2016 LSBC 18
Decision issued: May 30, 2016
Citation issued: June 24, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

CHARLES LOUIS ALBAS

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing date:	February 17, 2016
Panel:	Martin Finch, QC, Chair Dan Goodleaf, Public representative Bruce LeRose, QC, Lawyer
Discipline Counsel:	Kieron G. Grady
No-one appearing on behalf of the Respondent	

BACKGROUND

[1] This hearing concerns three aspects of alleged lawyer misconduct. The first relates to borrowing of monies from clients and the provision of legal services where the lawyer is alleged to have a direct or indirect financial interest in the subject matter of the legal services. The second relates to candour with the court and opposing counsel. The third relates to the duty to notify the Law Society of unsatisfied judgments.

[2] On February 17, 2016, the Panel heard from counsel for the Law Society, but Mr. Albas did not attend the hearing that day. As a result of his non-attendance, a

preliminary issue fell to be determined on whether the citation had been served on Mr. Albas in accordance with Rule 4-19 or if service had been waived by him.

[3] The Panel addressed the issue of service and then considered whether the hearing should proceed in the absence of the Respondent.

[4] The Panel determined service had been lawfully effected and decided to proceed with the hearing in the absence of the Respondent. The Panel found that the Respondent knew of the hearing and had indicated he did not intend to attend the hearing.

[5] Following the aforementioned determinations, the Panel addressed the citation on the issue of facts and determination of professional misconduct.

[6] The Panel found that the Respondent was guilty of professional misconduct with respect to all eight allegations of the citation.

[7] The following are reasons for those decisions and findings.

SERVICE OF NOTICE OF HEARING AND POSITION OF THE RESPONDENT REGARDING ATTENDANCE AT THE HEARING

Service of citation

[8] Rule 4-41 of the Law Society Rules requires the Hearing Panel to determine whether the citation has been served in accordance with Rule 4-19 or if service has been waived by the Respondent.

[9] Rule 4-19 states that a citation must be served on the Respondent:

(a) in accordance with Rule 10-1; and

(b) not more than 45 days after the direction that it be issued, unless the Discipline Committee or the Chair of the Committee otherwise directs.

[10] Rule 10-1(1) reads as follows:

Service and notice

10-1(1) A lawyer, former lawyer, articled student or applicant may be served with a notice or other document personally, by leaving it at his or her place of business or by sending it by

(a) registered mail, ordinary mail or courier to his or her last known business or residential address,

(b) electronic facsimile to his or her last known electronic facsimile number,

(c) electronic mail to his or her last known electronic mail address, or

(d) any of the means referred to in paragraphs (a) to (c) to the place of business of his or her counsel or personal representative or to an address given to discipline counsel by a respondent for delivery of documents relating to a citation.

[11] Rule 10-1(5) states that a document sent by ordinary mail is deemed to be served seven days after it is sent.

[12] Rule 10-1(6) states that a document sent by registered mail or courier is deemed to be served on the next business day after it is left or delivered.

[13] Rule 10-1(7) states that a document sent by electronic facsimile or electronic mail is deemed to be served on the next business day after it is sent.

[14] Rule 10-1(8) states that any person may be notified of any matter by ordinary mail, electronic facsimile or electronic mail to the person's last known address.

[15] The Law Society filed as Exhibit 1 the affidavit of Chrysta Gejdos sworn on February 12, 2016. According to the affidavit, the citation, along with a covering letter dated June 24, 2015, was served on the Respondent's counsel, Mr. Ihas, by courier on June 25, 2015.

[16] The Respondent's counsel acknowledged receipt of the citation on June 25, 2015. By virtue of this acknowledgement, the Panel finds there is a preponderance of evidence to establish service of the citation on Mr. Albas.

Proceeding in the absence of the Respondent

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

[18] In *Law Society of BC v. Tak*, 2014 LSBC 27, *Law Society of BC v. Gellert*, 2013 LSBC 22, *Law Society of BC v. Power*, 2009 LSBC 23, *Law Society of BC v. Basi*, 2005 LSBC 41, *Law Society of BC v. McLean*, 2015 LSBC 06 and *Law Society of BC v. Jessacher*, 2015 LSBC 43 (among others), hearing panels proceeded in the absence of the respondent.

