2015 LSBC 25
Decision issued: June 5, 2015
Citation issued: February 22, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

THOMAS PAUL HARDING

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	February 20, 2015
Panel:	Sharon Matthews, QC, Chair Ralston S. Alexander, QC, Lawyer John Lane, Public Representative
Counsel for the Law Society:	Robin McFee, QC
Counsel for the Respondent:	Gerald Cuttler

INTRODUCTION

[1] Thomas Harding was cited on six allegations of professional misconduct in relation to three different clients. In our previous decision, we found that he had committed professional misconduct on two allegations involving one of those clients. That decision was issued as 2014 LSBC 52.

[2] The allegations were that Mr. Harding:

a) failed to represent his client DA in a conscientious, diligent and efficient manner;

b) failed to report to the Lawyers Insurance Fund an application for want of prosecution brought against his client DA;

c) failed to advise his client DA, whose case was the subject of an application to dismiss for want of prosecution, to seek independent legal advice;

d) failed to report claims for special costs against him and his clients PJ and ZS to the Lawyers Insurance Fund; and

e) settled a lawsuit on behalf of his client ZS in circumstances where both he and ZS were provided with releases of claims for special costs as part of the settlement.

[3] Two allegations pertaining to Mr. Harding's client DA related to his delay in materially advancing her case for over four and one half years, after which an application for want of prosecution was brought (which did not succeed). We held that professional misconduct had been established with regard to the allegation that Mr. Harding failed to represent his client DA in a conscientious, diligent and efficient manner. We also found professional misconduct on the allegation that he failed to recommend independent legal advice to DA. We dismissed a third allegation of professional misconduct pertaining to the failure to report the application to dismiss for want of prosecution on DA's claim to the Lawyer's Insurance Fund.

[4] The other three allegations related to two clients of Mr. Harding in whose cases ICBC brought omnibus document production motions. Mr. Harding, on behalf of those clients, responded with motions against the defendants, defence counsel and ICBC employees for breach of the implied undertaking in litigation. The defendant respondents on the motions advised that they would be seeking special costs against Mr. Harding's clients and Mr. Harding personally. We dismissed two allegations of professional misconduct for failing to report the claims for special costs to the Lawyers Insurance Fund. We dismissed the allegation of professional misconduct in acting in a conflict of interest in relation to ZS by settling her case on terms that included release of all costs when the special costs claim against Mr. Harding personally was outstanding.

[5] On February 20, 2015 the Panel reconvened to hear submissions on disciplinary action and costs. The Law Society seeks a fine of $10,000 to $12,000 and costs of the disciplinary action phase of the hearing, which it estimates to be $4,361. Mr. Harding submits that a reprimand or a fine of $2,000 is appropriate and costs should be apportioned so that he is awarded net costs of 20 to 33 per cent of the total costs of the citation. We reserved. These are our decision and reasons.

THE ISSUES

[6] What is the appropriate discipline for Mr. Harding's failure to represent his client DA in a conscientious, diligent and efficient manner and for failing to refer her for independent legal advice?

[7] What is the appropriate order of costs given the result divided as described above?

FACTS

Practice background

[8] Mr. Harding was called and admitted as a member of the Law Society of British Columbia on August 31, 1990.

[9] Since his call, Mr. Harding has practised primarily in the areas of personal injury and family law. Since 1999 he has practised under the name Trial Lawyers Advocacy Group.

Client DA

[10] Mr. Harding was retained on DA's matter in late 2006 or early 2007. At that time, the matter was scheduled to proceed to trial within a month or two months.

[11] With the exception of one update meeting with the client, Mr. Harding took no steps on the matter for 49 months. The single meeting with the client yielded notes of one half of a page, but no plan and no action to move the case forward.

[12] When Mr. Harding took the step of filing a notice of intention to proceed after 49 months, the defendant brought an application to strike the claim for want of prosecution. Mr. Harding filed evidence on the application that the delay was his fault, and not as a result of the instructions of his client, who had always instructed him to press forward with the matter. He cited the pressures of his workload and seemingly constant occurrence of pressing and urgent matters. At the hearing of the facts and determination in this matter, there were agreed facts that the delay was due to Mr. Harding losing track of the file due to a failure in his bring forward system.

[13] There was no *mala fides* or improper motives on Mr. Harding's part. But we found that it could not be characterized completely as inadvertence or oversight due to a failed bring forward system, especially given the meeting 18 months after he was retained, following which there was still no action to move the case forward. We

found that at least part of the explanation is that he was too busy to get to DA's case, in circumstances where he had been retained on a case that was about to go to trial and he did nothing in four years to conclude it.

[14] We agreed with the characterization made by Mr. Justice Blair on the want of prosecution application (which did not succeed) that the delay was inordinate and inexcusable. We held that a mitigating factor was that there is no evidence of any dishonesty about activity on the file. Overall, we held that the conduct was grave and prolonged. We held that there was harm to Mr. Harding's client by virtue of the delay and that her interests were imperiled when the want of prosecution application was brought. We accepted the evidence that the ultimate harm was avoided by Mr. Harding's successful defence of that application. We noted that there is a public interest in the administration of justice that suffers when prolonged and avoidable delays occur. We held that Mr. Harding's conduct in not moving the case forward for 49 months in the circumstances was a marked departure from the conduct expected of a lawyer and amounted to professional misconduct.

[15] Mr. Harding did not notify the Lawyers Insurance Fund ("LIF") about the want of prosecution application. We concluded that, while we are of the view that Mr. Harding should have reported the want of prosecution application to LIF, Mr. Harding's conduct was not a marked departure from that expected.

[16] Mr. Harding did not recommend to DA that she obtain independent legal advice with regard to the want of prosecution application.

[17] We concluded that, during the timeframe starting when the want of prosecution application was launched up to the time it was dismissed, DA's interests were in peril due to the conduct of Mr. Harding. He should have referred her for independent legal advice, and his failure to do so was a marked departure from the conduct expected of a lawyer. Professional misconduct was made out on that allegation of the citation.

[18] There has been no complaint from Mr. Harding's client, and he continues to represent her in what appears to be a difficult case. That representation is provided pro bono.

Clients PJ and ZS

[19] Although the allegations pertaining to PJ and ZS were dismissed, they are relevant to the matter of costs so we will set out the pertinent facts.

[20] Mr. Harding was counsel for PJ and ZS in two separate Supreme Court of British Columbia actions in which PJ in one and ZS in the other brought proceedings for damages and losses allegedly caused by motor vehicle accidents.

[21] The defendants in both actions brought applications for orders that various non-parties produce various documents and information about PJ and ZS. These applications were supported by affidavits that either synopsized or exhibited information obtained by the defendants through the discovery process.

[22] On instructions, Mr. Harding prepared notices of motion on behalf of PJ and ZS seeking the dismissal of the production applications and a finding that the defendants, their lawyers, the affiants, the commissioners who took the affiants' oaths, the ICBC adjusters, and the CEO of ICBC were in contempt of court for breaching the "implied undertaking" of confidentiality by releasing documents obtained through discovery without consent and without a court order.

[23] The defendants advised Mr. Harding that in the event they were successful in having the contempt application dismissed, they would be seeking special costs against Mr. Harding and/or ZS and Mr. Harding and/or PJ.

[24] Mr. Harding arranged for independent legal advice and representation on the special costs issue, which he paid for.

[25] Mr. Harding did not report the claims for special costs to LIF.

[26] The contempt applications were not successful. While the special costs issue remained outstanding, Mr. Harding settled ZS's claim, on instructions. The terms of the settlement included abandonment of the claims for special costs against both Mr. Harding and ZS. This settlement term was the basis for the allegation in the citation that Mr. Harding acted in a conflict of interest.

[27] The BC Lawyers' Compulsory Professional Liability Insurance Policy states that the insurer does not provide coverage for special costs sought or awarded personally against a lawyer/insured. Although not specifically stated in the Policy, LIF provides coverage for claims brought by a client against his or her solicitor arising out of an alleged error that exposes the client to a claim for special costs.

