2014 LSBC 20
Report issued: April 30, 2014
Citation issued: December 20, 2012

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

DOUGLAS WARREN WELDER

Respondent

Decision of the Hearing Panel on Disciplinary Action

Hearing date: December 18, 2013
Panel: Lee Ongman, Chair, Jasmin Z. Ahmad, Lawyer, Jory C. Faibish, Public representative

Counsel for the Law Society: Geoffrey Gomery, QC
Appearing on his own behalf: Douglas W. Welder

BACKGROUND and summary of parties' positions

[1] In its decision on Facts and Determination issued August 30, 2013 the Panel found that the Respondent committed professional misconduct when he acted in a conflict of interest by representing a client, FW, in a foreclosure proceeding against his former client contrary to Chapter 6, Rules 1 and 7 of the *Professional Conduct Handbook* (the *Handbook* that was in effect at that time).

[2] The issue now before the Panel is the appropriate sanction to be imposed as a result of that finding.

[3] The Law Society and the Respondent made oral submissions on the appropriate sanction on December 18, 2013. In response to an invitation from the Panel, both parties made further written submissions, which concluded on February 11, 2014.

[4] The Law Society's primary position is that the Respondent should be found ungovernable, not solely on the basis of the finding of profession misconduct in this matter, but on the combined bases of that finding and the totality of his professional conduct record. If found ungovernable, the Law Society submits the Respondent must be disbarred.

[5] The Law Society's secondary position is that, if the Panel does not find that the Respondent is ungovernable, a one-year suspension, together with other remedial measures and costs are appropriate.

[6] The Respondent's position is that he is not ungovernable and further, that disbarment is not warranted in the circumstances of this case. His position is that a suspension of three months and costs is appropriate.

ISSUES

[7] The issues to be determined at this hearing are:

> (a) Is the Respondent ungovernable by the Law Society so as to warrant disbarment as the appropriate sanction; and

(b) If the Panel does not find that the Respondent is ungovernable, what is the appropriate sanction?

DISCUSSION AND ANALYSIS

Summary of available sanctions

[8] Together, subsections (5) and (7) of section 38 of the *Legal Profession Act* (the "Act") set out a wide range of sanctions that are available to a panel if an adverse determination is made against a respondent. Subsections (5)(c), (d), (e), (f) and (7) are most relevant to the issue before the Panel. Collectively, they allow the Panel to do one or more of the following:

- Impose conditions or limitations on a respondent's practice (s. 38(5)(c));
- Suspend a respondent from the practice of law (s. 38(5)(d));
- Disbar a respondent (s. 38(5)(e));
- Require a respondent to, among other things, complete a remedial program to the satisfaction of the practice standards committee or appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that he or she is competent to practise law (s. 38(5)(f); or
- … make any other orders and declarations and impose any conditions it considers appropriate (s. 38(7)).

[9] In addition, Rule 4-35 of the Law Society Rules has particular relevance to these proceedings. It provides in part:

> (4) The panel may consider the professional conduct record of the respondent in determining a disciplinary action under this Rule.
>
> (5) Regardless of the nature of the allegation in the citation, the panel may take disciplinary action based on the ungovernability of the respondent by the Society.
>
> (6) The Panel must not take disciplinary action under subrule (5) unless the respondent has been given at least 30 days notice that ungovernability may be raised as an issue at the hearing on disciplinary action.

Summary of Respondent's Professional Conduct Record

[10] Pursuant to Rule 4-35(5) and (6), by letter dated January 15, 2013, the Law Society gave the Respondent notice that, in the event of an adverse determination, it would seek disbarment on the basis of ungovernability.

[11] At the hearing of the matter, the Law Society urged the Panel to consider the Respondent's professional conduct record as the basis for a finding of ungovernability of the Respondent by the Law Society.

