2022 LSBC 24
Hearing File No.: HE20180045
Decision Issued: July 22, 2022
Citation Issued: June 7, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

DONALD ROY MCLEOD

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	May 18, 2022
Panel:	Craig Ferris, QC, Chair Darlene Hammell, Public representative John Waddell, QC, Lawyer
Discipline Counsel:	Robin McFee, QC, Maya Ollek
Counsel for the Respondent:	Jeffrey Wittman
Written reasons of the Panel by:	John Waddell, QC and Craig Ferris, QC

INTRODUCTION

[1] On June 7, 2018, a citation was issued (the "Citation") against the Respondent, Donald R. McLeod. The Citation alleges that:

1. Between September 2016 and January 2017, in the course of acting for your clients PF and WF, you obtained a committeeship order in relation to JS without providing notice of the committeeship application hearing to JS's counsel, when you knew or ought to have known that JS was represented by counsel who intended to participate in the application. By doing so, you did one or more of the following:

    (a) failed to conduct yourself in a manner characterized by courtesy and good faith, contrary to rules 2.1-4(a) and 7.2-1 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*"), and

    (b) engaged in sharp practice, contrary to rules 2.1-4(c) and 7.2-2 of the *BC Code.*

    This alleged conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act* (the "*Act*").

[2] A hearing was held on June 17 and 18, 2019 and this Panel issued its decision on Facts and Determination (the "Determination Decision") on September 6, 2019. We found that the Respondent committed professional misconduct with respect to subsection (a) of the Citation, by failing to conduct himself in a manner characterized by courtesy and good faith, contrary to rules 2.1-4(a) and 7.2-1 of the *BC Code*. We dismissed subsection (b) of the Citation.

[3] This decision addresses the appropriate disciplinary action arising from the Respondent's professional misconduct.

[4] In its submissions, the Law Society has accurately summarized paras. 10 to 63 of the Determination Decision as follows:

    (a) The complainant, Jacqueline Horton, was first consulted in August 2016 by JS, an elderly client, whom Ms. Horton determined had the capacity to retain and instruct her based on her experience (Determination Decision, paras. 11 to 13).

    (b) The Respondent was retained by JS' two adult children in August 2016 in relation to a proposed committeeship of JS (Determination Decision, para. 14).

    (c) The Respondent first wrote to Ms. Horton in September 2016, asserting his view that JS lacked capacity to make decisions concerning her affairs, including retaining Ms. Horton. He maintained

this throughout his dealings with Ms. Horton in the months that followed (Determination Decision, paras. 15, 25 to 27, 32, 45 and 47).

(d) In November 2016, the Respondent filed a Petition on behalf of his clients seeking committeeship of JS (Determination Decision, para. 23). Ms. Horton became aware of this only through the Public Trustee and Guardian. The Respondent repeatedly failed to serve the Petition materials on Ms. Horton, despite repeated requests (Determination Decision, paras. 29, 38, 40 and 45). Instead, the Respondent repeatedly asserted that Ms. Horton had placed herself in the position of a witness and could not represent JS (Determination Decision, paras. 32, 45 and 47).

(e) The Respondent made a without notice application to dispense with service of the Petition on JS. The Respondent did not advise Ms. Horton of the scheduling of this application. This was denied and the Court ordered that JS be personally served. The Court did not direct service on Ms. Horton, but stressed this was a "professional courtesy" (Determination Decision, paras. 34 and 35). The Petition materials were affixed to the door of JS' apartment, but the Respondent did not provide Ms. Horton with a copy (Determination Decision, para. 44). Although it was later determined that the materials served on JS included a Requisition setting the Petition hearing date, the Panel found it was apparent from Ms. Horton's communications to the Respondent that she was unaware of the hearing date.

(f) In January 2017, Ms. Horton wrote to the Respondent stating that she was retained to represent JS in the committeeship application, specifically requesting that the Respondent not take further steps until she filed her response materials, and twice asking the Respondent to confirm that he agrees not to do so (Determination Decision, paras. 49 and 51). The Respondent did not provide this confirmation (Determination Decision, paras. 50 and 53).

(g) The committeeship hearing proceeded on January 12, 2017. Neither JS nor Ms. Horton were in attendance. The Court granted committeeship over JS. Ms. Horton first learned of the hearing date the next day when she received a copy of the Court Order from the Respondent (Determination Decision, paras. 54 to 58).

(h) Ms. Horton immediately filed a without notice application on behalf of JS and was granted a stay of the Committeeship Order on January 13,

> 2017. This Order was ultimately set aside on March 2, 2017 (Determination Decision, paras. 59 to 63).

ISSUE

[5] What is the appropriate disciplinary action under sections 38(5) and (7) of the *Act*?

DISCUSSION

[6] In *Law Society of BC v. Lessing*, 2013 LSBC 29, a review board reaffirmed that, when assessing an appropriate disciplinary action, hearing panels must start with sections 38(5) and 38(7) of the *Act*. Section 38(5) of the *Act* provides a hearing panel with a range of options that it may impose in its discretion including, but not limited to, a reprimand, a fine, conditions or limitations on the lawyer's practice, suspension from practice and disbarment.

[7] In *Law Society of BC v. Nguyen*, 2016 LSBC 21, at para. 36 (cited with approval more recently in *Law Society of BC v. Golden*, 2019 LSBC 15, at para. 6), the review board wrote as follow:

> Still, the disciplinary action chosen, whether a single option from s. 38(5) or a combination of more than one of the options listed, must fulfill the two main purposes of the discipline process. The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. If there is conflict between these two purposes, the protection of the public and the maintenance of public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes. See *Law Society of BC v. Ogilvie*, 1999 LSBC 17, paras. 9 and 10; *Lessing*, paras. 57 to 61.

[8] This Panel agrees that the disciplinary action to be imposed must have regard to, and be consistent with, the Law Society's statutory mandate to protect public interest in the administration of justice and to ensure the maintenance of public confidence in the legal profession.

[9] In *Law Society of BC v. Dent*, 2016 LSBC 05, the hearing panel wrote that panels should move away from the long list of factors set out in *Ogilvie* and instead utilize a "modern approach" where the relevant *Ogilvie* factors are considered under four distinct headings:

(a) nature, gravity and consequences of conduct;

(b) character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession including public confidence in the disciplinary process.

[10] This approach was recently reaffirmed in *Law Society of BC v. Lee*, 2022 LSBC 05.

[11] Accordingly, in the modern approach, not all of the *Ogilvie* factors come into play in every proceeding and the weight to be placed on the various factors varies based on the particular facts of each matter.

[12] We note that the review board in *Lessing* placed particular emphasis on the protection of the public, including public confidence in the disciplinary process and public confidence in lawyers generally, as well as the rehabilitation of the lawyer. It was noted that these two factors, in most cases, play an important role. However, the review board emphasized that, in the event these two factors conflict, the protection of the public, including protection of public confidence in the legal profession, is paramount.

[13] In written submissions offered by counsel for the Law Society and the Respondent, both parties accepted the modern approach and offered analyses of the circumstances in conformity with it.

Nature, gravity and consequences of conduct

[14] The seriousness of the misconduct is the prime determinant of the disciplinary action to be imposed against a lawyer: *Law Society of BC v. Edwards*, 2020 LSBC 57, at para. 18.

[15] Rule 2.1-4(a) of the *BC Code* states:

(a) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers that cause delay and promote unseemly wrangling.

[16] