2015 LSBC 24
Decision issued: June 3, 2015
Oral decision: February 20, 2015
Citation issued: May 2, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

PHILIP RICHARD DERKSEN

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	February 20, 2015
Panel:	Elizabeth Rowbotham, Chair Paula Cayley, Public representative Donald Silversides, QC, Lawyer
Discipline Counsel:	Kieron Grady
Appearing on his own behalf:	Philip Derksen

INTRODUCTION

[1] The citation issued to Philip Richard Derksen contained several allegations of conduct by Mr. Derksen that the Law Society asserted constituted professional misconduct or were breaches of the *Legal Profession Act* (the "Act") or the Law Society Rules (the "Rules") and were therefore discipline violations.

[2] At the hearing of this matter, the Law Society withdrew the allegations contained in subparagraph 1(a) and paragraph 2 of the citation. Those allegations that were not withdrawn are reproduced below, with initials being substituted for the names of Mr. Derksen's clients:

1. You failed to notify the Executive Director of the Law Society in writing of the circumstances of one or more of the following unsatisfied monetary judgments against you and your proposal for satisfying such judgments, contrary to Rule 3-44 of the Law Society Rules:

   (b) Requirement to Pay dated November 16, 2011, issued by the Canada Revenue Agency, account number [number], in the amount of $57,572.47; and

   (c) Requirement to Pay dated July 17, 2012, issued by the Canada Revenue Agency, account number [number], the amount of $55,893.47.

   This conduct constitutes professional misconduct or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

3. Between August 2011 and December 2012, you failed to comply with Law Society accounting rules governing receipt of funds you received from your client, PB. In particular, you failed to do one or more of the following:

   (a) deposit a $500 cash retainer, received on or about August 3, 2011, into your law firm's trust account as soon as practicable, contrary to Rule 3-51;

   (b) record receipt of a cheque in the amount of $500 received on or about September 28, 2011 purportedly in payment of your fees, as required by Rule 3-63(2);

   (c) deliver a bill to your client until after November 14, 2012, or at all, in respect of the funds received on August 3, 2011 once you were entitled to bill for services rendered, as required by Rule 3-63(3) and section 69 of the *Legal Profession Act*;

   (d) deliver a bill to your client until after November 14, 2012, or at all, in respect of the funds received on September 28, 2011, as required by Rule 3-63(3) and section 69 of the *Legal Professions Act*.

   This conduct constitutes professional misconduct or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

4. Between August 15, 2011 and December 2012, you failed to comply with Law Society accounting rules governing receipt of a $1,000 cash retainer received from your client, TF. In particular, you failed to do one or more of the following:

(a) deposit the funds into your law firm's trust account as soon as practicable, contrary to Rule 3-51;

(b) record receipt of the funds, as required by Rule 3-63(2); and,

(c) deliver a bill to your client in respect of the funds, once you are entitled to bill for services rendered, until after November 14, 2012, or at all, as required by Rule 3-63(3) and section 69 of the *Legal Profession Act*.

This conduct constitutes professional misconduct or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

5. Between November 2011 and June 2012, you breached Rule 3-52(3) by:

(a) directing the Legal Services Society to deposit funds owing to you to your law firm's pooled trust account, when those funds did not meet the definition of "trust funds" pursuant to the Law Society Rules;

(b) failing to promptly notify the Legal Services Society that they were depositing funds owing to you to your law firm's pooled trust account and directing them to deposit the funds to your general account instead; or

(c) failing to follow up with the Legal Services Society to ensure that they were depositing funds owing to you to your law firm's general account.

This conduct constitutes professional misconduct or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

LEGISLATION AND RULES

[3] The following provisions of the Act are relevant in this case:

Lawyer's bill

69 (1) A lawyer must deliver a bill to the person charged.

(2) A bill may be delivered under subsection (1) by mailing the bill to the last known business or residential address of the person charged.

(3) The bill must be signed by or on behalf of the lawyer or accompanied by a letter, signed by or on behalf of the lawyer, that refers to the bill.

(4) A bill under subsection (1) is sufficient in form if it contains a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursements.

[4] The following Law Society Rules (the "Rules") are relevant in this case:

Failure to satisfy judgment

3-44(1) A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately notify the Executive Director in writing of

(a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and

(b) his or her proposal for satisfying the judgment.

(2) Monetary judgments referred to in subrule (1) include

(a) an order nisi of foreclosure,

(b) any certificate, final order or other requirement under a statute that requires payment of money to any party, and

(c) a garnishment order under the *Income Tax Act* (Canada) if a lawyer is the tax debtor, and

(d) a judgment of any kind against an MDP in which the lawyer has an ownership interest.

Deposit of trust funds

3-51(1) Subject to subrule (3) and Rule 3-54, a lawyer who receives trust funds must deposit the funds in a pooled trust account as soon as practicable.

(3) Despite subrule (1), a lawyer who receives trust funds with instructions to place the funds otherwise than in a pooled trust account may place the funds in a separate trust account in accordance with section 62(5) of the Act and Rule 3-53.

(4) Unless the client instructs otherwise in writing, a lawyer must deposit all trust funds in an account in a designated savings institution.

(5) As soon as it is practicable, a lawyer who deposits into a trust account funds that belong partly to a client and partly to the lawyer or the lawyer's firm must withdraw the lawyer's or firm's funds from the trust account.

Pooled trust account

3-52(3) Subject to subrule (4) and Rule 3-66, a lawyer must not deposit to a pooled trust account any funds other than trust funds.

(4) A lawyer may maintain in a pooled trust account up to $300 of the lawyer's own funds.

Cheque endorsed over

3-54 If a lawyer receives a cheque payable to the lawyer in trust and, in the ordinary course of business, pays the cheque to a client or to a third party on behalf of the client, in the form in which it was received, the lawyer must keep a written record of the transaction and retain a copy of the cheque.

Recording transactions

3-63(1) A lawyer must record each trust or general transaction promptly, and in any event not more than

(a) 7 days after a trust transaction, or

(b) 30 days after a general transaction.

(2) A lawyer must record in his or her general account records all funds

(a) received by the lawyer expressly on account of fees earned and billed or disbursements made by the day the funds are received,

(b) subject to a specific agreement with the client allowing the lawyer to treat them as his or her own funds, or

(c) that the lawyer is entitled to keep whether or not the lawyer renders any services to or makes any disbursements on behalf of that client.

(3) A lawyer who receives funds to which subrule (2) applies must immediately deliver a bill or issue to the client a receipt for the funds received, containing sufficient particulars to identify the services performed and disbursements incurred.

Consent to disciplinary action

4-22(1) A respondent may, at least 14 days before the date set for a hearing under this Part, tender to the Discipline Committee a conditional admission of a discipline violation and the respondent's consent to a specified disciplinary action.

(3) The Discipline Committee may, in its discretion, accept or reject a conditional admission and proposed disciplinary action.

(4) If the Discipline Committee accepts the conditional admission and proposed disciplinary action, it must instruct discipline counsel to recommend its acceptance to the hearing panel.

(5) If the panel accepts the respondent's proposed disciplinary action it must

(a) instruct the Executive Director to record the lawyer's admission on the lawyer's professional conduct record,

(b) impose the disciplinary action that the respondent has proposed, and

(c) notify the respondent and the complainant of the disposition.

CONDITIONAL ADMISSION AND CONSENT TO DISCIPLINARY ACTION

[5] Pursuant to Rule 4-22, Mr. Derksen admitted that he had professionally misconducted himself by committing the disciplinary violations set out in subparagraphs 1(b) and (c) and paragraphs 3, 4 and 5 of the citation and consented in writing to the following disciplinary action:

(a) a suspension of 45 days commencing on February 20, 2015 or such other date as the hearing panel may order; and,

(b) costs in the amount of $1,000 payable by April 30, 2015 or such other date as the hearing panel may order.

[6] The Discipline Committee accepted the conditional admission and proposed disciplinary action that was consented to by Mr. Derksen, and discipline counsel recommended to the Panel at this hearing that it accept those admissions and the proposed disciplinary action.

