2014 LSBC 17
Decision issued: April 9, 2014
Oral Reasons: February 25, 2014
Citation issued: May 29, 2013

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

DAVID DONALD HART

Respondent

Decision of the Hearing Panel

Hearing date: February 25, 2014
Panel: Lynal Doerksen, Chair, Glenys Blackadder, Public representative, John M. Hogg, QC, Lawyer

Counsel for the Law Society: Carolyn S. Gulabsingh
Counsel for the Respondent: Dennis C. Quinlan, QC

Background

[1] This matter comes before this Hearing Panel as a conditional admission of a discipline violation and consent to a specified disciplinary action that has been accepted by the Discipline Committee pursuant to Rule 4-22. The agreed disciplinary action cannot be imposed until reviewed and accepted by a hearing panel. At the hearing, we gave our oral decision accepting the admission of the Respondent and the consent to disciplinary action. These are our reasons.

[2] The citation reads as follows:

> 1. In the course of representing your client, Client A, in a family law matter regarding her spouse Mr. B, you failed to serve Client A in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. In particular, you failed to do some or all of the following:
>
> (a) keep your client reasonably informed;
>
> (b) answer reasonable requests from your client for information;
>
> (c) inform your client that something would happen or that some step would be taken by a certain date, then allowed that date to pass without follow-up information or explanation;
>
> (d) answer within a reasonable time communications that required replies;
>
> (e) do the work in hand in a prompt manner so that its value to your client was not diminished or lost;
>
> (f) prepare documents and perform other legal tasks accurately;
>
> (g) maintain office staff and facilities adequate to the lawyer's practice;

(h) disclose all relevant information to the client, and candidly advise the client about the position of a matter, whether such disclosure or advice might reveal neglect or error; and

(i) make all reasonable efforts to provide prompt service to your client;

contrary to Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook* then in force.

This conduct constitutes professional misconduct, pursuant to section 38 of the *Legal Profession Act*.

[3] Pursuant to Rule 4-30 we determined that service of the citation was made upon the Respondent as admitted by the Respondent in the Agreed Statement of Facts.

[4] In a written letter to the Chair of the Discipline Committee dated January 2, 2014, the Respondent admits to professional misconduct as set out in the citation in sub-paragraphs 1(a), (b), (c), (d), (g), (h) and (i) and to the following disciplinary action:

(a) a fine in the amount of $7,500 payable by April 30, 2014; and

(b) costs in the amount of $1,000 payable by April 30, 2014.

AGREED FACTS

[5] David Donald Hart was admitted to the Law Society of British Columbia on May 15, 1961 and maintains a full-time family law practice. Since 1998 Mr. Hart has been an associate counsel in a law firm.

[6] On or about September 9, 2009, Mr. Hart was retained by Client A to act for her in respect of issues arising from Client A's separation from her husband, Mr. B.

[7] On September 22, 2009, Mr. Hart filed a Writ of Summons and Statement of Claim on Client A's behalf in the New Westminster Registry, seeking a divorce and corollary relief.

[8] By letter dated October 28, 2009, Mr. Hart advised Client A that a Judicial Case Conference ("JCC") had been scheduled for January 8, 2010.

[9] On or about November 18, 2009, Client A's family residence was sold and the net sale proceeds of $45,073.64 were placed in Mr. Hart's trust account.

[10] On January 5, 2010, Mr. Hart's paralegal, Paralegal C provided the JCC Summary to Client A by email for her review and comment.

[11] On January 8, 2010, Client A and Mr. B attended a JCC with their respective counsel. Mr. B was represented by Lawyer D.

[12] On January 13, 2010, Mr. Hart wrote to Client A to report the outcome of the JCC and to advise that his paralegal would contact her to work with her on the unresolved issues, which were listed in Mr. Hart's letter. One of the unresolved issues was the amount to be paid by each party toward the cost of the parties' son's schooling.

[13] Mr. Hart provided his paralegal with a copy of his January 13, 2010 letter to Client A and instructed her to work with Client A to obtain some documents and information regarding Client A's outstanding claims.