[28] In light of the evidence on the terms of the Policy, we held that Mr. Harding could not have an obligation to report, let alone commit professional misconduct by failing to report. We dismissed the two allegations pertaining to failure to report to LIF on the ZS and PJ matters.

[29] With regard to the allegation of professional misconduct based on conflict of interest, we held that the claim for special costs did create circumstances where Mr. Harding had a financial interest in the outcome, but we found there was no conflict in these circumstances.

[30] We also held that, had these facts amounted to a conflict, it still would not have been professional misconduct because it was not a marked departure from the conduct expected of lawyers. We noted several mitigating factors, including that the conduct was not grave, it was a challenging situation for any lawyer, and no harm was done. We dismissed the allegation pertaining to acting in a conflict of interest.

Mr. Harding's Professional Conduct Record

[31] Mr. Harding has a professional conduct record consisting of two conduct reviews and two citations resulting in findings of professional misconduct.

Citation issued November 20, 2002

[32] Mr. Harding's client was suing his former lawyer whom Mr. Harding examined for discovery. Mr. Harding told an associate of the former lawyer that, at the examination for discovery, the former lawyer admitted enough to justify disbarment and that Mr. Harding was going to have the former lawyer disbarred. Mr. Harding subsequently apologized to the former lawyer and tendered a conditional admission of discipline violation and consent to a specified discipline action. This conditional admission was accepted by a hearing panel which imposed the specified discipline action in the form of a $1,000 fine and costs in the amount of $3,500: [2003] LSBC 20, [2003] LSDD No. 8.

June 29, 2004 Conduct Review before a single Bencher

[33] In the course of a medical malpractice trial and a subsequent costs application, Mr. Harding made unfounded allegations and criticisms of the conduct of the opposing counsel. Mr. Harding admitted that he was "injudicious in the wording of his responses and in his rebuttal and would avoid such conduct in the future." The Conduct Review Subcommittee was of the view that matters of this nature were unlikely to rise again and recommended no further action.

November 18, 2005 Conduct Review

[34] Mr. Harding admitted that he made injudicious comments about opposing counsel in a motor vehicle proceeding and acknowledged that he understood that sometimes

he went too far. The Subcommittee was satisfied that Mr. Harding had put systems in place and taken steps personally that would assist in avoiding a reoccurrence. The Subcommittee was also satisfied that Mr. Harding had taken steps personally to assist in controlling emotional outbursts that transgressed the rules. The Subcommittee recommended no further action.

October 18, 2010 Citation

[35] Mr. Harding was cited for writing two letters to his client's former lawyer that contained rude and discourteous remarks. The hearing panel found this to be professional misconduct. At the disciplinary action phase, counsel for the Law Society submitted that the appropriate disciplinary action was a fine of $2,500, taking into consideration an undertaking Mr. Harding had provided to the Law Society in relation to efforts at remediation. Counsel for Mr. Harding supported the Law Society's submission regarding the appropriate disciplinary action. The hearing panel was of the view that a short suspension together with Mr. Harding's undertaking would be an appropriate disciplinary action in the circumstances; however, in light of the Law Society's submission which Mr. Harding supported, the hearing panel "with reservations" accepted the Law Society's submission: 2013 LSBC 25 and 2014 LSBC 06.

Mr. Harding's stature in the profession and the community

[36] Thirty-eight letters and emails of support and character commendations were provided to us. Of those, 26 were written after our decision on facts and determination. Many of those writers made reference to our decision after the facts and determination phase, indicating that they were familiar with our findings.

[37] These letters and emails came from lawyers in Vancouver, the Fraser Valley, Vancouver Island, the BC Interior and the Kootenays.