[12] The whole of the Respondent's professional conduct record was before the Panel and referred to by the parties in their submissions. It includes six conduct reviews, six citations, and a practice standards referral over the period of 1991 to date. We have summarized portions of the record in chronological order below:

a. *Conduct Review #1* - July 3, 1992 – This conduct review concerned the Respondent's failure to

recognize a conflict in acting on both sides of a real estate conveyance in 1989. In its report to the Standing Discipline Committee, the conduct review subcommittee noted:

> The Subcommittee believes that Mr. Welder now understands what constitutes a conflict of interest and what is required of him if a conflict occurs.

Result: On that basis and on the Respondent's assurance that neither he nor his firm would act on both sides of conveyance in the future, the Subcommittee recommended that no further action be taken.

b. *Citation #1* - February 16, 1994 - The Respondent made a conditional admission to professional misconduct in making unfounded allegations against another member.

Result: Admission endorsed on record.

c. *Conduct Review #2* – September 11, 1995 – This conduct review arose from citation #1, two allegations of which were referred to a conduct review subcommittee. On its review, the subcommittee expressed its view that "this problem [between the Respondent and the other lawyer] has arisen from a failure to prevent the prior conflict between clients from affecting relations between counsel." It urged the Respondent to "do his best to de-escalate this matter and to end it on a reasonable and professional basis …"

Result: No further action.

d. *Conduct Review #3* – November 5, 1998 – This conduct review concerned the Respondent's failure to administer an estate in a timely manner. The subcommittee ultimately held that the Respondent's management of the file did not amount to "clear incompetence" and, with "some hesitation", recommended that no further action be taken.

However, it also reported as follows:

> Mr. Welder's response to the complaint did not bring any credit on himself. He took the occasion to attack [the beneficiary/complainant] but with respect to the substance of the claim, did not dispute the delay …

And further that:

> It should be pointed out that the Subcommittee did not accept the suggestions or allegations of [the Respondent] that [the beneficiary/complainant] and some of the other beneficiaries were uncooperative or in any way acted in an improper way. Indeed, the Subcommittee felt that the beneficiaries were more than patient.

Result: No further action.

e. *Citation #2* - December, 1998 – The Respondent was cited for professional misconduct in respect of his attempt to overturn an order of the Court of Appeal by a motion to the Supreme Court of Canada without giving notice to opposing counsel and having made misrepresentations to opposing counsel. On his conditional admission of misconduct, the hearing panel noted in its written decision:

> The allegations set forth in the citation are serious. That characterization is accepted by both the Respondent and the Law Society. They amount to conspiracy to defraud, they contain acts that amount to misleading, and other actions that may be considered sharp practice. It is clear that the Respondent's conduct falls below that which is to be expected from a member of the Law Society of this Province.

Result: 60 day suspension and costs.

f. *Citation #3* - October 22, 2001 - The Respondent was cited for and admitted his professional misconduct in failing to report unsatisfied judgments to the Law Society and in failing to collect and remit PST and GST. The panel noted the co-operation of the Respondent in reaching an Agreed Statement of Facts with the Law Society and his voluntary advice to the Law Society of an additional judgment when he became aware of the Rule to report judgments.

Result: Fine of $2,500, reprimand and the imposition of financial reporting conditions.

g. *Citation #4* – February 9, 2005 - The Respondent was cited for failing to remit funds collected for GST, PST and source deductions. An Agreed Statement of Facts was filed in which the Respondent acknowledged that he did the acts alleged, and that in so doing, "professionally misconducted himself." The hearing panel imposed a one-year suspension with a condition to provide monthly proof of full compliance with tax remittance required, and to fully cooperate with discipline committee's request for information.

On review, the Benchers reduced the suspension to three months, holding that the panel erred in not taking into consideration mitigating factors in favour of the Respondent as follows:

> (a) The Applicant acknowledged his misconduct. This is evidenced by the admissions in the Agreed Statement of Facts and the fact that he honestly disclosed the non-remittance of funds. This is a significant mitigating factor as it is evidence that there is hope for the rehabilitation of the Applicant;
>
> (b) The impact of the penalty upon the member: in the hearing before this Panel, the Applicant submitted that the one-year suspension would be such a blow to his practice that it was not likely that he could ever regain sufficient momentum to practise successfully again. We agree that a consequence this harsh is unwarranted by the offence itself, and that such an outcome is a likely result of such a suspension.

h. *Practice Standards Referral* – June 2005 – The Practice Standards Committee initiated a review of the Respondent's practice. The evidence does not disclose the basis for this referral to practice standards. However, the record reflects that recommendations were made, a compliance report was satisfied and the file closed.

i. *Conduct Review #4* – 2007 - The Respondent failed to comply with ongoing financial reporting requirements undertaken by him as a condition of a stay pending review of the suspension ordered by the hearing panel in citation #3 in 2005. On September 6, 2007, a Conduct Review Subcommittee met with him, and he admitted that he had not abided by the terms of the undertaking he had given. The Subcommittee reported:

> [17] Although clearly Mr. Welder was in breach of the undertaking, the consequences there from were mitigated by the fact that Mr. Welder had, in fact, made the payments on time as required, but through inadvertence he had failed to provide the proper notice of such payments. When it was brought to his attention he immediately complied. Mr. Welder has an extensive history with the Law Society, including 41 complaints going back to at least 1987.
>
> [18] The Subcommittee was at a loss as to why this matter was referred to the Subcommittee. However, upon reviewing Rule 4-9 and the options available to the Subcommittee, it was felt that nothing would be gained from imposing any further conditions. The undertaking signed by Mr. Welder appears on the face to continue until he is relieved of the undertaking by the Discipline Committee. In addition, the penalty imposed on June 8, 2007 requires Mr. Welder to pay his taxes

and remittances with further proof there from. Those requirements should be sufficient to ensure that Mr. Welder continues to make payments and provide proof of payments on a regular basis.

RECOMMENDATION

[19] The Subcommittee recommends that there be no further action.

j. *Conduct Review #5* – November, 2009 – The Respondent was subject of this conduct review as a result of his failure to fulfill an undertaking "arising from a complicated closing." The Conduct Review Subcommittee met with the Respondent twice. At the first meeting the Respondent "acknowledged his conduct and responses were below the norm expected of lawyers." The Subcommittee issued an interim report recommending that the Respondent "avail himself of professional psychological counselling service," meet with the counsellor "at least three times" and have the counsellor report directly to the Law Society, by way of the Subcommittee.

Having subsequently received the counsellor's report, the Subcommittee reported as follows:

> As indicated by Mr. Welder, his issues are not resolved but he is self-aware and working on matters concerning procrastination and the impact that this has had on his profession. We were impressed that Mr. Welder offered to re-attend for further voluntary counselling. This shows some insight. Mr. Welder was co-operative with us and with this process. The conduct which was the subject of this report resulted from poor office procedures and procrastination. He has changed the office procedures and he is working on the procrastination. We have urged him to keep timely with all correspondence.
>
> Therefore, given all the circumstances and commitment of Mr. Welder to continue with professional counselling, we recommend that no further action be taken.

k. *Citation #5* – August 12, 2009 – The Respondent was cited for failing to provide financial information requested by the Law Society during the course of an investigation of his practice. In finding that the Respondent committed professional misconduct, the hearing panel made the following finding:

> We pause at this point to note that the Respondent's conduct during the investigation was far from exemplary. He was not fully cooperative with Law Society staff during the field portion of the investigation. Despite his protestations to the contrary, the evidence shows that he played a "cat and mouse" game with the investigators. He testified to the effect that, while he did not attempt to obstruct the investigation, he did not believe it was his duty to assist it. He did not dispute the evidence of the Law Society staff that, in responding to follow-up requests for information, he advised Law Society staff that her requests were "not on the top of his priority list" and that he saw the additional requests as "a constant harassment." As set out in more detail above, the Respondent's written responses to questions from Law Society staff were provided well after the deadlines set by the Law Society, if they were provided at all. …
>
> The Respondent's conduct throughout this investigation demonstrated that his intention was to provide the minimum amount of information and cooperation. ….

