

2016 LSBC 13
Decision issued: April 1, 2016
Oral reasons on Facts and Determination: February 1, 2016
Citation issued: September 30, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JAMES LESLIE STRAITH

RESPONDENT

**DECISION OF THE HEARING PANEL ON
FACTS, DETERMINATION, DISCIPLINARY ACTION
AND COSTS**

Hearing date: February 1, 2016

Panel: Herman Van Ommen, QC, Chair
Jasmin Z. Ahmad, Lawyer
John Lane, Public representative

Discipline Counsel: Kieron Grady
Appearing on his own behalf: James L. Straith

BACKGROUND

- [1] This hearing concerns the obligation of lawyers to cooperate with the Law Society's investigation of complaints made against a lawyer and, in particular, to respond to communications from the Law Society for information and documents.
- [2] In February 2014, two former clients of the Respondent made a complaint to the Law Society about the manner in which the Respondent handled certain aspects of their file. In March 2014, the Law Society opened a complaint file and commenced its investigation into the allegations made by the former clients.

- [3] During the course of its investigation, the Law Society made requests of the Respondent for specific documents and information to assist it in the investigation of the complaint.
- [4] The citation authorized on September 25, 2015 and issued on September 30, 2015 sets out the sole allegation that the Respondent failed to promptly provide a full and substantive response to the Law Society's request for documents and information.
- [5] It is alleged that the conduct set out in the citation constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act* (the "Act").

HEARING BACKGROUND

- [6] The Respondent admitted service of the citation.
- [7] As the citation comprised only the allegation that the Respondent failed to respond to communications from the Law Society, this hearing proceeded pursuant to Rule 4-33 of the Law Society Rules (the "Rules"). Together, subrules (1) and (2) of that Rule allow a respondent and discipline counsel to adduce evidence at the hearing by affidavit.
- [8] The Law Society relied on the affidavit of Kurt Wedel sworn October 16, 2015. Mr. Wedel is the staff lawyer in the Professional Conduct Department of the Law Society who, at the time of the hearing, had conduct of the investigations of the complaints made by the former clients. Mr. Wedel also gave oral evidence at the hearing and was cross-examined by the Respondent.
- [9] The Respondent also gave oral evidence at the hearing and called his colleague, AB, to give evidence on his behalf. Both the Respondent and AB were cross-examined by Law Society counsel.
- [10] At the conclusion of the hearing, the Hearing Panel considered the evidence and determined that the Respondent had committed professional misconduct with respect to the allegations made in the citation.
- [11] However, we reserved making a determination with respect to the disciplinary action or costs to be imposed as the result of that determination.
- [12] These are our reasons with respect to the facts and determination and disciplinary action phases of this proceeding.

FACTS

Background

- [13] For the period prior to 2011, AB and the Respondent shared office space at the Respondent's office located in Horseshoe Bay.
- [14] Although he had been called to the bar of British Columbia in 1986, immediately prior to September 2012, AB was not a practising member of the Law Society. In September 2012, AB regained his status as a practising lawyer and commenced employment as a lawyer with the Respondent's law firm.
- [15] Prior to September 2012, AB sent and received email communications from his email address (the "Gmail Account").
- [16] After joining the Respondent's firm as a practising lawyer in September 2012, AB received and sent communication primarily from the firm's email address (the "Straithlit Email Address"). However, he also maintained his Gmail Account.

The complaints

- [17] In the fall of 2011, the Respondent agreed to assist the former clients in pursuing a test case to extend the current law with respect to who could be granted Canadian citizenship. The Respondent was lead counsel for the duration of his retainer with the former clients.
- [18] From the fall of 2011 to September 2012, AB assisted the Respondent with his work for the former clients as an unpaid volunteer doing administrative work. After he regained his active practising status in September 2012, AB assisted the Respondent as co-counsel for the former clients.
- [19] As a condition of doing so, AB had to copy the Respondent with all email correspondence that he sent and received during the course of the former clients' retainer. To the best of his recollection, he did so.
- [20] The Respondent's evidence was the same. He testified that, with some specific exceptions, he copied AB with all emails that he sent and received in respect of the former clients. Prior to September 2012, the Respondent copied and forwarded his emails to AB at his Gmail Account; after September 2012, he copied AB at the Straithlit Email Address.

- [21] In February 2014, two former clients of the Respondent made a complaint to the Law Society about the manner in which the Respondent and AB handled certain aspects of their file.
- [22] The Law Society opened separate files for each of the complaints concerning the Respondent and the complaints concerning AB. It assigned different complaint file numbers to each of those complaint investigation files.

The Law Society's initial request for documents and information

- [23] Ruth Long was the staff lawyer who was initially assigned to investigate each of the complaint files.
- [24] By letter dated May 28, 2014, Ms. Long first wrote to the Respondent and provided him written information about the complaints. She also requested production of the Respondent's client file along with responses to several other requests "in order to properly assess [the] complaints."
- [25] The May 28, 2014 letter states:

As you and [AB] worked together on this file, there is overlap in the concerns raised. We are, however, seeking written responses from each of you separately so that we can understand your roles in the litigation and in order to properly assess these complaints. ...

- [26] Ms. Long also wrote separately to AB on May 28, 2014 seeking a response in his complaint file.
- [27] On June 16, 2014, AB sent an email to Ms. Long in response to her letter of May 28, 2014 in which he stated, "This response is a joint response from [the Respondent] and myself with respect to the complaint of [the former clients] ... concerning the timing of a detailed response." The email was copied to the Respondent and the subject line referenced each of AB's and the Respondent's complaint file numbers.
- [28] AB advised Ms. Long, "There are in fact over 500 emails communications with the parties with respect to this matter and 3-4 Bankers Boxes of materials." He concluded the email as follows:

You have asked for our detailed written response on or before June 18, 2014. We have been working towards that deadline however, given that the voluminous materials, developing a detailed timeline and chronology and looking at the various issues and 9 allegations that have been

requested we will have our written submissions filed and detailed response to you on or before **July 18, 2014** based of [sic] the scope of work and time required to make these detailed submissions to the Law Society. This will include also all the email transmissions, telephone conference calls and client meetings that were held with respect to this matter this [sic] throughout this process.

- [29] Neither AB nor the Respondent provided a response by July 18, 2014.
- [30] After July 18, 2014, AB sent two further emails to Ms. Long asking for an extension of time to respond to the May 28, 2014 request. In particular:
- (a) On July 21, 2014, he confirmed that the materials would be delivered to the Law Society “on or before July 31, 2014 and likely before that date”; and
 - (b) Having delivered no materials by July 31, 2014, on August 1, 2014, he confirmed that “... we will have all of these materials with respect to this matter delivered to the Law Society on Wednesday morning, August 6, 2014.”
- [31] Each of AB’s emails requesting an extension of time referenced each of AB’s and the Respondent’s complaint file numbers and each was copied to the Respondent.
- [32] The Respondent did not make any direct requests for time to respond to the May 28, 2014 request.
- [33] By August 6, 2014, neither AB nor the Respondent had provided a substantive response to Ms. Long’s letter dated May 28, 2014.
- [34] On August 14, 2014, Ms. Long sent separate letters to each of the Respondent and AB. In each, she advised that the Law Society required their response to all of the requested materials by August 28, 2014.
- [35] On September 11, 2014, AB emailed the Law Society “to provide a status update on delivery of materials to your offices.” He advised that the “[c]omplete file will be delivered by the writer later tomorrow, September 12, 2014.”
- [36] The subject line of AB’s September 11, 2014 email referenced each of AB’s and the Respondent’s complaint file numbers. There is no indication that the Respondent was copied with the email.

[37] After receiving AB's email, on September 11, 2014, Ms. Long wrote to the Respondent in which she stated:

The Law Society requires your response and all of the requested material by **4:00 pm September 12, 2014**. This is the final warning and failure to submit your response to the Law Society by that time and date will be referred to the Chair of the Discipline Committee, pursuant to the summary hearing process. ...

[38] A similar letter was delivered to AB.

The Respondent's initial response to the Law Society's requests

[39] By two separate letters, each dated September 9, 2014, each of the Respondent and AB responded to the Law Society's letter of May 28, 2014 in which Ms. Long had requested production of the Respondent's client file along with responses to several other requests.

[40] Each of the Respondent and AB expressly adopted the other's response as part of his response. Each referred to the other's complaint file in the subject line of their correspondence.

[41] In addition to the written response, the Respondent also provided the Law Society with four boxes of documents he described as "our complete paper file." Those boxes contained a limited number of emails.

[42] In his letter, the Respondent advised Ms. Long that:

- (a) For completeness, we've also provided a binder of select documents which have been highlighted in referenced [sic] with respect to this matter. ...; and
- (b) He had attached an "overview chronology" to the letter.

[43] However, neither a binder of documents nor a chronology accompanied the letter.

[44] On October 14, 2014, Ms. Long wrote to the Respondent and requested that he produce the binder and the chronology by October 31, 2014. She sent a similar letter to AB in his complaint file.

[45] Neither the Respondent nor AB provided the binder or a chronology to the Law Society by October 31, 2014.

- [46] By December 8, 2014, Mark Bussanich had assumed conduct of the complaints investigations from Ms. Long. On December 8, 2014, he wrote to the Respondent and asked that he deliver the binder no later than December 22, 2014. He also sent a similar letter to AB.
- [47] On February 3, 2015, AB produced the binder and the chronology that had been first referred to in the Respondent's letter of September 9, 2014. In the correspondence accompanying the binder, AB noted as follows:

As I mentioned earlier there are numerous emails and 495 in total. The break out of these are noted under tab 1 of the chronology. I do not print out all of these as they are very voluminous. Not all of these were printed out but are available on the server should you have additional requests.

What has been provided as [sic] been recreated and there [sic] substantially more detail available and can be provided as needed.

- [48] AB's February 3, 2015 letter to the Law Society indicated that the Respondent was copied with that communication. However, the subject line of the letter references only AB's complaint file number.

The Law Society requests set out in the citation

- [49] On May 1, 2015, Mr. Wedel assumed conduct of the complaints investigations from Mr. Bussanich.
- [50] Having reviewed the material that had by then been provided to the Law Society, by letter dated May 13, 2015 to the Respondent, Mr. Wedel made a request for more specific additional material relating to the complaints as follows:
1. All timekeeping records;
 2. The accounts receivable ledgers;
 3. All email correspondence (to/from and within the firm, including the Respondent's email address);
 4. All notes of meetings/conversations; and
 5. Evidence of delivery of statements of account.
- [51] By letter also dated May 13, 2015, Mr. Wedel made a separate request of AB to provide additional materials relating to the complaint against him. The additional

materials requested of AB were narrower than the materials requested of the Respondent. Mr. Wedel asked that AB provide him with a copy of:

1. All timekeeping records (including records from the period before he joined the Respondent's firm);
2. All email correspondence to/from his Gmail Account; and
3. All notes of meetings/conversations.

[52] Each of Mr. Wedel's May 13, 2015 letters to the Respondent and AB asked that they deliver the requested materials by May 28, 2015. Both provided:

If you anticipate difficulty meeting this deadline, please let me know in advance so we can discuss another date by which I may expect your response.

[53] Mr. Wedel explained the reason for the requests set out in his May 13, 2015 letters. He testified that, having reviewed the information that had then been provided, he concluded that other information in documents important in the investigation was missing. He noted that:

- (a) Nothing in the Respondent's September 9, 2014 letter referencing the delivery of a "complete paper file" suggested that emails that had not been printed were contained in those boxes;
- (b) AB's February 3, 2015 letter referred to "495 emails"; however, the bankers boxes that had been produced by the Respondent contained only approximately 30 emails; and
- (c) He understood that, prior to September 2012, AB had sent and received emails from and to his Gmail Account. No emails from that email account were included in the documents that had been provided.

[54] On May 14, 2015, the Respondent contacted Mr. Wedel by telephone to respond to the requests made in the May 13, 2015 letter. In that conversation, the Respondent advised Mr. Wedel that:

- (a) Because the matter was partly pro bono, his time keeping records were not what they would normally be;
- (b) He had printed his accounts receivable ledger and would provide it;

- (c) He thought that all of the emails were included in the paper file that had been provided. Mr. Wedel told him that the paper file contained very few emails despite AB's earlier reference to "495 emails";
- (d) Having consulted with AB during the call, the Respondent advised Mr. Wedel that the emails were available;
- (e) He thought that all notes of meetings were in the paper file but that he would check; and
- (f) Statements of account were prepared and provided to one of the former clients.

[55] The telephone call concluded by Mr. Wedel advising the Respondent he would "stand by for receipt of the materials."

[56] Also on May 14, 2015, AB left a separate telephone message with Mr. Wedel in which he advised Mr. Wedel that he would need more than two weeks to produce the material that had been requested of him. In his message, he stated that he would call Mr. Wedel the next day. He did not.

[57] By May 28, 2015, neither the Respondent nor AB had provided Mr. Wedel with the information that he had requested in his letter of May 13, 2015.

[58] On May 29, 2015, Mr. Wedel sent separate letters to each of the Respondent and AB advising that the Law Society required their response and all of the requested material by June 12, 2015.

[59] On June 12, 2015, the Respondent attempted to deliver an email to Mr. Wedel to respond to his letters of May 13, 2015 and May 29, 2015. In it, he acknowledged that "not all emails were printed out in keeping with the concept of the paperless office." In specific response to Mr. Wedel's request for emails, he noted:

In particular, the emails that were exchanged in this matter are well over 800 and likely or [sic] more given the various people that we were in touch with as this matter progressed and the matter proceeded in the Federal Court.

These need to be manually printed out in their entirety. I will have to co-ordinate this with [AB] as we made his email the primary point of contact from September 2012 forward. There will inevitably be some duplication but for completeness sake this will be done primarily off AB's

email address since that is how we made sure, as much as possible, that there was one place will [sic] all email.

[60] Given the “substantial undertaking of time and effort” to produce the emails and given his work schedule, the Respondent suggested that, “I think realistically I can take some time away from my vacation and get all this information to you by July 30, 2015.” That letter was not copied to AB, and the subject line referenced only the Respondent’s complaint file number.

[61] However, the Respondent had used an incorrect email address, and Mr. Wedel did not receive the Respondent’s June 12, 2015 letter until June 16, 2015. Prior to receiving that letter on June 16, 2015, Mr. Wedel sent a further letter to the Respondent seeking a reply to his letters of May 13, 2015 and May 29, 2015. He advised the Respondent that:

... If your full response is not received by **June 29, 2015** this matter will be referred to the Discipline Committee or its Chair with a recommendation that the Chair issue a citation for your failure to respond to Law Society correspondence. ...

[62] On receipt of Mr. Wedel’s correspondence on June 16, 2015, the Respondent sent him a copy of his June 12, 2015 email attempts and a copy of his letter of that date.

[63] On June 15, 2015, AB also separately responded to Mr. Wedel’s May 29 letter by email. He advised Mr. Wedel that, among other things, he should be able to have all of the requested materials to him by July 26, 2015. That email was not copied to the Respondent, and the subject line referenced only AB’s complaint file number.

[64] In response, by letter dated June 16, 2015, Mr. Wedel advised AB that, if the response to his letters dated May 13, 2015 and May 29, 2015 was not received by June 29, 2015, the matter would be referred to the Discipline Committee or its Chair.

[65] On June 19, 2015, Mr. Wedel replied to the Respondent’s advice that he could deliver the material requested by July 30, 2015 noting that “[t]hat date is nearly seven weeks from the date of your letter and more than 11 weeks from my original request.”

[66] Mr. Wedel also stated:

It has now been more than five weeks since you received my request. You have not provided any of the requested material, nor have you advised that

you are unable to provide any of the requested material. In addition, there is no indication in your letter that you have taken any steps toward producing the requested material. Your advice that you think you can deliver the requested material by July 30, 2015 is not consistent with your obligation under Rule 3-5(10).

The Law Society's requirements of you are set out in my letters dated May 13, 2015, May 29, 2015, and June 16, 2015.

- [67] By June 29, 2015, the Respondent had not replied to Mr. Wedel's email of June 19, 2015, nor had he personally provided any of the requested material after that date or advised Mr. Wedel that he was unable to provide any of the requested material.
- [68] The Respondent testified that, because he had copied AB on all of his emails relating to the former clients, AB had the most complete set of emails relating to that matter. For that reason, he asked AB to produce all emails, including all emails from his Straithlit Email Address, that had been generated in respect of the former clients.
- [69] In the Respondent's view, AB's production of all the emails, including the emails from his Straithlit Email Address, would ensure that a complete set of emails had been produced to fulfil the request that the Law Society had made of him.
- [70] The Respondent testified that AB told him he had produced the emails from the Straithlit Email Address.
- [71] AB does not dispute the Respondent's evidence. He agreed that production of all of the emails from his Straithlit Email Address, together with all of the email from his Gmail Account, would result in the most complete set of emails that had been generated in respect of the former clients.
- [72] He also agreed that the Respondent had asked him to produce all of the emails from his Straithlit Email Address and that he had told the Respondent throughout that he had done so.
- [73] However, on cross-examination, AB conceded that the emails that he ultimately provided to the Law Society contained only those emails from his Gmail Account in compliance with the Law Society's specific request of him. He never directed his mind to the emails from the Straithlit Email Address.
- [74] Both AB and the Respondent testified that they only realized that AB did not produce the emails from the Straithlit Email Address during the course of their preparation for this hearing.

AB's response to the Law Society

- [75] On August 17, 2015 (after the June 29, 2015 deadline had passed) AB left Mr. Wedel a voicemail message and sent him an email in which he stated, "I have almost all the emails requested in printed out format. It has taken a great deal of time. I will personally deliver these to you on or before Thursday, August 20, 2015."
- [76] The subject line of the August 17, 2015 email only referenced AB's complaint file number, and it did not show as being copied to the Respondent.
- [77] AB did not provide the emails to Mr. Wedel by August 20, 2015.
- [78] On August 25, 2015, AB called Mr. Wedel and told him he was still assembling the emails that he hoped to deliver to them by August 28, 2015 or possibly August 27, 2015.
- [79] On August 25, 2015, Mr. Wedel emailed AB to clarify that the materials requested in the letters dated May 13, 2015, May 29, 2015 and June 16, 2015 is "overdue." However, given the telephone call of that morning, Mr. Wedel advised that he would not proceed with a referral to the Chair of the Discipline Committee before August 31, 2015.
- [80] On August 26, 2015, AB replied to Mr. Wedel's email, seeking confirmation that the outstanding request was contained in Mr. Wedel's letter dated May 13, 2015 and that the letters that followed were "reminder letters." He set out the specific request made of him in Mr. Wedel's May 13, 2015 letter being:
- (a) All timekeeping records;
 - (b) All email from the Gmail Address; and
 - (c) All notes of meetings and conversations.
- [81] The subject line of AB's email referenced only his own complaint file number and does not show to be copied to the Respondent. He did not seek confirmation of the request made of the Respondent.
- [82] On August 26, 2015, Mr. Wedel sent AB an email confirming that the outstanding requests were contained in the May 13, 2015 letter. He separately forwarded to him copies of the May 13, May 29, 2015 and June 16, 2015 letters.

[83] By letter dated August 28, 2015, received by the Law Society on August 31, 2015, AB delivered a letter to the Law Society in response to Mr. Wedel's original request of May 13, 2015.

[84] In the August 28, 2015 letter, AB set out the searches he conducted for each of the three categories of documents that had been requested of him and provided an explanation of those documents for which limited documents existed.

[85] He described the three categories of documents that he reviewed as follows:

- (a) Timekeeping Records;
- (b) Email Records from [the Gmail Account]; and
- (c) All Notes of Meetings/Conversations.

[86] He enclosed with the August 28, 2015 letter, the following:

- (a) "a bundle of documents" and a "power point presentation" in response to the request for notes of meetings and conversations; and
- (b) a copy of those emails requested from his Gmail Account.

[87] The Respondent testified that he did not see AB's August 28, 2015 response (despite the fact that the letter shows that it was copied to the Respondent) until he received the Law Society's disclosure, presumably after Mr. Wedel's affidavit was sworn on October 16, 2015.

Post-citation communications

[88] On October 9, 2015, the Respondent advised Law Society discipline counsel that he had no timekeeping records for the matter in question.

POSITION OF THE PARTIES

[89] The Law Society's position on this hearing is straightforward: notwithstanding ample opportunity to do so, the Respondent failed to deliver to the Law Society all of the information and documents that had been requested of him in its May 13, 2015 letter. That failure constitutes professional misconduct.

[90] The Respondent does not deny that he did not fully respond to the Law Society's May 13, 2105 request to produce documents including, in particular, the email

correspondence to and from and within his firm, including the Respondent's Straithlit Email Address.

- [91] However, he argued that that he took steps to respond to that request by delegating the obligation to respond to AB. Based on what AB told him, he believed that a response had been provided.
- [92] It is the Respondent's position that those steps should be sufficient to vitiate a finding of professional misconduct notwithstanding his failure to respond to communications from the Law Society.

ISSUES

[93] The issues to be determined by this Panel are:

- (a) Does the Respondent's conduct in failing to provide a full response to the Law Society's request for documents and information as set in its communications of May 13, May 29, June 16 and June 19, 2015 constitute professional misconduct pursuant to section 38(4) of the Act;
- (b) Did the Respondent delegate the obligation to provide a response to the Law Society to AB and, if so, was it reasonable for him to believe that AB had done so;
- (c) If so, is that delegation and his belief that AB had provided a full response enough to vitiate a finding of professional misconduct; and
- (d) If the Respondent's conduct does constitute professional misconduct, what is the appropriate disciplinary action to be imposed?

DISCUSSION AND ANALYSIS

Facts and determination

- [94] The well-settled test for "professional misconduct" is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members ..." That test, set out in *Law Society of BC v. Martin*, 2005 LSBC 16, has been consistently applied in disciplinary hearings in this Province.
- [95] It is also well-settled that the onus is on the Law Society to prove that a respondent's conduct amounts to "professional misconduct" on a balance of probabilities (*Law Society of BC v. Tak*, 2009 LSBC 25).

[96] The *Code of Professional Conduct for British Columbia* (the “Code”) provides a general guide to lawyers’ conduct in the Province and sets out the standards of that conduct. While not every breach of the Code will necessarily amount to professional misconduct, its provisions are instructive in considering whether the Respondent’s conduct is a marked departure from that conduct the Law Society expects of lawyers in BC.

[97] The Code provides direction with respect to a lawyer’s obligation to reply to communications from the Law Society and co-operate with its investigations involving the lawyer or a member of the lawyer’s firm. Specifically, Rule 7.1-1 requires lawyers to, among other things:

- (a) reply promptly and completely to any communication from the Law Society;
- (b) provide documents as required to the Law Society; and
- (c) co-operate with Law Society investigations involving the lawyer.

[98] The Rules also impose an obligation on a lawyer who is subject of an investigation to co-operate. Rule 3-5(7) provides:

A lawyer must co-operate fully in an investigation under this division by all available means including, but not limited to, responding fully and substantively, in the form specified by the Executive Director

- (a) to the complaint, and
- (b) to all requests made by the Executive Director in the course of an investigation.

[99] This Panel has considered the obligations imposed on a lawyer by the Code (and its predecessor *Professional Conduct Handbook*) and the Rules to respond promptly and fully to and co-operate with the Law Society regarding an investigation. In *Law Society of BC v. Dobbin*, 1999 LSBC 27, [2000] LSDD No. 12, the Benchers noted at paragraph 20:

If the Law Society cannot count on prompt, candid, and complete replies by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society’s paramount duty.

[100] On that basis, the Benchers in *Dobbin* concluded:

... [I]t is the decision of the Benchers that unexplained persistent failure to respond to Law Society communications will always be prima facie

evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct. ...

[101] That principle has been applied in subsequent decisions including *Law Society of BC v. Cunningham*, 2007 LSBC 17, *Law Society of BC v. Decore*, 2012 LSBC 17, *Law Society of BC v. Malcolm*, 2012 LSBC 04, *Law Society of BC v. Marcotte*, 2010 LSBC 18, *Law Society of BC v. Niemela*, 2012 LSBC 9 and *Law Society of BC v. Buchan*, 2013 LSBC 08.

[102] The panels in each of those decisions concluded that the lawyer's failure to respond to Law Society communications did constitute professional misconduct.

[103] However, in *Cunningham*, *Marcotte* and *Malcolm*, the hearing panels considered possible defences that would be sufficient to vitiate a finding of professional misconduct even in circumstances where a lawyer did fail to respond to communications from the Law Society.

[104] The burden to do so is high and was summarized by the panel in *Marcotte* as follows:

In *Cunningham*, the respondent testified that she was immobilized from responding. The panel held that to avoid a finding of professional misconduct, the respondent must show "an illness such as to incapacitate her to the extent of making her unable to answer correspondence." In that case, there was insufficient evidence to establish the incapacity as noted.

Failure to respond

[105] In the matter before this Panel, the Law Society's May 13, 2015 request of the Respondent for information and documents was limited to five specific categories of documents. The request was not ambiguous. All of those categories of requested documents were documents that were in his possession or his control.

[106] The Respondent's response to the Law Society's request has been limited. It has consisted solely of:

- (a) His telephone call to Mr. Wedel on May 14, 2015 (which he did not follow up with any document production);
- (b) His letter dated June 12, 2015 to Mr. Wedel in which he advised that he anticipated being able to provide a response by July 30, 2015 (he did not); and

- (c) His advice to Law Society discipline counsel on October 9, 2015 that he did not have any timekeeping records.

[107] None of those responses resulted in the production of any of the requested documents.

[108] Indeed, by August 28, 2015, three and a half months after the request was made, the Respondent had not produced any documents in three of the categories of documents that had been requested.

[109] The Respondent's failure to provide the requested documents is exacerbated by the persistence of that failure. The Respondent was given ample opportunity to respond:

- (a) When the Respondent did not reply to the initial deadline of May 28, 2015, Mr. Wedel, on his own initiative, extended the time to reply to June 12, 2015;
- (b) On June 16, 2015, Mr. Wedel, again on his own initiative, further extended the time to reply by another two weeks to June 29, 2015; and
- (c) After the final June 29, 2015 deadline had passed, Mr. Wedel did not immediately refer the Respondent's failure to respond to the Discipline Committee or its Chair with a recommendation that a citation be issued. The citation was not issued until three months later on September 30, 2015.

[110] Notwithstanding the unsolicited extensions of time provided to him by the Law Society, the Respondent did not provide the information or documents that had been requested of him.

[111] In fact, the Respondent had not produced those documents by the date of the hearing, approximately eight and a half months after the request was made for their production.

[112] In the circumstances, we have no difficulty in concluding that the Respondent has failed to fulfil the obligations imposed on him by the Code and the Rules to co-operate with the Law Society's investigation and, in particular, to respond to the Law Society's May 13, 2015 request for document production.

[113] In accordance with previous decisions, that conclusion is "*prima facie* evidence of professional misconduct".

Can the Respondent's failure to respond to the Law Society's request be excused?