[19] In applying section 42(2) of the *Legal Profession Act*, hearing panels have considered the following factors:

(a) whether the respondent has been provided with notice of the hearing date;

(b) whether the respondent has been cautioned that the hearing may proceed in his or her absence;

(c) whether the panel adjourned for 15 minutes in case the respondent was merely delayed;

(d) whether the respondent has provided any explanation for his or her non-attendance;

(e) whether the respondent is a former member of the Law Society; and

(f) whether the respondent has admitted the underlying misconduct.

It is submitted that (a), (b) and (d) should be given the most weight.

Whether the respondent has been provided with notice of the hearing date

[20] On September 3, 2015, Michelle Robertson, the Hearing Administrator, caused a letter, with enclosure, dated September 3, 2015 to be sent to the Respondent's counsel by courier. The enclosure was the Notice of Hearing dated September 3, 2015 (affidavit of Chrysta Gejdos – paragraphs 6).

[21] It was the position of the Law Society that the Respondent had been provided with notice of the time, place and date of the hearing and was deemed to have been served with the notice pursuant to, and in accordance with, Rule 10-1(1)(d).

[22] Mr. Ihas subsequently (on or about October 9, 2015) stopped acting as counsel for the Respondent in this matter (affidavit of Chrysta Gejdos – paragraph 8).

Whether the respondent has been cautioned that the hearing may proceed in his or her absence

[23] The Respondent had been cautioned that the hearing may proceed in his absence. The cautions were set out in:

(a) the citation issued June 24, 2015; and

(b) the Notice of Hearing dated September 3, 2015.

Whether the panel adjourned for 15 minutes in case the respondent was merely delayed

[24] The Panel adjourned briefly to consider delay and then proceeded.

Whether the respondent has provided any explanation for his or her non-attendance

[25] In an email to Mr. Grady dated February 3, 2016 (Exhibit 2), the Respondent provided an explanation for his non-attendance. He said he was in Florida and did not want to attend the hearing if at all possible (affidavit of Chrysta Gejdos – paragraph 10).

[26] In an email sent to the Respondent on February 12, 2016 (Exhibit 3), Mr. Grady advised him correctly that there was no rule that compelled a respondent to attend a disciplinary hearing. He was also advised, however, that the Panel could continue in his absence if satisfied that the Respondent was served with the Notice of Hearing. There is no evidence that the Respondent replied to Mr. Grady's email of February 12, 2016. On February 16, 2016, Mr. Grady again sent an email to the Respondent advising him of the location of the hearing scheduled for February 17, 2016.

[27] Both Exhibits 2 and 3 were sent to an email address from which the Respondent had previously replied.

Whether the respondent is a former member of the Law Society

[28] The Respondent is a former member of the Law Society as of January 1, 2016. In an email dated January 18, 2016 (which contained the hearing date in the "Re" line), he stated that he chose to not renew his licence because of the citation (affidavit of Chrysta Gejdos – paragraph 9).

Whether the respondent has admitted the underlying misconduct

[29] The Respondent has admitted in his email of February 3, 2016 to Mr. Grady that his conduct as alleged in the citation constitutes professional misconduct (affidavit of Chrysta Gejdos – paragraph 10). He has further admitted all facts set out in the Law Society's Notice to Admit.

Conclusion

[30] Having regard to all the circumstances, including evidence that the Respondent had been properly served with the citation and the Notice of Hearing, the Panel decided to proceed with the hearing of the citation, despite the Respondent's absence. The Panel relied on Section 42(2) of the *Legal Profession Act* and was satisfied that the Respondent had been served with the Notice of Hearing.

FINDINGS REGARDING ALLEGATIONS OF PROFESSIONAL MISCONDUCT

[31] The citation was authorized on June 11, 2015 and issued on June 24, 2015 (the "Citation").

[32] The Citation contains eight allegations that the Respondent:

(a) Borrowed money from clients (two allegations);

(b) Provided legal services to clients when he had a direct or indirect financial interest in the subject matter of the legal services (two allegations);

(c) Failed to disclose material facts in a notice of motion and supporting affidavit;

(d) Failed to disclose material facts and correct the record concerning an application in foreclosure proceedings;

(e) Misled opposing counsel; and

(f) Failed to notify the Law Society of three unsatisfied judgements.

Onus and standard of proof

[33] The onus of proof is well established. It is on the Law Society.

