2015 LSBC 51
Decision issued: November 12, 2015
Oral reasons: October 26, 2015
Citation issued: March 16, 2015

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**CHRISTOPHER ROY PENTY**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL**

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| Hearing date: | October 8, 2015 |
| Panel: | David Mossop, QC, Chair<br>J.S. Woody Hayes, Public representative<br>Gavin Hume, QC, Lawyer |
| Discipline Counsel: | Alison Kirby |
| Appearing on his own behalf: | Christopher R. Penty |

## INTRODUCTION

[1] A citation was authorized against Christopher R. Penty (the "Respondent") by the Discipline Committee on March 5, 2015 and issued on March 16, 2015.

[2] At the hearing on October 8, 2015, the Panel reserved its decision. On October 26, 2015 we asked the Hearing Administrator to advise the parties that the Panel accepts the conditional admission and proposed sanction of a four-month suspension starting on November 1, 2015, unless the parties agree to another starting date, and costs as agreed. The Panel advised that written reasons would follow. We were subsequently advised by the Hearing Administrator that the

parties had agreed to a starting date of December 1, 2015 until and including March 31, 2016. These are our written reasons.

## BACKGROUND

### Public summary

[3] The Respondent has practised law for over 30 years. The Respondent practises primarily in the areas of residential real estate, family, wills and estates and civil litigation.

[4] The Respondent admits to two of the three allegations of misconduct contained in the citation.

[5] First, he billed his client for services of his legal assistant without the express agreement of the client.

[6] The second allegation is that the Respondent made the following misrepresentations to the court that the Respondent knew or ought to have known were untrue:

(a) the Respondent misrepresented the date that the legal assistant ("SS") started working for the Respondent;

(b) the Respondent stated to the court that the legal assistant, SS, was not involved in the files until the end of the Respondent's conduct of the files, when the time sheets reflected that the legal assistant commenced working on the files much earlier; and

(c) in the supplemental submissions to the court, the Respondent stated that the legal assistant's time was a minor part of the time billed to the client when the time sheets reflected that the legal assistant's time was approximately 40 per cent of the time billed to the clients.

[7] The Law Society and the Respondent agree that the Respondent committed professional misconduct in regards to the above two allegations.

[8] This Hearing Panel, with some reservations, holds that an appropriate sanction or disciplinary action against the Respondent is a four-month suspension.

**Lawyers summary**

[9] This is a conditional admission pursuant to Rule 4-30. In such a situation, the Respondent and the Discipline Committee agree that professional misconduct took place and agree to a specific disciplinary action (e.g., a fine or a suspension). The Hearing Panel must either approve the conditional admission or reject it and send it back to the Discipline Committee. The Hearing Panel cannot substitute its own disciplinary action.

[10] The Respondent has a professional conduct record that includes:

(a) a conduct review for misleading the court; and

(b) a citation for swearing a false affidavit and discontinuing an appeal without instructions.

[11] The above citation resulted in a suspension of two months. On that basis, the parties seek the approval of this Hearing Panel for a four-month suspension plus costs. The question for determination in this proposed disciplinary action is: is a four-month suspension a fair and reasonable disciplinary action in all the circumstances?

**Citation**

[12] The citation reads as follows:

1. You issued two bills to your clients, ZZ and [the School], dated May 2, 2011 in connection with file numbers [number] and [number] that misrepresented the amount that you were entitled to bill for one or both of the following reasons:

   (a) you billed for time spent by your legal assistant, SS, as time spent by you in the absence of an agreement with your clients to bill for SS's time; and

   (b) you billed for tasks that were secretarial in nature in the absence of an agreement with your clients to bill for those tasks.

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

2. You issued a bill to your clients, ZZ and [the School] dated May 2, 2011 in connection with file no. [number] that was excessive in that the fees were

more than double the amount you told your clients they would be, contrary to Chapter 1, Rule 3(9), Chapter 9, Rule 1 and Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force.

