2016 LSBC 47
Decision issued: December 28, 2016
Citation issued: December 18, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

LAWYER 16

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing date:	August 4, 2016
Panel:	Bruce LeRose, QC, Chair Thelma Siglos, Public representative Michelle D. Stanford, Bencher
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	Henry C. Wood, QC

INTRODUCTION

[1] A citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-17 of the Law Society Rules by the Chief Legal Officer of the Law Society of British Columba on the direction of the Chair of the Discipline Committee. The citation alleged that:

1. In or around December 2012, in the course of acting for your client, RG, in an action in the Supreme Court of British Columbia, you proceeded by default without inquiry or reasonable notice to the respondent, when you knew the respondent had consulted with a lawyer and was participating in the process and defending the action. By doing so, you did one or both of the following:

(a) engaged in sharp practice contrary to Chapter 1, Canon 4(3) of the *Professional Conduct Handbook* then in force, and to your duties as an officer of the court;

(b) acted contrary to Chapter 11, Rule 12 of the *Professional Conduct Handbook* then in force.

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

[2] The citation was authorized on December 3, 2015 and issued on December 18, 2015. The Respondent admits, pursuant to an Agreed Statement of Facts, that he was served through his counsel with the citation on December 21, 2015 and waived the requirements of Rule 4-19 of the Law Society Rules 2015.

INTERIM APPLICATION

[3] The Law Society applied to have a letter of complaint to the Law Society dated June 11, 2013 filed as an exhibit, arguing it provided context to the background facts. The Respondent opposed the admission of this letter citing its contents could contain potential prejudicial or inflammatory material. The Law Society's application was dismissed as it was open to the Law Society to have this witness before the Panel through *viva voce* evidence thereby, properly allowing for cross-examination by the Respondent. The Law Society elected not to call the complainant as a witness.

BACKGROUND

[4] The Respondent was called and admitted as a member of the Law Society of British Columbia on November 30, 2005. He was also called and admitted as a member of the Law Society of Alberta on September 19, 2002.

[5] The Respondent has had a mixed practice of mostly criminal, family and motor vehicle law. Since his call to the British Columbia Bar, the Respondent has practised in a small town in BC. After March 2010, the Respondent practised as a sole practitioner until May 2014, when he began practising with an associate lawyer.

FACTS

[6] The parties submitted an Agreed Statement of Facts, which contains 28 paragraphs and 23 attachments. The Law Society did not call any witnesses. The Respondent testified on his own behalf. No other witnesses were called.

[7] In 2010, RG and DB were parties in a family law proceeding arising from the breakdown of their common-law relationship. Lawyer A represented RG in the family law proceeding.

[8] By letter dated November 18, 2010, Lawyer B wrote to RG on behalf of DB, and proposed a settlement of the issues arising from the separation.

[9] On December 7, 2010, Lawyer A filed a Notice of Family Claim in the Supreme Court of British Columbia on behalf of RG, seeking orders dividing the real property and assets owned by DB and RG.

[10] On December 13, 2010, Lawyer A wrote to Lawyer B confirming that he had advised he would not be acting on behalf of DB if the matter proceeded to court.

[11] DB did not file a Response to the Notice of Family Claim.

[12] On March 28, 2012, the Respondent, who was now acting for RG in place of Lawyer A, filed a Notice of Application on behalf of RG. The orders sought in the application included a claim for an order for exclusive occupation of the family residence and an order to transfer the court file to another Registry.

[13] On February 4, 2012, RG deposed an affidavit in support of his application for exclusive occupation of the family residence.

[14] On April 20, 1012, Lawyer B sent an email to the Respondent, which said:

> I am assisting DB, but am not going on record as her counsel. She was served with your Notice of Application returnable April 23, 2012 in [city] on April 28, 2012. She will consent to proceeding prior to a JCC, to the transfer of the court file to [city], and to a s. 67 order, with the other matters to be heard in [city] after she has had time to respond.
>
> Please advise if this is satisfactory to your client.

[15] On April 23, 2012, the Respondent appeared before Master Baker in respect of the Respondent's Notice of Application filed on March 28, 2012. DB appeared by telephone and was not represented by counsel for the application. During the

proceedings, the Respondent confirmed to the court Lawyer B had advised that he was assisting, but not retained by DB. DB advised the court the only aspect of RG's application she agreed with was to transfer the court file to another Registry. She also said she wanted the court file transferred so she could have time to retain a lawyer.

