2016 LSBC 09
Report issued: February 23, 2016
Citation issued: February 11, 2015

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**THOMAS PAUL HARDING**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL**

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| Hearing date: | November 26, 2015 |
| Panel: | Thomas Fellhauer, Chair<br>David Layton, Lawyer<br>Linda Michaluk, Public representative |
| Counsel for the Law Society: | Alison L. Kirby |
| Counsel for the Respondent: | Gerald A. Cuttler |

## INTRODUCTION

[1] The citation before us alleges five instances of professional misconduct against the Respondent arising out of his representation of NT ("the Wife") in family law litigation.

[2] On September 24, 2015, the Discipline Committee accepted the conditional admission and associated disciplinary action proposed by the Respondent pursuant to Rule 4-30 of the Law Society Rules and instructed the Law Society's counsel to recommend acceptance of the proposal to the hearing panel.

[3] Pursuant to this proposal, the Respondent conditionally admits to four instances of misconduct:

- he failed to serve the Wife in a conscientious, diligent and effective manner;

- he twice failed to recommend to the Wife that she obtain independent legal advice; and

- he failed to provide her with reasonable notice before withdrawing as her lawyer.

[4] The proposed disciplinary action is that the Respondent be fined $15,000 for this misconduct. Rule 4-30 requires that we either accept or reject this proposal. We can only accept it if satisfied the admission of misconduct is appropriate and the disciplinary action is within the range of fair and reasonable outcomes in all of the circumstances (*Law Society of BC v. Rai*, 2010 LSBC 2 para. 7).

## FACTUAL OVERVIEW

[5] The parties filed an Agreed Statement of Facts ("ASF"). We accept the facts set out in the ASF as proven and have taken them all into account in reaching our decision. What follows is an overview of the most salient facts gleaned from the ASF.

[6] The Respondent has been a lawyer in British Columbia since 1990. He practises primarily in the areas of family and plaintiff motor vehicle law.

[7] In July 2011 the Respondent was retained by the Wife to act in her family law matter. Her husband TT ("the Husband") was represented by CC ("Opposing Counsel").

### Judicial Case Conference Order

[8] On November 16, 2011 the parties and their counsel attended a Judicial Case Conference (JCC) before a judge. The Husband proposed that he receive weekday access to their child ("the Child") every morning before school. The Wife objected to the Husband gaining access every weekday morning.

[9] No agreement was reached, and the judge made an interim consent order that, among other things, allowed the Husband access three weekday mornings before school (Wednesday, Thursday and Friday).

[10] Following the JCC the Respondent and Opposing Counsel discussed finalizing the parties' claims by final consent order. These discussions did not, however, include the subject of weekday morning access to the Child.

[11] On November 18, 2011 Opposing Counsel emailed the Respondent a draft JCC Order for review. Her email stated that she agreed with the Respondent's suggestion that they proceed by final consent order. She proposed sending him a draft final order for review, following which they could discuss any "sticky issues."

[12] The Respondent suggested some minor changes to the draft JCC Order, which were accepted by Opposing Counsel. The JCC order was submitted by Opposing Counsel and entered on January 18, 2012.

**Final Order**

[13] On January 27, 2012 Opposing Counsel sent the Respondent a draft final order for "review and consideration." Her accompanying letter asked him to advise of any changes or revisions he wished to make, and encouraged him to call her if he wanted to discuss any matters contained in the draft.

[14] This draft final order provided the Husband with five mornings of weekday parenting time before school. It thus reflected the position the Husband had taken at the JCC, and not the comparable term contained in the JCC Order. The Respondent says he did not notice this distinction. Opposing Counsel did not expressly flag it or any other issue in her letter accompanying the draft.

[15] On February 7, 2012 the Respondent returned the draft final order to Opposing Counsel with two written comments, neither of which related to weekday morning access. Opposing Counsel made the suggested changes and sent the Respondent a revised draft the next day.

[16] On February 9, 2012 the Respondent returned the revised draft with his signature to Opposing Counsel. His accompanying letter indicated that he was in trial and so did not plan to attend the application to court to approve the final order.

[17] The Respondent did not forward the revised draft final order to the Wife or discuss its contents with her prior to signing it. In particular, he did not canvas with her the weekday morning access term contained in the revised draft.

[18] On February 9, 2012 Opposing Counsel submitted the signed final order for entry with the court.

[19] On February 20, 2012 the Respondent wrote Opposing Counsel regarding the payment of certain expenses. In this letter he noted that the Husband had the Child "every morning before school" and should be paying the expenses on those days.

[20] On March 21, 2012 a desk order divorce was filed and the final order was pronounced (the "Final Order"). The Final Order was entered on March 23, and later that day Opposing Counsel sent the Respondent a copy.

**Initial disagreement regarding weekday access term of Final Order**

[21] On April 4, 2012 the Respondent sent a copy of the Final Order to the Wife. She was away on vacation until April 14 but on April 16 phoned the Respondent's assistant to say she had not agreed to five days of weekday morning access by the Husband as set out in the Final Order.

[22] On April 17, 2012 Opposing Counsel wrote the Respondent stating that the Wife had breached the Final Order by failing to allow the Husband access to the Child that morning, and had told the Husband she would continue to breach the weekday morning access term. Opposing Counsel asked the Respondent to speak to the Wife regarding the consequences of her breach and advised that, should the breach continue, the Husband would bring an application for enforcement and seek costs. Opposing Counsel asked the Respondent to confirm that the Wife would abide by the Final Order in the future.

[23] Later the same day the Respondent's assistant informed him by email that the Wife had called the day before to say she did not agree with the weekday morning access term of the Final Order, having agreed only to three-day access as reflected in the JCC Order, and was confused by the Final Order. The Respondent's assistant also told him about the letter their office had just received from Opposing Counsel. She asked whether they could vary the Final Order, and inquired as to what she should say to Opposing Counsel.

[24] The Respondent was in trial and sent his assistant an email after court that day that stated: "We consented to this. Client needs to smarten up." The Respondent says that at the time he did not realize that he had signed the Final Order in error.

[25] On April 20, 2012 the Respondent's assistant emailed Opposing Counsel to say the Respondent was in trial and would not be back in the office until April 30.

[26] On April 23, 2012 Opposing Counsel sent the Respondent a letter advising that the Wife was still breaching the access provision of the Final Order by refusing Monday and Tuesday morning access and that, if she continued to do so, the Husband would bring an application for enforcement and seek costs.

[27] Later the same day, the Respondent's assistant emailed him to say she had spoken to the Wife that morning. The assistant told him the Wife was still waiting to hear back from him about "the correction that is to be made to the access agreement." The assistant also told the Respondent that the Wife said she was not going to let the Husband have five-day weekday morning access and that the Final Order had to be changed. The Respondent's assistant included the Wife's numbers so he could call her and alerted him to Opposing Counsel's letter of earlier that day, which was attached to the email.

[28] On April 24, 2012 the Respondent's Assistant emailed Opposing Counsel's letters of April 17 and 23 to the Wife. She said the Respondent was aware of the letters but was in trial and she would contact the Wife once she had received instructions from the Respondent.

[29] On May 3, 2012 the Respondent's assistant emailed the Wife to say she had spoken to the Respondent and he would be bringing an application to change the Final Order, "as there are a lot of issues and circumstances have changed." The assistant said she would be in touch once the application documents had been drafted so that the Wife could attend the office to swear an affidavit.

[30] On May 4, 2012 Opposing Counsel wrote the Respondent following up on her letters of April 17 and 23. She said that, if she did not hear from him by May 9, she would bring an application to enforce the Final Order.