[38] These communications, at more or less length, describe Mr. Harding as a lawyer who is an accomplished and passionate advocate for his clients, a giving and caring lawyer who often does pro bono work, a giving and caring colleague who spends a lot of time assisting other lawyers with their files at no charge, and a person who gives back to the greater community. Mr. Harding is reported to have organized drives for the Surrey Food Bank, for example. Many of the writers also report that they have observed that our findings and reasons at the facts and determination phase have affected Mr. Harding greatly since he generally takes great pride in being an effective and conscientious advocate for his clients.

[39] A concise example of the type of sentiments expressed in these letters is contained in the following passage of a letter written by Adam de Tuberville of Ramsay Lampman Rhodes of Nanaimo:

> I have known Mr. Harding for approximately 20 years through our involvement in the Trial Lawyers Association of British Columbia. I have been the recipient of advice from him on thorny matters and on numerous occasions have received his finished work product on evidentiary or substantive law issues.
>
> Having seen the attention to detail that encompasses Mr. Harding's usual legal work for his clients, I was surprised to read what occurred with client DA. From my knowledge of Mr. Harding over the many years, I can only describe this as a bit of an aberration and not his *modus operandi*. On the contrary, Mr. Harding cares greatly for his clients, perhaps at times to a fault to his detriment.

[40] We note that some writers, not Mr. de Tuberville, go on to make a submission on the appropriate penalty, or more accurately, the appropriate degree of leniency that the Panel should exercise. We do not find such submissions helpful because the writers do not take into account the factors we must consider, especially the public interest. They also seem, in some cases, to take a different view than we did of the gravity of the particular circumstances surrounding the failure to serve DA in a conscientious manner. For future cases, it would be more helpful if such submissions were left to counsel and the respondent, and not contained in letters. We have deliberately avoided being distracted by these submissions where they occurred.

[41] That comment aside, this impressive display of support provides helpful insight into fashioning the correct disciplinary response. We have taken the letters and emails of support into account as described below.

THE LEGAL PRINCIPLES

Statutory Principles

[42] Section 38 of the *Legal Profession Act*, SBC 1998, c. 9, provides the jurisdiction of the Law Society to sanction lawyers. It provides that, if an adverse determination is made, the hearing panel must reprimand the respondent, impose a fine (not exceeding $50,000), impose conditions or limitations on the respondent's practice, suspend the respondent from the practice of law in part or in whole, disbar the

respondent and/or require the respondent to take certain remedial steps or satisfy certain conditions.

[43] The issue of how a hearing panel should exercise its discretion to impose an appropriate disciplinary action must be determined with reference to s. 3 of the *Legal Profession Act* which reads as follows:

> **3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.
>
> See: *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 54.

The factors to be considered

[44] The s. 3 statutory objects and duties are reflected in the oft-cited and applied factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17 at para. 10 of the decision on penalty:

> While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
>
> 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.

[45] It is also often observed, and worth observing, that the role of the panel on deciding disciplinary action is not to punish or extract retribution, but to protect the public: *Law Society of BC v. Hordal*, 2004 LSBC 36.

Global sanction

[46] In cases where there has been a finding of professional misconduct relating to more than one allegation, it is necessary to determine whether there should be separate sanctions or a global sanction.

[47] In *Lessing* at paras. 75-78, the review panel established the following general rules:

a) the question of a whether a suspension or a fine should be imposed is best determined on a global basis of all the citations;

b) the question of the length of the suspension should be determined on a global basis;

c) if it is decided to impose a fine, it should be done on an individual citation basis.

[48] We adopt these principles in this case. We note that the six allegations were part of one citation, and accordingly, the two allegations we are addressing at this disciplinary action phase are part of one citation.

[49] In addition to the application of these general rules, we are of the view that, because the allegations on which professional misconduct was found are intertwined significantly, a global sanction for both is appropriate.

Progressive discipline

[50] The review panel in *Lessing* held that the professional conduct record of a respondent should be considered; however, its weight in assessing the specific disciplinary action will vary. Some of the non-exclusionary factors that a hearing panel may consider in assessing the weight to be given to a prior conduct record are as follows:

a) the dates of the matters contained in the conduct record;

b) the seriousness of the matters;

c) the similarity of the matters to the matters before the panel; and

d) any remedial actions taken by the Respondent.