[16] On April 23, 2012, Master Baker made orders transferring the file, restraining the disposition of family assets and adjourning the applications for exclusive occupation of the family residence and for a personal restraining order until June 4, 2013.

[17] On May 8, 2012, the Respondent emailed Lawyer B and wrote:

> ... Are you representing this woman or not? If you are not then it would be appreciated if she be forwarded my email address and I will communicate directly with her.

[18] On May 15, 2012, the Respondent received an email from DB in which she provided her email address. The Respondent forwarded this email to his assistant and directed that all future correspondence with DB should be sent to her email address provided.

[19] On June 1, 2012, DB deposed an affidavit before Lawyer B in response to RG's affidavit of February 4, 2012. She deposed:

> …On three occasions I have suggested to the TD Bank's lawyer that the family home could be sold, and three times he has informed me that he spoke to RG and RG refuses to sell. I cannot afford the monthly mortgage payments of about $1,400 per month and RG has never offered any assistance of any sort. I would be more than happy if RG would buy out my half interest in the equity at fair market value.

[20] DB's affidavit was filed and relied upon at RG's application before Madam Justice Koenigsberg on June 4, 2012. DB appeared by telephone. Madam Justice Koenigsberg ordered that RG have exclusive occupation of the family residence effective July 15, 2012.

[21] On June 5, 2012, the Respondent made a note in RG's client file that read:

> Reviewed file; no response to claim.
>
> Called Lawyer A as she had file previously to see if she was served.

Lawyer A advised never received response.

Asked Lawyer A what to do about file where there is no defence filed as I've never dealt with default judgment.

Lawyer A advised to do a search of registry to ensure nothing filed. If nothing filed, prepare desk order requisition and package and do it by default.

Explained situ with service of app re exclusive occupancy. Does this mean need to serve notice of default judgment?

Lawyer A: no, if search of registry indicates no response, follow default judgment rules.

Call with client re same; advised re same.

Sought instructions re default judgment; yes proceed.

Queried if he has had contact with OP.

RG: no has not seen or heard from her. He is attempting to arrange financing.

Note to Self:

1) retrieve precedents from library as office precedents not up to date;

2) Review case law to ensure procedure is accurate;

3) prepare desk order default judgment application;

4) submit via registered mail to registry.

[22] On October 11, 2012, the Respondent emailed Lawyer A seeking advice about proceeding to default judgment where a party had failed to respond.

[23] On October 29, 2012, the Respondent filed an application for a final desk order in the family action. The Respondent did not contact DB directly or indirectly and did not advise her that he was going to proceed to obtain a final order in the family law action by desk order.

[24] On December 7, 2012, the court made a final order in the family law action as a result of the desk order application filed by the Respondent, which re-apportioned

all of the equity in the family residence to RG and allowed for a court appointed nominee, rather than DB, to sign the forms required to transfer the family residence into RG's sole name.

[25] On June 11, 2013, Lawyer B made a complaint to the Law Society.

[26] On June 19, 2013, the family residence was transferred into RG's sole name.

POSITION OF THE PARTIES

[27] The Law Society submits that the actions of the Respondent in taking default judgment against DB knowing she was a self-represented litigant who had consulted a lawyer and was actively defending the action was either Sharp Practice contrary to Chapter 1, Canon 4(3) or contrary to Chapter 11, Rule 12 of the *Professional Conduct Handbook* (the "*Handbook*"), which was then in effect, thereby committing professional misconduct.

[28] The Respondent submits that his actions in taking default judgment in this case did not violate either of the provisions of the *Handbook* relied upon by the Law Society and, in any case, did not amount to professional misconduct.

ONUS AND STANDARD OF PROOF

[29] The onus of proof is well established, as is the standard of proof. Both are well known and consistently applied in Law Society hearings. The standard articulated by the Supreme Court of Canada in *FH v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193, 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.

[30] 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."

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

> … the burden of proof throughout the 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. ...

ISSUES

[32] The central issues in this matter are: was it sharp practice by the Respondent proceeding to default judgment, and was he obligated to notify either the opposing party or counsel she had consulted prior to seeking default?