[31] The Respondent replied to this letter the same day. Regarding the Wife's breach of the Final Order, he stated

> I appreciate you threatening an Application; however, it seems that many issues have arisen since the Judicial Case Conference on 16 November 2011.
>
> I have had a chance to speak to my client and will be filing an Application to change the Final Order.

[32] Opposing Counsel replied to this letter the same day stating that, unless and until the Final Order was actually varied, its terms remained binding. She again requested immediate implementation of the weekday morning access schedule as set out in the Final Order.

[33] To this point, the Respondent had not advised the Wife to get independent legal advice about his mistake in agreeing to the five-day weekday morning access term without her consent. Indeed, he had not even suggested to her that he might have made a mistake.

**Without prejudice agreement to revert to three-day weekday access**

[34] On May 8, 2012 Opposing Counsel wrote the Respondent proposing, on a without prejudice and interim basis, that the Child attend counselling and that the Husband have three-day access, instead of the five days required under the Final Order, until a proposed parenting coordinator directed otherwise.

[35] On May 10, 2012 the Respondent's assistant emailed Opposing Counsel's May 8 letter to the Wife. The assistant's email said that the application and affidavit to vary the Final Order were "almost complete," that the Respondent would finalize the application that day, and that they would book a court date as soon as possible. The assistant said they would let the Wife know once a date was set, at which point she could swear an affidavit.

[36] On May 11, 2012 the Respondent wrote Opposing Counsel indicating that the Wife agreed to counselling and three-day access. On the latter point, he stated:

> My client agrees that your client have the access to [the Child] as set out in the Order (Wednesday to Friday of each week and every second Saturday).

[37] On May 14, 2012 Opposing Counsel wrote to confirm the agreement. But she took issue with the Respondent's description of the weekday access term in his letter, reminding him that the Final Order provided for five-day weekday morning access. She also made clear that the Wife had been breaching this term and that the agreement to revert to three-day access was temporary and did not constitute acquiescence by the Husband. She asked the Respondent to remind his client of her obligations to abide by an entered court order. Opposing Counsel further stated that the Husband would bring an immediate application for enforcement and costs should the Wife breach the Final Order in the future.

[38] On May 15, 2012 the Respondent's assistant forwarded a copy of Opposing Counsel's May 14 letter to the Wife. On the issue of weekday access, the assistant advised that the Respondent wanted the Wife to draft something for the Husband to sign stating that the Husband would have weekday access Wednesday to Friday before school and the parties were working things out without lawyers and unnecessary court fees.

[39] The assistant told the Wife not to tell the Husband that the Respondent wanted this document signed, but to tell him she wanted it for her records.

[40] On May 16, 2012 the Wife emailed the Respondent's assistant to say the Husband had refused to sign the document but agreed to leave the current weekday access situation as is for the time being, with the Husband picking up the Child on Wednesday and keeping him until Friday morning.

[41] Later the same day, the Husband sent the Wife an email, which she forwarded to the Respondent's assistant. The Husband's email stated that he was agreeing to the current weekday access arrangement until the Child was better equipped "to deal with everything," at which point he expected her to comply with the Final Order. His email then stated:

> If you don't agree with it [the Final Order], as you have stated, that is something you need to deal with directly with your lawyer. He was given a copy of the court order, and signed it agreeing to its terms – if he did not get your consent to do so, then it is an issue between the two of you and has nothing to do with now trying to limit my access to [the Child], which was granted by the court.

[42] On May 18, 2012 the Wife emailed the Respondent's assistant to ask if the Respondent had "had any luck in speaking to [Opposing Counsel] about her changing the order?"

[43] On June 1, 2012 the Respondent's assistant sent him a memo regarding the weekday access issue. The memo reviewed some of the history to date, including Opposing Counsel's view that the Wife was in breach of the Final Order and the Wife's view that she could not be in breach because the Final Order was incorrect. The memo also stated that the assistant had reviewed the correspondence concerning the draft final order but could find no mention of changing the weekday access to every day. It concluded by saying the Wife was adamant that the disputed term be changed, and indicating that the assistant had drafted a Notice of Application and affidavit for an application to vary the Final Order.

[44] On June 6, 2012 the Respondent sent Opposing Counsel a letter that mentioned, among other things, that the Wife had indicated that the Child "is a lot happier with the new access regime" and that, once the Husband had settled into a new residence, the parties could discuss integrating more access with the Husband.

[45] The next day Opposing Counsel replied by letter, pointing out that the Husband had limited his access only temporarily and expected the terms of the Final Order to be honoured once he had moved into his new home. If the Wife continued to breach the Final Order at this point, steps would be taken to immediately enforce it and seek costs.

[46] On June 14, 2012 Opposing Counsel wrote the Respondent to advise that the Husband would be in his new address as of July 1. She said that as of this date the Husband expected that access pursuant to the terms of the Final Order be provided, otherwise he would bring an application for enforcement.

[47] On June 26, 2012 the Wife emailed the Respondent's assistant asking for an update on how they were proceeding with "getting it [the Final Order] back to what was agreed on." The Wife added: "I would love to be able to get things wrapped up and move forward."

[48] On June 27, 2012 the Respondent's assistant emailed the Wife. This email mentioned Opposing Counsel's letter of June 14, which appears not to have been attached, and indicated that this letter stated that "if the access regime did not go back to as ordered, you are in breach" and the Husband "would bring an Application." The email said the Respondent had written Opposing Counsel "asking her to explain how/why the access changed from the JCC Order to the Final Order."

[49] The Wife responded to this email the same day. She said she looked forward to hearing Opposing Counsel's explanation for "changing" the Final Order. She thought Opposing Counsel was pushing the Husband on the access issue, because he mostly seemed amicable. She said it was too bad Opposing Counsel could not see what was best for the Child.

[50] On June 28, 2012 the Respondent wrote Opposing Counsel stating, among other things, that there "appears to be a discrepancy" in the weekday morning access term in the JCC

Order and Final Order. He set out the term from each order, then stated that, having reviewed all correspondence between their offices, he was unable to find any indication that he had agreed to the access term as set out in the Final Order. He asked Opposing Counsel to explain "how the access got changed from the JCC Order to the Final Order."

[51] On July 26, 2012 the Wife emailed the Respondent's assistant asking whether Opposing Counsel had "responded to why she changed the order." The assistant replied that they had not heard anything but would continue to seek an answer. The Wife emailed again on July 29 to ask whether Opposing Counsel had a time frame "to explain herself."

[52] On July 30, 2012 the Respondent sent a follow up letter to Opposing Counsel asking for a response to his letter of June 28.

[53] On August 1, 2012 Opposing Counsel responded by noting that, although the JCC Order granted access on only three weekday mornings, the JCC judge had opined that access each weekday morning was more beneficial for the Child. Opposing Counsel further noted that the draft final order sent to the Respondent represented her client's proposed terms and reflected the JCC judge's sentiments, and that on being asked to advise of any changes or revisions, or to call to discuss terms, the Respondent had commented on only two issues. Opposing Counsel stated that based on this response she had had no reason to doubt the Respondent had reviewed the draft and obtained instructions to settle based on its terms. Finally, she advised that the Husband expected that the Final Order be honoured once school resumed in September, failing which he would apply to enforce it and seek costs.

[54] The Respondent has no record to indicate that the Wife was provided with a copy of Opposing Counsel's August 1, 2012 letter. His recollection is that he had instructed his assistant to email copies of all correspondence to the Wife.

[55] On August 3, 2012 the Wife emailed the Respondent's assistant to "follow up" regarding,

> … what the steps are to have the JCC order that [Opposing Counsel] changed corrected to what it was supposed to have been written up as? I understand [Opposing Counsel] is not responding, is there something else that we can do? I would really like to wrap things up and put this behind us.

