2015 LSBC 39
Decision issued: August 24, 2015
Citation issued: October 7, 2014

CORRECTED DECISION: PARAGRAPHS [89], [90] AND [93] OF THE DECISION WERE AMENDED ON AUGUST 26, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KEVIN ALEXANDER MCLEAN

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing date:	May 26, 2015
Panel:	Pinder K. Cheema, QC, Chair Dennis Day, Public representative Brian Wallace, QC, Lawyer
Discipline Counsel:	Alison Kirby
No-one appearing on behalf of the Respondent	

BACKGROUND

[1] Kevin McLean was called and admitted to the Law Society of BC on August 27, 2010. As of April 10, 2015, he was a former member of the Law Society by virtue of Rule 4-4.2(7) of the Law Society Rules.

[2] The citation addressed to the Respondent issued October 7, 2014 and amended on February 20, 2015, alleges that:

Conduct in Relation to Bill of Costs

1. In the course of representing your clients LD and MW, (the Tenants) regarding their bill of costs against JK (the Landlord), you:

   (a) sent correspondence to the unrepresented opposing party, JK, on five separate occasions, telling him that if he did not pay your clients' bill of costs, you would execute against his assets;

   (b) unilaterally set a date for the assessment of your clients' bill of costs knowing that JK was not available;

   (c) sent an email to JK advising him that his cheque in payment of your clients' costs had bounced and that you intended to commence execution proceedings when you knew or ought to have known that JK's cheque had cleared and that JK had paid in full the amounts owing;

2. You failed to respond to one or more communications from JK regarding scheduling a mutually convenient date for an appointment to tax your clients' bill of costs.

3. You told Master Baker, at the assessment hearing of the bill of costs that you had not responded to JK's scheduling requests because he was represented by counsel, when you knew or ought to have known that this was untrue.

Conduct in Relation to Defamation Action

4. In the course of representing yourself in a defamation action you commenced against the opposing party, JK, you failed to respond promptly to communications from opposing counsel, including:

   (a) two emails concerning trial scheduling;

   (b) two letters and some emails regarding a draft bill of costs;

   (c) two emails regarding filing of a notice of discontinuance;

   (d) five letters or emails regarding examinations for discovery;

   (e) an email regarding the filing of the notice of discontinuance after being advised that JK had withdrawn his consent to the filing;

   (f) three letters or emails regarding an application to set aside the notice of discontinuance; and

(g) a letter regarding payment of special costs.

5. Between October 2012 and August 2013, in the course of representing yourself in the defamation action, you:

   (a) unilaterally filed a notice of trial for two days without confirming opposing counsel's availability and after you had failed to respond to his requests to set a mutually convenient trial date;

   (b) failed to file a notice of discontinuance within a reasonable time after entering into a settlement agreement that required you to do so;

   (c) failed to file the notice of discontinuance by the date that you told opposing counsel you would do so;

   (d) filed the notice of discontinuance after opposing counsel told you that his client had taken the position that you had repudiated the settlement agreement and had withdrawn his consent to you filing the notice of discontinuance;

   (e) failed to inform opposing counsel that you had filed the notice of discontinuance, knowing consent had been withdrawn;

   (f) failed to attend a scheduled Supreme Court hearing to respond to opposing counsel's application to set aside the notice of discontinuance; and

   (g) failed to attend a scheduled examination for discovery.

6. Between January 2014 and March 2014, in the course of representing yourself in the defamation action, you failed to attend Supreme Court hearings and comply with the directions of the Court by:

   (a) failing to attend a scheduled hearing that you had agreed was peremptory on you;

   (b) failing to attend a scheduled hearing that was peremptory on you;

   (c) failing to comply with directions to file your doctor's letters relating to your missed appearances;

   (d) failing to attend a scheduled hearing that was peremptory on you;

(e) failing to comply with a direction to provide information to support your email to the Supreme Court trial coordinator that you had a scheduling conflict; and

(f) failing to attend a scheduled hearing.

7. On or about March 19, 2014, in the course of representing yourself in the defamation action, you emailed the Supreme Court trial scheduler that you were unable to attend the hearing scheduled for March 21, 2014 as you were "currently in trial on the Island" and you would "not be able to speak to the matter on Friday due to a scheduling conflict," when you knew that this representation was not true, or in the alternative, when you had created this conflict after the March 21, 2014 hearing had been scheduled.

Conduct in relation to the Law Society

8. You failed to notify the Executive Director of the Law Society in writing of the circumstances of the following unsatisfied monetary judgments made against you and your proposal for satisfying the judgments:

(a) an order for special costs made July 19, 2013 in the amount of $1,800, payable forthwith; and

(b) a certificate of costs filed May 9, 2014 in the amount of $27,400.

9. You attempted to resolve a complaint against you made by JK to the Law Society by offering to settle your defamation action against JK on conditions including that he withdraw his complaint.

10. You failed to provide a full and substantive response, promptly or at all, to communications from the Law Society arising from the complaint made by JK, in particular, three letters dated June 25, July 23 and July 30, 2014.

Each allegation contains a statement that the conduct described constitutes one or more of professional misconduct, conduct unbecoming a lawyer or a breach of the *Legal Profession Act* or Law Society Rules.

DECISION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

[3] The Respondent did not appear at the hearing of this matter, nor did anyone appear on his behalf.

[4] The hearing commenced as scheduled at 9:30 am on May 26, 2015. The Panel satisfied itself that the Respondent had been served in accordance with the Rules. He was emailed a copy of the citation to his last known email address on October 8, 2014. An auto reply was received from Mr. McLean on the same date.

[5] On October 8, 2014, personal service of the citation was effected at the North Vancouver address Mr. McLean had provided to the Law Society as his place of business.

[6] On February 19, 2015, an order for substituted service was issued authorizing service at a Downtown address and a West End address in Vancouver, BC.

[7] The Respondent commenced an action in BC Supreme Court on September 9, 2014 listing his address for service as a slight variation of the Downtown address. On September 14, 2014, a notice of address for service was filed listing the Downtown address as the office address of the party's lawyer.

[8] In December 2014, the Respondent commenced another action in Supreme Court listing his address for service as the West End address, which was the Respondent's residential address as listed on the Law Society Information System Profile.

[9] On February 13, 2015, the Law Society sent a Notice of Hearing by regular mail to the West End address advising that the hearing of this matter would take place on May 26, 2015 at 9:30 am at 845 Cambie Street, Vancouver, BC.

[10] On February 13, 2015, the Respondent sent a letter by fax to the Law Society regarding a Notice of Review. The letter did not contain any return contact information for the Respondent.

[11] On February 20, 2015, the citation was amended, clarifying dates and format of correspondence. No substantive changes were made.

[12] On February 23, 2015, the amended citation, together with the order for substituted service and Notice to Admit, was couriered to the Downtown address and the West End address.

[13] On March 30, 2015, the Respondent provided the Downtown address as his address for service in response to an inquiry by Madam Justice Gerow, regarding a civil action that the Respondent had commenced.

[14] On May 11, 2015, the Law Society mailed and couriered a letter to the Respondent at both the Downtown and West End addresses confirming the citation hearing date and his failure to respond to the Notice to Admit.