[7] The Panel may only accept or reject the proposed disciplinary action. If it does not accept the proposed disciplinary action, then it may not rely on the conditional admission or make any findings of fact or determinations or impose any disciplinary action.

FACTS AND ADMISSIONS

[8] In response to a notice to admit delivered by the Law Society pursuant to Rule 4-20.1, Mr. Derksen admitted the truth of certain facts set out in the notice to admit. The text of those admissions, or parts thereof, that are relevant to this decision are

reproduced verbatim below, except for the names of clients of Mr. Derksen, where initials have been substituted in the place of their names:

(a) Philip Richard Derksen (the "Respondent") was called and admitted as a member of the Law Society of British Columbia on May 20, 1988.

(b) On November 24, 2008, the Canada Revenue Agency ("CRA") issued a certificate pursuant to the *Income Tax Act*, under Federal Court Action No. [number], in the amount of $20,040.12 against the Respondent (the "Certificate").

(c) On November 16, 2011, CRA issued a Requirement to Pay, Account No. [number] in the amount of $57,572.47 directed to the Bank of Nova Scotia in relation to the Respondent ("Requirement to Pay #1").

(d) The Respondent failed to notify the Executive Director of the Law Society in writing of the circumstances of Certificate #1 and his proposal for satisfying Certificate #1, contrary to Rule 3-44 of the Law Society Rules. The Respondent admits this conduct is professional misconduct.

(e) On July 17, 2012, CRA issued a Requirement to Pay, Account No. [number] in the amount of $55,893.47 directed to the Bank of Nova Scotia in relation to the Respondent ("Requirement to Pay #2").

(f) The Respondent failed to notify the Executive Director of the Law Society in writing of the circumstances of Certificate #2 and his proposal for satisfying the Certificate, contrary to Rule 3-44 of the Law Society Rules. The Respondent admits this conduct is professional misconduct.

(g) In the summer of 2011, PB retained the Respondent to defend him against a charge of assault.

(h) On or about August 3, 2011, PB paid the Respondent $500 cash as a retainer (the "$500 Cash Retainer"). The Respondent's office issued PB a cash receipt #57419.

(i) After receiving the $500 Cash Retainer, the Respondent did not deposit the cash into a bank. Instead, he kept it in his control and ultimately used it. The Respondent does not recall when he used the cash or for what purpose.

(j) On or about September 28, 2011, PB paid the Respondent an additional $500 by cheque (the "Cheque") as additional payment to the Respondent for his services.

(k) The Respondent believes that he deposited the Cheque into his personal account at the Scotiabank.

(l) On November 15, 2012, the Respondent rendered an account for PB along with a cover letter. The Respondent rendered the account approximately one year after completing his services and receiving the last of PB's money and only did so because Daniel Chow, in the course of an audit, had pointed out to the Respondent that there was no account on file.

(m) There is no client address on the November 15, 2012 account or the cover letter. The cover letter indicates that it is "for P/U" which means pick-up. The Respondent does not know if the client ever attended to pick up his account and has not been able to ascertain whether this occurred.

(n) The Respondent failed to deposit the $500 Cash Retainer into his law firm's trust account as soon as practicable or at all contrary to Rule 3-51 and admits this conduct is professional misconduct.

(o) The Respondent failed to record receipt of the Cheque received on or about September 28, 2011 purportedly in payment of his fees, as required by Rule 3-63(2) and admits this conduct is professional misconduct.

(p) The Respondent failed to deliver a bill to PB until after November 14, 2012 in respect of funds received on August 3, 2011, once he was entitled to bill for services rendered, as required by Rule 3-63(3) and s. 69 of the *Legal Profession Act* and admits that this conduct is professional misconduct.

(q) The Respondent failed to deliver a bill to his client until after November 14, 2012 in respect of funds received on September 28, 2011 as required by Rule 3-63(3) and s. 69 of the *Legal Profession Act* and admits that this conduct is professional misconduct.

(r) On or about August 15, 2011, the Respondent received $1,000 in cash as a retainer from TF who had been charged with production of marijuana for the purposes of trafficking (the "$1,000 Cash retainer").