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

3. Between May 2012 and February 2013, in the course of representing yourself in a *Legal Profession Act* section 71 review before a Supreme Court Master of your bills dated May 2, 2011 issued to your clients, ZZ and [the School] you made the following representations to the court when you knew or ought to have known they were not true:

   (a) on May 15, 2012, you testified that your legal assistant, SS, commenced working for you at the beginning of 2011 when he had been employed by you since on or about November 2009;

   (b) on May 15, 2012, you testified that your legal assistant, SS, was not involved in your clients' files until toward the end of your conduct of the files, when timesheets reflected that SS commenced working on the files in or about April 2010; and

   (c) in your supplemental submissions dated November 28, 2012, you stated that your legal assistant, SS's time was a "very minor part" of the time billed to your clients when the timesheets reflected that SS's time was approximately 40 per cent of the time billed to the clients.

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

[13] The Respondent admits that he committed professional misconduct as set out in allegations 1 and 3 of the citation. In summary, the Respondent admits that he misrepresented the amounts he was entitled to bill his client by billing for his legal assistant's time as if it were his own and by billing for services that were secretarial in nature in the absence of an agreement to do so. The Respondent also admits that he made representations to the court both orally and in writing that he either knew were untrue or ought to have known were untrue.

[14] The Respondent is not prepared to admit that the conduct set out in allegation 2 of the citation constituted professional misconduct. The Law Society has decided not to proceed with that allegation. Accordingly, that allegation is dismissed.

**Evidence and admission**

[15] There was an Agreed Statement of Facts presented to this Tribunal. It consisted of 18 pages and 27 attachments.

[16] We also had the benefit of the oral and written submissions of the Law Society. The Respondent did not make any oral submissions or provide the Panel with any written submissions.

**Overall issues**

[17] Did the Respondent commit professional misconduct in regards to allegation 1?

[18] Did the Respondent commit professional misconduct in regards to allegation 3?

[19] Is a four-month suspension a fair and reasonable disciplinary action?

## FACTS

[20] In November 2009, the Respondent hired SS, a former lawyer with 20 years of experience who had resigned from the practice of law in accordance with a Rule 4-21 proposal. SS was not permitted to practise law, but was permitted to perform the work of a paralegal/legal assistant.

[21] The Respondent and SS completed handwritten daily time sheets recording the time spent on various client files.

[22] The Respondent's handwritten timesheets and those of SS were inputted into PC Law under the Respondent's billing code.

[23] In or about November 2009, the Respondent was retained by his clients in connection with an ongoing civil action (the "Civil Action").

[24] SS began working on the Civil Action on or about November 30, 2009.

[25] In or about February 2010, the Respondent was instructed to commence foreclosure proceedings on behalf of his clients (the "Foreclosure Proceedings").

[26] SS began working on the Foreclosure Proceedings on or about May 7, 2010.

[27] There was no written retainer agreement with respect to either the Civil Action or the Foreclosure Proceedings.

[28] The clients were aware that SS was a former lawyer with 20 years of experience and that he was working on their files.

[29] In or about May 2011, the Respondent ceased to act for his clients and issued two final legal bills for services rendered in connection with the Civil Action and the Foreclosure Proceedings.

[30] The time spent and services rendered by SS were all described on the two legal bills as the Respondent's time and services (under his initials) and was billed to the clients at the Respondent's hourly rate of $300.

[31] In May 2011, the Respondent commenced fee review proceedings in connection with the two legal bills.

[32] The Registrar's review of the two legal bills took place between May 2012 and January 2013.

[33] At the Registrar's review on May 15, 2012, the Respondent made the following representations to the court about charging out the time of SS:

> I'm not sure. I am trying to think of where – sometimes it's subsumed under my time, to be very – to be very blunt, but usually it's – it's his own time, but this – *these files were – for the most part predated SS's coming to work for me, which only happened in – I am thinking now – is at the beginning of 2011*. So he wouldn't – I don't think – and because of the involvement – because they were so involved at that time, *I don't recall that he had that much involvement. Just near the end there, where some of the – the emails are copied to him, so I am sorry, I can't answer that.*
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> [emphasis added]

[34] Sometime between May 15, 2012 and November 28, 2012, the Respondent reviewed both the transcript of the hearing on May 15, 2012 and his client files with respect to the Civil Action and the Foreclosure Proceedings.