FINDINGS

Was DB a self-represented litigant?

[33] At the outset, Lawyer B indicated he represented DB to RG's first lawyer, Lawyer A, and proceeded to set out terms for a settlement agreement on her behalf in November 2010.

[34] A month later, following the filing of the Notice of Family Claim on December 7, 2010, Lawyer A confirmed Lawyer B's communication that he would not be acting on DB's behalf should the matter proceed to trial, but was willing to assist her.

[35] The filed materials show that, in response to the Respondent filing notice of RG's application for exclusive occupation on April 20, 2012, the Respondent received two emails from Lawyer B indicating he was "assisting" DB but "not going on record as her counsel" and that she consented to a portion of the order sought, but reserved the remainder to be heard in court. The second email briefly added that DB had leave to appear by phone.

[36] On the date of the application, April 23, 2012, DB appeared by telephone and indicated to Master Baker she wanted time "to retain a lawyer" to deal with the balance of the application.

[37] Approximately two weeks after the application, the Respondent replied to Lawyer B's emails seeking clarification on whether he was representing DB or not and, if the latter, to forward his email to DB in order for him to communicate directly with her.

[38] Lawyer B did not respond directly, but the Respondent received an email from DB one week later with her email address.

[39] There was no further communication between the Respondent and Lawyer B related to DB, although the Respondent acknowledged in evidence that Lawyer B commissioned DB's affidavit June 1, 2012.

[40] DB represented herself for a second time at the next hearing June 4, 2012 before Madam Justice Koenigsberg. DB participated in the lengthy discussion on how and where to directly receive the entered order. DB did not advise the court she had counsel and ultimately agreed to pick up the entered order at the Court Registry, acknowledging she would likely be charged a fee for the copy.

[41] The Respondent testified that his last contact with Lawyer B was in May 2012.

[42] The evidence filed confirms that Lawyer B's involvement amounted to two brief email exchanges with the Respondent on April 20, 2012. The Respondent testified that he was also aware that Lawyer B had commissioned DB's affidavit on June 2012. Neither of these facts, in our view, amount to DB being represented by Lawyer B. Particularly when Lawyer B was clear in his first email that he was not going on record as her counsel. Lastly, when asked whether or not he was representing DB, and "if not" to forward the Respondent's email address to communicate with her directly, DB responded, not Lawyer B. The Respondent testified that, when DB responded, he understood "he's (meaning Lawyer B) not her lawyer."

[43] We conclude on the evidence that DB had likely consulted with Lawyer B from time to time over a period of nearly two years, but never retained him with respect to the family matter in this proceeding.

Did the Respondent have an obligation to give notice to Lawyer B and/or DB of the default judgment?

[44] The 2013 Supreme Court Family Rules, Rule 4-3(1) sets out:

> **Filing a response to a family claim**
>
> (1) To respond to a notice of family claim, a person must, within 30 days after being served,
>
> (a) file a response to family claim in Form F4, and
>
> (b) serve a copy of the filed response to family claim on the claimant and on the other person named in the notice of family claim as respondents.

No notice of hearing if no response to family claim

(2) A person served with a notice of family claim under Rule 4-1(2) who does not file a response to a family claim in accordance with subrule (1) of this rule is not entitled to receive notice of any part of the family law case including, without limitation, any court appearance, hearing, conference or trial.

[45] Within the context of default judgment, the *Handbook* provided specific responsibilities to lawyers regarding default proceedings at Chapter 11, Rule 12:

> A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

[46] The Supreme Court Family Rules permit the Respondent to take default judgment without notice where no response has been filed.

[47] We have already found that DB was not represented by Lawyer B. The *Handbook* did not define the meaning of "consulted."

[48] In this particular case, it would create an impractical precedent to find that two brief emails and a commissioned affidavit over a two-year period, should amount to a level that notice to this counsel would be required of any procedure, particularly when that counsel has indicated a clear desire not be involved in any court proceedings. Accordingly, notwithstanding Lawyer B was "consulted" by DB, we find that no inquiry or reasonable notice of the application for default judgment was required with respect to Lawyer B based on this level of consultation.