[14] On January 19, 2010, Lawyer D wrote to Mr. Hart by email and enclosed a letter from the parties' son's school detailing the schooling costs. Lawyer D advised that his client would pay a portion of the schooling costs directly to the school. Mr. Hart forwarded this letter to his paralegal and instructed her to provide a copy to Client A for her comment and response.

[15] On January 20, 2010, Mr. Hart's legal assistant, Legal Assistant E, forwarded to Client A the correspondence exchanged between Mr. Hart and Lawyer D following the JCC in respect to lists of documents.

[16] On March 12, 2010, the order made on January 8, 2010 at the JCC was entered.

[17] On March 29, 2010, Lawyer D wrote to Mr. Hart about the parties' son's schooling costs and arrears of child support that may be owed:

> I believe we have determined the cost for the Montessori school. Please inform me if your client is not in agreement with that position.
>
> With respect to the issue of any arrears of section 7 expenses, at court you informed me Client A would be preparing a detailed calculation of any arrears she believes are owing by Mr. B. It has been 80 days since the Judicial Case Conference and I still await Client A's detailed calculation.

[18] On March 31, 2010, Mr. Hart instructed his paralegal to follow up with Client A regarding the issues raised in Lawyer D's letter dated March 29, 2010 by asking his secretary, Secretary F, to email Paralegal C with his instructions.

[19] On April 29, 2010, Lawyer D wrote to Mr. Hart again and stated:

> May I please have a reply to my letter of March 29, 2010. Your client's response is taking far too long in coming. This matter needs to be resolved.

[20] On May 10, 2010, Paralegal C provided Client A with a first draft of a letter in response to Lawyer D's April 29, 2010 and March 29, 2010 letters. Client A emailed Paralegal C back the same day.

[21] On May 17, 2010, after Paralegal C consulted with Client A to obtain clarity on some of the issues in the letter to Lawyer D, Mr. Hart sent a letter to Lawyer D in response to his April 29, 2010 and March 29, 2010 letters.

[22] On June 3, 2010, Mr. Hart wrote to Lawyer D and asked for a response to his May 17, 2010 letter.

[23] On July 14, 2010, Lawyer D responded to Mr. Hart's May 17, 2010 letter. Secretary F emailed Client A on July 16, 2010 and provided her with a copy of the letter. In a separate email, Secretary F asked Client A to provide her comments on the letter to Paralegal C.

[24] On July 26, 2010, Client A sent Paralegal C and Secretary F duplicate emails with her comments in response to Lawyer D's July 14, 2010 letter. Paralegal C says she did not receive this email until Client A resent it on August 13, 2010.

[25] On July 28, 2010, Paralegal C emailed Mr. Hart and Legal Assistant E and asked if either of them had heard from Client A.

[26] On August 11, 2010, Client A emailed Paralegal C and asked for an update on her file.

[27] On August 13, 2010, Paralegal C contacted Client A by email and advised:

> I have reviewed your file and cannot see that we have received a response from you with respect to Lawyer D's letter of July 14, 2010. If you have provided a response could you please re-send it to me. Thank-you.

[28] Client A replied to Paralegal C's August 13, 2010 email the same day. In her email reply, Client A noted that she previously provided her response and commentary to Paralegal C on July 26, 2010. Paralegal C

forwarded Client A's email to Mr. Hart, and stated that Client A said she previously sent it but Paralegal C had no record of receiving it.

[29] On August 23, 2010, Client A emailed Paralegal C and asked for an update. Mr. Hart and his staff did not reply to this email.

[30] On August 25, 2010, Client A telephoned Mr. Hart's office and spoke with Legal Assistant E. After their conversation, Legal Assistant E reported the conversation by email to Mr. Hart and Paralegal C:

> Legal Assistant E – Aug 25 10 – 1:48PM – phone call from client asking for status of where we are at exactly. Nothing has happened for a year and she has spent so much money. She would like to proceed with matters herself except the financial issues. We are to advise her what is left to do and she'll see what matters she can handle on her own. She has also not received, although requested on numerous occasions, the JCC Order. I emailed it to her.
>
> Client is not happy!

As stated in her email, Legal Assistant E sent Client A a copy of the JCC Order on August 25, 2010 by email.