[34] The standard of proof has been articulated by the Supreme Court of Canada in *FH v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193 and has been adopted by Law Society hearing panels in numerous cases, including *Law Society of BC v. Schauble*, 2009 LSBC 11 and *Law Society of BC v. Seifert*, 2009 LSBC 17 at paragraph 13.

[35] In *Schauble* at paragraph 43 the panel quoted directly from *McDougall*:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "… evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But ... there is no objective standard to measure sufficiency.

[36] The burden of proof was also articulated by the hearing panel in *Seifert* at paragraph 13:

> ... the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities. In considering its findings in this matter, the Panel has applied that test.

Review of evidence

[37] Entered into evidence as Exhibit 5 was a Notice to Admit tendered by the Law Society dated November 20, 2015. That Notice to Admit sought 51 admissions of fact and the authenticity of 19 documents.

[38] Entered into evidence as Exhibit 6 was the Response of Charles Louis Albas dated November 25, 2015 to the Notice to Admit. In that Response, Mr. Albas admits the authenticity of the documents at tabs numbered 2 to 19 of the Notice to Admit, and admits the truth of the facts set out in paragraphs 1 through 51 of the Notice to Admit.

[39] MT was employed for over 30 years by the BC Assessment Office in Penticton. For investment, he made private loans to individuals or companies, secured by a mortgage. He began doing so in the late 1960s. Over the years, he made one or more loans a year, usually on a one-year basis. The amounts loaned gradually increased.

[40] MT eventually incorporated T Ltd., which he owns with his wife.

[41] At all material times, the Respondent was the owner and directing mind of a numbered company.

[42] MT retired from his employment with the BC Assessment Office in about 2005.

[43] MT met the Respondent in about 1980, when they became neighbours.

[44] MT generally used the Respondent as his lawyer when making loans to borrowers, unless a borrower wanted to use a different lawyer. MT also retained the Respondent to act on his personal legal affairs, for the preparation of the mortgages to secure loans made, and on the occasional foreclosure.

[45] From time to time, the Respondent would call MT and ask if he had any money to lend. If MT said he was interested, once the terms were settled, the Respondent prepared and registered the mortgage.

[46] On October 6, 2005, the Respondent contacted MT and said he was going to do a subdivision on some property in Langley, BC and wanted to borrow $485,000 from T Ltd. through the Respondent's numbered company. MT discussed terms with the Respondent: interest at 7 per cent, a one-year term, and the monthly payment amount on interest only. MT believed that the Respondent had already bought the property through his numbered company. MT asked for a personal guarantee, to which the Respondent agreed. MT has no notes in relation to the transaction and says the conversation was between the two of them only. MT and the Respondent met on one occasion only in relation to this transaction.

[47] The Respondent showed MT an appraisal that showed that the property that he wished to develop was purchased in August 2005 for $485,000 and that its current value as of October 2005 was $635,000.

[48] MT agreed to make the loan of $485,000 to the numbered company. He had to borrow to do so.

[49] The documents were prepared and the funds were advanced. The Respondent used the funds to purchase the property. On October 14, 2005, the Respondent applied for registration of the property with his numbered company as registered owner in fee simple. The application for registration was entered on October 24, 2005.

[50] The Respondent reported to MT on the registration on November 9, 2005.

[51] The Respondent told MT that the loan was to fund the subdivision costs, and MT would not have loaned the full purchase price had he known the loan was for the purpose of buying the property.

[52] On October 24, 2005, the Respondent, through his numbered company, entered into a contract with E Investments and NA for the installation of the services required to complete the subdivision for a price of $200,000.

[53] In 2006, the Respondent needed further funds to complete the subdivision. He obtained a loan for his numbered company from AV and JV. The Respondent

acted for AV and JV on a number of other occasions, both before and after this loan. The loan was for $300,000, secured by a mortgage upon which the Respondent was the covenanter. The Respondent's firm, Albas Wahl, drew the mortgage and registered it. The mortgage indicates the officer was "KM" who was a lawyer employed by Albas Wahl. The applicant was Albas Wahl. The mortgage was registered May 1, 2006.

[54] Payments were made by the Respondent to T Ltd. during the one year term of the mortgage. However, the subdivision did not complete. Payments by the Respondent to T Ltd. continued for a period of time, but then stopped.

[55] The Respondent made attempts to sell the property, but these were unsuccessful.