[35] The Respondent did not correct his misrepresentation to the court on May 15, 2012 as to: (a) the date SS started working for him; (b) when SS started work on the client files; or (c) the extent of SS's involvement on the Civil Action or Foreclosure Proceeding.

[36] On November 28, 2012, the Respondent wrote in his written supplemental submissions to the court as follows:

8. I had billed my legal assistant, SS's time out as mine and I admitted that this may have occurred from time-to-time. *The bulk of the time was mine*, SS being a 20 year called lawyer, it would be quite proper for him to be billed out at a lawyer's time rate as his expertise applied would be that of a 20 year called lawyer. However, *I believe I made the point that this would have been a very minor part of any time billed.*

[emphasis added]

[37] The Registrar held that Respondent's conduct in recording SS's time on the account as his own was unacceptable, that the Respondent was only entitled to bill his legal assistant's time at $150 per hour and that he was not entitled to bill for services that were secretarial in nature.

[38] The Registrar was only able to identify 2.8 hours in the Civil Action from the description of the services on the statement of account as being time billed for SS's services. She accordingly only reduced the account by $420.

[39] The Respondent's and SS's timesheets reflect that approximately 31 per cent of the time billed to the clients on the civil action related to work performed by SS and 56 per cent of the time billed to the clients on the Foreclosure Proceedings related to work performed by SS.

## LEGAL ANALYSIS

### Professional misconduct

[40] "Professional misconduct" is not a defined term in the *Legal Profession Act*, the Law Society Rules or *Professional Conduct Handbook*. The test for whether conduct constitutes professional misconduct was established in *Law Society of BC v. Martin*, 2005 LSBC 16, at paragraph 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.

[41] In *Martin* the panel observed at paragraphs 151-154 that a finding of professional misconduct did not require behaviour that was disgraceful or dishonourable. It concluded:

> 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.

[42] The "*Martin*" test was affirmed by a review panel in *Re: Lawyer 12*, 2011 LSBC 35.

**Did the Respondent commit professional misconduct in regard to allegation 1?**

[43] In this case the Respondent delivered legal bills to his client that on their face misrepresented the services performed by his legal assistant as having been rendered by him. By doing so, the Respondent failed to be candid with his clients about those services and the compensation he was entitled to receive.

[44] Chapter 9, Rule 7 of the Law Society of British Columbia's *Professional Conduct Handbook*, then in force, provides that:

> A lawyer must fully disclose, to the client or to any person who is paying part or all of the lawyer's fee, any fee that is being charged or accepted.

[45] That principle has been carried forward under Rule 3.6-3 of the new *Code of Professional Conduct for British Columbia* and commentary 1 to that Rule, which provides:

> **Commentary**
>
> [1] A lawyer's duty of candour to a client requires the lawyer to disclose to the client at the outset, in a manner that is transparent and understandable to the client, the basis on which the client is to be billed for both professional time (lawyer, student and paralegal) and any other charges.

[46] The Supreme Court of Canada in *R. v. Neil*, 2002 SCC 70, found that the duty of candour with the client on matters relevant to the retainer was part of a lawyer's duty to give undivided loyalty to a client that was intertwined with the fiduciary nature of the lawyer-client relationship.

[47] Similarly, the BC Court of Appeal in *Nathanson, Schachter & Thompson v. Inmet Mining Corporation*, 2009 BCCA 385 at para. 48 and 49, confirmed that the relationship between a lawyer and client is a fiduciary relationship that requires a lawyer to act at all times in utmost good faith towards the client. The court held that it creates a relationship of trust and confidence from which flow obligations of

loyalty and transparency which in turn "*requires the solicitor to be candid with the client on all matters concerning the retainer, including ensuring that in any transaction between the two from which the solicitor receives a benefit, the client has been fully informed of the relevant facts and properly advised upon them*." [emphasis added]

[48] The fiduciary nature of the relationship between a lawyer and a client and the requirement that lawyers be candid about their retainer was recently confirmed by a hearing panel in *Law Society of BC v. Pham*, 2015 LSBC 14, in connection with a finding of professional misconduct for, amongst other things, the billing of administrative mark-ups on disbursements.