(s) The Respondent provided TF a cash receipt #57420 acknowledging receipt of the $1,000. It was signed by the Respondent.

(t) The $1,000 Cash retainer by TF was a retainer that should have gone into the Respondent's law firm trust account but did not.

(u) On or about November 15, 2012, approximately six months after completing his services, the Respondent rendered an account for TF.

(v) The Respondent prepared the account … only because Daniel Chow, in the course of the audit, had pointed out to him that there was no account on file.

(w) Between August 15, 2011 and December 12, 2012, the Respondent failed to comply with Law Society account [sic] rules governing receipt of a $1,000 cash retainer received from his client TF. In particular, he failed to do the following:

i) deposit the funds into his law firm's trust account as soon as practicable, contrary to Rule 3-51;

ii) record receipt of the funds, as required by Rule 3-63(2); and

iii) deliver a bill to his client in respect of the funds, once he was entitled to bill for services rendered, until after November 14, 2012, or at all, as required by Rule 3-63(3) and section 69 of the *Legal Profession Act*.

The Respondent admits that this conduct constitutes professional misconduct.

(x) On November 16, 2011, CRA issued Requirement to Pay #1 against the Respondent in the amount of $57,572.47 with respect to the outstanding amounts owed by the Respondent for his taxes.

(y) The Respondent's bank received Requirement to Pay #1.

(z) The Respondent first learned of Requirement to Pay #1 in late November 2011 when he realized his three bank accounts with Scotiabank were

frozen. Upon making inquiries with Scotiabank, the bank informed the Respondent of the circumstances including Requirement to Pay #1.

(aa) The Respondent did not report Requirement to Pay #1 to the Law Society.

(bb) Upon learning of the November 16, 2011 Requirement to Pay, the Respondent immediately opened two accounts with TD Canada Trust ("TD"), a trust and a general account, so that he could have operating bank accounts which were not subject to a Requirement to Pay.

(cc) On or about November 29, 2011, the Respondent wrote to the Legal Services Society ("LSS") directing it to change the payment procedure for his LSS billings. He instructed LSS to commence depositing its payments of his statements of account into his new TD account, Account No. [number] ("TD 750 Trust"), rather than into his general account with Scotiabank as it had been doing.

(dd) TD 750 Trust was a new trust account the Respondent had opened at TD.

(ee) After receiving his request, LSS began depositing payments it owed to the Respondent into his new account, TD 750 Trust, as instructed by the Respondent.

(ff) By letter dated June 13, 2012, the Respondent instructed LSS to change their process and commence depositing its payment of his statements of account into his TD general account, Account No. [number] ("TD 718 General").

(gg) In February of 2012, the Respondent entered into a settlement agreement with CRA whereby he would make monthly payments in satisfaction of his debt. As a result, on February 20, 2012, CRA cancelled Requirement to Pay #1.

(hh) The Respondent was unable to make the payments pursuant to the settlement agreement with CRA and breached the settlement agreement shortly after he entered into it. Thereafter, CRA began to garnish 30 % of the Respondent's LSS billings directly.

(ii) Between November 2011 and June 2012, the Respondent breached Rule 3-52(3) of the Law Society Rules by:

i) directing the LSS to deposit funds owing to him to his law firm's pooled trust account, when those funds did not meet the definition of "trust funds" pursuant to the Law Society Rules;

ii) failing to promptly notify the LSS that they were depositing funds owing to him to his law firm's pooled trust account and directing them to deposit the funds to his general account instead; or

iii) failing to follow up with the LSS to ensure that they were depositing funds owing to him to his law firm's general account.

The Respondent admits that this conduct is professional misconduct.

[9] With respect to the admissions made by Mr. Derksen, we find the person named as Daniel Chow was a Law Society accountant who conducted a trust assurance audit of Mr. Derksen's records.

[10] We also find that Certificate #1 referred to in the admission set out above in subparagraph 8(d) is the same document as Requirement to Pay #1 referred to in the admission set out in subparagraph 8(c) and that Certificate #2 referred to in the admission set out in subparagraph 8(f) is the same document as Requirement to Pay #2 referred to in the admission set out in subparagraph 8(e).