- [114] However, that conclusion is not necessarily fully determinative of the issue. As noted in *Dobbin*, that *prima facie* evidence of professional misconduct “throws upon the respondent member a persuasive burden to excuse his or her conduct.”
- [115] The Respondent argued that he met that burden.
- [116] To excuse his failure to respond to the Law Society, the Respondent argued that he took steps to ensure that a response was provided. In particular, he says he delegated his obligation to respond to AB. Based on what AB told him, he believed that AB had provided documents in response to the Law Society's request of him.
- [117] Indeed, despite the Law Society's initial advice in May 28, 2014 that it was “seeking written responses from each of [them] separately,” there is little doubt that, prior to May 13, 2015, AB was purporting to gather documents and preparing a response to the Law Society's initial request of May 28, 2014 on behalf of both himself and the Respondent.
- [118] AB expressly described his initial reply to the Law Society's May 28, 2014 letter as a “joint response from [the Respondent] and myself with respect to the complaint of [the former clients]” Most, not all, of his subsequent communications with the Law Society prior to May 13, 2015 reference both his and the Respondent's complaint file numbers. Most, not all, are copied to the Respondent. All refer to AB and the Respondent together as “we” or, in the possessive, as “our.”
- [119] The initial document production provided to the Law Society on September 9, 2014 was expressly made on behalf of both the Respondent and AB.
- [120] That evidence does suggest that AB and the Respondent intended to, and did, provide a joint response to the Law Society's initial request of May 28, 2014. However, the documentary evidence does not support the assertion that the Respondent delegated his obligation to respond to the May 13, 2015 requests to AB or that AB accepted any such delegation.
- [121] Firstly, unlike their previous communications with the Law Society, from the date that the request was made on May 13, 2015, each of AB and the Respondent communicated with the Law Society separately. From that date, they no longer referenced the other's complaint file numbers or the other's name and no longer copied the other with their communications to the Law Society.

- [122] Although the Respondent mentioned that he would have to coordinate production of the requested emails with AB in his May 14 and June 12, 2015 communications with the Law Society, at no time did he expressly state that he would delegate that task to AB or that AB would respond to the requests on his behalf. Neither did AB.
- [123] The separate and distinct manner in which the Respondent and AB communicated with the Law Society in response to its May 13, 2015 requests is inconsistent with the assertion that the Respondent had delegated his obligation to respond to those requests to AB.
- [124] Most telling, however, is AB's actual conduct. He knew that, in order to produce all of the emails "to/from and within the firm" (the request that had been of the Respondent), he could not limit the email production to his Gmail Account. Rather, to comply with the broader request made of the Respondent, he would have to expand his production to include emails from his Straithlit Email Address. He did not.
- [125] Rather, the only emails that AB produced were those pre-September 2012 emails from his Gmail Account. That production is consistent with the specific request made solely of him.
- [126] On those facts, we do not accept the assertion that the Respondent had delegated his obligation to respond to the Law Society's May 13, 2015 requests to AB or that AB had accepted that responsibility.
- [127] In any event, even if the Respondent held the mistaken belief that AB was producing the emails that had been requested of the Respondent, AB's response of August 28, 2015 should have disabused him of that mistaken belief.
- [128] Firstly, on its face, AB's August 28, 2015 response letter is made on his behalf alone. The subject line only references AB's own complaint file number. In it, AB states, "This letter and the enclosures will constitute my reply and response."
- [129] Secondly, and more significantly, the letter clearly discloses that the only emails that AB printed and provided to the Law Society were those he obtained from his Gmail Account. There is absolutely no reference to AB's Straithlit Email Address (which would have included those emails "to/from and within the firm") or to the Respondent's email address, both of which were expressly included in the broader request of the Respondent.
- [130] For those reasons, we conclude that, by August 28, 2015, the Respondent knew, or ought to have known, that AB had not provided a response to the Law Society's

May 13, 2015 request on behalf of the Respondent. He still took no steps to do so on his own behalf.

[131] The Respondent's evidence that he did not see AB's August 28, 2015 response until he received the Law Society's disclosure is of little to no assistance to the Respondent at this hearing. To the contrary, that evidence only serves to highlight the lax attitude with which he approached his obligation to respond to the Law Society's requests.

[132] That lax attitude is evident in other of the Respondent's conduct in this matter. For example:

- (a) Mr. Wedel's May 13, 2105 letter expressly invited the Respondent to let him know if he anticipated any difficulty in meeting the Law Society's deadline and stated that he would discuss another date by which he could expect a response. Despite that invitation, the Respondent did not make any requests for an extension of time after the final June 29, 2015 deadline had expired;
- (b) In fact, the Respondent made no further attempts to communicate with the Law Society until after the citation was issued and he spoke with discipline counsel on October 9, 2015;
- (c) Despite purporting to have delegated his obligation to respond to the Law Society's request to AB, he did not make any effort to ensure that AB had done so. He did not even ask AB for a copy of the letter or the documents that AB had delivered to the Law Society supposedly on his behalf;
- (d) Even after receiving the citation, he did not ask the Law Society to review the documents that AB had provided to it, again supposedly on his behalf;
- (e) Once he did see AB's August 28, 2015 letter (presumably in October 2015), he made no attempt to review the documents that AB had provided or to explain or rectify the fact that the documents that had been requested of him had not been produced.

