Court of Appeal to provide testimony of the "off record" discussion by the Court of Appeal. This was raised at the second prehearing conference, and he was directed by the Chambers Bencher to apply to the President of the Law Society if he wished to compel a Court of Appeal judge to testify;
>
> (e) Mr. Vlug did not return a telephone call by discipline counsel to canvass availability for the citation hearing. As a result, the first available date for the hearing was in June 2013.

[147] When hearing dates were first canvassed, the Respondent did not state any willingness to make admissions, thus the original hearing had been scheduled on the basis that all facts would be disputed and the schedules of all witnesses had to be accommodated in terms of scheduling the hearing. The Respondent required Mr. Marzban to be present at the hearing for cross-examination, so Mr. Marzban's schedule had to be accommodated.

[148] We do not find the delay is inordinate or unacceptable, either in the investigation stage or in the post citation stage, especially in light of the delays in responding by the Respondent, and the procedural applications and steps taken by the Respondent, which had the effect of delaying the date of the hearing.

[149] We find that there is no evidence of prejudice to the Respondent as a result of the witnesses' memories being significantly weakened by the passage of time on material facts in respect to the ES matter.

[150] We find that the alleged delay did not amount to an abuse of process by the Law Society. The Respondent made his delay arguments at the end of the proceedings as an afterthought. If the Respondent were prejudiced by delay, one would expect he would have raised it at the outset of the proceedings.

SUMMARY OF FINDINGS

[151] In summary, we find that the Respondent has committed professional misconduct with respect to each of allegations 1 to 11.

[152] The application to dismiss the citation as a result of an abuse of process involving delay in proceeding on allegations 1 to 6 is dismissed.