[15] The Respondent wrote a letter dated May 19, 2015 to counsel in a civil action providing the Downtown address as his address for service.

[16] On May 20, 2015, the Law Society couriered a letter confirming the hearing date and enclosing its Book of Authorities to the Respondent at the Downtown address, and mailed it to the West End address.

[17] The Respondent was absent when the Panel convened at 9:45 am. The Panel adjourned for 15 minutes to accommodate any unintended delay by the Respondent. The Panel waited until 10:13 am before it reconvened.

[18] Section 42(2) of the *Legal Profession Act* permits a hearing panel to proceed in the absence of a respondent if the panel is satisfied that the respondent has been served with the notice of the hearing.

[19] The Respondent has not responded to any of the Law Society's correspondence nor has he filed any material. He has been advised, through the correspondence sent to him in October 2014, February 2015 and May 2015 that the hearing may proceed in his absence. He is now a former member.

[20] On February 25, 2015, the Respondent was served with a Notice to Admit dated February 23, 2015. He did not respond.

[21] Pursuant to Rule 4-20.1(7), the Respondent is deemed, for the purposes of the citation hearing, to have admitted the truth of the facts described in the Notice to Admit and the authenticity of the documents attached to the Notice to Admit.

[22] It does not necessarily follow, however, that the Respondent's deemed admission of the facts and authenticity of documents set out in the Law Society's Notice to Admit includes an admission that the facts alleged amount to professional misconduct. The Law Society must still prove to the satisfaction of this Panel, based on the preponderance of evidence, that the conduct alleged amounts to professional misconduct.

[23] In all of the circumstances of this case, including receipt of evidence that the Respondent had been served with the citation, amended citation and Notice of Hearing, and Notice to Admit, and the complete lack of response, we exercised our discretion to proceed with the hearing in the absence of the Respondent. We find he was duly served and had notice of the hearing date and place and that the Panel may proceed in his absence.

ONUS AND STANDARD OF PROOF

[24] The onus is on the Law Society to prove the allegations on a balance of probabilities.

[25] In *Law Society of BC v. Schauble,* 2009 LSBC 11, the hearing panel summarized the onus and standard of proof as follows (at para. 43):

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "... evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. …" (*F.H. v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193).

TEST FOR PROFESSIONAL MISCONDUCT

[26] The Law Society seeks a finding of professional misconduct with respect to the ten allegations contained in the citation.

[27] Alternatively, the Law Society suggests that allegations 1, 2 and 7 constitute incompetent performance of duties. Allegations 4, 5 and 6 constitute conduct unbecoming and incompetent performance. Allegation 8 constitutes conduct unbecoming and a breach or the Act or Rules.

[28] "Professional misconduct" is not a defined term in the *Legal Profession Act,* the Law Society Rules or *BC Code.* The test for whether conduct constitutes professional misconduct was established in *Law Society of BC v. Martin,* 2005 LSBC 16, at para. 171 as: ... "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[29] We take a "marked" departure to be a pronounced, glaring or blatant departure from the standard of expected conduct. A mere departure from the standard, it follows, is insufficient to constitute professional misconduct.

[30] In *Martin*, the panel also commented at para. 154:

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

[31] The Bencher review decision in *Re: Lawyer 12*, 2011 LSBC 35 is the leading pronouncement concerning the test for professional misconduct from a review panel. In the facts and determination decision of *Re: Lawyer 12,* the single bencher hearing panel had reviewed prior decisions and held at para. 14 (quoted in para. 7 of the review decision):

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

[32] Both the majority and the minority of the Bencher review panel confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test expressed by the single bencher hearing panel.

PROFESSIONAL MISCONDUCT VS. CONDUCT UNBECOMING

[33] Conduct unbecoming is defined in the *Legal Profession Act* as conduct that is contrary to the best interest of the public or legal profession or harms the standing of the legal profession. The definition has been considered in several cases, and the Benchers have adopted as a "useful working distinction" that professional misconduct refers to conduct occurring in the course of a lawyer's practice, while conduct unbecoming refers to conduct in the lawyer's private life (see *Law Society of BC v. Berge*, 2005 LSBC 28 (upheld on review 2007 LSBC 7) and *Law Society of BC v. Watt*, [2001] LSBC 16.

PROFESSIONAL MISCONDUCT VS. BREACH OF THE ACT OR RULES

[34] In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel considered the difference between a finding of breach of the *Act* or Rules and a finding of professional misconduct and held at paras. 32 and 35:

> … A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
>
> …

> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must 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 respondent's conduct.

PROFESSIONAL MISCONDUCT VS. INCOMPETENT PERFORMANCE OF DUTIES

[35] Under section 38(4)(b)(iv) of the *Legal Profession Act*, a panel may make an adverse determination that the respondent has committed "incompetent performance of duties undertaken in the capacity of a lawyer."

[36] "Competence" is not defined in the *Legal Profession Act*.

[37] In *Law Society of BC v. Goldberg,* 2007 LSBC 03, the lawyer was cited for, among other things, failing to demonstrate adequate knowledge of substantive law, practice and procedures to effectively apply that substantive law and the skills to represent his client's interests effectively (quality of service). The panel considered the meaning of incompetence and stated at paras. 49 and 50 as follows:

> The *Legal Profession Act* does not define "competence". In *Law Society of BC* v. *Eisbrenner*, [2003] LSBC 03, the Panel defined "competence". It held that a lawyer should:
>
> a) have the intellectual, emotional and physical capacity to carry out the practice of law;
>
> b) demonstrate professional responsibility and ethics;
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> c) set up, maintain office systems and file organization corresponding to the current or anticipated practice of the lawyer;
>
> d) communicate in a timely and appropriate manner with clients, counsel and others and document those communications in an appropriate manner;
>
> e) have an adequate knowledge of substantive and procedural law in the areas practised, be able to relate the law to a client's affairs and determine when the problems exceed the lawyer's ability; and

f) develop and apply technical skills such as drafting, negotiation, advocacy, research and problem solving to appropriately carry out a client's instructions.

A useful discussion of competence can be found in *The Regulation of Professions in Canada* by James T. Casey, commencing at page 13 through to page 14. *In summary, the question is whether or not a mistake or mistakes made by a professional will be of such significance so as to demonstrate incompetence. Assessing incompetence is a function of looking at the nature and extent of the mistake or mistakes and the circumstances giving rise to it or them*. It may be self-inflicted or the result of negligence or ignorance. In considering this issue we bore in mind that we are not dealing with an allegation that the Respondent was incompetent generally. Instead, the issue before us was the handling of the *Dunbar* Appeals and whether or not they were handled competently.

[emphasis added]

ALLEGATION 1 CONCERNING BILL OF COSTS

[38] It is alleged that the Respondent engaged in dishonourable or questionable conduct that casts doubt on his professional integrity or competence or reflects adversely on the integrity of the legal profession or the administration of justice, contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force, by :

(a) sending correspondence to an unrepresented party, JK, saying that the Respondent would take execution proceedings on a bill of costs that the Respondent knew or ought to have known had not yet been agreed upon or taxed and therefore could not yet be the subject of execution proceedings;

(b) unilaterally setting a date for the assessment of his clients' bill of costs for a date when he knew that JK was not available and had been communicating with the Respondent to set a mutually convenient date;

(c) sending an email to JK in stating that JK's cheque had bounced and threatening execution proceedings, when the Respondent knew or ought to have known that the cheque had not bounced and that the amounts owed by JK in costs had been paid.

