2018 LSBC 02
Decision issued: January 17, 2018
Oral decision: October 6, 2017
Citation issued: March 14, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

IAN FRANK MCTAVISH

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	October 6, 2017
Panel:	Joost Blom, QC, Chair June Preston, Public Representative Sarah Westwood, Bencher
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	William B. Smart, QC

INTRODUCTION AND PRELIMINARY MATTERS

[1] On March 14, 2017, a citation was issued to the Respondent pursuant to the *Legal Profession Act* and the Rules of the Law Society. The citation was amended on June 6, 2017 (the "Citation"). The Citation alleges that, between December, 2010 and September, 2015, the Respondent failed to provide the quality of service expected of a competent lawyer when he was retained to settle the estate of a client's late mother, and that the conduct constitutes professional misconduct.

[2] Pursuant to Rule 4-21(2)(a), the Law Society applied to amend the Citation to correct two erroneous dates regarding the duration of the Respondent's involvement with the client, and to amend the name of the client's late mother.

[3] With the Respondent's consent, we granted the Law Society's application to amend the Citation (the "Amended Citation").

[4] The Respondent admits that he was properly served with the Citation.

[5] The matter came on for hearing pursuant to Rule 4-30. Under this Rule, the Respondent made a conditional admission of professional misconduct and agreed to proposed disciplinary actions. Rule 4-30 requires that a hearing panel consider the conditional admission and the proposal and, if the panel finds them acceptable, impose the proposed disciplinary action.

[6] In considering a proposal under Rule 4-30, Rule 4-31 provides that a hearing panel may only accept or reject the proposal and related disciplinary action. It is not open to the hearing panel to come to a different conclusion regarding the proposed disciplinary action, to reconsider the citation, or otherwise to vary the proposal approved and recommended by the Discipline Committee.

[7] At its meeting on September 28, 2017, the Discipline Committee considered and accepted the proposal and instructed discipline counsel to recommend the acceptance of the proposal to the hearing panel.

[8] In this case, the Respondent admits the allegation set out in the Amended Citation that, in summary, he failed to take appropriate steps to probate the client's late mother's will or administer her estate, failed to keep the client reasonably informed about the matter, failed to respond to communications from the client between March and September 2015, and failed to provide the client with complete and accurate relevant information about the status of the application for probate and the status of administration of the estate. The Respondent also admits that this conduct constitutes professional misconduct.

[9] The Law Society and the Respondent propose that disciplinary action be a fine of $6,000, payable on or before April 30, 2018. This would result in a summary of the circumstances of this matter being published pursuant to Rule 4-48 and that publication identifying the Respondent by name.

[10] At the conclusion of the hearing, we gave an oral decision that the conduct described in the agreed statement of facts at issue in these proceeding constitutes professional misconduct. The Hearing Panel accepted the proposed specified disciplinary action and ordered a fine in the amount of $6,000, payable on or before April 30, 2018. The Law Society sought, and the Respondent consented to, an order for costs in the amount of $1,288.05 payable on or before April 30, 2018, and we so ordered.

[11] What follows are our reasons for those decisions.

AGREED STATEMENT OF FACTS

[12] An Agreed Statement of Facts (the "ASF") was filed. Below are portions of the ASF that we have anonymized to protect the identity of the Respondent's client and preserve solicitor-client privilege.

Member background

[13] The Respondent was called to the bar and admitted as a member of the Law Society of British Columbia on June 26, 1974.

[14] The Respondent practises law as a sole practitioner in Salmon Arm, British Columbia, primarily in the areas of family and criminal law.

Background facts

[15] The client is also the complainant (the "Complainant") in this matter.

[16] The Complainant's mother ("IG") passed away on September 19, 2010, leaving a will appointing the Complainant and his brother ("FB") as joint executors of her estate (the "Estate"). The only substantial asset in the Estate was a rural property (the "Property"). In her will, IG left 70 per cent of the property to the Complainant, and 30 per cent to FB.

[17] Over the years, commencing in approximately 1997, the Respondent performed various legal services for the Complainant. The Respondent issued an account to the Complainant on May 27, 1997.

[18] The Respondent and the Complainant met regarding the Estate on December 10, 2010. That meeting was reflected in a Statement of Account issued to the Complainant dated March 23, 2011.