[31] On August 31, 2010, Client A emailed Mr. Hart and said:

> Mr. Hart
>
> I wish to express my disappointment by the lack of services and professionalism that has been demonstrated by several members of your team. My repeated requests for the Court Order from the Jan 2010 JCC were ignored until Aug 25 2010. I then received a statement dated August 19 2010 for "services rendered." From my perspective, there were no "services rendered" and it appears I was billed for asking for updates on a file that should have been concluded months ago. In short, I am contesting this bill.
>
> When I initially retained you, you told me the matter would be concluded in 4-6 weeks and would cost $5000 with change in my jeans. I have now paid thousands of dollars and am not much further ahead than I was a year ago. You had also told me Lawyer D always settles which he has yet to do and I have not seen you arguing my position.
>
> I have repeatedly forwarded my direction that continues to be disregarded, which is completely unacceptable and results in nothing more than additional fees. I expected a higher level of professionalism from an organization with your reputation.
>
> Regards

[32] On September 7, 2010, Client A phoned Legal Assistant E. Legal Assistant E relayed the content of their conversation to Mr. Hart and Paralegal C by email the same day. Legal Assistant E's email said:

> Legal Assistant E – Sep 7 10 – 1:21PM – voicemail message from Client A indicating it looks like David doesn't want to represent her anymore – when can she pick up her monies from trust.
>
> I see that there is about $45,000 in trust to be held pending court order.
>
> Did you speak with her David? I don't see a letter or email going out to her to give her this assumption.

[33] On September 9, 2010, Paralegal C emailed Mr. Hart. In the email she wrote:

> David, after discussing this file with you on Tuesday the 7th, I phoned Client A and left a long apology, advising we were short-staffed, I was away for two weeks, I'm back and have met with you, asking her to contact me and advise whether it is okay for us to proceed on her behalf. I haven't received a reply. What should we do now?
>
> ....
>
> Thanks, W

Mr. Hart replied to Paralegal C's email and told her to send Client A an email repeating the voicemail message Paralegal C had left for Client A.

[34] On September 9, 2010, Paralegal C emailed Client A stating as follows:

> Good Morning "Client A",
>
> I attempted to reach you by telephone on Tuesday, the 7th of September, but I haven't heard back. I apologize that matters haven't proceeded, we are short staffed (secretarial) and I was away for two weeks. I am back in the office now and have met with David Hart with respect to your matter. Could you please contact me either by email or phone and advise whether it is okay for us to proceed on your behalf.
>
> Thank you.

[35] On September 10, 2010, Paralegal C began drafting a response to Lawyer D's July 14, 2010 letter and sent an email to Client A attaching a draft of the response. Paralegal C also provided a copy of the draft response to Mr. Hart by email on September 10, 2010.

[36] On September 16, 2010, Client A emailed Paralegal C with her comments on the draft response.

[37] On September 29, 2010, Paralegal C sent by email a revised draft letter to Client A and asked for her response. Paralegal C followed up by email to Client A dated October 5, 2010, asking for approval.

[38] On October 5, 2010, Client A responded by email to Paralegal C stating:

> Great, please fwd to Lawyer D.

[39] On October 6, 2010, Mr. Hart faxed a response to Lawyer D's July 14, 2010 letter by letter dated October 5, 2010.

[40] On November 10, 2010, Mr. Hart wrote to Lawyer D to request a response to his letter dated October 5, 2010.

[41] Lawyer D wrote to Mr. Hart by letter dated December 7, 2010, acknowledged that a response to the October 5, 2010 letter was overdue, and proposed a new schedule for his client to have access to his son.

[42] On December 9, 2010, Mr. Hart wrote to Client A, enclosing a copy of Lawyer D's letter dated December 7, 2010. Mr. Hart wrote to Client A:

> ... Please review it and provide us with your comments as soon as possible. If we can get this issue resolved then hopefully we can expect a prompt response to our letter of October 5, 2010.

A copy of Mr. Hart's December 9, 2010 letter was provided to Client A by email from Legal Assistant E.

[43] On December 14, 2010, Client A replied to Legal Assistant E's email. She wrote:

> I will respond to Lawyer D on my own behalf. Can no longer afford legal bills but may need some

assistance from time to time.