[56] In June 2008, T Ltd. filed a petition in foreclosure against the numbered company, the Respondent, AV and JV and two other respondents in the Penticton Registry of the BC Supreme Court. T Ltd.'s counsel was CS.

[57] On August 28, 2008, an order nisi of foreclosure was granted in the T Ltd. foreclosure, including an amount required to redeem and judgment in favour of T Ltd. against the numbered company and the Respondent for $506,373.93, with a six-month redemption period.

[58] On March 19, 2009, conduct of sale was granted to AV and JV as second mortgagee.

[59] On about August 7, 2009, through their counsel, JJ, AV and JV filed an application for an order approving a sale at a price of $495,000, returnable August 27, 2009.

[60] The Respondent said that, when he received AV and JV's application, he contacted NA and told him that, unless he brought forward a purchaser and at a better price, the property was likely to be sold at a loss. The Respondent says he called NA because NA had been involved in earlier attempts to sell the property.

[61] NA faxed an offer dated August 20, 2009 at a price of $950,000 from a RS. The Respondent noted that the offer was not in a form that could be approved by the court, so he made some notations and faxed it back to NA.

[62] On August 21, 2009, the Respondent filed a response opposing AV and JV's application for an order approving sale.

[63] Early in the morning of August 27, 2009, the date set for the hearing of AV and JV's application, the Respondent received an offer by fax for the sale of the property at $950,000 to "RS through his nominee corporation, a Division of M

Ltd." to complete November 4, 2009. The offer required a deposit of $20,000 to be paid to the Respondent in trust within 72 hours of acceptance.

[64] The Respondent prepared an application for an order approving the RS offer, and swore an affidavit in support. He described the offer submitted by AV and JV as prepared by a "vulture" and attached the offer from RS. On August 27, 2009, the Respondent took the application and affidavit to the courthouse, filed them, and gave copies to the parties attending. On August 27, 2009, the court approved the RS offer.

[65] The Respondent ordered a company search on M Ltd. at about 8:00 am on August 27th, 2009. The Respondent did so because he had been unable to reach RS and he wanted to make sure the offer was real. The Respondent at no time spoke with RS, and all information he received about RS came through NA. The search showed that the corporate purchaser, M Ltd., had been dissolved on April 9, 2007 for failure to make required filings. The Respondent reviewed the corporate search sometime on August 27, 2009.

[66] The Respondent did not disclose the result of the M Ltd. corporate search to any other parties in the T Ltd. foreclosure and took no steps to return the matter to court.

[67] The RS offer that had been approved by the court required a deposit of $20,000 within 72 hours of acceptance to be paid to the Respondent in trust. The deposit was not paid within that time frame and was never paid.

[68] By letter dated August 31, 2009, JJ sent a draft form of the order approving the offer to the Respondent, which the Respondent received on September 2, 2009. By that date, the Respondent knew that M Ltd. had been dissolved and that the deposit had not been received.

[69] The Respondent's file contains no record of any communication regarding the sale of the property between September 2, 2009 and November 4, 2009, the date the sale was supposed to complete.

[70] Under the terms of the order approving the sale to RS, JJ was to handle the closing. The other parties, and in particular, T Ltd. and AV and JV, assumed that the sale would indeed complete. The day before the scheduled closing date, T Ltd.'s lawyer sent a bill of costs to the Respondent.

[71] On November 3, 2009, JJ spoke with the Respondent, who gave him an explanation for RS's absence and indicated that the sale would complete. No mention was

made of the deposit. On November 4, 2009, JJ contacted the Respondent and asked about the deposit, and the Respondent told him that he would have to check with his office. By the closing date of November 4, 2009, the Respondent was aware that he had not received the deposit. Telling JJ he had to check with his office regarding the deposit was misleading.

[72] On November 4, 2009, JJ wrote to the Respondent indicating he had not heard from the purchasers or been able to contact them and seeking confirmation that the deposit was in the Respondent's trust account.

[73] On November 9, 2009, JJ telephoned the Respondent who told him that he had not received the deposit. The Respondent told JJ he was advised that morning that the RS purchase was still supposed to be going ahead.

[74] In November, 2009, the Respondent gave JJ and CS the names of two different law firms said to be acting for the purchaser. When contacted, each lawyer denied any knowledge of the transaction. The Respondent states that the names of RS's purported lawyers were given to him by NA.