[39] The Law Society seeks an adverse determination of professional misconduct as the Respondent's intentional misconduct constitutes dishonourable conduct that reflects adversely on his own professional integrity and that of the legal profession.

[40] Did the Respondent commit each of these acts set out above? We find he did.

[41] JK communicated his intention to the Respondent to settle the draft bill of costs, or alternatively, to set the draft bill of costs for a review hearing. In return, the Respondent emailed JK on five separate dates that, if JK delayed proceedings, he would commence execution against JK's assets, he would seek post-judgment execution against JK's assets and then would send the sheriff unless the full amount of costs was paid. (At all relevant times, the parties were dealing with a draft bill of costs yet to be reviewed by the Registrar.)

[42] On March 20, 2012, JK advised the Respondent that he was not available until early May. He also advised that he had received legal advice that the draft bill of costs was not enforceable until it had been reviewed by the Registrar and that, as it was the Respondent's bill of costs, it was up to him to set the matter for hearing. The following day, March 21, 2012, the Respondent, without consultation or notice to JK, filed an appointment to assess his bill of costs on April 2, 2012.

[43] On May 28, 2012, the Certificate of Costs in the amount of $9,356 was filed with the Court.

[44] On May 31, 2012, JK's cheque in the amount of $9,356, payable to Kevin A. McLean Law Corporation, cleared his account and was deposited into the Respondent's trust account.

[45] On June 11, 2012, the Respondent withdrew the sum of $9,356 by trust cheque and deposited it into his general account. On the same date, he withdrew the sum of $9,356 from his general account by way of general cheque number 128, payable to himself. There were insufficient funds to cover general cheque number 128, and it was returned NSF.

[46] On June 14, 2012, the Respondent sent a number of emails to JK accusing him of having issued a NSF cheque and threatening to send the sheriff if JK did not deliver a certified cheque to the Respondent that day.

[47] Is it dishonourable or questionable conduct? We find that each of the instances noted above constitutes dishonourable conduct.

[48] We find that the Respondent made repeated communications to an unrepresented party that he would take execution proceedings if the party did not pay the draft bill

of costs when he knew or ought to have known that a draft bill of costs is not subject to execution proceedings. He ceased his conduct only after JK advised him that a draft bill of costs was not subject to execution proceedings.

[49] We also find that the Respondent had received a number of emails from JK advising of JK's availability in his attempts to secure a mutually convenient date for the hearing of the draft bill of costs. In the last such email, sent on March 20, 2012, JK advised that he would not be available until early May. The Respondent responded by saying that the sheriff would be well into the execution process by that date.

[50] The Respondent's action on March 21, in unilaterally selecting the hearing date of April 2, followed immediately on that email. We find the Respondent's actions, of failing to consult, when he knew or ought to have known that JK wished to set the matter for hearing, and then selecting a date suitable only to the Respondent, followed by his failure to notify JK, particularly in the context of prolonged discussions with JK about setting a date, constitutes dishonourable conduct.

[51] We also find that the Respondent's email of June 14, 2012 to JK, accusing him of having issued a NSF cheque and threatening to send the sheriff when the Respondent knew or ought to have known that JK's cheque had been deposited into and cleared the Respondent's trust account at least two weeks before June 14 is dishonourable conduct.

[52] Each of these allegations is a situation wherein the Respondent took actions that show a marked departure from the standard expected by the Law Society of its members (*Martin*).

[53] We find that each of them constitutes professional misconduct.

ALLEGATION 2 – FAILURE TO RESPOND TO COMMUNICATIONS

[54] It is alleged that the Respondent failed to respond to communications from JK regarding scheduling a mutually convenient date for an appointment to tax the Respondent's clients' bill of costs.

[55] The Law Society seeks an adverse determination of professional misconduct, and cites the duty to respond with reasonable promptness to all professional letters and communications, as set out in Chapter 11, Rule 6 of the *Professional Conduct Handbook* and continued under Rule 7.2-5 of the *BC Code*.

[56] JK emailed the Respondent on January 24, 2012 expressing his wish to settle the draft bill of costs or, alternatively, to select a mutually convenient hearing date to review the draft bill of costs. On January 25, JK emailed the Respondent to again confirm his availability for mid-February. The Respondent emailed JK on January 27 with a counterproposal, a deadline and his intention to proceed with post-judgment execution but did not address JK's question of selecting a hearing date.

[57] On January 30, JK twice emailed the Respondent requesting confirmation of a suitable hearing date. The Respondent in return sent JK four emails; none contained a response to JK's request for suitable dates.

[58] On March 20, 2012, JK again emailed the Respondent advising of his availability and requesting the selection and setting of a hearing date. The Respondent responded in the same vein as he had in January – he threatened to commence execution but did not address the issue of selecting a hearing date.

[59] On March 21, the Respondent unilaterally selected a hearing date of April 2, 2012 as noted above.

[60] JK sent a total of four emails – January 24, 25, 30 and March 20, 2012 – attempting to deal with the issue of a mutually convenient hearing date. We find that, while the Respondent received and responded to some of JK's emails, he never provided a substantive response to JK's specific request to select a mutually convenient hearing date. All of JK's emails expressed his objective of setting the draft bill of costs for hearing, and he provided his availability so that a mutually convenient date could be selected. The Respondent never addressed that issue and, instead, set the draft bill of costs for hearing unilaterally for a time that he knew, based on communication received from JK, that JK would not be available.

[61] The Respondent's failure to address JK's requests to select a mutually convenient date to set the hearing, particularly in the face of JK's numerous, specific emails setting out his availability, constitutes a marked departure from the conduct expected by the Law Society of its members and therefore constitutes professional misconduct.

ALLEGATION 3 – MISREPRESENTATION

[62] It is alleged that the Respondent represented to the Supreme Court that he had not responded to JK's scheduling requests because JK was represented by counsel when he knew or ought to have known that this representation was not true,

contrary to Chapter 8, Rule 1(e) or Chapter 1, Rule 2(3) of the *Professional Conduct Handbook* then in force.

[63] Chapter 8, Rule 1(e) and Chapter 1, Rule 2(3) of the *Professional Conduct Handbook* then in force provided as follows:

> 1 A lawyer must not
>
> > (e) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established,
>
> 2 To courts and tribunals
>
> > (3) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law …

[64] The Law Society seeks an adverse determination of professional misconduct.

[65] On May 28, 2012, the Respondent and JK appeared before Master Baker on behalf of the Respondent's clients to assess his draft bill of costs. The transcript of the May 28 hearing shows that the court questioned the Respondent about his lack of reply to JK's emails of January, 2012 requesting dates through until early March for the hearing. The Respondent advised the court that he did not reply to JK as JK had counsel and that the Respondent was speaking directly with Gowlings (as counsel) on JK's behalf.

[66] The court then confirmed its understanding of what the Respondent had said to the court:

> Court: I'm trying to understand … what your response was to JK's request or offer when he said – give me dates he said from late January and you say, well, he had counsel or I was reasonable in my apprehension that he had counsel.
>
> KM: Absolutely

[67] In fact, the first communication that the Respondent received from Gowlings was an email dated March 22, 2012 of Robert Fashler advising the Respondent that he was "assisting JK in relation to the bill of costs and that JK had not received a Notice of Appointment to assess the costs. Please clarify."

[68] On March 26, 2012, Robert Fashler emailed the Respondent to clarify the scope of his retainer as follows:

> ... for the time being, this firm is providing legal representation to JK in a very limited capacity while he is out of town and unable to represent himself. We are assisting him to ascertain the date of the Appointment you set ... JK continues to represent himself generally in ...

[69] We find that, from January 2012 until March 22, 2012, the Respondent and JK were emailing each other directly about issues dealing with the draft bill of costs, including scheduling of a hearing date. We also find that there is no evidence that Gowlings was retained by JK before March 22, 2012.

[70] We find that when the Respondent told the court on May 28, 2012 that he did not reply to JK's January emails about dates, he knew that the first contact between him and Gowlings did not occur until the email of March 22, 2012.

[71] We find that when the Respondent told the court on May 28 of his reason for not responding to JK's January emails about dates, the court accepted the Respondent's statement that he was corresponding directly with counsel for JK about dates.

[72] We find that his misrepresentation misled the court and that his subsequent failure to correct the court's misunderstanding is evidence that he intended that the court remain in a state of misapprehension.

[73] Prior discipline decisions involving misrepresentations to the court have characterized such conduct as professional misconduct rather than incompetence. (See *Law Society of BC v. Galambos*, 2007 LSBC 31; *Law Society of BC v. Lowther*, [2002] LSBC 5; *Law Society of BC v. MacKinnon*, [2002] LSDD No. 11 and *Law Society of BC v. Botting*, 2000 LSBC 30)

[74] We find this act of misrepresentation constitutes professional misconduct.

ALLEGATION 4 – FAILURE TO RESPOND

[75] The citation alleges that the Respondent failed to respond promptly to several communications from or on behalf of opposing counsel, PS, contrary to Chapter 11, Rule 6, of the *Professional Conduct Handbook* then in force, or Rule 7.2-5 of the *Code of Professional Conduct for British Columbia*, which requires a lawyer to reply reasonably promptly to any communications from another lawyer that requires a response. The Law Society seeks an adverse determination of professional misconduct.

[76] The Respondent filed a defamation action against JK on July 23, 2012. He suggested a trial date of December 10, 2013.

[77] JK retained counsel, PS, who communicated with the Respondent on 17 occasions from October 10, 2012 to July 29, 2013 as noted below:

a. *trial scheduling*

October 10, 2012 - PS requested the Respondent's availability by October 11, 2012; (the Respondent replied on October 15, 2012).

October 15, 2012 - PS requested the Respondent's availability for a trial date of April 17, 2013; (the Respondent did not reply).

b. *draft bill of costs*

November 27, 2012 - PS requested the Respondent review and agree to the draft bill of costs, otherwise an appointment would be taken out; (the Respondent did not reply).

December 12, 2012 - PS sent an appointment to the Respondent to assess the draft bill of costs, returnable January 18, 2013; (the Respondent did not reply or acknowledge receipt of materials).

January 10, 2013 - PS emailed the Respondent regarding the scheduled assessment date of January 18 and asked him to acknowledge the December 12 letter and materials and his assistant's email of January 3; (the Respondent did not reply or acknowledge receipt of materials).

c. *filing of Notice of Discontinuance*

January 31, 2013 - PS emailed the Respondent asking that, as the Respondent had not filed the Notice of Discontinuance in the defamation action by January 25 as the Respondent had previously agreed, he please do so by the end of business on January 31, 2013; (the Respondent's auto email stated he was out of the office until February 1, 2013).

February 8, 2013 - PS emailed the Respondent advising that, as the Respondent still had not filed the Notice of Discontinuance, his clients were revoking consent to file same and he was requesting dates for discovery; (the Respondent did not reply).

d. *Examinations for Discovery*

February 15, 2013 - PS sent a letter and email to the Respondent enclosing an appointment to examine for discovery for April 19, 2013; (the Respondent did not reply or acknowledge receipt of materials).

March 6, 2013 - PS sent a letter to the Respondent confirming that discovery would proceed on April 19, 2013 and the hearing of the assessment of costs, currently set for March 25, would be adjourned; (on April 18, at 9:12 am, the Respondent replied stating that he was in day nine of a ten-day trial; he objected to the adjournment of the cost hearing; he did not address the April 19 date).

April 18, 2013 - PS emailed the Respondent asking whether he intended to attend the discovery set for April 19, 2013; (the Respondent did not reply and did not attend the discovery the following day).

July 19, 2013 - PS emailed and couriered materials to the Respondent advising that the application to set aside the Notice of Discontinuance was granted, that costs of $1,800 were awarded against the Respondent and payable forthwith; PS sent a copy of the entered order and a copy of the appointment to examine for discovery for August 1, 2013; the Respondent was asked to acknowledge service and to provide alternative dates; (the Respondent did not reply or acknowledge receipt of materials).

July 29, 2013 - PS emailed and couriered a letter to the Respondent reminding him of the discovery set for August 1 and of the special costs of $1,800 that were still unpaid; (the Respondent replied on July 31, but did not address the unpaid costs or the August 1 date).

e. filing of Notice of Discontinuance

March 27, 2013 - PS emailed the Respondent asking for the name of the person who had signed and filed the Notice of Discontinuance on behalf of the Respondent; a reply was sought by noon on March 28, 2013; (the Respondent did not reply).

f. setting aside the Notice of Discontinuance

April 19, 2013 - PS emailed the Respondent to advise that he would be applying to set aside the filed Notice of Discontinuance and asked for a reply by April 22, 2013 so that suitable dates could be arranged; (the Respondent wrote on April 22 telling PS to stop setting dates unilaterally, but he did not address the issue of dates).

April 23, 2013 - PS wrote to the Respondent to determine whether the date of May 27 was convenient for the application to set aside the filed Notice of Discontinuance; he was also asked to admit service of materials; (the Respondent did not reply or acknowledge receipt of materials).

May 13, 2013 - PS wrote and emailed the Respondent confirming that he would proceed on May 27, 2013 to set aside the Notice of Discontinuance; (the Respondent did not reply).

g. payment of special costs

July 29, 2013 - as noted above, PS wrote and emailed a letter advising the Respondent that he was ordered to pay the sum of $1,800 forthwith as special costs in the defamation action and asked him to pay immediately; (the Respondent did not respond, nor did he pay the amount as ordered by the court).

[78] We find that the facts disclose a consistent and repetitive pattern of failing to reply to opposing counsel throughout the course of the litigation.

[79] In cases where PS's communications related to requests to schedule dates, the Respondent's pattern of failing to reply was interspersed with letters objecting to the dates finally chosen by PS, without providing any alternative dates when he was available.