[49] In *Pham*, the lawyer was found to have committed professional misconduct in charging excessive fees in billing clients for disbursements not actually incurred or billing clients amounts that exceeded the actual amount of a disbursement, either by adding an administrative "mark-up" or by basing the amount billed for the disbursement on an estimate, and in improperly recording retainer funds on the wrong client ledger and preparing a fictitious letter and invoice in support of the withdrawal of funds from trust.

[50] With respect to the billing of disbursements not incurred, based on estimates or marked up, the panel stated at paragraphs 40 to 43:

> [40] Not only is the conduct a clear violation of the Act and the *Handbook*, it involved dishonesty (particular in respect of the billings for disbursements not actually incurred and in billing for disbursements on the basis of estimates) and a breach of the basic duty of candour owed to the client (particularly in respect of the undisclosed "mark-ups" billed).
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> [41] While the *Handbook* requires lawyers, not support staff, to issue statements of account, we note that there is nothing to suggest any sinister or nefarious intention in allowing his support staff to prepare and failing to supervise his staff's preparation of the bills. On the evidence, it appears that the Respondent was, at best, sloppy and lazy in his billing practice.
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> [42] However, clients deserve more. They deserve thoughtful and honest billing practices by their lawyers. They deserve to know that they have the full attention of their lawyers in all matters relating to their retainers, including billing matters. They deserve to know that the amounts they are billed for disbursements actually reflect the costs incurred by the lawyer issuing the bill.

> [43] In our view, the dishonesty and lack of candour evidenced by the manner in which the Respondent billed for disbursements does nothing to instill his clients with confidence that his accounts for disbursements accurately reflect the costs he actually incurred. Rather, they are left to guess what portion of the bill for disbursement reflects the lawyer's actual costs and what portion is a money-making exercise at their expense. That, in turn, does not reflect well on the profession.

[51] In this case, the Respondent did not ensure that SS's time was properly recorded in PC Law and, once the legal bills were generated, he did not correct the misleading nature of the bills before they were sent to his client. The Respondent also did not correct the misleading nature of the bills at the registrar hearing when the billing of his legal assistant's time became an issue.

[52] As a result, neither the Respondent's clients, who were objecting to paying the bills, nor the Registrar were able to distinguish between services provided by the Respondent and services provided by his legal assistant. As in *Pham*, the clients and court were left to guess what portion of the bills reflected the lawyer's actual fees and what portion related to the marked up services rendered by SS.

[53] In the circumstances, a finding of professional misconduct is appropriate and the Respondent's admission is accepted.

**Did the Respondent engage in professional misconduct in regard to allegation 3?**

[54] The Respondent admits, as set out in allegation 3 of the citation, that between May 2012 and February 2013, in the course of representing himself in a *Legal Profession Act* section 71 review of his bills before a Supreme Court Master, he made misrepresentations to the court that he knew or ought to have known were untrue.

[55] In this case, the Respondent testified in court on May 15, 2012 that the work on the client files "*for the most part predated SS coming to work for [him]*" which "*only happened … at the beginning of 2011*." The Respondent admits that he knew at all materials times that SS had been employed by him since November 2009.

[56] The Respondent also testified that he did not recall that SS "*had that much involvement*" in his clients' files and that that involvement occurred "*just near the end there, where some of the – the emails are copied to him.*" The Respondent admits that he knew that SS had been working on the client files since at least April 2010.

[57] In the Respondent's supplemental submissions dated November 28, 2012, the Respondent wrote that SS's time was a "*very minor part*" of the time billed to his clients. In fact, the timesheets reflect that SS's time was approximately 31 per cent of the time billed to the clients on the Civil Action and 51.3 per cent of the time billed to the clients on the Foreclosure Proceedings. The Respondent admits that he ought to have known that this representation was untrue.

[58] The Respondent admits that this conduct constitutes professional misconduct.