Thanks

"Client A"

[44] Legal Assistant E responded to Client A's email on December 14, 2010 and told Client A that Lawyer D would not be able to deal with her directly until Mr. Hart was removed as solicitor of record. Legal Assistant E advised that Mr. Hart had a Notice of Intention to Act in Person in his file, which Client A signed when she first retained Mr. Hart, which would need to be filed and Client A would have to satisfy Mr. Hart's final account before Client A could act on her own. Legal Assistant E asked Client A to get in touch to confirm her instructions to proceed as Legal Assistant E described.

[45] On December 14, 2010, Legal Assistant E and Client A also spoke over the telephone. Client A asked if her file could be transferred to a paralegal other than Paralegal C. Legal Assistant E also emailed Mr. Hart and asked for his instruction about whether or not he wanted to get off the record as Client A's counsel. Mr. Hart replied by email, instructing Legal Assistant E to:

> Pursue A/R and send her MITAP [sic] for signature and return and filing.

[46] On December 15, 2010, Client A emailed Legal Assistant E and confirmed she wanted her file transferred to another paralegal and that she would prepare a draft response to Lawyer D and forward it to the new paralegal.

[47] On December 15, 2010, Paralegal C emailed Lawyer G, the senior partner at Mr. Hart's firm, and asked if the file could be transferred to another paralegal. Lawyer G replied that the file should be transferred to another paralegal and that he would ask Mr. Hart to speak with Client A in January. Paralegal C emailed Legal Assistant E and asked her to contact Client A to advise of the new paralegal to work on her file.

[48] On December 15, 2010, Mr. Hart sent a reply by fax to Lawyer D's December 9, 2010 letter.

[49] On or about January 12, 2011, Mr. Hart received a letter from Lawyer H, who advised he had been retained to act for Mr. B in place of Lawyer D. Mr. Hart did not provide a copy of this letter to Client A, or advise her that Lawyer H had been retained in place of Lawyer D.

[50] On January 19, 2011, Legal Assistant E emailed Mr. Hart and advised him to stop working on the file until the outstanding account receivable had been paid. Legal Assistant E noted Client A's current account receivable was approximately $2,500 and there was $45,073.64 held in trust on Client A's behalf.

[51] On March 9, 2011, Client A emailed Paralegal I, the new paralegal assigned to her file and stated:

> Hi "Paralegal I". Very glad you have been assigned this case and am hopeful you can assist with moving it forward to a final resolution. The attached letter was the last "offer" letter sent to Lawyer D, in October 2010 again we await a response. This has already gone on too long and needs to be resolved. Please advise as to the best course of action Thanks "Client A".

[52] On March 15, 2011, Paralegal I replied to Client A by email and said:

> Hello "Client A", I would suggest one more further follow up with Lawyer D's office requesting a response to our October correspondence. If he continues to not respond, we may have no choice but to proceed with a Court application.

[53] Client A responded to Paralegal I's March 15, 2011 email the same day. Her email said:

> Please see the attached response I have prepared that simply needs to go on your letterhead and

be sent to Lawyer D. Again I do not need to proof it again nor do I need a copy of it. If there is anything else you want to add that may have an impact please feel free. Thanks for your reply.

[54] On April 20, 2011, Legal Assistant E emailed Mr. Hart and provided him a copy of her previous note of January 19, 2011 and said:

> We need to figure out what we are going to do on this file. Her a/r now is about $2700. She needs to decide whether she still wants us to act and if so, we need to secure our a/r and further retainer some how [sic].
>
> If not, let's get off record and get paid!
>
> Any suggestions?
>
> Here are my notes from January. …

[55] On April 21, 2011, Legal Assistant E sent a statement of account to Client A by email, requested that she pay the outstanding amount of $2,877.93 immediately and advised they needed to discuss if Client A wished Mr. Hart to continue representing her. Client A replied to Legal Assistant E by email the same day and said:

> I am confused as I had previously been told ... and been billed for you to tell me (: not to send payments and that the payment would be withdrawn from the funds you have in trust. Now I am being billed twice this time and the Feb 2011 fee for you to ask me to pay the account. I would still like a meeting to review the amount of money that I have already paid which is far greater than I was initially advised and again the "work" done by Paralegal C the former paralegal was completely inadequate and well below satisfactory. I still require representation and trust that moving forward, more effort can be devoted to push this file, which is far from complex, to some sort of final resolution.