[80] In considering whether the Respondent's conduct is a marked departure from that conduct the Law Society expects of lawyers, the provisions of the *Professional Conduct Handbook* and *BC Code* are relevant because they articulate the standards against which the Respondent's conduct is to be measured.

[81] Chapter 11, Rule 6 of the *Professional Conduct Handbook* requires a lawyer to reply reasonably promptly to any communications from another lawyer that requires a response.

[82] The obligation to answer with reasonable promptness all professional letters and communications from other lawyers that require an answer is continued under Rule 7.2-5 of the *BC Code*.

[83] There are number of decisions in which panels have found professional misconduct for failing to respond to communications from another lawyer with periods of delay ranging from five months to two years: see, for example, *Law Society of BC v. Tsang*, 2005 LSBC 18, (five months); *Law Society of BC v. Niemela*, 2013 LSBC 15, (17 months); *Law Society of BC v. Clendening*, 2007 LSBC 10, (16 months);

Law Society of BC v. Williamson, 2005 LSBC 19, (20 months); and *Law Society of BC v. Braker*, 2007 LSBC 01, (two years).

[84] In this case, the repetitive pattern of failing to respond promptly or at all to communications from PS substantially lengthened the litigation and is a marked departure from the conduct expected of lawyers and constitutes professional misconduct.

[85] While the misconduct here was related to the Respondent's personal litigation, which he commenced against JK, the underlying defamation action arose out of his professional involvement with JK, the opposing party in another action, and related to matters arising from his professional involvement rather than his personal capacity.

[86] Hence, a finding of professional misconduct rather than conduct unbecoming is more appropriate. (See *Law Society of BC v. Bauder*, 2012 LSBC 13.)

ALLEGATION 5 – DEFAMATION ACTION

[87] It is alleged that the Respondent engaged in dishonourable or questionable conduct that casts doubt on his professional integrity or competence or reflects adversely on the integrity of the legal profession or the administration of justice, contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force or Rule 2.2-1, of the *Code of Professional Conduct for British Columbia*, by doing one or more of the following:

(a) unilaterally filing a notice of trial for two days without confirming opposing counsel's availability and after he failed to respond to opposing counsel's request to set a mutually convenient trial date;

(b) failing to file a notice of discontinuance within a reasonable time after entering into a settlement agreement that required him to do so;

(c) telling opposing counsel that he would file the notice of discontinuance by January 25, 2013 but then failing to do so;

(d) filing a notice of discontinuance after opposing counsel advised the Respondent that his client's position was that the Respondent had repudiated the settlement agreement and his consent to the filing of a notice of discontinuance had been withdrawn;

(e) failing to inform opposing counsel that he had filed a notice of discontinuance after the Respondent was aware that the defendants' consent to that filing had been withdrawn;

(f) failing to attend a scheduled Supreme Court hearing relating to opposing counsel's application to set aside the notice of discontinuance;

(g) failing to attend a scheduled examination for discovery.

[88] The Law Society seeks an adverse determination of either professional misconduct or incompetent performance of duties. The Law Society submits that the conduct as a whole should be viewed as questionable or dishonourable conduct rather than reflecting a lack of knowledge of the substantive or procedural law surrounding offers to settle.

Unilaterally filing notice of trial

[89] Between August 29 and September 8, 2012, PS, counsel for the opposing party, requested the Respondent's dates for a two day trial. The Respondent did not provide them as he had agreed he would do.

[90] Between September 12 and 18, 2012, a trial date of December 2013 was discussed, but it was discarded as being too far away for a fast-track file. Between October 10 and October 15, 2012, PS tried to determine mutually convenient dates for the trial and, specifically, whether the Respondent was available for a three-day trial commencing on April 17, 2013. The Respondent did not reply nor provide dates.

[91] On October 15, the Respondent emailed PS to advise that he knew that PS was out of the office, that it was not his practice to set matters down unilaterally and that he would wait until PS returned to his office.

[92] Later the same day, the assistant for PS emailed the Respondent asking if he was available for a three-day trial starting on April 17, 2013. The Respondent did not reply.

[93] On October 22, 2012, the Respondent emailed PS to advise that he had filed a notice of trial for two days and that the Respondent was sending a copy of same to his office. The notice of trial, filed on October 22, set the trial for February 18 and 19, 2013. It is noted that these dates had never been discussed nor proposed.

[94] We find that the Respondent's action of unilaterally setting a trial date, without consulting opposing counsel, on dates that had not been discussed, where discussions had been ongoing between counsel, and where the date-setting had

been immediately preceded by the Respondent's assurance that it was "not his practice to set matters down unilaterally," constitutes dishonourable conduct. It is not incompetent performance of duties – no special knowledge of substantive or procedural law is required to abide by one's assurance to opposing counsel that one does not "have a practice of setting matters down unilaterally." We find that it meets the test for professional misconduct.

Failure to file a notice of discontinuance within a reasonable time

[95] On November 14, 2012, the Respondent agreed to settle his defamation action "by filing a notice of discontinuance" and by "paying the taxable tariff costs to date." PS requested that the Respondent provide him with a filed notice of discontinuance. Between November 14, 2012 and January 15, 2013, the Respondent and PS exchanged correspondence on six occasions.

[96] On January 15, 2013, the Respondent emailed PS in response to PS's request for the filed copy of the notice of discontinuance, stating "I NEVER said I would file a Notice of Discontinuance forthwith. I specifically worded the Offer so that I had the discretion to file the Notice of Discontinuance as I saw fit based on my business structure and financial circumstances." He was critical of PS's efforts to resolve the matter and directed that PS stop "setting matters unilaterally."

[97] We find that this response is not such a marked departure such that it constitutes professional misconduct.

Failure to file the notice of discontinuance by January 25, 2013 and failure to advise that he had filed the notice of discontinuance on February 8, 2013

[98] These two events are not complex but are troubling. Following the January 15 letter noted above, PS emailed the Respondent asking him to provide a filed copy of the notice of discontinuance by January 17, 2013; otherwise, PS would apply for an order enforcing the settlement and, in addition, would seek costs.

[99] The Respondent emailed PS on January 17 to say that he would file the notice of discontinuance by Friday, January 25, 2013.

[100] The Respondent did not alert PS to any difficulties he might have in complying with the deadline, he did not file the notice as he had agreed, and he did not notify PS that he had not filed it by January 25, 2013. In short, he ignored his commitment and ignored opposing counsel.

[101] On January 31, 2013, PS emailed the Respondent requiring that the notice be filed by the end of that day and, in return, an auto reply was received that the Respondent was not available until February 1, 2013.

[102] On February 8, 2013, PS emailed the Respondent again to advise that a search of the court registry showed that the notice of discontinuance had not been filed, that there was no longer a settlement of the action and that his clients had withdrawn their consent to the filing of the notice of discontinuance. He provided dates for the examination for discovery.

[103] On February 8, 2013, the Respondent filed a notice of discontinuance, but no copy was sent to PS, nor was PS advised that it was filed.

[104] PS continued to advance the action and, on February 15, sent the Respondent an appointment to examination for discovery for April 19, 2013. The Respondent did not reply nor acknowledge as requested.