**Misrepresentation to the court**

[59] In *Law Society of BC v. Vlug*, 2014 LSBC 09, the panel found that a lawyer had committed professional misconduct in lying to the Court of Appeal. The panel held at paragraph 57:

> A lawyer cannot play semantics with the court by alleging that a faxed copy of correspondence from a lawyer as a "cc" was not correspondence received from that lawyer, nor can the lawyer play semantics with the wording of the letter when answering a specific question posed to him or her by a judge**.** *The Law Society must demand that lawyers are forthright and honest in all their dealings with the court, and following Law Society of BC v. Galambos, 2007 LSBC 31, the court must be able to accept statements of counsel without having to make further inquiry; anything less would bring the administration of justice into disrepute.* In our view, the Respondent's conduct in this regard brings the administration of justice into disrepute. We find that it amounts to professional misconduct.
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> [emphasis added]

[60] Similarly, in *Law Society of BC v. Batchelor*, 2014 LSBC 11, the panel found that the lawyer's conduct in relying on two improperly commissioned affidavits and in making misrepresentations to the court when questioned about the commissioning of one of the affidavits amounted to professional misconduct. The panel made the following comments at paragraph 20 regarding a lawyer's duty when making representations to the court:

> Practising law is an honour and a privilege afforded to a very small percentage of society, and with it comes significant responsibilities. Three of the most serious responsibilities are managing trust funds, providing undertakings and upholding the duty to the court. Lawyers are officers of the court, and as officers of the court, lawyers make representations to the court on which the Judges and Registry staff must be able to rely. Our

> court system functions only because lawyers are officers of the court and the court can rely on the representations they make. *Those representations are the foundation of the important decisions the judiciary makes that directly impact the lives of those members of the public involved in the court process. There is no room for a cavalier attitude, sloppy practice, or dishonesty when it comes to these hallmarks of our legal system.*
>
> [emphasis added]

[61] In this case, the Respondent failed to be forthright and honest in all his dealings with the court. While he admitted that he had billed SS's time as his own, he did not clarify the extent of that misrepresentation. On the contrary, he compounded his error by misrepresenting that SS was only hired towards the end of his retainer and had had little involvement with the client files. As a result, the court was left with the impression that the bulk of the work described in the legal bills had been performed by the Respondent and it was only able to identify a small portion of the work performed by SS.

[62] In all of the circumstances, a finding of professional misconduct is appropriate and the Respondent's admission is accepted.

**Is a four-month suspension a fair and reasonable disciplinary action?**

[63] The Respondent has admitted professional misconduct and consents to a suspension of four months. The Discipline Committee has instructed Discipline Counsel to recommend to this Hearing Panel that this sanction be accepted.

[64] Deference should be given to the recommendation to accept the proposed disciplinary action if it is within the range of a "fair and reasonable disciplinary action in all of the circumstances." As stated in *Law Society of BC v. Rai*, 2011 LSBC 02, at paragraphs 6 through 8:

> [6] This proceeding operates (in part) under Rule 4-22 of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.

[7] This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? *This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances.* The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"

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

[emphasis added]

**General principles regarding disciplinary action**

[65] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the review panel confirmed that the starting point in determining the appropriate disciplinary action to be imposed under section 38(5) and (7) of the *Legal Profession Act* was a consideration of the Law Society's mandate under section 3 of the *Act*. Section 3 provides 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
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> (a) preserving and protecting the rights and freedoms of all persons,
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> (b) ensuring the independence, integrity, honour and competence of lawyers,
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> (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.

[66] The *Lessing* review panel noted that the objects and duties set out in section 3 of the *Act* were reflected in the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, at paragraphs 9 and 10 of the disciplinary action report:

> [9] *Given that the primary focus of the Legal Profession Act is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct.* Section 38 of the *Act* sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. *In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.*
>
> [10] The criminal sentencing process provides some helpful guidelines, such as: *the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members.* 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:
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> (a) the nature and gravity of the conduct proven;
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> (b) the age and experience of the respondent;
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> (c) the previous character of the respondent, including details of prior discipline;
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> (d) the impact upon the victim;
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> (e) the advantage gained, or to be gained, by the respondent;
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> (f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

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

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

(k) the need for specific and general deterrence;

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

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

[emphasis added]

[67] The review panel in *Lessing* observed that not all the *Ogilvie* factors would come into play in all cases and the weight to be given these factors would vary from case to case but noted that the protection of the public (including public confidence in the disciplinary process and public confidence in lawyers generally) and the rehabilitation of the respondent, were two factors that, in most cases, would play an important role. The panel stressed however that where there was a conflict between these two factors, the protection of the public, including protection of the public confidence in lawyers generally, would prevail.