On Review the Benchers ordered that the Respondent pay costs of the review and remitted the issue of penalty to the hearing panel. The hearing panel stated, among other things:

> The Panel considers the Respondent's conduct to be grave. His conduct, both during the audit and the later investigation, showed a deliberate and prolonged failure or refusal to cooperate with the Law Society's investigators. …

> Although the Respondent has now complied with the Law Society's requests for information, his submissions regarding disciplinary action indicate that he does not believe that his conduct was serious. To that extent he has not acknowledged his own misconduct, and there are no mitigating circumstances.

Result: 45-day suspension and costs.

l. *Citation #6* – March 22, 2011 – The citation was issued for failing to report two Canada Revenue Agency's Requirements to Pay to the Law Society and for failing to comply with ongoing obligations arising out of citation #4. The hearing panel noted:

> In the case at hand, the Respondent's conduct was ongoing, repeated and occurred over a period of approximately 20 months. He failed to respond substantively to seven letters from the Law Society between February 2009 and January 2011. Indeed, his actions were obstructionist in nature. …
>
> The Respondent's conduct was similar concerning his failure to provide a proposal to satisfy the judgments. He had also failed to respond to staff inquiries about a proposal to satisfy the CRA judgments. He had been offered a final chance to provide a proposal in January 2011 and again failed to do so.
>
> The pattern of misconduct, particularly when combined with an admission of a failure to comply with the provisions of an earlier Review Panel decision, strike at the ability of the Law Society to perform its core function, which is to regulate its members in the public interest.

The Respondent co-operated and made a conditional admission pursuant to Rule 4-22.

Result: Three month suspension and costs.

m. *Conduct Review #6* – 2012 – This conduct review resulted from the Respondent's conduct in witnessing client signatures on a land transfer document and leaving it with the clients in circumstances that, to the Respondent's knowledge, would be a fraudulent preference. The client registered the transfer document, leading to unnecessary further legal costs and expense to the client. The Panel found that the Respondent lacked objectivity and needed to disassociate himself from the client's cause. The review was sufficient disciplinary action.

Result: No further action.

Ungovernability

[13] Although the Law Society Rules expressly allow a panel to take disciplinary action based on the potential "ungovernability of a respondent by the Society," they do not provide any specific guidance as to what constitutes "ungovernability", nor do they set out any factors or indicia of ungovernability.

[14] However, the decisions of discipline panels of the Law Society and of other jurisdictions are instructive.

[15] In particular, the concept of "ungovernability" was considered by the panel in *Law Society of BC v. Spears*, 2009 LSBC 28. Although the panel in that decision did not ultimately determine that the member was "ungovernable", it described the concept as follows:

> [7] The Panel is very concerned that the Respondent has in the past demonstrated an unwillingness to comply with conditions imposed upon him by the Law Society. *It is a fundamental requirement of anyone who wishes to have the privilege of practising law that that person accept*

that their conduct will be governed by the Law Society and that they must respect and abide by the rules that govern their conduct . If a lawyer demonstrates that he or she is consistently unwilling or unable to fulfill these basic requirements of the privilege to practise, that lawyer can be characterized as "ungovernable" and cannot be permitted to continue practise.

[8] The Law Society's mandate to regulate lawyers in the best interests of the public cannot be fulfilled if it permits lawyers who have demonstrated ungovernability to continue to practise.

[9] All lawyers are expected to deal with the Law Society in an honest, open and forthright manner at all times. The Respondent has failed to do that. He has thereby put at serious risk his opportunity to have the privilege of practising.

[10] The Panel recognizes it cannot bind the hands of any future disciplinary panels, but it does wish to convey to the Respondent that this is very likely to be his last opportunity to display the sort of conduct expected of and required of all lawyers."