[133] At best, the Respondent demonstrated a lax and indifferent attitude toward his obligation to respond to the Law Society's request. At worst, he blatantly and knowingly ignored the Law Society's request and his obligation to respond to that request. Even at best, his conduct cannot be condoned.

[134] Either way, the Respondent falls far short of meeting the “persuasive burden” referred to in *Dobbin* that is required to excuse his failure to fully and promptly respond to the Law Society.

[135] We conclude that the Respondent’s failure to provide a full and substantive response promptly or at all to the communications from the Law Society “disclose[s] a marked departure from that conduct the Law Society expects of its members. ...”

[136] Accordingly, under section 38(4) of the Act, we determine that the Respondent has committed professional misconduct with respect to the allegation set out in the citation.

DISCIPLINARY ACTION

[137] Having concluded that the Respondent’s conduct constituted professional misconduct, this Panel must determine the appropriate disciplinary action to be imposed as a result of that finding.

[138] The primary purpose of disciplinary proceedings is to fulfil the Law Society’s mandate set out in section 3 of the Act to uphold and protect the public interest in the administration of justice.

[139] Gavin MacKenzie in *Lawyer and Ethics: Professional Regulation and Discipline*, loose-leaf (Toronto: Carswell, 1993), at page 26-1 wrote:

The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

[140] The factors to consider in assessing a penalty are set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17.

Nature and gravity of the conduct proven

[141] A lawyer’s failure to respond to the Law Society pursuing an investigation into his or conduct is very serious. This failure or refusal to respond goes to the heart of the ability of the Law Society to regulate lawyers in the public interest.

[142] Of significance in this case is the continued failure to respond. Even after being served with the citation the Respondent appeared at this hearing still having failed

to produce the documents requested. There is no dispute that they are relevant and material to the investigation and no objection to their production was made.

Factors related to the Respondent

[143] The Respondent is 65 years of age and was called to the Bar in August 1985. His professional conduct record consists of a dated conduct review and a more recent referral to Practice Standards.

Specific and general deterrence

[144] General deterrence is required when a lawyer fails to respond to the Law Society. The public's confidence and integrity of the profession is compromised if the Law Society does not ensure that lawyers respond appropriately so that it can properly regulate lawyers.

[145] Specific deterrence is required in this case because the Respondent's approach to the demands for disclosure was lax as described in paragraph 132 of these reasons, and his failure to comply with the demand for documents continued through this hearing despite no legitimate excuse.

[146] The Law Society sought a fine of \$5,000 and costs of \$2,472.50.

[147] With respect to the fine, the Law Society noted two cases in which a fine of \$5,000 has been previously imposed. They are *Niemela* and *Law Society of BC v. Jessacher*, 2015 LSBC 43.

[148] In *Niemela*, the panel referred to the Respondent's prior professional conduct record, which included a citation for failing to respond to another lawyer about the release of the Certificate of Pending Litigation. In this case, this is the Respondent's first citation.

[149] In *Jessacher* the Respondent did not attend the summary hearing and had completely refused to cooperate with the Law Society at all.

[150] In this case, although the Respondent had not, at the time of the hearing, produced the documents requested, despite having no objections to producing them, we find the circumstances are not as egregious as those in *Niemela* and *Jessacher*. We find a fine of \$3,500 is appropriate.

COSTS

[151] The Law Society seeks an order for costs in the amount of \$2,472.50. This consists of \$2,000 for a one day hearing under Schedule 4 Tariff Item 24 and disbursements for the attendance of the court reporter in the amount of \$472.50.

[152] Rule 5-11 requires the Panel to award the Tariff costs unless we are satisfied that we should depart from the Tariff under Rule 5-11(4). *Law Society of BC v. Racette*, 2006 LSBC 29, sets out the factors to determine the reasonableness of the award of costs. The Respondent did not rely on personal financial circumstances to justify a reduction in the costs sought.

[153] The fine of \$3,500 and costs of \$2,472.50 must be paid within 90 days of the date of the issuance of these reasons.

PRODUCTION ORDER

[154] A Panel may, under Section 38(7) of the Act, “make any other orders and declarations and impose any conditions it considers appropriate.” In this case we order the Respondent to produce all emails as requested in the letter dated May 13, 2015 from Mr. Wedel within two weeks of this order.