[105] On March 6, 2013, PS sent the Respondent another letter confirming both his clients' withdrawal of their consent and the April 19 date for the examination for discovery.

[106] On March 27, PS emailed the Respondent to advise that his registry search showed that a notice of discontinuance had been filed on February 8, 2013 but never served. PS queried the Respondent as to when or by whom the notice had been filed on February 8, 2013. He received no reply. (The next communication from the Respondent was April 18, 2013.)

[107] The Respondent's behaviour in this incident – he agreed to a course of action, he then failed to comply, and failed to communicate when he knew or ought to have known that opposing counsel was relying on him to comply, and thereby causing PS to spend even more time pursuing the action – is a marked departure from conduct expected of lawyers and therefore professional misconduct. He says one thing but does the opposite. He failed to follow through on multiple occasions, thereby causing inordinate difficulty for opposing counsel while creating no benefit for anyone.

Failure to attend hearing and examination for discovery

[108] On April 19, 2013, PS emailed the Respondent informing him that he wished to schedule the application to set aside the notice of discontinuance on May 13, 2013 and requesting that he provide reasonable alternative dates.

[109] The Respondent's reply, on April 22, directed that all further correspondence be by letter. No dates were provided.

[110] On April 23, 2013, PS sent the Respondent the notice of application now returnable for May 27, 2013. The Respondent did not reply or acknowledge.

[111] On May 13, PS sent a letter to the Respondent, referencing his earlier correspondence and the lack of a reply from the Respondent and confirming the May 27 hearing date.

[112] On May 21, the Respondent sent PS a letter advising that he was commencing a five-day trial as of May 27, 2013 and telling PS not to set dates unilaterally.

[113] On May 23, PS sent alternative dates to the Respondent, and on May 24, the Respondent emailed saying the proposed date of July 19 was "amenable."

[114] On July 17, the Respondent filed his response to the application to set aside the notice.

[115] On July 19, PS attended before Master Baker alone. The court set aside the notice of discontinuance. In its reasons for awarding special costs, the court commented on the Respondent's actions to date:

> Given all the circumstances leading up to today's application the position taken by the plaintiff, based on the evidence before me, has certainly been high-handed and unreasonable. Mr. McLean's failure to appear today or to explain his absence and to put the counsel for the defendants to the cost of preparing for what he anticipated to be a two hour contested application, in my view, is the sort of conduct which the Court ought to condemn by an award of special costs.

[116] An order of special costs was made in the amount of $1,800, payable forthwith.

[117] No explanation was provided by the Respondent to either the court or to PS before or after the hearing as to why he failed to attend.

[118] On July 19, PS sent the Respondent a copy of the entered order of July 19, 2013 requiring payment of costs of $1,800 forthwith, and offered to settle the matter or to set the examination for discovery for August 1, 2013, or on an alternative date. A copy of the appointment for August 1 was enclosed. The Respondent did not reply or acknowledge.

[119] On July 29, PS wrote again, reminding the Respondent of his obligation to pay the costs forthwith, confirming the date of August 1, 2013 and advising of his lack of response as to alternative dates.

[120] During the late evening of July 31, hours before the scheduled examination for discovery, the Respondent replied by fax that he had read the July 29 letter on July 30, and that he would be away from the office until mid-week. He also reminded PS not to send any correspondence by email so "please do not expect me to ready [sic] any of your email correspondence."

[121] At 9:23 pm, PS emailed the Respondent confirming his letters of July 19, and 29, confirming the August 1 date, and the lack of response by the Respondent to provide alternate dates. The Respondent did not attend the discovery and PS had the non-appearance certified. While he may have given "notice" it was completely inadequate and self-serving.

[122] The Respondent's conduct in failing to attend the hearing and examination for discovery without reasonable notice or any explanation is a marked departure from expected conduct and amounts to professional misconduct.

ALLEGATION 6 – FAILURE TO ATTEND COURT APPEARANCES

[123] The Law Society seeks an adverse determination of this allegation of six instances of failure to attend a hearing or comply with a direction of the court. We have reviewed each of the incidents below:

(a) On or about January 10, 2014, the Respondent failed to attend a scheduled hearing that he had agreed was peremptory on him, without justifiable excuse;

We find this is not made out. While the hearing was peremptory on the Respondent, he advised PS in three emails on January 10 between 12:07 am and 9:15 am that he was "ill and would not be able to attend court on January 10, 2014 and to please advise the court"; PS did so.

(b) On January 21, 2014, the Respondent failed to attend a scheduled hearing that was peremptory on him, without justifiable excuse;

We find this aspect of the allegation is not made out; the Respondent emailed PS on January 21, at 4:05 am, advising that he was "extremely sick and would be away for the foreseeable future."

PS subsequently advised him by email that the court had adjourned the matter to 4 pm on February 21, peremptory on the Respondent and had ordered that he file doctors' letters by 4 pm on February 14 as to his health on January 10 and 21, 2014.

(c) On February 14, 2014, the Respondent failed to comply with a direction of the court to file doctors' letters relating to his failure to attend hearings scheduled for January 10 and January 21, 2014;

We find that this aspect is made out. The Respondent knew or ought to have known that, in the context of his six requests for adjournments between October 7, 2013 and January 21, 2014, it was imperative that he respond to this request by the court. He did not alert the court to any difficulties he would have responding to it. He failed to respond to it, and he failed to acknowledge his lack of response.

(d) On February 21, 2014, the Respondent failed to attend a scheduled hearing that was peremptory on him, without justifiable excuse;

We find this aspect is made out. The Respondent knew or ought to have known that, in the context of having failed to attend on court on two previous occasions that were peremptory on him, and having failed to file letters as directed by February 14, he had an overriding obligation to attend this peremptory court appearance on February 21, 2014. Advising counsel by email at 12:27 and 1:13 pm that his computer crash prevented him from *speaking* to the matter that day is not a justifiable excuse for failing to *attend* a peremptory court appearance.

(e) On or about March 19, 2014, the Respondent failed to comply with a direction to provide information in support of his email to the trial coordinator that he had a scheduling conflict on March 21, 2014, including information regarding the case he was involved in, the name of the judge and the courtroom;

We find this aspect is made out. The Respondent knew or ought to have known, in the context of his failures to attend court appearances peremptory on him, and failure to respond to court direction to provide information, that there was an overriding obligation to respond. He did not alert the court to any difficulties he anticipated in responding, he failed to respond, and he failed to acknowledge his lack of response.

(f) On or about March 21, 2014, the Respondent failed to attend a scheduled hearing without notice or justification;

We find this aspect is not made out. The Respondent was advised by email on March 12, 2014 of the hearing date of March 21, 2014. On March 19 (Wednesday), he emailed Supreme Court scheduling to advise that he was in trial and he would be unable to speak to the matter on March 21, 2014 (Friday), due to a scheduling conflict. We find that he did provide notice of his intention not to attend the hearing scheduled for March 21, 2014.

[124] We find that the conduct above, as set out in (c), (d), and (e), of failing to attend a court appearance peremptory on him (following six adjournments granted to him), and failing to comply with court direction to provide information to the court in support of his requests for further adjournments, meets the test of professional misconduct. The fact that it was his personal litigation does not absolve him of his obligations to the court as a lawyer.