[emphasis added]

[16] The issue of "ungovernability" was also discussed at some length in *Law Society of BC v. Hall*, 2007 LSBC 26. In that decision, the panel reviewed the decisions in *Law Society of Upper Canada v. Hicks*, [2005] LSDD No 6, *Law Society of Upper Canada v. Misir*, [2005] LSDD No 60 and *Law Society of Manitoba v. Ward* [1996] LSDD No 119, all of which were disciplinary cases in which the lawyers were found to be ungovernable and disbarred from the practice of law as a result, and concluded:

[27] The foregoing cases suggest that the relevant factors upon which a finding of ungovernability might be made will include some or all of the following:

1. A consistent and repetitive failure to respond to the Law Society's inquiries.

2. An element of neglect of duties and obligations to the Law Society with respect to trust account reporting and records.

3. Some element of misleading behaviour directed to a client and/or the Law Society.

4. A failure or refusal to attend at the discipline hearing convened to consider the offending behaviours.

5. A discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances.

6. A history of breaches of undertaking without apparent regard for the consequences of such behaviour.

7. A record or history of practising law while under suspension.

[28] It is the view of this Panel that it will not be necessary for Panels in the future to establish that all of these indicia of ungovernability are present in order to make such a finding. These indications, like the penalty guidelines found in the *Law Society of BC v. Ogilvie*, [1999] LSBC 17, will have a fact-specific impact in each separate case that is considered. It will be for the Benchers to determine the appropriate treatment of the indicia described herein, including their usefulness in the discipline process and the manner, if at all, that they will be applied. We do not foreclose the possibility that a finding of ungovernability can be made if all that was present was a repeated failure of the lawyer to respond to inquiries from the Law Society, if that failure is illustrative of a wanton disregard and disrespect of the lawyer for the regulatory processes that govern his or her

conduct.

[17] In this case, the Respondent's conduct and behaviour as evidenced by his professional conduct record appears to fall, at least generally, within several, but not all, of those indicia of ungovernability. However, in some instances, the indicia of ungovernability are mitigated by other factors not present in the cases considered by the panel in Hall. Of note:

(a) Most significantly, the findings of the hearing panels in respect to citations #5 and #6 evidence a disturbing failure to respond to Law Society inquiries. Citation # 5 relates to inquiries relating to "bank accounts which hold or held trust or general funds";

(b) Citations #3 and #4 and conduct review #4 are evidence of "neglect of duties and obligations to the Law Society" in the Respondent's failure to report unsatisfied judgments to the Law Society and to comply with ongoing financial reporting requirements. However, in the hearings in respect of each of citations #3 and #4, the Respondent co-operated with the Law Society by agreeing to an Agreed Statement of Facts and by subsequently voluntarily advising the Law Society when he became aware of the Rule to report judgments (citation #3) and by "honestly disclos[ing] the non-remittance of funds" (citation #4).

The breach giving rise to conduct review #4 was mitigated by the fact that the Respondent had, in fact, made the payments on time as required and immediately complied with the reporting requirements when his failure to do so was brought to his attention;

(c) The Respondent's "attack" of the complainant in conduct review #3 was similar to his treatment of his former client in this proceeding. Both may be considered evidence of "misleading behaviour" directed to a client, albeit not during the conduct of the Respondent's retainer with the client.

Citation #2 is clear evidence of "misleading behaviour" directed toward opposing counsel;

(d) Each of the six citations demonstrates a "discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances."

The Respondent admitted professional misconduct in respect of four of the six citations and entered into Agreed Statements of Fact in respect of three;

(e) While conduct review #5 is evidence of the Respondent's failure to fulfill an undertaking, it is the sole incident of his doing so. It does not amount to a "history of breaches of undertaking without apparent regard for the consequences of such behaviour." In respect of that matter, the Subcommittee noted that, "We were impressed that Mr. Welder offered to re-attend for further voluntary counselling. This shows some insight. Mr. Welder was co-operative with us and with this process. …";

(f) There is no refusal to attend at a discipline hearing;

(g) There is no record of practising law while under suspension.

[18] Without doubt, the most troubling aspect of the Respondent's professional conduct record is the conduct giving rise to citations #5 and #6 and the hearing panels' express findings in their determinations of those citations.