[56] On April 27, 2011, Mr. Hart wrote to Lawyer H advising that Lawyer D was authorized to forward to Lawyer H the sum of $45,073.65, being one-half of the net proceeds of the sale from the family home.

[57] On April 29, 2011, Legal Assistant E spoke with Client A by telephone to discuss her outstanding account receivable and the funds Mr. Hart held in trust on her behalf. Client A asked if the trust funds were being held in an interest bearing trust account. Legal Assistant E reported the conversation to Mr. Hart and Paralegal I by email. Paralegal I responded to Legal Assistant E's email the same day and copied Mr. Hart.

[58] On May 2, 2011, Client A met with Mr. Hart and Legal Assistant E in an attempt to address her outstanding concerns. At the meeting, Mr. Hart assured Client A that he would provide her with a letter outlining her options, but he did not send Client A this letter as he told her he would.

[59] On May 5, 2011, Secretary F advised Client A by email that Mr. Hart had talked to Lawyer H, who said he would be reviewing his file materials and would provide an update.

[60] On May 18, 2011, Mr. Hart wrote to Lawyer H to request a reply to his October 5, 2010 letter.

[61] On July 27, 2011, Lawyer H wrote to Mr. Hart about his client's proposed summer access visits with his son. Paralegal I provided a copy of this letter to Client A on July 29, 2011 and asked for her instructions. Client A emailed Paralegal I with her instructions on August 2, 2011. In her email she said:

> ...
>
> Please I am begging you to get me out of this marriage and to a resolution. As this matter has been dragged out unnecessarily and I have now purchased a second DIY Divorce Kit in addition to

> having attempted to work with a FJC x 2 and the New West Mediation Practicum Program to no avail in addition to several years of legal fees I am begging you to please make a concentrated effort and help me.
>
> I met with Mr. Hart and Legal Assistant E back in April/May at which time I met with them on a Mon and Mr. Hart advised me he would send me a letter at no cost by Wed outlining my options and their costs in addition to the reconciled bill shortly thereafter and it is now approximately 3-4 months later and still nothing.
>
> …

[62] On August 10, 2011, Mr. Hart wrote to Lawyer H in reply to Lawyer H's July 27, 2011 letter. In the concluding paragraph of this letter Mr. Hart wrote:

> Lastly, despite your advice in May of this year that you would respond to our client's proposal as set out in our correspondence to Lawyer D in October of 2010, we have still not had any response. It appears we are going to have to take application in this respect and ask that you please advise of your availability during the week of September 12, 2011.

[63] On August 12, 2011, Paralegal I emailed Client A regarding access and concluded by saying "please advise as to how you wish to proceed." Client A responded by email dated August 15, 2011.

[64] On August 26, 2011, Client A emailed Lawyer G and expressed her dissatisfaction with Mr. Hart's services. In her email Client A inquired about a discount to her account that Mr. Hart had previously offered her, and said she wanted to meet with Lawyer G to explain the reasons for her dissatisfaction and explain why she felt she was entitled to be reimbursed for the amount of the retainer.

[65] In response to Client A's email to Lawyer G, Mr. Hart sent a letter dated August 30, 2011 via email. The subject line of the email misstated Client A and Mr. B as having the same last name. In the letter, Mr. Hart wrote:

> I have now had the opportunity to speak with Lawyer G with respect to your dissatisfaction with our services and confirm that we will agree to write off your existing accounts receivable in the amount of $3,000.97 and provide you with a refund of an additional $500.00.
>
> I enclose a Notice of Intention to Act in Person and ask that if you are in agreement with the above proposal, that you sign and return same to our office. Once we have filed the Notice of Intention to Act in Person in the Court Registry, we will provide you with the refund cheque in the amount of $500.00, together with your file materials.