**Nature and gravity of the misconduct**

[68] The nature and gravity of the misconduct is a prime determinant of the disciplinary action to be imposed. This view is consistent with prior Law Society decisions as summarized by the panel in *Law Society of BC v. Gellert*, 2014 LSBC 05 at paragraph 39:

> We have taken the *Ogilvie* factors into account in the Respondent's case. But not all of the factors deserve the same weight in all cases. For instance, the nature and gravity of the misconduct will usually be of special importance (MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline*, (Toronto. Carswell, 1993), p. 26-1; *Law Society of BC v. Williamson*, 2005 BCSC 19, para. 36; *Law Society of BC v. Harder*, 2006 BCSC 48, para. 9; *Law Society of BC v. Goulding*, 2007

BCSC 39, para. 4; *Law Society of BC v. Skogstad*, 2009 BCSC 16, para. 6; *Law Society of BC v. McRoberts*, 2011 BCSC 4, para. 29), not only because this factor in a sense encompasses several of the others, but also because it represents a principal benchmark against which to gauge how best to achieve the key objective of protecting the public and preserving confidence in the legal profession. Indeed, this key objective is the prism through which all of the *Ogilvie* factors must be applied, a message that shines through clearly in the discussion in *Ogilvie* itself at paras. 9 and 10, and has since been affirmed in other decisions such as *Lessing*, (*supra*), at paras. 57 to 61.

[69] In this case, the Respondent not only failed to be forthright and honest to the clients at the time of rendering the legal bills but failed to clarify the misleading nature of the bills when he had the opportunity to do so at the Registrar's hearing. Instead, he misled the court about the extent of SS's involvement on the client files both at the hearing and in his later written submissions.

[70] The Respondent's conduct shows a lack of integrity or dishonesty that suggests that a suspension rather than a fine would be the appropriate sanction.

**Respondent's professional conduct record**

[71] The Respondent has a professional conduct record that consists of a prior citation and two prior conduct reviews summarized as follows:

(a) **Conduct Review authorized April 2014:** A conduct review was held on June 16, 2014 to discuss the Respondent's conduct in swearing an affidavit, in support of an application to adjourn a summary trial, that contained a *misleading statement*. The Respondent had failed to ensure the accuracy of the statement, which was based on information and belief.

(b) **Conduct Review authorized November 1994:** A conduct review was held on January 6, 1995 to discuss the Respondent's conduct in accepting a case of dubious merit and failing to provide his client with an honest assessment of the merits and in failing to obtain adequate informed consent from his client to permit opposing counsel (who was in a conflict) to continue to act.

(c) **Citation issued May 17, 1994:** The Respondent was found to have committed professional misconduct in abandoning an appeal without client instructions and *swearing a false affidavit* that had an adverse

impact on his former client. The Respondent represented a client incarcerated in the United States who sought to recover money that had been seized by authorities and forfeited to the Crown as proceeds of crime. The court denied the client's application to recover the money and the Respondent filed an appeal of that decision. Although he had no instructions from the client to abandon the appeal, the Respondent did so. In a subsequent application by the client's new lawyer to reinstate the appeal, the Respondent swore a false affidavit that he had obtained instructions from the client to abandon the appeal, although this statement was untrue. The panel noted that the Respondent did not have a mere lapse of judgment, but had very seriously transgressed his obligations. The panel suspended the Respondent for two months, which the panel found was "*at the low end of the range that fits these circumstances.*" The panel also ordered the Respondent to apologize to his former client and his counsel.