[19] This Panel accepts the serious nature of that conduct as described by the panels in the passages set out in subparagraphs 12(l) and (k) above. Indeed, but for other mitigating factors with respect to other aspects of the Respondent's record, it would be difficult to distinguish that conduct from the conduct described in *Hicks* and *Ward* (supra).

[20] However, without diminishing its seriousness in any way, much of the conduct evidenced by the Respondent's conduct record is mitigated by factors that do not exist in *Hicks* or *Ward*.

[21] The following mitigating factors are of particular significance:

> (a) Although the Respondent was not exonerated on each conduct review, no further action was taken in any of the six conduct reviews and the one practice standards review that comprise part of the conduct record;
>
> (b) The Respondent's acknowledgments and admissions of improper conduct in respect of several of the matters set out in the record (conduct review #1, citation #1, citation #2, citation #3, citation #4, conduct review #4, conduct review #5 and citation #6);
>
> (c) The Respondent's noted co-operation with the Law Society in numerous of the matters set out in the record (citation #3, conduct review #3 and conduct review #4); and
>
> (d) An indication in 2008 of "underlying psychological issues impinging on the Respondent's ability to practise in a reasonable and professional manner" and, more significantly, his voluntary attendance at counselling to address those issues.

[22] In our view, those factors offer some indication that, in the language of *Spears* (supra), the Respondent is not "consistently unwilling" to be governed by the Law Society.

[23] On the basis of those mitigating factors, this Panel has, with great hesitation, come to the conclusion the Respondent's conduct falls just short of the conduct of the respondents in *Hicks* and *Ward* and does not warrant a finding that the Respondent is ungovernable.

[24] We stress, however, that that conclusion is based on this Panel's application of the particular circumstances of this case. The Panel reiterates the decision of the panel in Hall that it will be for every panel to determine the appropriate treatment of the indicia of governability "including their usefulness in the discipline process and the manner, if at all, that they will be applied."

[25] We, too, do not intend to foreclose the possibility that finding of ungovernability can be made for less, or more, serious conduct or for less lengthy conduct records.

[26] Furthermore, although this Panel recognizes that it cannot predetermine any future findings, nor does it purport to, we would impart the same caution to the Respondent as did the Panel in *Spears*: that this is very likely to be his last opportunity to display the sort of conduct expected of and required of all lawyers in BC.

Alternative Sanctions

[27] Our finding that the Respondent is not ungovernable does not conclude our analysis. The Panel now must consider the appropriate sanction to impose.

[28] The leading case in determining the factors in determining the appropriate discipline are set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17. In the *Ogilvie* case, the panel identified a non-exhaustive list of factors for consideration in disciplinary proceedings 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 on 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.

[29] Although the Panel has considered all of the *Ogilvie* factors, we have placed greatest significance on the following:

(a) the nature and gravity of the misconduct;

(b) the Respondent's lengthy prior discipline history;

(c) the possibility of remediating or rehabilitating the Respondent; and

(d) the need to ensure the public's confidence in the profession.

The nature and gravity of the misconduct

[30] Acting in a conflict of interest amounts to a breach of one of the bastions of the legal profession, ranking with confidentiality, loyalty to clients, fulfilling undertakings, safeguarding trust funds, and duties to the Courts. Failure to uphold these bastions leads to disintegration of the public's confidence in the profession.

[31] As we noted in the Facts and Determination decision in this matter, without the security that the conflict rule provides, a client would not be able to provide his or her lawyer with documents or other information, or otherwise be candid in his or her communications with the lawyer, without fear that doing so will be revealed or used against the client in a subsequent matter.

[32] The submission of Law Society counsel at the Facts and Determination hearing also bears repeating: the conflict rule "grounds the relationship of trust and confidence subsisting between lawyer and client."

[33] Finally, it is significant that the finding of professional misconduct was not a close call. The Panel had no difficulty in concluding that the Respondent's conduct constituted a clear breach of the fundamentally important rule against acting in conflict of a client's interest.

[34] This case reflects a serious instance of professional misconduct. That will be an aggravating factor in the determination of an appropriate sanction to be imposed.