[56] The Respondent has no record to suggest that he responded to this email.

**Contempt application and application to vary Final Order**

[57] In early September 2012 the Child's school resumed. On October 1 Opposing Counsel served the Wife personally and also delivered to the Respondent a contempt application for breaching the weekday morning access term of the Final Order.

[58] On learning of the contempt application, the Respondent did not advise the Wife to obtain independent legal advice.

[59] On October 2, 2012 the Respondent's assistant emailed the Wife to say they had "finally" heard back from Opposing Counsel and that "she is adamant that the changes to the final order were agreed on by the parties (which you did not agree to)." The assistant further advised that the materials for an application to vary the Final Order had been drafted. Finally, the assistant stated that the Respondent would contact the Wife to discuss the contempt application.

[60] The Wife responded by email the same day asking how Opposing Counsel could be "filing that I am in breach of the order she has made up?"

[61] On October 9, 2012 the Respondent wrote Opposing Counsel to advise that his associate (the "Respondent's Associate") would be handling the contempt application. He described the application as "ill-conceived, capricious, and a breach of your professional duties." The Respondent also wrote that the Wife had been in frequent contact with the Husband in the past few months and the issue of the additional two mornings had not been raised. He added: "It appears that it is your influence that is driving this rather egregious application seeking draconian remedies." The Respondent put Opposing Counsel on notice that he would bring a cross-application to alter the Final Order and would seek special costs against her personally.

[62] Also on October 9, 2012 the Respondent swore an affidavit in response to the contempt application. In it he deposed in relation to the weekday morning access term in the Final Order: "I accept full responsibility for missing the changed Access schedule." He had not before acknowledged this error. In particular, he had not acknowledged it to the Wife.

[63] On October 15, 2012 the Respondent's Associate filed and delivered an application to amend the weekday morning access provision of the Final Order. On the same day, the Respondent's Associate informed Opposing Counsel that the Wife would no longer be seeking special costs against her personally.

[64] On October 24, 2012 a chambers judge heard the contempt application and the application to vary the Final Order. At this hearing, the Respondent's Associate stated that he was not alleging any fraud by Opposing Counsel. Rather, he submitted that the Respondent had made an unintentional mistake and had acted without authority in signing the Final Order.

[65] The chambers judge commented that the main issue was whether the variation application should be allowed because the Wife had not truly consented to the disputed access term. This comment led counsel for the Husband to agree to adjourn the contempt application.

The parties were then asked to file written submissions on the issue of whether the Wife was estopped from challenging the Final Order due to her delay in applying to vary it.

[66] On November 13, 2012 the chambers judge issued a ruling setting aside the disputed access term in the Final Order and restoring the three-day access term that had been contained in the JCC Order, pending further application on the merits for a new access provision. In her ruling, the judge found that the Wife had not truly consented to the disputed term.

[67] The chambers judge nonetheless awarded costs against the Wife in any event of the cause. She did so because the Wife had sat on her rights for two-and-a-half months beginning in early August, which is when Opposing Counsel wrote the Respondent stating that the Husband would insist that the access term be honoured starting in September. The judge held that the Wife had not proceeded diligently in the face of the Husband's continued contention that the Final Order was enforceable.

[68] On the same day the chambers judge released her ruling, the Respondent reported himself to the Lawyers Insurance Fund. His letter stated, among other things, that:

- He was responsible for a potential or alleged error, which he said had occurred because Opposing Counsel "improperly altered the terms of a consent order, and I signed it without being aware she had done so."
- "It's hard to guard against the deliberately unethical conduct of others, but I will ensure we all read documents more closely."
- "Costs in the rough amount of $2,000 - $4,000. I propose to pay those myself, without request by my client"

[69] On November 15, 2012 the Respondent emailed the Wife to say he would pay the court costs of the recent application. He then added:

> It's clear that [Opposing Counsel] fraudulently altered the terms of the order after I had agreed to it – but equally, I suppose I should have read every word again. It frankly never occurred to me that a lawyer would falsify an order like this. It's cost me personally all the time we have spent on that issue, plus about $4,000 I'll have to pay [Opposing Counsel].
>
> I will be reporting [Opposing Counsel] to the Law Society and suggest you do too.

Later in this email, the Respondent referred to Opposing Counsel's "falsified order."

[70] The Respondent did not advise the Wife to obtain independent legal advice concerning the costs order.

**Events surrounding payment of costs order**

[71] On April 19, 2013 the Respondent sent the Wife a statement of account, which he said had been reduced by $10,585 representing the time spent contesting the contempt application and applying to vary the Final Order. He said these fees had been deducted "since they resulted out of an error on the part of my office." The Wife paid this account in full.

[72] On June 6, 2013 a consent order containing the new final access provision was filed with the court. It gave the Husband parenting time every morning before school, until delivery to school.

[73] On July 16, 2013 the Respondent wrote to the Wife informing her that he was closing her file. He did not tell the Wife that he had not paid the costs order made against her.

[74] On July 17, 2013 Opposing Counsel sent the Respondent a draft bill of costs for $6,826.43 regarding the outstanding costs order. In response, the Respondent proposed costs of $2,992.63. Opposing Counsel countered at $3,361.45. On September 3 she sent the Respondent an offer to settle for $3,275 and advised, as she had forewarned two weeks earlier, that an appointment would be taken out for a September 18 costs hearing.

[75] On September 9, 2013 the Respondent wrote the Wife enclosing Opposing Counsel's offer to settle and recommending that she accept it. He asked her to provide him with the funds to pay the costs order.

[76] On September 10, 2013 the Respondent was served with an appointment for a costs hearing returnable on September 18. He emailed it to the Wife on September 11, and asked her to instruct him to accept the Husband's offer. Contesting the issue, he said, would cost her "a couple of thousand, at least."

[77] On September 12, 2013 at 11:50 a.m. the Wife emailed the Respondent. She told him that her understanding was that Opposing Counsel's "poor practice changed my agreement with [the Husband] without advising you and you did not catch the change before you signed it." She asked why she should have to pay the court costs for putting the order "back to the way it should have been." She asked the Respondent to clarify.

[78] At 4:30 p.m. the Respondent emailed the Wife. He said he had not charged her for his work arising out of Opposing Counsel "switching the order" and added, "I can't really be expected to pay for when someone else commits fraud against you." The Respondent noted that they had actually won their point, in that the "offending passage of the order was struck out," but the judge refused their request that the Husband pay costs. He explained: "The Judge was in a nasty mood I guess. That's not my fault." The Respondent concluded by saying that he was trying to save the Wife the expense of arguing in court over $75.

[79] The Wife replied at 4:47 p.m. stating that, if the order had been filed correctly, there would not have been a contempt application and that, while she appreciated him not charging her for Opposing Counsel's "fraud," his office had signed off on it.

[80] On September 13, 2013 at 11:09 a.m. the Respondent emailed the Wife noting that there would have been an application by the Husband to obtain the extra days regardless, and that the Wife had ultimately lost on this point. He said that his foregoing fees and her paying the court costs was a fair division. He explained his reasoning as follows:

> I think that having the other lawyer commit a fraud is not something that I am fairly held 100% at fault for. Having the judge not order costs against them for that, was pretty shocking. But, again, it's not MY fault that a judge acts irrationally.

[81] The Wife replied in an email sent at 1:36 p.m. to say that the applications would have been avoided had the Respondent read the order before signing it. She mentioned the added steps and stress this had caused her. She agreed that Opposing Counsel had committed fraud, but said that it was not her fault the Respondent's office did not read the order. She asked whether the Respondent had accepted Opposing Counsel's offer to settle the costs.