[75] On November 20, 2009, CS wrote to the Respondent and asked whether the transaction would close. In handwriting, the Respondent faxed back a note on CS's letter, copied to JJ, that stated: "I have been pushing the purchaser (enforcement proceeding) and they have advised me that they will complete the purchase." As the Respondent had never spoken with RS or any lawyer on his behalf or on behalf of M Ltd, the statement by the Respondent in his faxed handwritten notes to CS of November 20, 2009 was on its face untrue.

[76] On December 18, 2009, AV and JV initiated foreclosure proceedings against the numbered company and the Respondent in the Penticton Registry of the Supreme Court. On January 28, 2010, order nisi was pronounced, including judgment against the numbered company and the Respondent in the amount of $402,698.92 with a one-day redemption period.

[77] On January 6, 2010, the Respondent told JJ "he was still in touch with RS" and the sale would complete. On January 28, 2010, conduct of sale was granted to T Ltd. in the T Ltd. foreclosure.

[78] On September 2, 2010, the Respondent and AV and JV entered into a forbearance agreement whereby the Respondent was to pay $2,000 per month and, so long as he continued to do so, the amount owed in excess of $300,000 would be forgiven.

[79] On April 19, 2012, on the application of T Ltd., the sale of the property at a price of $585,000 was approved by the court. The sale completed. This left a shortfall of over $100,000 on the T Ltd. debt.

[80] On November 15, 2012, a certificate of costs was entered in the T Ltd. foreclosure against the Respondent and his numbered company for $16,739.15.

[81] T Ltd. has continued to pursue its judgment through garnishment and examination in aid of execution, without success.

[82] The Respondent failed to satisfy the judgment ordered against him in the amount of $506,373.93 pursuant to the order nisi of foreclosure dated August 28, 2008 and failed to notify the Executive Director of the Law Society in writing of the circumstances of the unsatisfied monetary judgment against him and his proposal for satisfying such judgment.

[83] The Respondent also failed to satisfy the judgment ordered against him in the amount of $402,698.92 pursuant to the order nisi of foreclosure dated January 28, 2010 and failed to notify the Executive Director of the Law Society in writing of the circumstances of the unsatisfied monetary judgment against him and his proposal for satisfying such judgment.

[84] The Respondent further failed to satisfy the Certificate of Costs in the amount of $16,739.15 and failed to notify the Executive Director of the Law Society in writing of the circumstances of the unsatisfied monetary judgment against him and his proposal for satisfying such judgment.

Applicable law

[85] The *Legal Profession Act*, the *Code of Professional Conduct for British Columbia* and the Law Society Rules do not offer a singular definition of professional misconduct. Rather, the ambits of professional misconduct have developed in the same fashion as the common law, through decisions of Law Society hearing panels following assessment of impugned conduct of lawyers as considered through the cases. In *Law Society of BC v. Martin*, 2005 LSBC16, the panel articulated a now much-followed test. It said at paragraph 170: "The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[86] In *Martin* the panel found concern in the degree of fault that a lawyer might display that could constitute gross culpable neglect. The panel said, "The real question to

be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer." This may be expanded by reference to the preface of the Canons of Legal Ethics stated in Chapter 2.1 of the *Code of Professional Conduct for British Columbia*: "A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession." It is to these various roles and their implied standards that professional conduct must be measured. Ultimately, our concern is to determine if the conduct of the Respondent is a marked departure from these standards.

Allegations of borrowing from client (allegations 1 and 3)

[87] The preamble to Chapter 7 of the *Professional Conduct Handbook*, the forerunner of the *Code of Professional Conduct*, which was in effect at the time of the incidents in question, stated:

> The purpose of this Chapter is to state the general principles that should guide a lawyer's conduct when the lawyer is invited to act both as legal advisor and business associate.
>
> Generally speaking, a lawyer may act as legal advisor or as business associate, but not both.
>
> These principles are not intended to preclude a lawyer from performing legal services on his or her own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to be uninsured as a result of Exclusion 6 in the B.C. Lawyer's Compulsory Professional Liability Insurance Policy and similar provisions in other insurance policies.