[51] We also note that the *Ogilvie* factors include the prior discipline record of the respondent. It is one of several factors, all of which have to be given some weight, or no weight, relative to the other factors and as dictated by the facts and circumstances of the case.

[52] Mr. Harding's professional conduct record is relevant. There is an issue as to how much weight it should be given since the incidents covered by it all relate to rude and discourteous conduct to other lawyers. The professional misconduct in this case is not about rude or discourteous behavior. We will discuss the weight to be given in our analysis of all of the factors.

ANALYSIS

The *Ogilvie* factors

Gravity of the conduct

[53] In our determination of professional misconduct for failing to represent DA in a conscientious, diligent and efficient manner, we held that the misconduct was grave and had put her case in jeopardy because an application to dismiss her case was made. We also held that failure to refer DA for independent legal advice was grave and aggravated by Mr. Harding's belief that he did not need to if he successfully

defended the want of prosecution application. We held that was exactly why she needed independent, objective legal advice and Mr. Harding's failure to refer her was not consistent with his obligation of candour to his client. This factor carries significant weight in establishing the fine we impose.

Age and experience

[54] Mr. Harding is a lawyer of mature age and over 20 years of experience. This factor is not significant except to the extent that he is not able to plead inexperience as an explanation for the misdeeds.

Character and prior disciplinary record

[55] Mr. Harding's professional conduct record demonstrates an inability to hold his temper and treat other lawyers with professional courtesy. That demonstrated problem is not related to the allegations of professional misconduct we have found except in a general way: Mr. Harding has demonstrated difficulty complying with the rules and the professional conduct norms of lawyers. We give his prior professional conduct record modest weight.

[56] We also believe that Mr. Harding's character is a significant factor. The letters of support demonstrate that these professional misconduct findings are significantly out of character for him – he is generally a passionate advocate for his clients and not one to fail to vigorously pursue his clients' cases. His general character is also lauded – he is described as a caring, supportive and helpful colleague. These comments must be taken in the context of his also proven tendency to be rude and discourteous to lawyers who are in positions opposite to the interests of his clients.

[57] Accordingly, we also give significant weight to the testimonials in support of Mr. Harding. The positive traits he has demonstrated ameliorate his professional conduct record to an extent.

Impact on the victim

[58] There was no negative impact on DA. This is a factor to be given modest to significant weight.

Advantage gained

[59] There was no advantage gained or to be gained by Mr. Harding. This factor is neutral.

The number of times the offending conduct occurred

[60] As we discussed in our previous reasons, the failure to provide conscientious, diligent and efficient representation can either be viewed as one long failure or the sum of things that should have been done over the more than four-year period of inactivity. This factor directly overlaps with the gravity of the misconduct, and although we have given gravity significant weight, we do not weigh it twice with this factor. The failure to refer to independent legal advice occurred once, and so this factor is not significant on that finding of professional misconduct.

Acknowledgement and redress

[61] Mr. Harding immediately acknowledged to his client and the court that the failure to move DA's case forward was his responsibility. He did not acknowledge that it was professional misconduct, because he took the position that it was as a result of an oversight and a mere mistake does not amount to professional misconduct. Although we disagreed with that position, taking it does not amount to a failure to acknowledge his responsibility.

[62] However, Mr. Harding took the position that he was justified in not referring DA for independent legal advice because he could and did succeed in defending the application to dismiss for want of prosecution. His position is, in that instance, a failure to acknowledge his responsibility.

[63] Overall, this factor is slightly aggravating.

Remediation or rehabilitation

[64] Mr. Harding has supplemented his bring forward system with a written reminder that his assistant keeps in addition to his computer diarizing. While we found this was not just a failure of a bring forward system, it does help to have a second person reminding and encouraging one to take action on files that might otherwise languish. We find this to be an appropriate response and therefore an ameliorating factor.

The impact of criminal or other sanctions

[65] There are no criminal or other sanctions to consider.