[66] On September 1, 2011, Client A replied to Mr. Hart's letter of August 30, 2011 and wrote:

> please resend to [email address] as I cannot open this.
>
> BTW I am Ms [A] and My husband's name is [Mr. B]...I realize your office has only been dealing with the file for 2 yrs now but I'd like to ensure after all this time you at least have the players straight

[67] On September 7, 2011, Ms. J, another employee of Mr. Hart's firm, emailed Client A and again provided her with a copy of Mr. Hart's August 30, 2011 letter. Ms. J wrote:

> "Client A",
>
> Please find enclosed a copy of the letter as per the e-mail below.

> Also, please note that subject line of the e-mail is now correct. This is one of the many problems that had arisen with our new computer program.

[68] On September 27, 2011, Ms. J emailed Client A again and asked her to provide a signed copy of the Notice of Intention to Act in person, so that a refund could be provided. Client A replied to Ms. J's email the same day, stated her dissatisfaction with Mr. Hart's proposed discount of fees, and advised that the address reflected on the Notice of Intention to Act in Person was incorrect.

[69] On February 17, 2012, Client A emailed Ms. J and said:

> "Ms. J"
>
> The address on page two is incorrect therefore I cannot sign the document. I would also ask that an additional $500 refund be considered as the $500 initially offered would likely not even cover the amount of interest that has been lost as a result of not having the money from the sale of the matrimonial home in an interest bearing savings account.
>
> Please advise asap and in the event the refund will be increased to $1000 and the address on page 2 can be amended … I will happily sign the document.

[70] On February 27, 2012, Client A emailed Ms. J and said:

> As I can longer continue to be involved with your firm, I will sign the form as per the terms you initially presented however I want to make it very clear, I remain unsatisfied by the lack and quality of service. Please advise once you have amended the document so I can sign and return it to you.

[71] On March 1, 2012, Client A emailed Mr. Hart and stated:

> Please advise once address on page 2 has been amended … and I will sign the letter

[72] On March 9, 2012, Client A filed a Notice of Intention to Act in Person form dated March 2, 2012 in the court registry.

[73] On May 2, 2012, Legal assistant E emailed Client A and asked for a copy of the filed Notice of Intention to Act in Person, and advised that the funds held in trust on her behalf would be placed into an interest bearing trust account. Legal Assistant E advised that once Mr. Hart's firm had received the filed Notice of Intention to Act in Person and the authorization form to transfer the trust funds to an interest bearing account, her file material and refund cheque would be ready for her to pick up.

[74] On May 2, 2012, Client A responded to Legal Assistant E's email and said:

> I faxed you the Notice of Intention to Act in March but will scan and email it for you. It sure would have been great to have the money in an interest bearing trust account years ago. Please forward Lawyer H's contact info and I will ensure he also receives a copy.

[75] On May 7, 2012 the funds Mr. Hart held in trust on Client A's behalf were placed in an interest bearing trust account.

[76] On July 10, 2012, Client A and her husband entered into a Separation Agreement, resolving all outstanding issues.

ISSUES

[77] Are the facts outlined above sufficient to find the Respondent committed professional misconduct; and is the proposed disciplinary action within the acceptable range for this conduct?

PROFESSIONAL MISCONDUCT

[78] Professional misconduct is not defined in the Legal Profession Act, the Law Society Rules, the Professional Conduct Handbook or the Code of Professional Conduct for British Columbia. However, it is defined in several cases, the leading case being Law Society of BC v. Martin, 2005 LSBC 16, in which the hearing panel held "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[79] What began as a relatively straightforward matrimonial matter for Client A turned into a very frustrating and seemingly never ending legal nightmare. From the time Client A retained the Respondent until her matter was finally concluded (without the assistance of the Respondent), almost three years had passed. Although it was not stated, it appears this matter could have been concluded well within a year. We note that Client A was diligent throughout in her communications with the Respondent and his staff; it is unfortunate that the Respondent was not as diligent as his client.

[80] Added to the unnecessary delay, the Respondent failed to put his client's funds in an interest bearing account, failed to provide an opinion letter when he promised to do so, failed to correct an address on a Notice of Intention to Act in Person, failed to notify his client that her husband's lawyer had been replaced, and failed to inform his client that he would cease work until his account was paid.

[81] We have no difficulty concluding that the actions and inactions of the Respondent as set out above is a marked departure from the conduct the Law Society expects of its members. We accept the Respondent's admission that he has committed professional misconduct.