[19] By letter dated May 28, 2011, the Complainant asked the Respondent to contact FB's lawyer ("LK"), and arrange for LK to deal directly with the Respondent, rather than dealing with the Complainant.

[20] On July 11, 2011, the Respondent wrote on the Complainant's behalf to LK.

[21] By letter dated July 22, 2011, the Respondent advanced a settlement offer to LK.

[22] By letter dated September 12, 2011, LK rejected the settlement proposal offered in the Respondent's letter dated July 22, 2011.

[23] By letter dated May 11, 2012, the Respondent wrote to LK and stated that the Complainant was anxious to proceed with obtaining probate, and enclosed a Renunciation to be signed by FB.

[24] By letter dated May 17, 2012, LK wrote to the Respondent with an offer from FB to renounce his status as co-executor of the Estate and release all claims to the Estate, in exchange for a payout of $60,000.

[25] By letter dated May 30, 2012, the Respondent accepted, on the Complainant's behalf, the offer from FB contained in the May 17, 2012 letter, and that the $60,000 would be provided upon probate being granted.

[26] By letter dated June 5, 2012, LK wrote to the Respondent to advise that FB did not accept the $60,000 was to be paid when probate was granted.

[27] Although the Complainant instructed the Respondent in early June to accept FB's offer extended in LK's letter dated June 5, 2012, the Respondent did not communicate the Complainant's acceptance of the offer to LK until September 4, 2012.

[28] By letter dated September 6, 2012, LK enclosed the Renunciation and Release signed by FB, and put the Respondent on an undertaking not to use the documents until $60,000 was delivered to LK.

[29] By letter dated September 19, 2012, the Respondent forwarded $60,000 to LK along with the Release executed by the Complainant.

[30] On December 10, 2012, the Respondent's assistant asked him where the original Renunciation signed by FB was located as she was unable to find it.

[31] Between September 19, 2012, and August 8, 2013, the only actions or steps the Respondent took on the Complainant's file were the following:

(a) letter to the Royal Bank of Canada ("RBC") dated December 12, 2012, seeking information about IG's accounts and assets held there;

(b) letter to RBC dated January 11, 2013, enclosing IG's death certificate;

(c) letter to the local Savings and Credit Union ("SCU") dated January 16, 2013, regarding IG's accounts and assets held there;

(d) letter to Scotia Momentum Visa dated January 17, 2013, requesting IG's account balance;

(e) letter to SCU dated January 28, 2013, enclosing IG's death certificate;

(f) letter to Scotia Momentum Visa dated February 13, 2013, requesting IG's account balance;

(g) letter to LK dated March 26, 2013, seeking the Renunciation and Release from FB;

(h) letter to LK dated August 8, 2013, seeking the Renunciation and Release from FB.

[32] LK passed away on November 14, 2013. The Respondent was unaware of LK's passing until January 30, 2014.

[33] Between August 8, 2013, and January 23, 2014, the Respondent took no steps or actions to advance the Complainant's matter to conclusion.

[34] By letter to LK dated January 23, 2014, the Respondent again requested the Release signed by FB from LK.

[35] On January 31, 2014, the Respondent requested a signed Renunciation and Release from an assistant at the firm where LK was formerly employed.

[36] On February 4, 2014, staff from LK's former firm e-mailed the Respondent's assistant and advised that FB was willing to sign a new Renunciation if the Respondent's office would provide a letter stating the newly signed Renunciation was a replacement of the previously signed Renunciation and would not prejudice him. On February 19, 2014, the Respondent e-mailed staff from LK's former firm and stated he would provide the requested letter the next day.

[37] By letter dated March 11, 2014, the Respondent wrote to LK's former firm and enclosed a letter addressed to FB dated March 11, 2014, confirming that the newly signed Renunciation would replace the previously signed Renunciation and would not prejudice him.

[38] By letter dated March 19, 2014, the Respondent received a copy of the newly signed Renunciation by FB from LK's former firm.

[39] On March 24, 2014, the Respondent wrote a memo to his assistant requesting that she make an appointment for the Complainant to meet with him, as it was

necessary that the Complainant sign the affidavit required for the application for probate. In the memo, the Respondent stated that it was urgent to make the probate application before March 28, 2014, as he understood he would need to file the documents before the *Wills, Estates and Succession Act* (the "*WESA*") came into effect. The *WESA* came into effect on March 31, 2014.