The impact of the proposed penalty on the Respondent

[66] With regard to the impact of the proposed penalty on the respondent, we do not have any direct evidence of his financial means which would lead us in a specific direction on the quantum of a fine. We have been told, through the letters of support, that Mr. Harding has suffered great embarrassment and remorse through the publication of our decision on facts and determination. That is relevant to specific deterrence, but not to this factor.

Specific and general deterrence

[67] With regard to specific deterrence, the evidence shows that, in addition to having his misconduct published, he is specifically mortified by having been found to have professionally misconducted himself in a manner that is inconsistent with his approach of vigorously representing his clients, in which he takes great pride. We take this into account and give it significant weight.

[68] However, general deterrence is also important. While each case must be decided on its specific facts, we must demonstrate to the profession as a whole that failure to take any steps at all for four years is serious and attracts a serious penalty. Delay is a problem in the justice system. Delay can occur while lawyers are taking appropriate steps to move a case along, and of course that will not attract discipline. But we must pay attention and act when a lawyer's action or inaction causes inexcusable delay as in this case.

Public confidence in the integrity of the justice system

[69] Public confidence is at least as important as general deterrence for the same reasons. These two factors receive significant weight. It is the absolute failure to do anything for four years, and then to not send the client for independent legal advice when her claim was in jeopardy due to the inaction, that animates our view of these factors and the gravity.

[70] Counsel for Mr. Harding submits that we should take notice of the fact that there are many applications for dismissal for want of prosecution and not many disciplinary hearings. He asserts that publication of our decision and a reprimand will satisfy the requirements of general deterrence and public confidence.

[71] We disagree. We have found the proven misconduct to be grave for the reasons given above. When such a finding is made, a reprimand runs the risk of defeating general deterrence and public confidence.

[72] Counsel for Mr. Harding also submits that public confidence is addressed by the fact that Mr. Harding took responsibility for his misconduct. We agree that ameliorates the misconduct somewhat but not to the point that the gravity of the conduct and the public confidence in the administration of justice can be addressed with a reprimand only.

The range of penalties in similar cases

[73] Prior discipline decisions involving failing to serve clients in a conscientious, diligent and efficient manner and for failing to recommend independent legal advice (although both allegations are not necessarily found in all of the precedent cases) demonstrate a broad range of disciplinary action imposed. That range includes a reprimand at the lower end and a suspension at the higher end.

[74] We have concluded that a reprimand is not an appropriate sanction given the seriousness of the incidents involved at this time, the need for general deterrence, the public interest in the Law Society taking matters involving failure to provide conscientious, diligent and efficient representation seriously, and Mr. Harding's professional conduct record.

[75] With regard to a suspension, many of the cases involving suspension involve an element of dishonesty or deceit where the professional misconduct is based solely on allegations like those in this case. For example, in *Law Society of BC v. Simons*, 2012 LSBC 23, there was a significant element of dishonesty in that the respondent had misled the client regarding the status of the court action and did not advise his client when an application for a dismissal for want of prosecution was brought. Where, however, there is a significant record of discipline, a suspension may be imposed despite the absence of deceit.

[76] As discussed above, we have concluded that Mr. Harding's professional discipline record is relevant to the sanction in this case and should be given modest weight. Although we register the concern that this case is the continuation of a pattern of operating outside the rules that govern lawyers in British Columbia, it is not a continuation of the pattern of the types of cases in which Mr. Harding has previously been found to have professionally misconducted himself. In our view, given his professional discipline record and the context of these facts, including that there was no *mala fides* and no deceit involved in either of these incidents, a suspension is not the correct sanction.

[77] Accordingly, we turn our focus to cases where a fine has been levied.

[78] We have been referred to these cases involving fines in a range from $4,000 to $7,500: *Law Society of Alberta v. Chick*, [2008] LSDD No. 155; *Law Society of BC v. Epstein*, 2011 LSBC 12; *Law Society of BC v. Hart*, 2014 LSBC 17; *Law Society of BC v. McLellan*, 2011 LSBC 23; *Law Society of BC v. Wilson*, 2012 LSBC 06; *Law Society of BC v. Harrison*, [1992] LSDD 10.