Disciplinary Action

[82] The intent of Rule 4-22 is to facilitate certainty to the parties involved and to reduce the time and costs required to conduct a hearing. Once a finding of professional misconduct has been made, the next question for the Hearing Panel is, as was stated in *Law Society of BC v. Rai*, 2011 LSBC 2 at paragraph 7: "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?" It is not open to the Hearing Panel to adjust the recommendation. We must accept it as presented or reject it and return the matter to the Discipline Committee.

[83] The factors this Hearing Panel must consider in determining if the recommended disciplinary is appropriate are set out in the oft cited *Law Society of BC v. Ogilvie*, [1999] LSBC 17 as follows:

> (a) the nature and gravity of the conduct proven;
>
> (b) the age and experience of the respondent;
>
> (c) the previous character of the respondent, including details of prior discipline;
>
> (d) the impact upon the victim;
>
> (e) the advantage gained, or to be gained, by the respondent;
>
> (f) the number of times the offending conduct occurred;
>
> (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
>
> (h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

The factors applicable to this case are set out below.

The nature and gravity of the conduct proven

[84] Failing to provide a sufficient level of service to one's client is a serious matter. Although not as harmful to the profession as a matter of deceit or the misappropriation of client funds, this misconduct still strikes at the heart of the public interest in the administration of justice and the trust the public will have in lawyers generally.

The age and experience of the respondent

[85] The Respondent is 77 years of age and has been practising law for almost 53 years. He is an experienced family law litigator.

Character of the respondent, including details of prior discipline

[86] The Respondent has a lengthy history with the Law Society consisting of three prior citations, three conduct reviews and a referral to the Competency Committee (predecessor to the Practice Standards Committee). As recounted in the Law Society submissions, the details of his Professional Conduct Record (PCR) are as follows:

(a) In October 1978, the Respondent attended a conduct review for inducing an employee at another lawyer's office to release a conveyancing file and an executed deed of land, and for issuing a trust cheque for which the funds were not yet available, as the deposit for the funds had not yet cleared with the bank.

(b) In May 1980, the Respondent attended a conduct review to address his conduct in opening mail addressed to opposing counsel's client and for failing to respond to opposing counsel's correspondence.

(c) In 1985, the Respondent admitted professional misconduct and conduct unbecoming in respect of allegations in a citation authorized in November 1983 for failing to provide quality of service to a client, failure to respond to the Law Society and for misleading the Law Society regarding the same matter. The Respondent was reprimanded, and fined $1,000.

(d) In 1990, the Competency Committee ordered a Peer Review of the Respondent's practice. Upon reviewing the Peer Review report, the Competency Committee directed that a Law Office Management and Systems ("LOMAS") review would be done approximately one month after the LOMAS program was implemented, with monitoring to be conducted by Law Society staff.

(e) On October 2, 1990, the Respondent provided undertakings to the Competency Committee to: a) never take another drink; b) to make the changes to his practice recommended in the Peer Review;

and c) to take a remedial program in LOMAS.

(f) In February 1991, the Competency Committee referred the Respondent to the Lawyer's Assistance Committee and directed that the final Peer Review Report and the LOMAS review report be referred to the Discipline Committee. In July 1991, when the Competency Committee considered a follow-up report, the Committee directed that a contract be considered with the Respondent that would allow for continuing monitoring of him and his practice. In October 1991, the Competency Committee directed the Respondent to attend at a physician for an assessment, diagnosis, prognosis and proposed plan of treatment to determine whether the Respondent was fit to continue in practice. In March 1992, the Competency Committee accepted the Respondent's proposal to continue regular visits with his physician, who would provide reports to the Committee, to engage in regular counselling sessions through Interlock with reports to be provided to the Committee, and that his doctor was to advise the Committee if the Respondent ceased taking his prescribed medication. In November 1992, the Respondent's Competency Committee file was closed after the Committee discontinued the requirement that it receive reports from the Respondent's physician, as there was agreement from the doctor that he immediately notify the Law Society if the Respondent ceased being his patient or if he deviated from "complete sobriety".