[40] On April 1, 2014, the Respondent wrote to FB [sic] and stated he would apply to probate IG's will. The Respondent's assistant wrote him a memo dated April 15, 2014, which stated the Kelowna registry had called to advise the application to probate IG's will could not proceed by desk order because the application for probate did not distribute the Estate in accordance with the instructions in IG's will. In the memo, the Respondent's assistant reported the registry had provided two options to the Respondent to obtain a grant of probate:

1. he could file a Requisition to place the matter on the Chambers list and speak to it in court; or

2. amend the documents so that the distribution of the Estate would be in accordance with the instructions in IG's will.

[41] Between May 20 and May 23, 2014, the Respondent communicated to his staff to file a Requisition with the court, to place the matter of the Estate on the Masters Chambers list to address the differences between the affidavit of the executor sworn August 3, 2013, and the provisions in the will regarding the distribution of the Estate. On May 23, 2014, such a Requisition was filed with the court.

[42] By memo dated May 28, 2014, the Respondent's assistant confirmed that the matter of the Estate had been placed on the court list for May 29, 2014.

[43] The Respondent was interviewed by the Law Society on June 24, 2016, and he told the Law Society that he attended court on May 29, 2014, and was told by the presiding Master that more documents were needed to be filed in order to probate the will. The Respondent says he told the Complainant of what happened at court on May 29, 2014, but does not have any notes from his court attendance, or notes of his conversation with the Complainant wherein he reported on the May 29, 2014 court appearance, and did not send a reporting letter to the Complainant of the court attendance.

[44] By letter dated February 4, 2015, the Respondent wrote to the Complainant and stated he would be sending the Complainant's file to another lawyer to complete the "final Application" on the Complainant's file.

[45] After February 4, 2015, the Respondent did not contact the Complainant again until September, 2015.

[46] The court granted probate of IG's will on January 21, 2016.

[47] On August 29, 2015, the Complainant filed a complaint (the "Complaint") to the Law Society.

ISSUE

[48] The issue in this case is whether the Respondent acted in a manner that constitutes professional misconduct and, if so, is the proposed disciplinary action within the acceptable range for this conduct.

Discipline violation – professional misconduct

[49] This Panel accepts the admission of the Respondent that his conduct in respect of the allegation in the Amended Citation constitutes professional misconduct.

[50] 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 Law Society hearing panels in several cases.

[51] The leading case is *Law Society of BC v. Martin*, 2005 LSBC 16, wherein the hearing panel concluded 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.

[52] 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.

[53] In the 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.

On Review, both the majority and the minority of the Bencher review panel in *Lawyer* 12, 2011 LSBC 35, confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test expressed by the single Bencher hearing panel.

[54] In our view, the Respondent's conduct in respect of the allegation in the Amended Citation does amount to a marked departure from the standard of conduct that the Law Society expects of its members, and as such, does constitute professional misconduct.

Appropriateness of penalty

[55] Deference should be given to the recommendation of the Discipline Committee to accept the proposal if the proposed disciplinary action is within the range of a "fair and reasonable disciplinary action in all of the circumstances." As stated in *Law Society of BC v. Rai*, 2011 LSBC 2 at paragraphs 6 through 8:

> This proceeding operates (in part) under Rule 4-22 of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.
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> This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"
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> This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it

> protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

[56] In considering the Discipline Committee's recommendation, the question faced by this Panel is not whether we would impose the same sanction as is proposed by the parties, but rather whether this Panel finds the proposal is fair and reasonable in all the circumstances, giving consideration to the factors enumerated below.

[57] Whether the proposed disciplinary action is appropriate in this case must be considered within the context of the non-exhaustive list of factors set out in *Law Society of BC v. Ogilvie,* 1999 LSBC 17, as follows:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

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

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

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

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

(k) the need for specific and general deterrence;

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

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

[58] In *Law Society of BC v. Lessing*, 2013 LSBC 29, a Law Society review panel reaffirmed the *Ogilvie* factors and noted they reflect the objects and duties of the Society set out in section 3 of the *Legal Profession Act*. The review panel placed particular emphasis on public protection, including public confidence in the profession generally.