[125] That a lawyer has a fundamental, overriding responsibility to attend scheduled court appearances does not require any specialized knowledge of substantive law. In addition, failure to attend a peremptory court appearance and failure to respond to court direction in the manner noted above, connotes a complete lack of respect for the court. We find this aspect is particularly deserving of sanction and is a marked departure from the standard expected of lawyers.

[126] The case of *Law Society of BC v. Lessing*, 2013 LSBC 29, states at paras. 118 and 121:

> As to the breaches of the court orders and contempt finding, it is the particular duty of the Law Society to uphold and protect the public interest in the administration of justice by ensuring the independence, integrity, honour and competence of lawyers; *Legal Profession Act*, s. 3(b). A lawyer's failure to abide by court orders and being found in contempt cuts very close to the bone and requires a strong response.
>
> ...
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> … Many lawyers have spent considerable time trying to convince clients to obey court orders. It sends a very bad signal to the public to have lawyers disobey court orders and the same lawyers finding themselves in contempt of court. It looks like the legal profession is speaking in two different directions. Therefore, this Review Panel finds that lawyers who

breach court orders and lawyers who find themselves in contempt should face severe sanctions.

ALLEGATION 7 - REPRESENTATION TO THE COURT

[127] The citation alleges that the Respondent sent an email to Supreme Court's manager of trial scheduling in which he represented that he was unable to attend a scheduled hearing as he was "currently in trial on the Island" and he would "not be able to speak to the matter on Friday due to a scheduling conflict," when he knew that this representation was not true or, in the alternative, when he had created the scheduling conflict after the hearing had been scheduled, contrary to Rule 2.1-2(a) of the *Code of Professional Conduct for British Columbia*.

[128] The facts of this allegation are troubling.

[129] At 9:51 am and at 3:03 pm on March 12, 2014, the Respondent was advised of the scheduled hearing date of March 21, 2014.

[130] At 7:45 pm on March 12, 2014, the Respondent emailed lawyer DW suggesting a meeting on an unrelated matter on Friday March 21, 2014. DW agreed.

[131] On March 17, 2014, the Respondent emailed DW to suggest that they meet either at 3 pm or at 4 pm on March 21, 2014. DW confirmed that 4 pm on March 21 would be suitable.

[132] On March 19, 2014, the Respondent emailed Supreme Court scheduling that he was "currently in trial on the Island and … not able to speak to the matter on Friday (March 21) due to a scheduling conflict."

[133] The Law Society seeks an adverse determination of professional misconduct for misleading the court as to his availability for the hearing.

[134] Two concerns arise - the Respondent's creation of the scheduling conflict in the face of his pending court commitment on March 21, and further, his adjournment request of the March 21 hearing based on his assertion that he was "in trial on the Island" and had a scheduling conflict.

[135] First, we find that the Respondent knew that the hearing was scheduled for March 21; he had agreed to that date and had been notified of that date. He knew or ought to have known that scheduling the meeting at 4 pm on March 21 would necessarily conflict with his obligation to attend court on the same date at the same time. We find that scheduling the client matter at 4 pm on March 21, 2014 was a deliberate

act on his part with the intended consequence that he would have to seek an adjournment of the court date.

[136] Secondly, he knew or ought to have known that his adjournment request of the court based on his “trial schedule and his scheduling conflict” would lead the court to believe that his trial schedule created the conflict. That is exactly what happened as evidenced by the court’s request for the name of the case, name of the judge and the courtroom of his trial. His subsequent failure to respond and correct the court’s misunderstanding was evidence that he intended that the court remain in its state of misapprehension.

[137] Neither act –creating the scheduling conflict, or telling the court that he had a scheduling conflict and then leaving the court with that misunderstanding – is acceptable conduct for a lawyer. Both are marked departures from the standard expected of lawyers. Both acts meet the test of professional misconduct.

ALLEGATIONS 8 – CONDUCT IN RELATION TO THE LAW SOCIETY

[138] Allegation 8 says that the Respondent failed to notify the Executive Director of the Law Society in writing of the circumstances of the following unsatisfied monetary judgments against him and his proposal for satisfying such judgments, contrary to Rule 3-44 of the Law Society Rules:

(a) an order made July 19, 2013 in British Columbia Supreme Court for special costs in the amount of $1,800 payable forthwith;

(b) a Certificate of Costs filed May 9, 2014 in the amount of $27,400.

[139] Rule 3-44 provides as follows:

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,

(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.

(3) Subrule (1) applies whether or not any party has commenced an appeal from the judgment.

(4) If a lawyer fails to deliver a proposal under subrule (1)(b) that is adequate in the discretion of the Executive Director, the Executive Director may refer the matter to the Discipline Committee or the Chair of the Discipline Committee.

[140] In *Law Society of BC v. Welder*, 2002 LSBC 4, the lawyer was found to be in breach of Rule 3-44, even in light of his evidence that he was unaware of the existence of the rule at the time he breached it.

[141] In *Law Society of BC v. Welder*, 2012 LSBC 18, the hearing panel held that the obligation to notify the Law Society of an unsatisfied monetary judgment under Rule 3-44 is part of a lawyer's professional responsibility. In that case, the panel found that a lawyer's failure to immediately report unsatisfied judgments against him and his failure to communicate with the Law Society regarding its inquiries about how he proposed to satisfy judgments against the lawyer that the Law Society knew about, constituted professional misconduct.

[142] The Law Society seeks an adverse determination, submitting that the Respondent knew of his obligation to notify the Executive Director of unsatisfied judgments and how he proposed to satisfy them. Given this deliberate failure, his misconduct is elevated from a breach to professional misconduct.

[143] On May 24, 2013, the Respondent confirmed the scheduled hearing date of July 19, 2013.

[144] The Respondent failed to attend on July 19 and, as noted above, he did not advise counsel or the court that he would not be attending. When provided with the entered order of costs in the amount of $1,800, payable forthwith, he did not acknowledge or reply.

[145] The Respondent did not satisfy the order for costs forthwith, or within 7 days, and he did not inform the Executive Director of the entered order for costs or his proposal for satisfying it as required by Rule 3-44.

[146] On August 26, 2013, the Law Society wrote to the Respondent, asking him to advise if the monetary judgment had been paid and, if not, what arrangements he had made to do so. His attention was drawn to Rule 3-44(4).

[147] The Respondent did not reply by the date requested of September 4, 2013.

[148] On May 1, 2014, PS notified the Respondent that he had scheduled an assessment of costs hearing before the Registrar for May 8, 2014.

[149] On May 5, the Respondent emailed PS to advise that he was not available on May 8, 2014. He did not attend, and costs were assessed against him in the amount of $27,400.

[150] An entered copy of the Certificate of Costs was sent to him on May 9, 2014. On May 13, 2014, the Respondent emailed PS to advise of his payment proposal.

[151] The Respondent did not satisfy the Certificate of Costs within 7 days, and he did not immediately notify the Executive Director of the circumstances and his proposal for satisfying it.

[152] Ultimately, the Respondent paid the full amount of $27,400 on June 6, 2014.

[153] We find that the Respondent's failure to notify the Executive Director and to provide a payment proposal of the July 19, 2013 entered order was a breach of the Rules.