[88] Rule 4 of Chapter 7 stated:

> **CLIENT LOAN, CREDIT OR GUARANTEE**
>
> **4.** Unless the transaction is of a routine nature to and in the ordinary course of business of the client, a lawyer must not borrow money or obtain credit from a client of the lawyer's firm, or obtain a benefit from any security or guarantee given by such a client.

[89] The evidence establishes and the Respondent has admitted that, on two occasions, he borrowed money from his clients. These admissions are made in paragraphs 6,

9, 11-14 (in relation to MT) and 18-19 (in relation to AV and JV) of the Notice to Admit. The amounts of money involved were not insignificant sums.

[90] These were extraordinary transactions for the benefit of the Respondent alone.

[91] Neither loan was of a routine nature, and neither client loaned money in the ordinary course of their business. Even in relation to MT, T Ltd.'s loans were a "side-venture" for MT and made in a limited way (paragraph 4 of the Notice to Admit).

[92] On the basis of the evidence and admissions, the Panel finds the allegations contained in paragraphs 1 and 3 of the Citation have been proven and the conduct of Mr. Albas amounts to professional misconduct. It constitutes clear violation of the prohibited conduct described in Rule 4, Chapter 7 and is a marked departure from the conduct expected of lawyers.

Providing legal services when the lawyer has a direct or indirect financial interest in the subject of the legal services (allegations 2 and 4)

[93] Rule 1 of Chapter 7 stated:

> **DIRECT OR INDIRECT FINANCIAL INTEREST**
>
> 1. Except as otherwise permitted by the *Handbook*, a lawyer must not perform any legal services for a client if:
>
> (a) the lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
>
> (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgement.

[94] Again, the evidence is clear and the Respondent has admitted that, on two occasions, he provided legal services when he had a direct or indirect financial interest in the subject matter of the legal services. The legal services relate to the preparation and registration of the mortgages that accompanied the loans. These admissions are made in paragraphs 13-15 (in relation to MT) and 18 (in relation to AV and JV) of the Notice to Admit and are reflected in the documents at tabs 4, 5 and 7 of the Notice to Admit.

[95] Clients are entitled to expect undivided loyalty from their lawyers. When the lawyer has a financial interest in the subject of the legal work, an obvious potential conflict exists. A lawyer entering such an arrangement cannot necessarily fairly satisfy two masters.

[96] Past discipline cases support the proposition that borrowing from a client or acting for the client in placing security where the lawyer has a direct financial interest in the subject matter of the legal services amounts to professional misconduct.

[97] In *Law Society of BC v. Dent*, 2001 LSBC 36, the lawyer admitted that he had borrowed $50,000 from a friend of his wife, then acted for the friend in placing the security on the loan (a third mortgage). He admitted his conduct amounted to professional misconduct. His admission was accepted by the panel.

[98] In a more serious case, *Law Society of BC v. Pomeroy*, 1999 LSBC 37, the lawyer caused his client to loan money to a company in which he had an interest. There were, in addition, much more serious allegations, including misappropriation.

[99] In *Siefert*, the lawyer admitted that he committed professional misconduct when he performed legal services for a client in relation to the proposed acquisition of shares in a company in which the client had a financial interest by virtue of the lawyer holding shares in that company.

[100] More recently, in *Law Society of BC v. Singh*, 2013 LSBC 17, the lawyer faced eight allegations in a citation, three of which related to his conduct in borrowing $20,000 from a client, failing to advise a client that he was not representing the client's interests and improperly withdrawing the funds from the trust account rather than the general account to repay part of the loan. The lawyer admitted that he had committed the conduct and that the conduct constituted professional misconduct.

[101] In *Law Society of BC v. O'Neill*, 2013 LSBC 23, the lawyer admitted that he negotiated an amended and restated finder's agreement between his client and third parties when he had a direct financial interest in the agreement. The lawyer also admitted that that conduct was a conflict of interest that constituted professional misconduct. The hearing panel accepted the admission and concluded that the Respondent had been guilty of professional misconduct. We find, in light of the evidence and admissions, that the Respondent is has committed the professional misconduct alleged in paragraphs 2 and 4 of the Citation.

Failing to disclose materials facts to the court and failing to correct the record (allegations 5 and 6)

[102] Counsel for the Law Society submits that the evidence related to these allegations is contained in paragraphs 25-33 of the Notice to Admit (with the exception of the particularized allegation in paragraph 5(a)).