[82] The Respondent emailed back at 7:18 p.m. to say he had not accepted the offer but was suggesting she do so.

[83] On September 16, 2013 the Wife emailed the Respondent. She said that the bottom line was that "all of these court costs was the result of your neglect and error." She refused to pay the costs and added, "If you want to continue this banter perhaps we should get an opinion from the Law Society."

[84] The Respondent replied in an email sent later that morning. He said the Wife's latest email made it impossible for him to be her lawyer and that he had informed Opposing Counsel and the court that he no longer represented her. He said he would therefore not be acting at the costs hearing two days hence.

[85] On September 16, 2013 the Respondent sent a Notice of Intention to Withdraw as Lawyer to Opposing Counsel, but he did not serve this Notice on the Wife. Opposing Counsel responded the same day. She asserted that both she and the Wife had seven days to object to the withdrawal and that, if the Respondent did not attend the costs hearing on September 18, she would bring the letter to the attention of the court.

[86] On September 18, 2013 the Wife attended the costs hearing in person. She tried to adjourn the hearing to give her time to better understand the process, but withdrew her request after the Registrar indicated that an adjournment was unlikely given that the Respondent had been given ample notice of the hearing. The Registrar assessed the bill of costs at $3,309.34. The Wife paid this amount to the Husband by way of monthly payments.

[87] On September 20, 2013 the Respondent submitted a Notice of Withdrawal of Lawyer dated September 16 for entry with the court. On September 30 he delivered the filed Notice to the Wife and Opposing Counsel.

[88] On October 28, 2013 the Wife complained to the Law Society regarding the Respondent's handling of her matter.

[89] On April 10, 2014 the Wife wrote to the Respondent asking for a refund of all fees and disbursements as well as compensation for the costs assessed against her.

[90] On April 24, 2014 the Respondent wrote to the Wife saying he could not deal with her because she had an outstanding complaint against him with the Law Society.

[91] On July 16, 2014 the Law Society referred the Respondent to his statement to the Lawyers Insurance Fund dated November 13, 2012, in which he had said he would personally pay the costs order made against the Wife.

[92] On September 30, 2014 the Law Society referred the Respondent to his email to the Wife of November 15, 2012, in which he told her he would pay the costs order.

[93] On October 31, 2014 the Respondent, through his counsel, acknowledged that he had advised the Wife he would pay her costs and stated that he had forgotten about his November 15, 2012 email.

[94] On November 20, 2014 the Respondent wrote the Wife enclosing a cheque for $3,275. The costs order had been $3,309.34, but the Respondent said that he was only paying the amount of costs Opposing Counsel had offered to settle for, given that he had recommended the Wife accept this offer.

## ARE THE ADMISSIONS ON THE ALLEGED INFRACTIONS APPROPRIATE?

[95] Professional misconduct occurs where a lawyer's action constitutes a marked departure from the conduct the Law Society expects of lawyers (*Law Society of BC v. Martin*, 2005 LSBC 16, para. 171). Conduct falling within this "marked departure" test will display culpability that is grounded in a fundamental degree of fault, but intentional malfeasance is not required – gross culpable neglect of a lawyer's duties as a lawyer also satisfies the test (*Law Society of BC v. Gellert*, 2013 LSBC 22, para. 67).

[96] The Respondent admits professional conduct in four respects, each of which relates to an allegation set out in the citation.

**Failure to provide client with an acceptable quality of service**

[97] The citation alleges that, between January 2012 and September 2013, the Respondent committed professional misconduct by failing to serve the Wife in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that expected of a competent lawyer, contrary to Rules 3 and 5 of Chapter 3 of the *Professional Conduct Handbook* (the "*Handbook*") and Rules 3.2-1 and 3.2-2 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*").

[98] The *Handbook* was in force until the end of 2012. Rule 3 of Chapter 3 provides that a lawyer shall serve a client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. Rule 5 of Chapter 3 states that a lawyer shall make all reasonable efforts to provide prompt service to a client and, if the lawyer foresees undue delay, shall promptly inform the client.

[99] Rules 3.2-1 and 3.2-2 of the *BC Code*, which came into force in January 2013, are similar to the two provisions from the *Handbook*. Rule 3.2-1 provides that a lawyer has a duty to provide courteous, thorough and prompt service to clients and that the quality of service required is service that is competent, timely, contentious, diligent, efficient and civil. Rule 3.2-2 states that, when advising a client, the lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

[100] The Respondent admits that he committed professional misconduct by doing the following:

- failing to provide the Wife with a copy of the draft final order that Opposing Counsel provided to him on January 27, 2012 or otherwise to notify the Wife of all of the terms proposed;

- consenting to the draft final order when he ought to have known his client did not agree to all of its terms, which resulted in the filing of the Final Order on March 23, 2012;

- failing to provide the Wife with Opposing Counsel's letter dated August 1, 2012 or to inform her of its contents and, in particular, that she was expected to comply with the Final Order;

- failing to respond to the Wife's email dated August 3, 2012 in which she asked whether his office had heard from Opposing Counsel regarding varying the Final Order;

- failing to remind the Wife that the costs order made against her was still outstanding when he wrote about closing the file in July 2013; and

- failing to inform the Wife or keep her informed in a timely way about the costs settlement negotiations he engaged in on her behalf with Opposing Counsel.

**First failure to recommend client obtain independent legal advice**

[101] The citation alleges that the Respondent committed professional misconduct by failing to recommend to the Wife that she obtain independent legal advice after she had notified him in April 2012 that she did not consent to all of the terms of the Final Order, contrary to Chapter 4 of Rule 5.1 of the *Handbook*.

[102] Chapter 4 of Rule 5.1 provides that, if a lawyer reasonably apprehends that an error or omission has been made, the lawyer is or may be responsible and the error or omission is or may be damaging to the client, the lawyer must promptly inform the client of the facts of the error or omission without admitting legal liability and recommend that the client obtain independent legal advice.

[103] The Respondent admits that his failure to recommend to the Wife that she obtain independent legal advice after learning that she did not consent to the weekday morning access term of the Final Order constitutes professional misconduct.

**Second failure to recommend client obtain independent legal advice**

[104] The citation alleges that the Respondent committed professional misconduct by failing to recommend to the Wife that she obtain independent legal advice in respect of the costs ordered against her on November 2012, contrary to Chapter 4 of Rule 5.1 of the *Handbook*. The Respondent admits this professional misconduct as alleged.

**Failure to provide client with reasonable notice of withdrawal**

[105] The citation alleges that the Respondent committed professional misconduct by failing to provide the Wife with reasonable notice of his withdrawal as her lawyer, contrary to Rule 3.7-1 of the *BC Code*.

[106] Rule 3.7-1 states that a lawyer must not withdraw except for good cause and on reasonable notice to the client. The commentary provides that, where the matter of reasonable notice is covered by rules of the court, these rules will govern.

[107] The Supreme Court Family Rules permit a lawyer who has ceased to act for a party to serve a notice of intention to withdraw on that party and on the other parties (Rule 21-4(4)). A party who is served with such a notice may object to the withdrawal within seven days, by filing an objection and serving a copy on the lawyer (Rule 21-4(5)). The lawyer may file a

notice of withdrawal of lawyer if no objection, notice of change of lawyer or notice of intention to act in person is filed within seven days after service of the notice of intention to withdraw (Rule 21-5(6)). The lawyer will cease to be the party's lawyer once the filed notice of withdrawal has been served on all parties (Rule 21-4(7)).