[72] The review panel in *Lessing* considered the significance of the professional conduct record and the concept of progressive discipline in determining the appropriate disciplinary action. The review panel stated at paragraphs 71 to 74:

> [71] In this Review Panel's opinion, it would be a rare case for a hearing panel or a review panel not to consider the professional conduct record. These rare cases may be put into the categories of matters of the conduct record that relate to minor and distant events. In general, the conduct record should be considered. However, its weight in assessing the specific disciplinary action will vary.
>
> [72] Some of the non-exclusionary factors that a hearing panel may consider in assessing the weight given are as follows:
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> (a) the dates of the matters contained in the conduct record;
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> (b) the seriousness of the matters;
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> (c) the similarity of the matters to the matters before the panel; and
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> (d) any remedial actions taken by the Respondent.

[73] The Respondent's disciplinary history is a particularly aggravating factor since it shows a pattern of misleading the court and making false representations, which raises concerns about significant personal and professional conduct issues.

**Impact on complainant and advantage gained by respondent**

[74] As a result of the Respondent's conduct, the Registrar was unable to identify which services had been rendered by SS and the legal bill in the Civil Action was accordingly only reduced by $420. The Respondent personally profited from his misrepresentations.

**Range of sanctions in prior similar relevant cases**

[75] Allegations 1 and 3 are interrelated. Both involve misleading statements about the extent of legal services rendered by the Respondent as opposed to his legal assistant. Allegation 1 relates to the misleading attribution of the work on the face of the legal bills as being that of the Respondent and allegation 3 relates to misleading statements made verbally and in writing to the court about the extent of his legal assistant's involvement on the client files.

[76] The sanctions imposed for misrepresentations or misleading the court (reckless or deliberate) involve suspensions ranging from one to three months. In addition to the decision of *Law Society of BC v. Penty*, 2001 LSBC 07, involving the Respondent, the decisions that are the most similar to the circumstances of this case are *Law Society of BC v. Botting*, 2000 LSBC 30; *Law Society of BC v. Addison v.* 2007 LSBC 12; *Law Society of BC v. Batchelor*, 2014 LSBC 11; *Law Society of BC v. Samuels*, 1999 LSBC 36; and *Law Society of BC v. Galambos*, 2007 LSBC 31.

[77] In *Botting*, the lawyer made a false statement to the court during an application for access to a child to the effect that opposing counsel had consented in principle to the access. He repeated the false statement to the Law Society during the course of the investigation. He had a prior history of two conduct reviews, but there is no mention of the nature of the underlying conduct that led to these reviews other than that he "had a tendency to become competitive, argumentative and difficult." At the time of the hearing, the lawyer was not practising (he became a non-practising member in 1999). He was suspended for 90 days.

[78] In *Addison* the lawyer misled opposing counsel by instructing him to add a witness to the defence's lists of witnesses when he knew the witness was dead. There was no personal gain for the lawyer. He had a clean disciplinary record. He was suspended for one month.

[79] In *Batchelor* the lawyer relied on two improperly commissioned affidavits that were filed electronically in a manner that did not comply with the Rules of Court. He also made misrepresentations to the Court when questioned about the commissioning of one of the affidavits. The lawyer was suspended for one month.

He had a prior disciplinary history that consisted of a prior conduct review and a prior citation.

[80] In *Samuels* the lawyer implied to the court that he had been in recent contact with his clients' mothers when in fact he had not been in contact with them for a considerable period of time prior to his application to adjourn the trial. The lawyer admitted that he was knowingly inaccurate in what he had implied to the court. Prior to the matter being brought to the Law Society's attention, the lawyer had apologized in writing to the judge, who accepted his apology. There is no mention of any disciplinary history in the decision. The panel nevertheless imposed a suspension of 90 days. The panel wrote at paragraph 12:

> The respondent misled the Provincial Court of British Columbia in the course of his representation of two young people. This is a very serious matter, as the Court has to rely on the submissions given to it by counsel as fact. It is an essential cornerstone of our system of justice that counsel's submissions reflect the actuality. Any departure is an assault on the integrity of that system. …

[81] In *Galambos* the lawyer falsely stated on an application for short leave that the defendant had been served when he did not know whether that was true. He did not return to court and correct the misstatement when he subsequently found out that the defendant had not been served. He was suspended for one month. The decision makes no mention of the lawyer's disciplinary record. The panel commented at para 6:

> .... The court must be able to accept statements of counsel without having to make inquiry. And indeed, when counsel, having discovered that he or she has made a misrepresentation (and there is no alternative) must inform the court of the incorrect statement that had been made. That seems to us to be an aggravating factor here.