[154] However, his failure to report the Certificate of Costs, entered on May 9, 2014, particularly in light of the Law Society letter to him of August 26, 2013, elevates this conduct from a breach of Rule 3-44 to professional misconduct.

ALLEGATION 9 – OFFER TO SETTLE IN RETURN FOR WITHDRAWAL OF COMPLAINT

[155] Allegation 9 sets out that, in or around August 2012, the Respondent attempted to resolve a complaint to the Law Society made by JK on or about June 28, 2012 by offering to settle an action commenced by the Respondent, on the condition that, among others, he withdraw his complaint, contrary to Chapter 2, Rule 1, or Chapter 13, Rule 3(c) of the *Professional Conduct Handbook* then in force.

[156] Chapter 2, Rule 1 of the *Professional Conduct Handbook* prohibits a lawyer from engaging in questionable conduct that casts doubt on his professional integrity or reflects adversely on the integrity of the legal profession or the administration of justice.

[157] Chapter 13, Rule 3(c) of the *Professional Conduct Handbook* prohibits a lawyer from improperly obstructing or delaying Law Society investigations, audits and inquiries.

[158] The Law Society submits that, in considering whether the Respondent's conduct is a marked departure from that conduct the Law Society expects of lawyers, the provisions of the *Professional Conduct Handbook* are relevant because they articulate the standards against which the Respondent's conduct is to be measured.

[159] An attempt to delay or obstruct a Law Society investigation by negotiating the withdrawal of a complaint has been found to constitute professional misconduct: see *Law Society of BC v. Batchelor*, 2013 LSBC 09; *Law Society of BC v. Carten*, 1999 LSBC 40; and *Law Society of BC v. Gerbrandt*, [1993] LSDD No. 190.

[160] In *Batchelor*, the panel found that the lawyer had committed professional misconduct in attempting to resolve the complaint made by his client to the Law Society by preparing and entering into a written agreement with her, the terms of which included that he would pay her $11,000 and she would withdraw the complaint. The panel stated at paras. 44-45:

> One of the functions undertaken by the Law Society as regulator is the investigation of complaints and the determination of the appropriate outcome that should flow from that investigation process. The investigation of complaints and the appropriate treatment of them are at the core of the Law Society's work in the fulfillment of its regulatory function (see *Law Society of BC v. Luk*, 2005 LSBC 44 at paragraphs [18] and [19]).
>
> Any attempt to undermine the Law Society's ability to regulate the profession should be strongly discouraged. A clear message should be sent to the legal profession that there will be no tolerance of lawyers attempting to undermine the Law Society's investigation of complaints by negotiating a withdrawal of the complaint.

[161] The Law Society submits that an adverse determination of professional misconduct is appropriate.

[162] In March 2012, while discussing settlement of the defamation action with PS, the Respondent asked whether JK still intended to report the Respondent to the Law Society. PS advised him that it was highly inappropriate to address that issue in the context of settlement negotiations.

[163] On July 6, 2012, the Respondent was advised that JK had made a complaint to the Law Society.

[164] On July 23, 2012, the Respondent commenced an action against JK in the Supreme Court of British Columbia.

[165] On August 23, 2012, the Respondent offered to settle the above action provided JK "formally request that the Law Society discontinues its investigation."

[166] We find that this action is a breach of Chapter 13, Rule 3(c). We agree that the Respondent's action of including the withdrawal of the complaint as a term of settlement would effectively forestall the Law Society investigation.

[167] Previous cases have found that attempts to negotiate a withdrawal of a complaint to constitute professional misconduct. We agree that the Respondent's action meets the test of professional misconduct.

ALLEGATION 10 – FAILURE TO RESPOND TO COMMUNICATIONS FROM THE LAW SOCIETY

[168] Allegation 10 sets out that the Respondent failed to provide a full and substantive response promptly or at all to communications from the Law Society concerning its investigation of a complaint, contrary to Rule 7.1-1 of the *Code of Professional Conduct for British Columbia*. In particular, the Respondent failed to respond to one or more of letters dated June 25, July 23 and July 30, 2014.

[169] Rule 7.1-1 of the *BC Code* requires a lawyer to, among other things, reply promptly and completely to any communication from the Law Society, provide documents as required by the Law Society and cooperate with Law Society investigations involving the lawyer.

[170] Law Society Rule 3-5(6) requires a lawyer to cooperate fully in an investigation by all available means. This includes, but is not limited to, responding fully and substantively, in the form specified by the Executive Director to the complaint and to all requests made by the Executive Director in the course of an investigation.

[171] The case law is clear that the obligation to respond to the Law Society is of fundamental importance because a lawyer's failure to respond impairs the Law Society's ability to govern lawyers effectively. In *Law Society of BC v. Dobbin,* 1999 LSBC 27*,* at para. 20, the majority of the Benchers on review stated that:

> The duty to reply to communications from the Law Society … is a cornerstone of our independent, self-governing profession. If the Law Society cannot count on *prompt, candid*, *and complete replies* by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. *The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.*
>
> [emphasis added]

[172] For this reason, the majority in *Dobbin* held that a failure to respond to the Law Society will always be *prima facie* evidence of professional misconduct. As stated by the Benchers on review at para. 25:

> … unexplained persistent failure to respond to Law Society communications will always be *prima facie* evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct. The circumstances which led the member to fail to respond are peculiarly within his or her means of knowledge. It cannot be a part of the evidentiary burden of the Law Society to show both that the member persistently failed to respond and the reasons for that failure.

[173] In *Law Society of BC v. Marcotte*, 2010 LSBC 18*,* at para. 48, the hearing panel quoted from para. 22 of the hearing panel's decision in *Law Society of BC v. Cunningham,* 2007 LSBC 17*,* expressing it this way:

> It is hardly necessary for us to repeat what many panels before us have said, which is that the LSBC cannot satisfactorily discharge its function of over-seeing the conduct of its members unless the members respond as required to LSBC investigations. The same must be said about inquiries concerning member conduct initiated by the [Legal Services Society]. The LSBC must remain vigilant. If members of the public were to come to think that the LSBC pursues its investigations casually, by not requiring

> those under investigation to respond promptly and comprehensively, it might be thought that someone other than lawyers should govern the legal profession. If self-governance were lost, lawyer independence, of which self-governance is an essential element, would be lost as well, and that loss would be contrary to the public interest.

[174] The Respondent was sent correspondence dated June 25, July 23 and July 30, 2014. He did not reply by the deadlines imposed.

[175] The Respondent has not provided any explanation as to why he did not respond to Law Society communications. The failure to respond is unexplained and persistent. We find the Respondent's conduct in this situation meets the test of professional misconduct.

[176] We find that his conduct reflects adversely on his own professional integrity and that of the legal profession. It constitutes professional misconduct.

SUMMARY

[177] In summary, we find that the Respondent has committed professional misconduct with respect to Allegations 1(a) to (c), 2, 3, 4(a) to (g), 5(a) and (c) to (g), 6(c) to (e), 7, 8(a) and (b), 9 and 10. Allegations 5(b) and 6(a), (b) and (f) are dismissed.