[108] The import of these rules is that the Respondent could not withdraw as the Wife's lawyer prior to the costs hearing because he had not served her with a notice of intention to withdraw. His only other option was to apply to obtain the court's permission to withdraw, but he did not do so.

[109] The Respondent admits that his manner of withdrawing constituted professional misconduct because he did not provide his client with reasonable notice.

## CONCLUSION

[110] We conclude that the Respondent's admissions of professional misconduct as described in paragraphs 97-109 are appropriate.

## IS THE PROPOSED DISCIPLINARY ACTION WITHIN THE RANGE OF FAIR AND REASONABLE DISCIPLINARY ACTIONS?

[111] The disciplinary action proposed by the Respondent under Rule 4-30 is a fine of $15,000 and costs of $2,125 payable on or before April 30, 2016. We must decide whether this proposal is within the range of fair and reasonable disciplinary actions in all of the circumstances.

[112] Our main focus in determining whether the proposal falls within this range must be on the protection of the public interest and the need to maintain the public's confidence in the legal profession. These overarching principles are promoted by a number of subsidiary principles, including the need for specific and general deterrence, rehabilitation, punishment and denunciation (*Law Society of BC v. Ogilvie*, 1999 LSBC 17, paras. 9-10).

[113] The decision in *Ogilvie* sets out numerous factors that may be relevant in applying these principles in any given case. Not all of the factors come into play in every case, and the weight to be given to a particular factor may vary depending on the circumstances (*Law Society of BC v. Lessing*, 2013 LSBC 29, para. 56).

[114] Where a respondent has committed more than one act of professional misconduct, the penalty will usually be imposed on a global basis. As noted in *Law Society of BC v. Gellert*, 2014 LSBC 5:

> [37] In cases involving multiple allegations of professional misconduct and/or rule breaches, the usual approach is to arrive at a disciplinary action that is suitable for all of the incidents viewed globally [citations omitted]. A global approach tends to carry with it the benefit of simplicity and will, in most cases, be particularly well-suited to arriving at a result that furthers the objective of protecting the public. After all, the extent to which the public needs protection, and the manner by which such protection is best provided, must ultimately relate to the entire scope of the misconduct in issue and not to each particular wrongdoing viewed piecemeal.

[115] As will become apparent, the concept of progressive discipline is relevant in this case. *Lessing*, at para. 72, observes that, in assessing the weight to be given to a respondent's professional conduct record, the factors to take into account may include: (a) the dates of the matters contained in the record; (b) their seriousness; (c) their similarity to the matters before the panel; and (d) any remedial actions taken by the respondent.

[116] Keeping the above principles in mind, we will now address the *Ogilvie* factors in determining whether the parties' proposal falls within the range of fair and reasonable disciplinary actions in all of the circumstances.

**Nature and gravity of the misconduct**

[117] The Respondent's misconduct is serious. It was multi-faceted and continued over a lengthy period of time, permeating many aspects of the Respondent's professional relationship with the Wife. It involved a breach of several obligations that are fundamental to a lawyer's duties to his or her client.

[118] The Respondent's misconduct began when he agreed to the Final Order without properly reading it or canvassing its contents with the Wife, when he ought to have known that she profoundly disagreed with the weekday morning access term. A lawyer has a duty to provide a quality of service that is competent, conscientious and diligent. The Respondent's conduct in this respect, though unintentional, was markedly deficient.

[119] Significantly compounding the seriousness of this initial error was the Respondent's reaction on being informed by the Wife that she did not agree to this term. A lawyer must be honest and candid with the client, and inform the client of all information known to the lawyer that may affect the client's interests in the matter. Yet the Respondent did not candidly admit his mistake until almost six months later, when he swore his affidavit in responding to the Husband's contempt application. Nor did he tell the Wife that she was obligated to comply with the Final Order unless and until an application could be successfully brought to alter its terms. Furthermore, the Respondent did not promptly bring an application to vary the Final Order. And he did not recommend that the Wife obtain

independent legal advice, which was obviously necessary given that his mistake had caused her predicament and was the most obvious basis upon which she could obtain a remedy.

[120] The Respondent's failure to respond properly in the face of his initial mistake spanned from mid-April 2012, when the Wife first brought the problem with the Final Order to his attention, until early October 2012, when she was served with the contempt application. During this period, the Wife asked the Respondent on seven occasions what steps he was taking to rectify the problem. And Opposing Counsel advised him on eight occasions that the Husband intended to enforce the terms of the Final Order if the Wife refused to grant access pursuant to its terms.

[121] It is true that, for part of the time after the Final Order was entered on March 23, 2012, from essentially May 8 until September 1, 2012, there was an interim agreement under which the Husband did not take steps to enforce the access term in the Final Order. But Opposing Counsel always made clear that this agreement was temporary and did not amount to waiver, and that the Husband would eventually insist that the access term of the Final Order be followed.

[122] It was therefore no surprise when, on August 1, 2012, Opposing Counsel wrote the Respondent to say that the access term would have to be complied with come September, failing which the Husband would bring a contempt application. Yet the Respondent never brought this letter or its contents to the Wife's attention. Worse still, he failed to respond to her August 3 email asking what steps were being taken to alter the contentious term. The result was that the Wife had to defend a contempt application, had to explain why the delay in seeking to vary the Final Order should not operate as waiver of her ability to do so, and although she succeeded in modifying the Final Order, was ordered to pay the costs of both applications due to this delay.

[123] Following the costs order, the Respondent continued to engage in unacceptable conduct. He failed to advise the Wife to seek independent legal advice, which denied her the ability to obtain an unbiased opinion as to who was at fault and who should bear the responsibility for paying the costs order.

[124] This failure is aggravated by the Respondent's subsequent correspondence with the Wife, in which he repeatedly alleged that fraud by Opposing Counsel was the primary cause of the problematic term in the Final Order, and claimed that the chambers judge's cost ruling was irrational and attributable to the judge being in a nasty mood. The Respondent also encouraged the Wife to report Opposing Counsel to the Law Society. The Wife clearly accepted these comments about Opposing Counsel as true. In the same vein, the Respondent's letter reporting himself to the Lawyers Insurance Fund contended that Opposing Counsel had deliberately acted unethically.

[125] There is no evidence to support these allegations against Opposing Counsel. They are manifestly ill-founded and unfair. They are also contrary to the express concession made by the Respondent's Associate in arguing the application to vary.

[126] Before us, the Respondent argued that his allegations of fraud against Opposing Counsel must not be viewed as an aggravating factor because they are not expressly mentioned in the citation.

[127] We reject this submission and, in particular, any suggestion that a proven fact logically relevant to assessing the gravity of one or more acts of misconduct must be ignored unless it is expressly mentioned in the citation. The Respondent's baseless allegations of fraud operated to downplay his own responsibility for the Wife's serious legal predicament. They therefore made it less likely that she would take action contrary to the Respondent's interests, for instance by discharging him as counsel, reporting him to the Law Society or seeking compensation by threatening or commencing civil proceedings. The allegations are thus inextricably linked to the Respondent's failure to recommend that the Wife receive independent legal advice.

[128] We find support for this view in Rule 5.1 of *Handbook*, which, in setting out the duty to recommend independent legal advice where there is a reasonable apprehension that a lawyer's error may be damaging to the client, expressly states that the lawyer must "*inform the client of the facts of the error and omission*, without admitting legal liability" (emphasis added). This requirement can only be read as requiring that the lawyer accurately inform the client of the relevant facts relating to the error and omission. It cannot be otherwise, given a lawyer's fiduciary duty to the client and the need for candour to ensure that the client is properly able to assess whether independent legal advice is needed and, if such advice is obtained, to ensure it is informed and comprehensive.