[103] A lawyer's duty of candour and integrity includes the obligation to disclose all material facts in an application before the court. The failure to do so has the potential to mislead the court and other interested parties.

[104] This duty is often discussed in the context of an *ex parte* application, where no opposing party can test the facts or submissions of counsel. In the present case, the Respondent's application was not *ex parte* but was brought without prior notice, and so, while the other parties were present, they had had minimal opportunity to evaluate or independently verify the Respondent's affidavit or submissions.

[105] In *Law Society of BC v. Vlug*, 2014 LSBC 09, the panel considered an allegation that the respondent misrepresented to the court the contents of a telephone call with another counsel. The disposition of *Vlug* was partly reversed on review, but the initial hearing panel's decision contains a convenient summary of the principles and authorities:

> [29] It is of fundamental importance that lawyers ensure that any representations that are made to a court or regulator are made so that the court or regulator need not have to make further inquiry. In *Law Society of BC v. Galambos*, 2007 LSBC 31, the hearing panel made a finding of professional misconduct in respect of a misrepresentation the respondent made to the court.
>
> [30] In *Law Society of BC v. Samuels*, [1999] LSBC 36, the hearing panel considered misleading statements a lawyer made to the court and found professional misconduct in respect of those statements. The panel commented at paragraph 12:
>
> > It is an essential cornerstone of our system of justice that counsel's submissions reflect the actuality. Any departure is an assault on the integrity of that system.
>
> [31] The law does not require us to find intentional misconduct. A determination of professional misconduct may be made even if the misrepresentation is not intentional. In *Law Society of BC v.*

Botting, 2000 LSBC 30, the citation before the hearing panel alleged misrepresentations to the court and to the Law Society. The panel held at paragraph 60:

> While there is no specific prohibition in the Canons or the *Handbook* this Hearing Panel has no doubt that a lawyer has an obligation not to make misrepresentations to the court or the Law Society. Clearly, the justice system would fall into dispute and the ability to properly regulate the members of the profession would be seriously compromised if members did not have an unequivocal obligation to take care to be truthful in all written and oral representations to the Courts and the Law Society.

[32] With respect to the issue of filing affidavits with false or misleading statements, the hearing panel in *Law Society of BC v. Foo*, [1997] LSDD No. 197, commented on the importance for lawyers to ensure accuracy in documents that will be relied on by the courts or other litigants:

> This matter of members of the Law Society causing documents which would be relied upon by other litigants and Courts, to be filed, is a very serious matter where the member permits this to be done knowing that the documents filed either contain errors or contain falsehoods. Next to defalcation of trust funds by a lawyer, knowingly taking a false affidavit is about as serious a breach of professional conduct as can occur.

[106] In *Galambos*, the lawyer advised the court that an application had been served on the opposing party. On leaving the courtroom, the lawyer's junior advised that it had not been served. The lawyer did not return to the courtroom to correct the misapprehension he had created. In suspending the lawyer for one month, the panel wrote:

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

[107] In *Law Society of BC v. Nejat*, 2014 LSBC 51, Mr. Nejat admitted professional misconduct for failing to disclose that he no longer held any funds in trust for his client when, during an application, the court ordered those funds frozen. Mr. Nejat did not, while in court, know the funds had been paid out. He also admitted professional misconduct for failing to correct the misapprehension he had created with the court and opposing counsel.

[108] The Respondent had an obligation to advise the court on August 27, 2009 that he had not been able to contact the buyer's representatives despite making attempts to reach them and, furthermore, he was concerned enough about the veracity of the offer to conduct a company search, the results of which he did not yet have. Had this information been disclosed to the court, the offer may not have been accepted over the other, lesser offer.

[109] This misconduct was compounded when the Respondent discovered, later the same day, that the corporate search of M Ltd. revealed that the company had been dissolved more than two years earlier and did not disclose this important information to the court or the other parties.

[110] Further, when the deposit was not paid within 72 hours as required by the offer, this important information was also not immediately disclosed to the court or any other parties.

[111] The Respondent's failure to advise the court that he had been unable to contact the buyer and had conducted a company search, the results of which he did not have, and his subsequent failure to advise the court and opposing counsel of the results of the company search and the non-receipt of the deposit are all breaches of his duty of candour and good faith to the court and opposing counsel and constitute professional misconduct. The information withheld had the potential for either the court to reach a different decision or for other counsel to change their positions. The Respondent deliberately left the court and other counsel with only part of the complete picture.