[49] Regarding DB, as a self-represented litigant, best practices might have dictated a special courtesy be given to her; however, the Supreme Court Family Rules clearly permit default proceedings when a Response has not been filed. In this case, it had not been filed over two years and during a period of time when she had had the assistance of a lawyer.

[50] Further, we find on the evidence that proceeding to default is not taking paltry advantage of a slip. DB had two years to file a Response, she did not take the opportunity to do so, notwithstanding she had consulted counsel at least twice. Default proceedings are permitted by the Supreme Court Family Rules in those circumstances, and we find that the Respondent was operating within those Rules whether DB was a self-represented litigant or represented by counsel.

[51] Having concluded the Respondent was operating within the rules, in these circumstances, the Panel need not make a determination on whether the Respondent's conduct was a marked departure from the standard expected by the Law Society.

[52] However, if we are wrong in our findings that the Respondent was operating within the ambit of the Supreme Court Family Rules, we provide further analysis below.

Did the Respondent engage in sharp practice by proceeding to default judgment without inquiry or reasonable notice?

Sharp practice

[53] The Respondent's alleged misconduct occurred during 2012. Accordingly, a lawyer's professional duties and obligations to others were under the guidance of the *Handbook,* Chapter 1, Canons of Legal Ethics. The Canons specifically related to this case are to the client, Canon 3(5):

> A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

And to other lawyers, Canon 4(3):

> A lawyer should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests which do not prejudice the rights of the client or the interests of justice.

[54] Additionally, within the context of default judgement, the *Handbook* in 2012 provided specific responsibilities to a lawyer regarding default proceedings at Chapter 11, Rule 12:

> A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in a matter without inquiry and reasonable notice.

[55] Counsel for the Law Society relied on *Law Society of BC v. Barron*, [1997] LSDD No. 141, as standing for the proposition that, by proceeding to obtain a divorce without notice to the opposing lawyer on the basis the proceeding was undefended when the opposing party was represented by counsel, the respondent had engaged in sharp practice. It was alleged that this conduct constituted professional misconduct. The opposing party had filed an appearance five months previous to the desk order application, and had appeared in hearings but had not filed pleadings.

[56] *Barron* is easily distinguished from the case before the Panel. Firstly, the matrimonial proceedings had been commenced less than a year before Mr. Barron had obtained the desk order. He had had clear and regular communication with the opposing party's counsel during this time, there was significant prejudice in the order obtained as it involved a continuation of a custody order of a child the opposing party sought to vary and Mr. Barron refused to have the order immediately set aside when requested.

[57] In the case before the Panel, DB had had two years to file a Response and failed to do so. She did not request the order be set aside, and most notably, the un-contradicted evidence from the Respondent was that there was no longer any equity in the family home. In other words, there was no prejudice to DB, unlike in the *Barron* case.

[58] In our view, in addition to our findings above, this is not a case involving the Respondent taking paltry advantage of a slip on the part of an opposing party. DB sought the assistance of an experienced family lawyer over the period of two years. She was an educated woman employed as a supervisor in a financial institution. The consequences of failing to file a Response would surely have been discussed and understood by DB at some point over the two years.

[59] Counsel for the Law Society also relied on *Xpress view Inc. v. Daco Manufacturing Ltd.*, 2002 OJ No. 4078, 36 CCEL (3d) 78 (Ont. SCJ). This case is also related to taking advantage of a slip, which we have found did not occur in the case before us.

[60] In relation to the Law Society finding professional misconduct, *without* sharp practice, counsel for the Law Society relied on *Law Society of BC v. Roberts*, 2012, LSBC 31. This case essentially involved failure of the respondent to communicate effectively and his seeking and obtaining default judgment without reasonable notice. The finding of professional misconduct was related to a number of breaches that, in our view, do not apply in the case before us.

Can seeking a just remedy for your client result in sharp practice?

[61] It can be reasonably perceived that there is a tension or inherent conflict between a lawyer's obligation to his or her client pursuant to the *Handbook* Canons 3(4) and (5) and the lawyer's responsibilities to other lawyers or opposing parties.