[82] In *Pham*, the lawyer was suspended for two months for charging excessive fees by issuing accounts to clients and withdrawing funds from trust to pay those accounts in order to "clean up the trust account"; in billing clients for disbursements not actually incurred or billing clients amounts that exceeded the actual amount of a disbursement, either by adding an administrative "mark-up" or by basing the amount billed for the disbursement on an estimate; and in improperly recording retainer funds on the wrong client ledger and preparing a fictitious letter and invoice in support of the withdrawal of funds from trust.

**CONCLUSION ON DISCIPLINARY ACTION**

[83] In *Law Society of BC v. Martin,* the salient features to be considered when determining whether a suspension should be imposed include a consideration of whether the misconduct contains: (a) elements of dishonesty; (b) repetitive acts of deceit or negligence; (c) significant personal or professional conduct issues.

[84] It is important to realize that this matter is a conditional admission pursuant to Rule 4-30. Such a procedure is unique. It is not an agreement between counsel for the Law Society and the respondent, at the doorstep on the day of the hearing. Rather, it has been approved by the Discipline Committee, which is composed of benchers, both elected and appointed, and non-benchers. The committee numbers may vary from year to year, but in most cases, far exceed the number of members on a hearing panel. In other words, a lot of eyes review the conditional admission. The same cannot be said of other admissions and agreements on disciplinary action. Therefore, conditional admissions should be given more deference than other admissions and agreements on disciplinary action. In addition, other admissions and agreements on disciplinary actions allow a hearing panel to reject the proposed disciplinary action and provide the parties an alternative disciplinary action. In such circumstances, of course, the hearing panel should give the parties notice. No such right exists in conditional admissions. The hearing panel either must accept the admission and the proposed disciplinary action or reject it and send it back to the Discipline Committee.

[85] This Hearing Panel makes the above comments for two reasons.

[86] First, respondents should be encouraged to make admissions and agree to disciplinary action at an early stage so the Discipline Committee can consider the matter. *If respondents leave it to the last minute and make a decision a day or two before the hearing date, the conditional admission procedure is not available.* There may not be enough time to canvass the Discipline Committee. The respondent will then face a hearing panel that will show less deference to the proposed agreement. In addition, that hearing panel may impose a totally different disciplinary action (e.g., a longer suspension).

[87] Of course, this matter is a conditional admission. We must give a greater degree of deference to the proposed disciplinary action. What exactly does this mean in this case?

[88] This case is a serious matter of professional misconduct. It is not as serious as stealing money from a trust account; however, it is in the next level of seriousness. This is a breach of one's duty to the court. *Lessing* dealt with contempt of court.

This case deals with misleading the court. In such circumstances, a suspension is warranted, rather than a fine. This is particularly true if there is a record of similar misconduct in the past.

[89] The more difficult question is how long should the suspension be? The previous suspension was two months. This Hearing Panel feels a doubling or tripling of that amount is a fair range. In other words, a suspension between four to six months. This Hearing Panel would order a six month suspension if the matter were not a conditional admission. However, since the matter is a conditional admission, the Hearing Panel accepts the four-month suspension as a fair and reasonable disciplinary action in all the circumstances. The proposed disciplinary action is within the appropriate range.

[90] The Respondent made a wise decision in going the route of a conditional admission. The Hearing Panel also accepts that an award of costs in the amount of $2,500 is appropriate, as agreed to by the parties.

**ORDER**

[91] The Hearing Panel accepts the Respondent's conditional admission and proposed disciplinary action and:

(a) orders a suspension of four months commencing on December 1, 2015 and continuing until and including March 31, 2016; and

(b) orders the Respondent to pay costs of $2,500 on or before December 1, 2015.

[92] The Panel instructs the Executive Director to record the Respondent's admission on the lawyer's professional conduct record.