The Respondent's prior discipline history

[35] We have reviewed the Respondent's professional conduct record above.

[36] Although we have found that the conduct evidenced by the record fell just short of warranting a finding of ungovernability, the length and the content of that record are, without doubt, serious aggravating factors in our determination of the appropriate sanction.

[37] The Respondent's conduct record is also significant in that it discloses previous disciplinary sanctions that have been imposed on the Respondent. Those sanctions include a reprimand, conditions, fines, costs and four separate suspensions of 60 days, 3 months, 45 days and, most recently, a suspension of 3 months relating to citation #6 in March 2011.

[38] As noted by this Panel in *Law Society of BC v. Batchelor*, 2013 LSBC 9:

> [49] The principle of progressive discipline stipulates that a lawyer who has had prior discipline, whether for the same or different conduct and whether that conduct has been joined in one proceeding or dealt with by way of successive proceedings, will be subject to a more significant disciplinary sanction than someone who has had no prior discipline.
>
> [50] The principle is in accordance with the Law Society's obligation to protect the public and the reputation of the legal profession. It sends a clear message to the public and the legal profession that the Law Society will not tolerate lawyers who repeatedly ignore their professional responsibilities.

[39] In light of the Respondent's conduct record, this Panel concludes that the principle of "progressive discipline" applies in this case to significantly increase the sanction that otherwise would have been imposed for his acting in a conflict of interest.

Possibility of remediating or rehabilitating the Respondent

[40] This is not the first instance in which the Respondent has committed professional misconduct by acting in a conflict of interest (citation #1). However, that instance of professional misconduct occurred in 1992 and in circumstances different than the circumstances giving rise to the most recent finding that he acted in a conflict of interest.

[41] Furthermore, at the time of the hearing on Facts and Determination, the Respondent did not recognize the conflict of interest issue, insisting that, having reviewed the Rules and having given the matter consideration, he had formed the opinion that he was free to represent FW in the foreclosure proceeding against his former client.

[42] However, by the date of the hearing on disciplinary action, the Respondent seemed to have recognized the error of his conduct. His written submissions provided as follows:

> I recognize that I made a mistake in acting for FW against my former clients. I should have simply refused to take on the mortgage foreclosure and referred the matter out to other counsel. Whether or not I thought I understood the conflict of interest rule in these circumstances I should have refused the retainer to avoid any possibility of there being a conflict of interest. I believe I learned that lesson.

[43] While the Law Society does not concede that anything can be done to rehabilitate the Respondent (and, indeed, disputes the point), it does note that, "If one took the view that the problem in this case stemmed from the respondent's misapprehension of the conflict rule, one might require him to complete a remedial course on legal ethics and professionalism." (The Law Society goes on to submit that "… that is not the cause of the problem in this case.")

[44] Although it was only at the hearing on disciplinary action that the Respondent conceded that he had "made a mistake in acting for FW against [his] former clients," by that date he was able to identify the action he should have taken in the circumstances. ("I should have refused the retainer to avoid any possibility of there being a conflict of interest.")

[45] By identifying the appropriate conduct, the Respondent has demonstrated that he is likely to handle a similar situation appropriately in the future. The Panel is not ready to close the door on remediation and rehabilitation quite yet.

The need to ensure the public's confidence in the profession

[46] The importance of the need to ensure the public's confidence cannot be understated as a factor in determining an appropriate sanction. Indeed, pursuant to section 3 of the Act, "It is the object and duty of the society to uphold and protect the public interest in the administration of justice … ."

[47] As noted by the Review Panel in *Law Society of BC v. Lessing*, 2013 LSBC 29, protection of the public, together with the rehabilitation of the lawyer, "will, in most cases, play an important role" in determining the sanction to be imposed against a lawyer who commits professional misconduct. It noted:

> [60] Undoubtedly, if there is a conflict between these two factors, then protection of the public will prevail. However in many cases, conditions or limitations can be imposed on the lawyer and the public is still protected. In addition, disciplinary action less than full disbarment can be imposed. In such situations, the lawyer can continue to practise while attempting to rehabilitate him or herself under conditions imposed by the hearing panel. ...".