[62] The Supreme Court of Canada has affirmed the prominence of lawyers' duty to their clients, emphasizing their fiduciary duty to be "a zealous advocate for the interests of his client." It has acknowledged the threat posed to that fundamental obligation for effective representation by the preferring of other interests (*C.N.R. v. McKercher*, 2013 SCC 39, [2013] 2 SCR 649, at paras 25, 26).

[63] It is helpful to note that, within weeks of the Respondent allegedly breaching Chapter 11, Rule 12, on January 1, 2013, Chapter 11, Rule 12 of the *Handbook* became Rule 7.2-1. The wording in commentary [5] relating to not proceeding by default without reasonable inquiry and notice when a lawyer is aware another lawyer has been consulted, did not change; however, in a ruling in 2014, the Ethics Committee considered whether a lawyer would have similar duties to a self-represented litigant that the lawyer has to another lawyer under Rule 7.2-1, commentary [5]:

> … It was the Committee's view that a lawyer's general duty of courtesy and good faith to all persons with whom the lawyer has dealings may require a lawyer to extend certain courtesies to self-represented persons similar to those accorded to lawyers. However, it was the Committee's view that the requirements of commentary [5] are standards to which lawyers should aspire as much as possible when dealing with self-represented litigants, *not standards to which they are bound.*
>
> [emphasis added]

[64] In this case the Respondent was aware his client was under tremendous pressure from the TD Bank who had filed a Petition to the court to foreclose on the family home.

[65] The Respondent testified that his client was, in turn, instructing him to act expeditiously in resolving the issue of sole occupancy of the family home in order for him to refinance and avoid foreclosure. The Respondent testified that he did not act hastily, but consulted with a senior lawyer (Lawyer A) who had previously represented his client and conducted his own research of default proceedings as these circumstances were new to him. Based on this advice and his research, the

Respondent concluded he could seek a final order in the family law action by desk order.

[66] Counsel for the Law Society cross-examined the Respondent on this point. It was suggested that Lawyer A, who provided advice regarding seeking default proceedings, was not fully informed of the file the Respondent was referring to.

[67] The Respondent agreed in cross-examination he had not advised Lawyer A of details of the file he was referring to in their email. This may have been true when he sought advice in an email dated October 11, 2012. However, in the materials filed, his notes on June 5, 2012 revealed that he had contacted Lawyer A specifically to determine whether DB was served. Lawyer A confirmed she had not received a response. The Respondent was then advised on the procedure of obtaining a default judgment. Additionally, the Respondent asked further about the procedure where there has been service of an application for exclusive occupancy.

[68] We find on a balance of probabilities, that Lawyer A was aware the file the Respondent was referring to was her previous client, RG, and that, accordingly, the advice she provided regarding obtaining default judgment without notice on at least one occasion was based on her being fully informed as to the facts of the case.

[69] Further, with respect to failing to give reasonable notice, the Respondent testified under direct examination that, when given notice of the earlier applications, he found DB "argumentative and unpleasant." He believed DB was motivated to "hurt" RG and had a history of destroying or disposing of the family assets. The Respondent testified he believed notice would provide DB the opportunity to delay the proceedings, seriously jeopardizing his client's ability to refinance the family home. Based on this history, he proceeded to obtain the final desk order re-apportioning the equity in the family home to RG. The Respondent's evidence was not contradicted, nor meaningfully challenged on these points.

[70] We accept the Respondent's evidence as truthful to the best of his recollection of events occurring four years ago. His evidence was delivered in a straight-forward manner, and he was not evasive or defensive under cross-examination. His evidence was also uncontradicted.

[71] We find that, in balancing his client's interest and the threat of foreclosure against the courtesy of providing reasonable notice to DB, the Respondent was not required to provide such notice under the Supreme Court Family Rules and by proceeding to default without reasonable inquiry and notice, he did not engage in sharp practice contrary to the Rules of the Law Society.

Prejudice to DB

[72] Out of an abundance of caution, the Panel also considered whether there was any prejudice to DB as a result of the default judgment. DB was not called as a witness. Therefore, relying on the filed materials under the Agreed Statement of Facts, it is clear that DB wanted the family home sold or for RG to buy out her half interest at fair market value.

[73] The default judgment allowed the home to be apportioned 100 per cent to RG with exclusive occupation. Although the Respondent did not have a clear recollection under cross-examination, the filed materials unequivocally indicated the purpose of seeking exclusive occupancy of the home was to avoid foreclosure of the family home by obtaining refinancing, then payout DB's interest in the home.