[11] No evidence was heard or received by the Panel other than the admissions made by Mr. Derksen and several documents the authenticity of which Mr. Derksen also admitted were filed as exhibits. None of those documents are necessary for our findings of fact.

[12] We find that those facts admitted by Mr. Derksen set out in paragraph 8, above, establish that he failed to take the actions he should have taken as alleged in subparagraphs 1(b) and (c) and paragraphs 3, 4 and subparagraphs 5(b) and (c) of the citation and establishes that he did take that action alleged in subparagraph 5(a) of the citation.

DETERMINATION

[13] What constitutes professional misconduct is not defined in the Act or the Rules or described in the *Code of Professional Conduct*. Since the decision by the hearing panel in *Law Society of BC v. Martin*, 2005 LSBC 16, the vast majority of panels have adopted as a test for professional misconduct whether the conduct of the lawyer in question exhibited a "marked departure" from the standard of conduct the Law Society expects of lawyers. This is a subjective test that must be applied after

taking into account decisions of other hearing panels, publications by the Law Society, the accepted standards for practice currently accepted by the members of the legal profession in British Columbia and what, at the relevant time, is required for protection of the public interest.

[14] A breach of the Act or failure to comply with a Rule will not necessarily amount to professional misconduct, but it may do so if the breach or failure to comply is serious.

[15] Guidance for when a breach of the Rules can constitute professional misconduct will be found in a number of discipline panel decisions. When determining whether a Rule breach may constitute professional misconduct, panels give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the lawyer's conduct (see *Law Society of BC v. Lyons*, 2008 LSBC 09 at para. 35).

[16] The Law Society submits that Mr. Derksen's actions and omissions, including those failures described in subparagraphs 1(a) and (b), paragraphs 3 and 4 and subparagraphs 5(b) and (c) of the citation, constitute professional misconduct, and Mr. Derksen has admitted that each of them constitutes professional misconduct.

[17] We are satisfied that the conduct described in the citation that Mr. Derksen has admitted to is a marked departure from the standard of conduct the Law Society expects of lawyers. We therefore find that all of the conduct described in those paragraphs of the citation constitutes professional misconduct.

BASIS FOR ACCEPTING OR REJECTING A PROPOSED DISCIPLINARY ACTION

[18] We agree with the following statements made by the panel in *Law Society of BC v. Rai*, 2011 LSBC 02 at paragraphs 7 and 8, regarding the purpose of Rule 24-22 and on what basis a hearing panel should decide whether or not to accept a proposed disciplinary action:

> 7. This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The

Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"

8. This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary action. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

PROFESSIONAL CONDUCT RECORD

[19] On May 25, 1992, the Competency Committee of the Law Society recommended a practice review of Mr. Derksen's practice be conducted. The report of that practice review dated October 21, 1992 recommended that Mr. Derksen take several steps to improve his competence, including limiting his practice to areas he was competent in, that he not practise on his own but work in an association with a more experienced practitioner, that he improve his office systems, including his file bring forward system, his billing system, a list of files and his review, closing and billing files and that he improve the manner in which he handled his clients. As a result of that practice review report, Mr. Derksen gave an undertaking to the Law Society on March 23, 1993 that he would cease practising in the area of wills and estates.

[20] On August 19, 1996, following receipt of a follow-up practice review report dated June 6, 1996, Mr. Derksen gave further undertakings to the Law Society. These included the following:

(a) not to practise in the real estate area as a solicitor;

(b) to continue counselling to deal with problems concerning motivation, time management, procrastination, avoidance and delay as long as necessary;

(c) to try to improve his receivables and billings by instituting a policy of monthly billings, to review his active files at least monthly and highlight

those files that should be billed, and to set aside time at the end of each month to review draft bills as prepared by his secretary and get them out;

(d) to document ongoing conduct with clients and others involved in a file and send confirming letters to client and other file contacts;

(e) to send clients interim reports providing them with updates and analysis on their files.