(g) In September 1995, the Respondent was cited for applying trust funds held on behalf of an estate towards his client's outstanding legal account in the client's family law matter, when the client did not consent and the Respondent had not been retained to act for the estate. The Respondent also threatened to destroy his client's file if she did not retrieve it from his office. The Respondent was reprimanded and ordered to pay a fine of $1,000.

(h) In February 1999, the Respondent attended a conduct review to address his advice to a client not to grant her former husband access to their daughter, despite that there was a court order providing him with specified access.

(i) In November 2007, the Respondent admitted professional misconduct in respect of a citation issued in May 2007 for his conduct in taking a client's oath on an affidavit, and relying on the affidavit after the affiant advised him some of the statements in the affidavit were untrue and for misleading the court by telling the court that a witness had been subpoenaed when she had not. He was fined $2,000.

The impact upon the victim

[87] The Respondent's misconduct impacted Client A emotionally and financially. The emotional impact was caused by the lengthy delay and not receiving the quality of service properly due her. The financial impact was ultimately addressed by the Respondent but, at the time, unnecessarily added to the stress Client A experienced. Fortunately, in the end, Client A was able to obtain the legal result she desired.

The advantage gained, or to be gained, by the respondent

[88] The Respondent gained nothing by this misconduct.

The number of times the offending conduct occurred

[89] The misconduct was of a recurring nature and occurred over a lengthy period of time but, fortunately, only involved one client.

Whether the respondent has acknowledged the misconduct and taken steps to disclose

and redress the wrong and the presence or absence of other mitigating circumstances

[90] The Respondent has done the following in mitigation:

(a) admitted to the misconduct without the necessity of a hearing;

(b) written off Client A's account amounting to $3,000;

(c) further reimbursed Client A $500; and

(d) compensated a partner in the firm for his time spent on the file.

The impact of the proposed penalty on the respondent

[91] The Respondent has a stated willingness and an ability to pay the proposed fine and costs.

The range of penalties imposed in similar cases

[92] The misconduct in this case was described as a "quality of service" as opposed to a matter involving deceit. The range of penalties involved in this type of case is generally a fine and costs. We are persuaded that the two most relevant prior cases, as set out in the submissions of the Law Society and the Respondent, are *Law Society of BC v. Epstein*, 2011 LSBC 12; and *Law Society of BC v. McLellan*, 2011 LSBC 23.

[93] In *Epstein* the admitted misconduct in an estate matter involved a failure: a) to keep the client reasonably informed; b) to answer within a reasonable time communications from the client that required a response; c) to do the work that the respondent had been engaged to do promptly so that its value to the client would not be diminished or lost; and d) to do the work accurately. The respondent had a disciplinary record that included two prior conduct reviews and a practice review. The respondent was fined $4,500 and ordered to pay costs of $2,000.

[94] *McLellan* involved an estate matter as well. The admitted misconduct involved a failure by the respondent: a) to keep the client reasonably informed; b) to answer within a reasonable request from the client for information; c) to do the work at hand in a prompt manner so that its value to the client was not diminished; d) to make all reasonable efforts to provide prompt service to the client; and e) to disclose all relevant information to the client. The respondent commenced an action but failed to advance the claim or inform his client over a seven-year period. The respondent's discipline record included two conduct reviews and a citation. The respondent was fined $5,000 and ordered to pay costs of $3,000.

DISPOSITION

[95] The only factor that gives us some pause is the Respondent's extensive Professional Conduct Record. However, similar misconduct in other cases has resulted in fines being ordered, and we see no reason to depart from the recommendation. The prior record will require a higher fine and the recommendation is at the higher end of the range.

[96] Therefore we order that the Respondent pay:

(a) a fine in the amount of $7,500 payable by April 30, 2014; and

(b) costs in the amount of $1,000 payable by April 30, 2014.

[97] The Executive Director is instructed to record Mr. Hart's admission on his professional conduct record.

ANCILLARY ORDERS

[98] At the request of Law Society counsel and by agreement of the Respondent we made two further orders:

> (a) Pursuant to Rule 5-6 the attachments to the Agreed Statement of Facts (Exhibit 2) will be sealed and not be disclosed to protect the confidential and privileged information of Client A;
>
> (b) Any publication that refers to the Respondent's former client will be by "Client A" only.