[74] DB had no ability to pay the mortgage. The Respondent testified that RG required DB to be off title in order for him to refinance. At the hearing June 4, 2012, Madam Justice Koenigsberg went to great lengths to explain that it was not to DB's advantage to remain in the home given the amount in arrears that had accumulated over the last 22 months that RG was attempting to rectify, that the equity in the home was diminishing and that, as a result, DB may end up "owing" RG when the parties reached the point of final settlement.

[75] Although RG intended to payout DB's interest in the family home once sold, the Respondent's evidence was uncontradicted in that there was little to no equity remaining given the market value. This was, in particular, because of the mortgages against it and the money DB owed to RG after he paid nearly all of the arrears to put the property in good standing.

[76] Lastly, it was open to DB to apply to set aside the default under the BC Supreme Court Civil Rules. As indicated above, DB was not called as a witness, and there was no evidence before us that DB availed herself of this option. However, it is notable that the order was made December 7, 2012, but the family residence was not transferred into RG's sole name until June 19, 2013, six months later.

[77] Ironically, the default judgment essentially achieved what DB was seeking in Lawyer B's letter sent to Lawyer A in November 2010. In particular, that "… for the sale of the real estate with you being liable for any deficiency."

[78] In consideration of all of the evidence, we find that it was to the benefit of both parties that RG obtain exclusive occupancy of the family home and that DB was not prejudiced by the default judgment taken by the Respondent December 7, 2012.

PROFESSIONAL MISCONDUCT

[79] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook* or the *Code of Professional Conduct for British Columbia*, but has been considered by hearing panels in several cases.

[80] The leading case is *Law Society of BC v. Martin*, 2005 LSBC 16. The hearing panel concluding at paragraph 171, the test 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."

[81] In *Martin*, the panel also commented at paragraph 154:

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

[82] The Bencher review decision in *Re: Lawyer 12*, 2011 LSBC 35, is a recent pronouncement concerning the test for professional misconduct. In the Facts and Determination decision of *Re: Lawyer 12*, 2011 LSBC 11, the single Bencher hearing panel considered prior decisions regarding the test and held at paragraph 14:

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

[83] Both the majority and minority of the Bencher review panel confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test expressed by the single Bencher hearing panel in *Re: Lawyer 12*.

[84] The hearing panel in *Law Society of BC v. Gellert*, 2013 LSBC 22, summarized what type of conduct will support a finding of professional misconduct, at paragraph 67:

> Conduct falling within the ambit of the "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 member's duties as a lawyer also satisfies the test (*Martin*, para. 154*; Law Society of BC v. Singh*, 2013 LSBC 76, paras 11 – 12).

[85] We find firstly on the evidence that, after two years from the Notice of Family Claim being filed and served on DB and her having had the benefit of legal advice and personally attended (by phone) two hearings on this matter, the Respondent was entitled to proceed to default without notice pursuant to Rule 4-1(2) of the Supreme Court Family Rules.

[86] Secondly, we find that, in doing so, the Respondent did not take paltry advantage amounting to sharp practice, but was acting for the benefit of his client to obtain a proper result permitted by the Supreme Court Family Rules and that this conduct did not fall markedly below the standard expected of lawyers.

CONCLUSION

[87] Accordingly, on the evidence, we find that the Respondent was not acting outside of the Rules of the Law Society when he proceeded to default proceedings pursuant to the Supreme Court Family Rules 4-3(2).

[88] Further, the Respondent was not under any obligation to notify DB as a self-represented litigant, or otherwise, given the clear failure of DB to file a Response over a period of two years without evidence before the Panel as to the reason why.

DETERMINATION

[89] We conclude that the Respondent did not engage in sharp practice as set out in allegation 1(a) of the citation.

[90] We conclude further that the Respondent did not engage in professional misconduct by obtaining default judgment without inquiry or reasonable notice when the Respondent was aware the opposing party had consulted with counsel as set out in 1(b) of the citation.

[91] The citation issued against the Respondent is therefore dismissed.

COSTS

[92] If the parties cannot agree as to costs, submissions may be made up to 30 days from the date that this decision is issued.