[129] This conclusion is bolstered by comments made in *Law Society of BC v. Harding*, 2014 LSBC 52 ("*Harding*"). There, the panel persuasively explained the connection between the importance of candour and the duty to promptly recommend independent legal advice where a lawyer's error may have damaged the client. After setting out the complete text of Chapter 4, Rule 5.1 of the *Handbook*, the panel stated:

> [98] In addition, Chapter 3, Rule 3, referred to above, lists whether the lawyer has disclosed all relevant information to the client including information that could reveal neglect or error of the lawyer as one of the indicia of conscientious, diligent and efficient manner of representation.
>
> [99] This is an area of trepidation for lawyers. It is tempting but not appropriate for lawyers to decide that they can "fix" the error so there is no utility to recommending independent legal advice. *The duty to recommend*

> *independent legal advice is based on an objective standard. It is part of a lawyer's fiduciary duty to his or her client, which includes scrupulous adherence to the obligation not to put the lawyer's own interests ahead of the client and to be candid, even where they have a plan to remedy the situation*: *Law Society of Alberta v. Chick*, [2008] LSDD No. 155.
>
> …
>
> [145] Whether the failure to do so [i.e., recommend independent legal advice as required] amounts to professional misconduct is informed by the duty of candour and the duty not to prefer his [i.e., the lawyer's] interests over those of his client. While the client was told of the application, and she was told that the delay was due to Mr. Harding, she was never told she might have a claim against him if the application succeeded. She would have been told that if she had been referred for independent legal advice.
>
> [emphasis added]

[130] Continuing with our review of the seriousness of the Respondent's misconduct, although he told the Wife shortly after the costs order was made against her that he would pay the costs himself, he did not honour his promise and in closing the file did not tell her that the costs order remained unsatisfied. Nor did he inform the Wife when Opposing Counsel contacted him about the order and negotiations ensued as to the proper calculation of costs.

[131] We accept the Respondent's explanation that he had forgotten about his promise to pay the costs order. But this forgetfulness, on such an important matter, and to his client's significant prejudice, is unacceptable. She ended up having to attend a costs hearing and then pay the costs herself. She should never have had to do either.

[132] Two other aspects of the Respondent's failure to pay costs are worth mentioning. First, he was reminded of his promise to pay costs by the Law Society on July 16 and September 30, 2014, but only admitted his obligation on October 31, and did not send the Wife a cheque until November 20. Second, he did not pay the Wife the full amount owed. Instead, he peevishly insisted on withholding $75 on the ground that she had rejected his advice to accept Opposing Counsel's offer to settle. He had no basis for withholding this payment given that he had earlier agreed to pay the costs order.

[133] Finally, the Respondent withdrew from the matter without giving the Wife reasonable notice. The result was that she was forced to conduct the costs hearing without counsel, in circumstances where she quite justifiably did not understand why she, and not the Respondent, should be paying.

**Age and experience of the respondent**

[134] At the time of the events in question, the Respondent had been practising for well over 20 years and was a seasoned litigator. None of the incidents of misconduct can be attributable to inexperience.

**Respondent's professional conduct record**

[135] The Respondent's professional conduct record contains two conduct review subcommittee reports and four citations upon which a panel made findings of misconduct. As will be explained further below, the parties take the position that we should consider only three of the citations in determining whether the proposed disciplinary action is within the range of fair and reasonable outcomes.

[136] *Citation issued November 20, 2002*. On April 14, 2003 a hearing panel accepted the Respondent's Rule 4-22 (now Rule 4-30) admission of professional misconduct as alleged in the citation (*Law Society of BC v. Harding*, 2003 LSBC 20). The misconduct related to a social gathering on November 29, 2000 at which the Respondent told a number of lawyers that S, a lawyer he was suing for negligence on behalf of S's former clients, had at an examination for discovery admitted enough to have himself disbarred and that the Respondent was going to get S disbarred. Six weeks later the Respondent wrote to S stating that, if he had made these comments, he unreservedly retracted them and offered his sincere apology. The Respondent was fined $1,000.

[137] *Conduct review authorized on April 1, 2004*. On June 29, 2004 a conduct review subcommittee issued a report regarding an incident where the Respondent had alleged that "opposing counsel had refused to comply with the Rules of the court, offered false evidence or misstated the facts and law, asserted untruths, [and] failed to conduct himself as a reasonably [sic] trial lawyer." After the judge determined that these allegations had no basis, the Respondent apologized to the court and opposing counsel for making them. At the conclusion of the trial, however, he made further uncivil and personal remarks regarding opposing counsel. The subcommittee took the view that a matter of this nature was unlikely to arise again, it appears because the Respondent had taken steps to avoid a recurrence.

[138] *Conduct review authorized on September 8, 2005*. A conduct review subcommittee issued a report relating to an incident in which the Respondent wrote letters suggesting that another lawyer had committed perjury and pressured a witness to give untruthful evidence. Moreover, in an account presented to his client, the Respondent's time entry indicated that, in his discussion with the other lawyer, the lawyer "admits telling C to say 'don't know' w/r seatbelt – just doesn't get it (perjury)." The subcommittee noted that the Respondent now understood the need to avoid ill-considered or uninformed criticism of the

competence, conduct or advice of other lawyers. The subcommittee was satisfied that the Respondent had systems in place to avoid a recurrence of such conduct and that he had taken steps to avoid emotional outbursts that transgress the rules. Finally, the subcommittee observed that the Respondent recognized that there is a limit to the patience of the Law Society concerning potential future occurrences of a similar nature.

[139] *Citation issued October 18, 2010*. On August 30, 2013 a panel found that the Respondent committed professional misconduct as alleged in the citation (*Law Society of BC v. Harding*, 2013 LSBC 25). The misconduct involved the Respondent writing to his client's former lawyer two letters dated March 15, 2010 that contained rude and discourteous remarks directed at the former lawyer. In the first letter, the Respondent inaccurately suggested that a Law Society ethics advisor had referred to the former lawyer as stupid and dishonest. In the second letter, he refused to retract the offensive comments and continued to be abusive, condescending, rude, disrespectful and discourteous towards the other lawyer. The Law Society and the Respondent together submitted that a fine of $2,500 was appropriate, given that the Respondent had provided an undertaking that he would continue to receive counselling and treatment from a psychologist. The panel was of the view that a short suspension together with the undertaking was a more appropriate result. However, in light of the parties' joint submission, the panel "with reservation" accepted the lesser penalty of a $2,500 fine (*Law Society of BC v. Harding*, 2014 LSBC 6). We have been informed that the Respondent has since fulfilled the terms of this undertaking.

[140] *Citation issued February 22, 2013*. On November 3, 2014 a panel found that the Respondent had committed professional misconduct by failing to provide his client with an acceptable quality of service and failing to recommend that the client obtain independent legal advice, as alleged in the citation (*Harding*). The Respondent had failed to take any steps in advancing his client's claim in a personal injury matter, except for a single meeting with the client, over a period of 49 months, from January 12, 2007 to February 11, 2011. The reason advanced for his inaction was that, due to workload pressures, he did not diarize the file and so it was not subject to his "bring forward" system. The defendants brought an application to dismiss the client's action for want of prosecution. The Respondent swore an affidavit on the application admitting that the failure to take any steps was entirely his fault, for the reasons just mentioned. He did not, however, recommend to his client that she obtain independent legal advice regarding the want of prosecution application. The application was dismissed on the basis that, while there had been inexcusable delay on behalf of the Respondent, the defendants had not suffered serious prejudice. The panel fined the Respondent $6,000 for these two instances of misconduct (*Law Society of BC v. Harding*, 2015 LSBC 25).