[48] Notwithstanding the Review Panel's acknowledgment that there are a myriad and range of sanctions that can protect the public interest, in the circumstances of that case, it held as follows:

> [119] We have previously discussed public confidence in the profession. Simply put, a lawyer who breached three court orders and finds himself in contempt should face some sort of suspension. *Particularly so when he has a conduct record and has failed to report judgments against him. The Respondent has too much disciplinary baggage to excuse himself from suspension.* His mental health issues go to the length of the suspension, not to the requirement for a suspension.
>
> [emphasis added]

[49] Given this Respondent's "disciplinary baggage", the Panel is also of the view that it would be difficult, if not impossible, to maintain the public's confidence in the profession unless a suspension of a significant length is imposed.

[50] In their submissions, the Law Society and the Respondent referred the Panel to the range of penalties that had been imposed in other disciplinary proceedings for acting against a former client. Those penalties ranged from reprimands to fines to a practice restriction and a 4-month suspension. While we acknowledge the importance of prior decisions in assessing an appropriate discipline, as noted by the Review Panel in *Lessing*, (supra), … "no two cases are the same. Facts may differ significantly from one case to another."

[51] In our view, the Respondent's professional conduct record is so singular such that the range of penalties imposed in other "conflict of interest" proceedings have limited application to the particular circumstances of this case. For that reason we have placed limited significance on this factor.

SUMMARY

[52] Having considered the evidence and the law before it, the Panel has concluded that the Respondent's conduct falls just short of warranting a finding that the Respondent is ungovernable.

[53] However, particularly in light of the "*Ogilvie* factors" and the decision of the Review Panel in *Lessing* (supra), we conclude that a suspension from the practice of law for one year is appropriate

[54] In our view, a suspension of one year's length is easily supported by the length and the content of the Respondent's conduct record and is consistent with the principle of progressive discipline. When combined with remedial courses and practice reviews focused on specified topics, a one-year suspension will also serve the important functions of rehabilitation and ensuring public confidence in the disciplinary process and in the profession.

COSTS

[55] In the circumstances, the Respondent will pay the Law Society's costs of each the hearings on the citation, including the hearing on facts and determination and the hearing on disciplinary action. Rule 5-9(1.1) requires that we have regard to the Tariff of costs in Schedule 4 to the Rules (the "Tariff") in calculating costs. We see no reason to depart from that Rule.

[56] Counsel for the Law Society submitted a bill of costs prepared in accordance with the Tariff. As he did not have the benefit of knowing how long the final hearing would be at the time it was prepared, the bill of costs includes a disbursement for the court reporter's attendance for a full day of hearing.

[57] As the final day of hearing was adjourned mid-day, we reduce the claim for court reporter's fees for December 16, 2013 from $420 to $210. However, because the final hearing on December 16, 2013 took more than two and half hours, in accordance with to Rule 5 9(1.4), the units for a full day of hearing will be applied.

[58] We accept the bill of costs prepared by the Law Society reduced by $210.

[59] Costs are assessed at $13,692.

ORDER

[60] The Panel orders that the Respondent:

> (a) is suspended from practice for a period of one year commencing June 1, 2014 and until the Respondent has:
>
> > (i) completed approved Continuing Professional Development for 2014 with a minimum credit of 12 units;
> >
> > (ii) completed to the satisfaction of the Practice Standards Committee a remedial course on professional ethics, including conflicts, approved in advance by the Practice Standards Committee;
>
> (b) undergo two consecutive semi-annual practice reviews that successfully demonstrate satisfactory trust accounting procedures, satisfactory file management, appropriate conflict checks and decisions, and an understanding of substantive legal issues at the level of a competent practitioner. The first practice review to commence six months after return to practice; and
>
> (c) pay costs in the amount of $13,692 in two equal instalments due June 1, 2015 and November 1, 2015.