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

[60] In the recent decision *Law Society of BC v. Dent*, 2016 LSBC 05, the panel examined the *Lessing* review panel's comments about the *Ogilvie* factors and provided guidance at paragraphs 16 to 18 on how the *Ogilvie* factors should be considered when determining sanction:

> It is time to provide some simplification to this process. It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.
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> There is an obligation on counsel appearing before the hearing panel to point out to the panel those factors that are primary and those factors that play a secondary role. Secondary factors need to be mentioned in the reasons, if those secondary factors tip the scales one way or the other. However, in most cases, the panel will determine the appropriate disciplinary action on the basis of the primary factors without recourse to the secondary factors.
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> In addition, it is time to consolidate the *Ogilvie* factors, ("consolidated *Ogilvie* factors"). It is also important to remember that the *Ogilvie* factors are non-exhaustive in nature. Their scope is only limited by the possible frailties that a lawyer may exhibit and the ability of counsel to put an imaginative spin on it.

[61] The panel reduced the Ogilvie factors to four consolidated factors: (1) nature, gravity and consequences of conduct; (2) character and professional conduct record of the respondent; (3) acknowledgement of the misconduct and remedial action; and (4) public confidence in the profession including public confidence in the disciplinary process.

Nature, gravity and consequences of the misconduct

[62] The misconduct is serious. Ensuring quality and appropriate legal services are provided to the public goes to the heart of the Law Society's mandate to regulate the profession and uphold and protect the public interest in the administration of justice. One of the primary functions of a lawyer is to provide competent legal services to the members of the public who have hired a lawyer. Accordingly, the sanction imposed for this type of misconduct should send a clear message to the profession to deter other lawyers from providing sub-standard services to clients, which will also demonstrate effective regulation of the profession to the public, thereby instilling confidence in the integrity of the profession.

[63] In *Law Society of BC v. Epstein*, 2011 LSBC 12 at paragraphs 20 and 21, the panel made the following comments about the seriousness of a lawyer's failure to provide competent quality of service to clients:

> The Respondent's misconduct consisted of a failure to serve his client competently in two particular respects: first, by failing, on two separate occasions, to perform accurately the same fairly elementary task of reading carefully the results of a title search and in the result failing in a timely way to advance his client's objectives and carry out her instructions; and second, by failing to respond in a timely way to her enquiries.
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> These cannot in our opinion be considered trivial departures from the standard of conduct expected in the circumstances. They are serious. Each represents a failure to do something quite elementary – to do necessary work carefully and to keep a client properly informed – not only in terms of the standard of practice but also from the point of view of the reasonable expectations of a client.

[64] The Respondent's misconduct had consequences to the Complainant. The Complainant stated in the Complaint that, because probate was not granted, the title of the Property was not transferred, precluding the Complainant from re-financing the Property until after probate was granted in January 2016. The Complainant had provided the $60,000 to pay out FB's interest in 2012, and had to wait over three

years for the grant of probate and transfer of title allowing him to re-finance the Property. The Complainant asserted that the delay in achieving probate caused financial hardship for him.

[65] The misconduct occurred in respect of only one client, in respect of one matter, but endured for nearly five years.

Character and Professional Conduct Record of the Respondent

[66] The Respondent has practised law in British Columbia since 1974. At the time the misconduct in this case started, he had been called to the bar for over 35 years. Given the length of time he had been practising law, the Respondent ought to have known the limitations of his experience in estate law. He should have recognized shortcomings in his experience and sought assistance from, or referred the matter to counsel more familiar with estate law.

[67] The Respondent's Professional Conduct Record ("PCR") was tendered as an exhibit in this matter, and was reviewed by this Panel. By definition, a PCR includes prior citations, conduct reviews, recommendations made by the Practice Standards Committee and any conditions or limitations placed on the Respondent's practice under the Rules.

[68] The Respondent's PCR includes a conduct review, two referrals to the Practice Standards Department, and a prior citation, which resulted in a three month suspension. The Respondent's PCR is only partially related to the subject matter of the Citation, because the prior citation and the December 2016 Conduct Review were not directed to address the quality of service provided to clients. The referrals to Practice Standards in 1995 and 2012 resulted in recommendations that appeared to address issues of client service, delay and adequacy of office systems. It is particularly noteworthy that: 1) following the 1995 referral to Practice Standards, the Respondent was under a practice directive between 1997 and 2000 not to practise in the area of wills and estates, unless he had the assistance of another lawyer; and 2) when the misconduct in this case arose, the Respondent was in the midst of the 2012 Practice Standards referral.