[79] As in all cases, the facts of the precedents are not completely apposite. The prevailing factors are the length of time the inattention to the file persisted, whether the lawyer failed to communicate, and whether there was any element of dishonesty in communications (especially pertaining to the status of the file or the delays in the file).

[80] For example, the *McLellan* decision involved a lawyer who took few steps for six years notwithstanding inquiries from the client. The gravamen of the failure to move the case along in that case was that the lawyer had formed the view that the case was not worth pursing but had not advised the client of that. The fine was $5,000. We find the gravity of the professional misconduct in that case to be similar to the gravity in this case, notwithstanding that the facts are different. We also note that, in *McLellan*, the lawyer did not have a professional conduct record and there was one proven allegation of professional misconduct, whereas in this case there are two.

[81] In *Chick* the lawyer professionally misconducted himself by failing to serve a statement of claim in time, not telling the client of the error and consenting to the discontinuance of the action without advising the client to get independent legal advice. The panel imposed a fine of $4,000 and a reprimand.

[82] In *Hart* a fine of $7,500 was imposed where the lawyer had been found to have professionally misconducted himself by failing to serve his client in a conscientious, diligent and efficient manner. When he was initially retained he advised the client that the matter would be concluded in four to six weeks and, in the ensuing two and one half years had accomplished little. The lawyer had a professional conduct record including three conduct reviews and three citations including one for failing to provide the required quality of service to the client. In addition to failing to serve the client in a conscientious, diligent and efficient manner the lawyer in that case had been found to have failed to put his client's funds in an interest-bearing trust account, failing to provide an opinion letter when he had promised to do so, failing to correct a pleading and failing to keep his client informed of pertinent matters.

[83] In this case, the length of time of the inattention was long relative to other cases, but there was no dishonesty and no *mala fides*. The issue of whether there were

problems with responding to communications with the client is not clear on the agreed facts (see our previous decision on this point).

DISCIPLINARY ACTION

[84] In our view, the gravity of the two allegations on which we found professional misconduct, the need for deterrence, especially general deterrence, and the need to ensure that the public understands that the Law Society takes seriously failures to conscientiously, diligently and efficiently represent clients and to refer them for independent legal advice when required to do so, mandate a global fine of $6,000.

COSTS

[85] Success was divided at the facts and determination phase. The Law Society succeeded on two of six allegations relating to one of three clients and client matters to which the citation pertained.

[86] The Law Society submitted that the parties should bear their own costs of the facts and determination hearing and that Mr. Harding should pay costs of this phase. Mr. Harding submitted that the costs of the discipline proceedings in total should be divided one third/two thirds, so that he essentially would recover one third of the costs, or alternatively, no costs should be awarded.

[87] It is our view that Mr. Harding enjoyed more success than did the Law Society. Although the disciplinary action and costs phase was necessary because of the two allegations we found were made out, there are features of the four that were not made out that must be taken into account. In particular, we found that the facts underlying the allegations pertaining to conflict of interest for client ZS and failure to report to LIF for clients PJ and ZS were exceedingly thin. In particular, there was no conflict to support the allegation on conflict, let alone a conflict that could be characterized as professional misconduct. With regard to the allegations for failing to report the claims for special costs to LIF, the applicable policy, on its face, does not cover such claims.

[88] Accordingly, we are persuaded that costs must be adjusted from that proposed by the Law Society to better reflect the outcome. We order that Mr. Harding pay the cost of the reporter for the disciplinary action hearing but in all other respects the parties bear their own costs.

DISPOSITION

[89] We impose a fine of $6,000, payable by July 31, 2015. We order that the Law Society and Mr. Harding bear their own costs of both the facts and determination hearing and this hearing, except the costs of the court reporter at the February 20, 2015 hearing in the amount of $441, which we order Mr. Harding to pay by July 31, 2015.