Misleading other counsel (allegation 7)

[112] The evidence in support of this allegation is contained in paragraphs 37-42 of the Notice to Admit.

[113] In *Nejat* at paragraph 37, the hearing panel makes it clear that the duty of candour and honesty extends to a lawyer's dealings with opposing counsel.

[114] Not only did the Respondent not advise other counsel in a timely manner that the deposit had not been received and that M Ltd. was not in good standing (and had not been for more than two years), he made statements that misled or were intended to mislead opposing counsel into believing that the sale approved by the order of the court would complete (paragraphs 38, 40, 41 and 42).

[115] The Respondent knew by the end of August 27, 2009 that M Ltd. was not in good standing, and he never advised opposing counsel of this information. The Respondent knew by August 31, 2009 that the deposit had not been received, but he did not advise opposing counsel of this information until November 9, 2009. Not only did he not disclose material information, he made statements that would have the effect of creating an impression (that the sale would complete) when he had to have known there was no basis for those statements.

[116] Counsel should be able to rely on assertions of other counsel without the need for suspicious reassessments. The duty of candour advances a common professional interest in fair and even dealings. Such conduct of the Respondent constitutes professional misconduct and is admitted as such by the Respondent. It reveals a deliberate failure to candidly inform the other counsel involved of matters of fact that could affect their decisions, deliberations and conduct.

Failing to report judgments (allegation 8)

[117] The evidence in support of this allegation is contained in paragraphs 47 and 49-51 and tabs 8, 17 and 19 of the Notice to Admit.

[118] Rule 3-44 at the time (now Rule 3-50) states:

> **Failure to satisfy judgment**
>
> **3-44**(1) A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately notify the Executive Director in writing of
>
> (a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and
>
> (b) his or her proposal for satisfying the judgment.
>
> (2) Monetary judgments referred to in subrule (1) include
>
> (a) an order nisi of foreclosure,
>
> (b) any certificate, final order or other requirement under a statute that requires payment of money to any party,

(c) a garnishment order under the Income Tax Act (Canada) if a lawyer is the tax debtor, and

(d) a judgment of any kind against an MDP in which the lawyer has an ownership interest.

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

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

[119] The Respondent admits that he failed to comply with Rule 3-44. He has offered no explanation for his lack of compliance. He does not state that he was unaware of the rule.

[120] Failing to comply with Law Society Rules can result in an adverse determination of either professional misconduct or a breach of the Act or rules under section 38(4) of the *Legal Profession Act*. In this case, the Law Society submits that the appropriate adverse determination is professional misconduct.

[121] In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel considered the distinction between a breach of the rules that constituted a breach of the Act or rules under section 38(4)(b)(iii) of the *Legal Profession Act* and one that constituted professional misconduct under s. 38(4)(b)(i). The panel found at paragraphs 32 and 35:

> [32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
>
> ...
>
> [35] In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

[122] There are decisions where the lawyer has professed to be unaware of the rule in question, and in those circumstances, panels have sometimes in the past declined to make a finding of professional misconduct (*Law Society of BC v. Lessing*, 2012 LSBC 19) or have, alternatively, made a finding of a rules breach (*Law Society of BC v. Boles*, 2016 LSBC 02).

[123] However, in *Law Society of BC v. Tungohan*, 2015 LSBC 02, the panel found the lawyer had committed professional misconduct in relation to his failure to report a monetary judgment against him, stating at paragraph 141 that "Mr. Tungohan never provided an explanation to the Law Society or to the Panel during the course of the hearing as to why he failed to report the monetary judgment."

[124] In *Law Society of BC v. Derksen*, 2015 LSBC 24, the hearing panel accepted the lawyer's admission that he committed professional misconduct by not reporting judgments (along with other accounting breaches).

[125] In the absence of any explanation from the Respondent as to why he did not report the judgments as he was required to do, the Panel finds Mr. Albas' conduct constituted professional misconduct as alleged in allegation 8 of the Citation.

CONCLUSION

[126] The Panel finds the Respondent is guilty of professional misconduct with respect to allegations 1, 2, 3, 4, 5, 6, 7 and 8 of the Citation.

[127] A hearing respecting disciplinary action in this matter will take place at a date to be fixed.