[69] In September, 2017, the Respondent gave the Law Society an undertaking to not practise in the area of estate law until released of the undertaking by the Discipline Committee of the Law Society.

[70] The fact that the Respondent was previously suspended following the 1985 citation should not result in the application of progressive discipline resulting in a greater sanction in this case. The conduct giving rise to the 1985 citation occurred over 30

years ago and is completely different from and unrelated to the misconduct alleged in the Citation.

Acknowledgement of the misconduct and remedial action

[71] The Respondent has admitted all of the facts underlying the allegation in the Amended Citation, and that his conduct in respect of it constitutes professional misconduct. By mid-May 2017, approximately two months after the Citation was issued, the Respondent, through his counsel, communicated his desire to explore resolution of the Citation pursuant to Rule 4-30.

[72] In addition, the Respondent voluntarily gave an undertaking to the Law Society to refrain from practising estate law until the Discipline Committee relieves him from the undertaking. The voluntary provision of this undertaking suggests that there is no further remedial action that need be taken regarding this Respondent.

Public confidence in the profession and disciplinary process

[73] The public will have confidence in the profession and the disciplinary process if the sanction is proportionate to the misconduct and is fair and reasonable in all of the circumstances, which includes the sanctions levied in other, prior, similar cases and the respondent lawyer's professional conduct record.

[74] Cases in which the only misconduct present is a failure to provide quality of service are rare. Typically, fines are ordered in respect of this type of misconduct, particularly where no other misconduct is proved. Some prior similar cases are summarized and analyzed in the following paragraphs, which include a range of fines from $3,000 up to $7,500.

[75] In *Law Society of BC v. Wesley*, 2015 LSBC 05 (Facts & Determination), 2016 LSBC 07 (Disciplinary Action), the respondent failed to enter an order made at a Judicial Case Conference regarding child support, access and custody for approximately 20 months; failed to advise her client concerning the risks of not entering the order or the costs involved to settle its terms; and the client was unable to have the order enforced by the Family Maintenance Enforcement Program because it had not been entered. She was fined $3,000.

[76] In *Law Society of BC v. Harding*, 2014 LSBC 52 (Facts & Determination), 2015 LSBC 25 (Disciplinary Action), the respondent failed to advance a personal injury claim for more than four years, and his inaction led to an application for dismissal of the claim for want of prosecution, which he successfully defended. He failed to advise his client to seek independent legal advice. The respondent's PCR consisted

of two prior citations and two conduct reviews and he was ordered to pay a fine of $4,000.

[77] *Law Society of BC v. Wilson*, 2012 LSBC 06, proceeded under (then) Rule 4-22 (now Rule 4-30). While acting as an executor, over a period of six years, the respondent failed to either renounce his executorship or apply for a grant of probate and administer the client's estate, and failed to file tax returns for the estate. He derived no personal benefit from his conduct and had no PCR. He was fined $4,500.

[78] In *Epstein*, the respondent was retained to convey a property interest by the executrix of an estate and failed to perform accurately the task of reading the results of the title search. He failed to advance his client's objectives and carry out her instructions in a timely way, as well as failed to respond to the client. His PCR consisted of two conduct reviews and a referral to the Practice Standards Department. He admitted the misconduct and the disciplinary action hearing was contested, resulting in a fine of $4,500.

[79] *Law Society of BC v. McLellan,* 2011 LSBC 23, proceeded under (then) Rule 4-22 (now Rule 4-30). The respondent had been retained to probate an estate. The executrix of the estate instructed the respondent to pursue a civil action to recover alleged disposition of estate assets by the financial advisor of the estate. The respondent failed to take substantive steps to move the matter forward for more than six years and failed to respond to inquiries from the client. There was no personal gain to the respondent; he was remorseful and apologetic. His PCR consisted of two conduct reviews and a citation. He was fined $5,000.