[141] *Citation issued June 18, 2013*. The fourth and most recent finding of misconduct against the Respondent relates to a citation arising out of an incident that occurred on June 26,

2012 (*Law Society of BC v. Harding*, 2015 LSBC 45). On the latter date the Respondent attended a tow yard in his capacity as counsel to take pictures of a client's vehicle, which had been involved in an accident. On being refused access to the vehicle, he argued with the tow yard staff. The argument culminated in the Respondent calling 911 and making comments to the operator about the need to have a police officer speak to the staff or else he was going to get a crowbar and smash up the place. The Respondent's intent was not to threaten the staff but to have the police attend to assist his cause, and he believed they were more likely to attend if he raised "the urgency" by making the crowbar comment. The hearing panel dismissed the citation. The Law Society sought a review of that decision. A majority of the review board reversed the hearing panel's dismissal of the citation. The majority concluded that the Respondent's comments, while not amounting to a criminal threat, constituted dishonourable or questionable conduct that reflected adversely on the administration of justice and so constituted professional misconduct.

[142] The review board decision was released after the Discipline Committee accepted the Rule 4-30 proposal in this case. Counsel have informed us that the board's decision is under appeal and, in any event has not yet been the subject of a disciplinary action hearing. They have also asked us not to consider the board's finding of professional misconduct. At the oral hearing, counsel for the Law Society explained that to take this finding into account would be inappropriate, given that the Respondent will be sanctioned for that misconduct at a later date. The suggestion appears to be that our considering this matter now would improperly supplant the role of the panel responsible for meting out disciplinary action in the future, and so constitute double punishment.

[143] We do not find it necessary to decide whether this submission is correct because the nature of the misconduct identified by the board is very different from that at issue in our case, and given the Respondent's already lengthy professional conduct record this additional entry has no material impact on our decision. Nonetheless, we observe that, under the Law Society Rules, a finding of professional misconduct forms part of a respondent's record even where the associated disciplinary action has not yet been imposed. This conclusion is not affected by the fact that the finding is under appeal (*Law Society of BC v. Perrick*, 2015 LSBC 42, paras 24-47).

[144] Having reviewed the Respondent's professional conduct record, we conclude with several observations.

[145] First, some of the entries regarding the Respondent's lack of civility and failure to control his temper are dated. Moreover, the subject matter of the incidents is not closely related to the subject matter of this case. The Respondent's counsel has also assured us, based on the completed undertaking referred to at paragraph 139 above, that the Respondent's problems with incivility have been addressed and remedied. These considerations might ordinarily favour ascribing limited weight to the incidents pertaining to a lack of civility but for one

important factor. The Respondent's allegations of fraud against Opposing Counsel bear some similarity to the incidents of incivility, in particular those directed at other lawyers. We appreciate that the current matter does not include an allegation of professional misconduct due to incivility. And we do not suggest that the Respondent made the allegations of fraud believing them to be false. But the allegations were clearly groundless and thus unreasonably made, and as explained above, they represent an integral part of the Respondent's misconduct in failing to recommend that the Wife obtain independent legal advice. The Respondent's unfair criticism of the chambers judge can be viewed in much the same way. For these reasons, we give more weight to this portion of the Respondent's professional conduct record than would otherwise have been the case.

[146] Second, the most troubling component of the Respondent's professional conduct record is the 2014 finding of professional misconduct for a failure to provide an acceptable quality of service and a failure to recommend independent legal advice. This entry is very similar to the subject matter of the citation before us. Furthermore, on March 1, 2012 the Law Society informed the Respondent that it had opened a complaint file regarding this other matter. This information should have brought home to the Respondent the paramount importance of providing adequate service to his clients and to recommend independent legal advice where required by the *Handbook* and *BC Code*. Yet it did not. The Respondent subsequently committed similar types of misconduct in handling the Wife's matter. This is a significant aggravating factor.

[147] Finally, the conduct that was the subject of the 2014 finding of professional misconduct was markedly less serious than the misconduct at issue here. In the 2014 case, unlike here:

- there were only two acts of professional misconduct (not four);
- the failure to provide an acceptable quality of service involved fewer itemized incidents of substandard representation;
- the Respondent immediately admitted his error upon learning that the file had slipped through the cracks;
- he did not fail to respond to communications from his client;
- his client did not make a complaint to the Law Society, and indeed he was still representing her when the penalty phase of the proceeding took place;
- there is no indication that the Respondent failed to provide his client with a full and candid explanation for the delay in the case, or that in explaining the delay he rashly and unjustifiably blamed another lawyer and the chambers judge.

**Impact on the victim**

[148] The adverse impact of the Respondent's misconduct on the Wife was significant. She suffered stress. She endured significant and unnecessary delay in bringing an application to vary a term in the Final Order to which she profoundly objected and had never agreed. She was the subject of a contempt application. She was forced to conduct the costs hearing without counsel. She was required to pay costs, and was not reimbursed until over a year later, and even then not in full. And she was misled as to the Respondent's true level of responsibility for the contentious term in the Final Order and the chambers judge's costs order, as the Respondent incorrectly attempted to shift a large part of the blame to Opposing Counsel and the chambers judge.

**Advantage gained or to be gained by the respondent**

[149] The Respondent did not charge the Wife a substantial amount of fees and paid the large bulk of the costs order, although, as mentioned above, he refused to honour his promise to pay the entire amount. He certainly did not gain financially by his misconduct. On the other hand, had he acted properly throughout, there is no reason to believe that any of these expenses would have been incurred. In other words, one can view the foregone fees and paid costs as simply going some way towards reflecting what the Wife would have had to pay had the Respondent acted properly.

[150] The Respondent's conduct in agreeing to the Final Order without properly reading the document and without obtaining instructions obviously gained him no advantage. But we cannot say the same about other aspects of the Respondent's misconduct, at least in the short-to-medium term. In particular, his delay in taking steps to vary the Final Order and his failure to recommend that the Wife obtain independent legal advice favoured his own interests over hers, and operated to reduce the risk of adverse consequences arising as a result of his initial error.

**Number of times the offending conduct occurred**

[151] All of the Respondent's professional misconduct flowed from an initial error made in approving the Final Order without properly reading it or obtaining instructions. None of the misconduct would have occurred otherwise.

[152] However, we do not view the misconduct as tantamount to a single instance of gross negligence. The failure to provide an acceptable quality of service relates to six different incidents spanning a lengthy period of time. And the Respondent committed professional misconduct in three other respects, each one serious in its own right.

**Whether respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence of other mitigating circumstances**

[153] The Respondent has admitted to the misconduct, which is a mitigating factor. The Respondent also reduced his fees to the Wife and paid a substantial amount to the Wife towards the costs award made against her.

**Possibility of rehabilitating the respondent**

[154] We have been provided with no information one way or another to suggest the Respondent has taken steps to ensure that the misconduct to which he has admitted will not occur again. However, we do note that subsequent to the conduct in issue in this matter, the Respondent satisfied an undertaking given in connection with an earlier citation to follow a treatment plan proposed and monitored by a psychologist (see paragraphs 139 and 145 above). We view this as a mitigating factor.

**Impact of the proposed penalty on the respondent**

[155] We have been given no indication as to the impact of the proposed penalty on the Respondent. We do not know whether a $15,000 fine would be a significant burden or if, instead, it would cause no real hardship. We do, however, recognize that the fine is a fairly large one.