[21] A LOMAS Review Report dated July 25, 2003 prepared by a Law Society staff lawyer at the direction of the Practice Standards Committee made several recommendations, including that Mr. Derksen:

(a) continue with counselling to assist him with motivation, time management, procrastination, avoidance and delay;

(b) undertake to restrict his practice to criminal law only;

(c) arrange his finances and fee structures so he could afford part-time secretary and bookkeeping help as he now recognized the difficulty he had in doing that work himself;

(d) improve the management of his workflow and day;

(e) implement several recommendations to better document his files.

[22] On September 3, 2003, Mr. Derksen agreed to all of the recommendations made in the LOMAS Review Report.

[23] On April 14, 2004, a hearing panel found in respect of a citation issued to Mr. Derksen on January 12, 2004 that, between July 1 and September 24, 2003, he had practised law without having paid his professional liability insurance fee due on June 30, 2003 and that he had failed:

(a) to hold funds collected in payment of goods and services tax and funds deducted from employee wages as source deductions pursuant to the *Income Tax Act* and to hold funds collected in payment of social service tax; and

(b) to remit any such funds as required to the Government of Canada or the Government of British Columbia.

[24] In respect of the 2004 citation, Mr. Derksen was reprimanded, fined $4,000 and ordered to pay costs in the amount of $1,410.50. The hearing panel also imposed the following conditions on Mr. Derksen's practice:

(a) that, commencing June, 2004 and ending March, 2006 to coincide with his quarterly remittances of GST, PST and employee source deductions, he provide quarterly statutory declarations to the Law Society regarding these remittances together with any practice debts incurred and the status of those practice debts from the date of the previous declaration and the number of visits Mr. Derksen had with his psychiatrist or psychologist during that quarterly period; and

(b) that he provide the Law Society with a final reporting letter from his psychiatrist with the last statutory declaration advising as to Mr. Derksen's progress through treatment for procrastination and anxiety.

[25] The 2004 hearing panel also strongly recommended and suggested that Mr. Derksen remain in contact with the Lawyer's Assistance Program and seek assistance of the Lawyer's Assistance Program when any concerns arose regarding his ability to stay focused on his practice. The hearing panel did not impose that recommendation as a condition of his practice.

[26] On December 17, 2009, Mr. Derksen attended a meeting of a Conduct Review Subcommittee concerning his conduct in failing to advance a client's file in a timely manner. Mr. Derksen had failed to obtain requested medical information for a client in time for it to be produced for trial and was discharged by his client. The client retained new counsel, who obtained an adjournment of the trial. Although Mr. Derksen had requested the medical information from the treating physician, he failed to properly diarize the file, and it was not properly followed up on in order for the information to be obtained in time for the trial. Mr. Derksen acknowledged to the Subcommittee that he did not meet his client's expectation and recognized that he fell short of the standard expected of competent counsel. Mr. Derksen informed the Subcommittee that he had recognized his error and had implemented changes to his file management system.

[27] Mr. Derksen was subject to another conduct review, which was held on November 16, 2011, with respect to failure to attend court when scheduled that resulted in prejudice to his client. The Conduct Review Subcommittee discussed with Mr. Derksen the importance of maintaining proper systems to ensure that he is able to fulfill his professional obligations. Mr. Derksen acknowledged to the Subcommittee that his conduct was inappropriate and apologized for his lack of service to his client. He attributed his failure to attend provincial court when

scheduled to deficiencies in his calendar and the manner in which he dealt with telephone calls from his clients and messages left by them. He assured the Subcommittee that he had taken steps to avoid future problems and that he had a new receptionist to whom he had given new instructions concerning the taking and relaying messages.

[28] On April 9, 2013, a citation was issued to Mr. Derksen for failing to respond properly to communications from the Law Society concerning its investigation regarding one of the judgments which was the subject of this hearing, and because he failed to provide a substantive response properly to communications from the Law Society concerning its investigation regarding concerns arising from the compliance audit of his practice conducted in October, 2012. At the hearing of the 2013 citation Mr. Derksen admitted the conduct alleged and that it constituted professional misconduct. The hearing panel ordered Mr. Derksen to provide a complete and substantive response to the Law Society by December 15, 2013 and suspended Mr. Derksen from practising law for a period of one month commencing January 1, 2014. He was also required to pay $2,000 costs to the Law Society by December 31, 2013.