[80] *Law Society of BC v. Menkes*, 2016 LSBC 24, also proceeded under Rule 4-30. In that case, the respondent had delayed in taking steps to advance his client's personal injury claim, failed to respond to communications from the client and failed to take steps he told the client he would take. His proposed sanction of a $7,500 fine was accepted by the hearing panel.

CONCLUSION

[81] The proposed sanction of a $6,000 fine is in keeping with the sanctions ordered in prior, similar cases and is an appropriate sanction in light of the Respondent's PCR, the seriousness of the misconduct and all of the circumstances of this case.

ORDER TO PROTECT CONFIDENTIAL AND PRIVILEGED INFORMATION

[82] At the conclusion of the hearing, the Respondent made an application pursuant to Rule 5-8(2) for a "non-disclosure order" such that portions of the exhibits entered in evidence and the transcript of this proceeding not be disclosed to the public. The Law Society supported that application.

[83] Openness and transparency are an important part of these disciplinary proceedings. Rule 5-8(1) provides that every hearing is open to the public. Rule 5-9 permits any person to obtain a transcript of the hearing or a copy of an exhibit entered during a public portion of a hearing.

[84] However, the Rules also recognize that there may be legitimate reasons to restrict public access to a hearing or to exhibits filed at a public hearing. For example, a person's ability to obtain a copy of an exhibit is expressly subject to solicitor-client privilege. Rule 5-8(2) permits a panel to make an order that specific information not be disclosed in order to "protect the interests of any person".

[85] In this case, the evidence of the events giving rise to the Citation and the Amended Citation and the evidence filed in this hearing include information that is subject to solicitor client privilege.

[86] In our view, the interest of the Complainant and other third parties in maintaining the confidentiality of the information given in evidence outweighs the interests of a member of the public in obtaining that information.

[87] Accordingly, pursuant to the discretion afforded by Rule 5-8(2), we order that:

(a) Each of the exhibits entered in evidence and the transcript of this proceeding be redacted prior to being released to a member of the public so as not to disclose any of the following:

i. any information that would identify any party not named as a party to this proceeding;

ii. any information of a confidential nature; and

iii. any information and documents that are subject to solicitor-client privilege; and

(b) Paragraph 1 of the Citation and the Amended Citation be amended to replace the full name of the Complainant and his late mother with their initials.

COSTS

[88] The authority to order costs is derived from section 46 of the *Legal Profession Act* and Rule 5-11 of the Law Society Rules 2015. The rule provides:

> …
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> (3) Subject to subrule (4), the panel or review board must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society in respect of a hearing on an application or a citation or a review of a decision in a hearing on an application or citation.
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> (4) A panel or review board may order that the Society, an applicant or a respondent recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4 if, in the judgment of the panel or review board, it is reasonable and appropriate to so order.
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> (5) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.
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> (6) In the tariff in Schedule 4,
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> (a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and
>
> (b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units applies.
>
> …

[89] Hearing panels are required to consider the tariff when calculating costs, and the costs calculated under the tariff *are to be awarded* unless under Rule 5-11(4) a panel determines it is reasonable and appropriate to award no costs or costs in an amount other than that permitted by the tariff. The tariff not only gives guidance to hearing panels on the items to consider when calculating costs, but it also gives respondents guidance on the range of costs to be expected.

[90] The costs are calculated under section 25 of the tariff, which applies to hearings under Rule 4-30. The range presented in the tariff is $1,000 to $3,500, exclusive of disbursements.

[91] The Respondent has proposed costs of $1,000 plus disbursements, payable by April 30, 2018 or such other date as ordered by the Hearing Panel.

[92] The only disbursements included in the proposed costs are for court reporter fees in accordance with Rule 5-11(6) for a half day, and courier costs. The total costs with disbursements are $1,288.05.

[93] Despite being at the lowest end of the range provided for in the tariff, the proposed costs of $1,288.05 are reasonable and are appropriate considering that, very early in the process, the Respondent stated his willingness to make admissions and explore resolution of the Citation under Rule 4-30. In addition, the Citation contains only one allegation arising from a single client matter, and the facts are not overly complex.

[94] For all of the foregoing reasons, this Panel accepts the Respondent's proposal in full and as recommended by the Discipline Committee, pursuant to Rule 4-30.

[95] We instruct the Executive Director to record the lawyer's admission on the lawyer's professional conduct record.