**Need for specific and general deterrence**

[156] There is a significant need for specific deterrence in this case, given that this is the Respondent's second citation involving an unacceptable quality of service and a failure to recommend independent legal advice. The need for general deterrence is also substantial. Lawyers must recognize the great importance of providing clients with competent service and taking prompt and appropriate steps to provide clients with the opportunity to obtain independent legal advice where errors have been made.

**Need to ensure the public's confidence in the integrity of the profession**

[157] The need to ensure the public's confidence in the integrity of the profession is particularly engaged in this case. The Respondent's misconduct was serious and multi-faceted. His client suffered substantial harm. He has an extensive record of professional misconduct, and most particularly a prior entry involving misconduct for similar failings. And we have no information to suggest he has taken steps to avoid making the same mistakes in the future. A reasonable member of the public fully informed of the facts might well look askance at the Respondent receiving only a fine, and not a suspension, and thereby question the integrity of the profession at large as well as the ability of the Law Society to regulate

the conduct of lawyers. It is thus necessary to consider the range of penalties that have been imposed in similar cases.

**Range of penalties imposed in similar cases**

[158] The parties have referred us to four decisions said to be the most similar to the circumstances of this case.

[159] One is *Harding*, discussed in detail at paragraphs 140, 146 and 147 above, in which the Respondent received a $6,000 fine for failing to provide adequate service and failing to recommend independent legal advice to his client. As noted, the extent and gravity of the misconduct in that case was less serious, and the harm to the client less substantial, than in the case before us now. Also, the Respondent had no prior incidents of misconduct in these areas. The same can no longer be said, and so the need for general and specific deterrence increases.

[160] In *Law Society of BC v. Epstein*, 2011 LSBC 12, the respondent admitted to professional misconduct by failing to provide an adequate quality of service. An executrix had retained him to transfer real property registered to her deceased partner to the estate. Between November 2006 and September 2007 the respondent conducted two online searches but both times failed to notice that the title had recently been cancelled and transferred to two other co-owners. He failed to act promptly on the results of the title search and also failed to respond to his client's inquiries in a timely way. The respondent had been the subject of conduct reviews in 2000 and 2006, which both revealed a similar lack of attentiveness, and a practice review that was completed in 2008 and focused on the need to better organize his practice. The panel noted that the penalties in cases involving a failure to provide adequate service ranged from a reprimand to a 45-day suspension. It imposed a fine of $4,500 but noted that, if the respondent did not take steps to end the pattern of carelessness and inattention, he would face far more serious consequences.

[161] In *Law Society of BC v. McLellan*, 2011 LSBC 23, the panel accepted a Rule 4-22 (now Rule 4-30) proposal regarding a failure to provide an adequate quality of service. Over a period of about seven years the respondent took very few steps to advance a client's civil claim. He did not do the work promptly. He did not keep the client reasonably informed. And he failed to respond to many inquiries by his client as to the status of the case. The result was unreasonable delay in the client pursuing the action, although there appears to have been some issue as to whether the action had much merit. The Respondent had a prior conduct review for breaching an undertaking in 1986, a citation for breaching an undertaking in 2003, which resulted in a $3,000 fine, and a conduct review for conflict of interest in 2010. Since the incident, the respondent had taken concrete steps to ensure similar misconduct did not occur in the future, and he was genuinely remorseful. His motivation appears to have been to save the client money, and he did not gain personally from the misconduct. The fine imposed was $5,000. In accepting the proposal, the panel

noted that the cases provided by the parties indicated a range of penalties from a reprimand to a short suspension.

[162] In *Law Society of BC v. Hart*, 2014 LSBC 17, the panel accepted a Rule 4-22 (now Rule 4-30) proposal under which the respondent admitted to professional misconduct for failing to provide adequate service. He was not diligent in communicating with his client, which caused significant delay in what should have been a relatively straightforward matrimonial matter. He also failed to put the client's funds in an interest-bearing account, failed to provide a promised opinion letter, failed to notify the client that her husband had changed lawyers, failed to correct an inaccurate address on a Notice of Intention to Act in Person, and failed to tell his client that he would cease work until his account was paid.

[163] The respondent in *Hart* had a lengthy professional conduct record comprising three conduct reviews, two citations and a 1990 referral to the Competency Committee. One of the citations, from 1985, was for failure to provide adequate service to a client, failure to respond to the Law Society and misleading the Law Society in the same matter, and had resulted in a $1,000 fine. The panel viewed *Epstein* and *McLellan* as the cases most similar to the respondent's, but agreed that his extensive professional conduct record required a higher fine. The panel therefore accepted the proposal under which the Respondent was fined $7,000.

[164] A decision not cited to us but nonetheless of relevance is *Law Society of BC v. Perrick*, 2015 LSBC 42. There, the respondent committed professional misconduct by failing to provide an acceptable quality of representation in acting for a client in matters arising from two motor vehicle accidents and by failing to respond promptly or at all to eight letters sent by opposing counsel regarding the same matters. The inadequate service involved a fairly pervasive failure over a period of more than two years to keep the client reasonably informed and to take substantive steps to advance her claims. The respondent had a prior conduct review from 1993 involving a conflict of interest and, more significantly, a recent finding of professional misconduct in multiple respects including three instances of failure to provide an adequate quality of service and a failure to respond to opposing counsel's communications. The panel suspended the respondent for 30 days.

[165] We mention *Perrick* for three reasons. First, the decision notes that the disciplinary action for failure to provide adequate service ranges from a reprimand to a six-month suspension (para. 65).

[166] Second, *Perrick* addresses the issue as to whether a fine should be preferred over a short suspension. The panel offers the view that a short suspension may send a stronger message than a large fine. We agree. The fine proposed by the respondent in *Perrick*, as in our case, was $15,000 (paras. 58-59).

[167] Third, and most importantly, *Perrick* recognizes that a suspension may be more appropriate than a fine even where there is no deceit on the part of the respondent, in cases where there

are repetitive acts of negligence and significant professional conduct issues. The panel found there to be repetitive acts of negligence because the respondent admitted to a lack of quality of service with respect to eight particulars (in the present case, the number is six), and had also committed professional misconduct by failing to respond to opposing counsel's letters (in the present case, there are three additional findings of professional misconduct). The previous finding of misconduct for a failure to provide adequate service was also important, and the same applies in our case, although the Respondent's previous misconduct in this respect was less serious than in *Perrick*.

[168] Having reviewed the penalties imposed in other cases involving an unacceptable quality of service, we find that they range from a reprimand to a moderate suspension. However, our focus must be on the fair and reasonable range of penalties for *similar* cases. *Hart* and *Perrick* are somewhat similar to our case, although material differences remain. In our view, the low end of the range in the circumstances of our case would be a very significant fine, at least in the vicinity of what has been proposed by the parties. The higher end of the range would involve a suspension of a month or somewhat more.

## CONCLUSION

[169] Having considered the *Ogilvie* factors and the paramount need to protect the public and ensure public confidence in the integrity of the profession, we conclude that the disciplinary action proposed is at the very low end of the range in the circumstances. However, we must recognize the value of Rule 4-30 proposals in encouraging the parties to craft creative and fair settlements and in facilitating settlements by providing the parties with a measure of certainty (*Rai*, at paras. 6-8). For this reason, our task is not to determine what penalty we think the most appropriate, but rather to accept or reject the proposed disciplinary action based on whether it falls within the fair and reasonable range for similar cases. It does, and so we accept the proposal.

## ORDER

[170] The Respondent has committed professional misconduct as alleged in paragraphs 1(a) to (f), 2(b), 3 and 5 of the citation. We therefore order that he pay a fine of $15,000 and costs of $2,125, payable on or before April 30, 2016.

[171] We also instruct the Executive Director to record the Respondent's admission on his professional conduct record.