OGILVIE FACTORS

[29] Counsel for the Law Society referred this Panel to those factors listed by the hearing panel in *Law Society of BC v. Ogilvie*, 1999 LSBC 17 at paragraph 10, as being appropriate to consider when determining what is an appropriate disciplinary action.

[30] The Law Society submitted that the following factors support a suspension as the appropriate disciplinary action in this case:

(a) the multiple incidents of misconduct;

(b) the misconduct occurred over an extended period of time;

(c) the various types of misconduct that involve failures to comply with Mr. Derksen's obligations to his regulatory body and his obligations to his clients, which suggest a common theme of inattentiveness to the requirements of practice; and

(d) Mr. Derksen's prior discipline history, which includes accounting or financial responsibility breaches, a fine and a previous suspension.

[31] The Law Society submitted that the following factors favour a 45-day suspension rather than a longer period of suspension in this case:

(a) the lack of any element of dishonesty; and

(b) the lack of current disciplinary decision that would support, on these facts, a longer suspension.

[32] Mr. Derksen did not dispute the Law Society's submissions that these factors indicate a 45-day suspension is appropriate in this case, and we accept those submissions.

SUBMISSIONS BY MR. DERKSEN

[33] Mr. Derksen did not testify or call any evidence at the hearing, but he did make submissions to the Panel.

[34] Mr. Derksen submitted that the requirements to pay described in subparagraphs 1(b) and 1(c) of the citation are in respect of the same debt. The Law Society does not dispute this is the case.

[35] With respect to the funds paid to him by his clients, PB and TF, which are the subject of paragraphs 3 and 4 of the citation, Mr. Derksen submitted that, although the allegations in those paragraphs are correct and supported by his admission, he did issue receipts to those clients for the funds received but failed to otherwise record the receipts in his accounting system. Counsel for the Law Society agreed that those receipts were issued by Mr. Derksen.

[36] Mr. Derksen also told the Panel that, when he directed the Legal Services Society to deposit payment of his fees to his trust account and not to his general account, as alleged in paragraph 5 of the citation and admitted by him, he did not do so in an attempt to avoid garnishment. Mr. Derksen did not admit that his direction to the Legal Services Society was made in an attempt to prevent garnishment of the fees paid by the Legal Services Society, and there was no evidence before this Panel that this was the case.

[37] Mr. Derksen told the Panel that he had made arrangements to have his practice covered and his clients represented by other counsel for the 45-day period beginning on February 20, 2015, including arranging a caretaker for his practice during that period of time.

[38] When asked by a member of the Panel what things had been put in place to ensure that there would no repetition of the type of conduct described in the citation, Mr. Derksen said that, during 2011 and 2012, when the conduct occurred, he had an inexperienced and unqualified person as a staff member. He said that he has now hired a person who has experience in working in a law office and has bookkeeping experience. He also said that he was having marital difficulties in 2011 and 2012 and that he had become divorced. He said that, in order to deal with the emotional problems he encountered as a result of his marital difficulties, he had been taking anti-depressants and one of their effects was that he allowed things to slip. He said that he was no longer taking any such medication. He did not, however, mention his depression as one of the causes of his procrastination. This may indicate a lack of insight, and we recommend he discuss this issue with his therapist.

RANGE OF DISCIPLINARY ACTIONS IN SIMILAR CASES

[39] Counsel for the Law Society referred us to several previous decisions made by hearing panels in cases similar, or somewhat similar, to this case. These included *Law Society of BC v. Cruickshank*, 2012 LSBC 27, where the lawyer had also made a conditional admission and consented to a proposed disciplinary action. That lawyer had failed to comply with various accounting rules, breached two undertakings, failed to enter into a written contingency fee agreement with five clients, failed to remit GST and PST in a timely manner and failed to remit employee source deductions. Among breaches of the accounting rules, the lawyer had withdrawn funds by way of unsigned trust cheques, had withdrawn trust funds by way of improper electronic transfers and failed to immediately eliminate trust shortages. The lawyer had a disciplinary history, which included three conduct reviews, one of which included a breach of undertaking, and another citation in respect of which an adverse determination was made. The majority of the hearing panel in that case determined a one-month suspension was fair and reasonable, but the third member of the panel would have rejected the proposed disciplinary action because they thought a one-month suspension was not sufficient.

[40] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the Benchers reviewed a hearing panel decision in which the disciplinary action was fines in the total amount of $14,000. In that case, the lawyer had failed to notify the Executive Director of the Law Society of ten unsatisfied monetary judgments and to provide a proposal for satisfying them and had also failed to comply with three court orders. The review panel determined that fines were inappropriate and that the appropriate sanction for that conduct was a one-month suspension.

[41] *Law Society of BC v. Welder*, 2012 LSBC 18, involved another citation for which the lawyer made conditional admissions and consented to a proposed disciplinary action pursuant to Rule 4-22. The proposed disciplinary action was a suspension of three months and payment of costs. That lawyer had failed to communicate with the Law Society regarding two requirements to pay issued by the Canada Revenue Agency and had also failed to comply with the provisions of a Law Society review panel order. That lawyer had a professional conduct record consisting of five conduct reviews and five citations in respect of which adverse determinations were made.

[42] Neither the Law Society nor Mr. Derksen referred us to any other cases in which the conduct of the lawyer was similar to that which is the subject of the citation in this matter.

[43] We are satisfied that the proposed disciplinary action in this case is not inconsistent with the cases we were referred to in which the conduct of the lawyers was similar to that of Mr. Derksen.

COSTS

[44] Counsel for the Law Society submitted that, under item 23 of Schedule 4, the range of costs for a hearing where there has been a conditional admission and consent to disciplinary action pursuant to Rule 4-22 is $1,000 to $3,500 and, in the circumstances of this case, the low end of that range was acceptable to the Law Society.

APPROPRIATENESS OF PROPOSED DISCIPLINARY ACTION

[45] After considering the facts of this particular case and, in this case, Mr. Derksen's professional conduct record and the decisions of previous Law Society panels in somewhat similar cases, we are satisfied that the proposed disciplinary action of a 45-day suspension, to which Mr. Derksen has consented, is within the range of a fair and reasonable disciplinary action in all of the circumstances. With respect to costs, we accept the Law Society's submissions that the low end of the range for costs for a hearing pursuant to Rule 4-22 is appropriate, and we are therefore satisfied that the costs of $1,000, which has been consented to by Mr. Derksen, is fair and reasonable in the circumstances.

DISCIPLINARY ACTION

[46] We therefore accept Mr. Derksen's proposed disciplinary action.

[47] At the hearing Mr. Derksen told the Panel that he had expended considerable effort and money in arranging for a caretaker for his practice for the 45-day period beginning on February 20, 2015 and for other counsel to represent his clients during that period of time and that it would create significant hardship for him if a 45-day suspension commencing on some date other than February 20, 2015 were imposed. We therefore pronounced our decision regarding the disciplinary action orally at the hearing of this matter on February 20, 2015 and informed Mr. Derksen and counsel for the Law Society that written reasons would be issued at a later date. These are those reasons.

[48] On February 20, 2015, we made the following orders and gave the following instructions and now confirm those in writing:

(a) We suspended Mr. Derksen from the practice of law for a continuous period of 45 days beginning on February 20, 2015.

(b) We ordered that Mr. Derksen pay costs to the Law Society in the amount of $1,000 on or before April 30, 2015.

(c) We instructed the Executive Director to record Mr. Derksen's conditional admission on his professional conduct record.

[49] Although not an order and not as a condition or limitation on Mr. Derksen's practice, we recommend that Mr. Derksen continue to use resources such as the Lawyer's Assistance Program of British Columbia or Optum and such psychological or psychiatric therapy or any other counselling he feels would be useful to improve the skills he will need to practise law in the future. We were encouraged by his assertion that he intended to obtain this type of assistance. His disclosure of having sought such assistance in the past and that he appeared motivated to do so in the future were persuasive facts in our decision to accept his proposal.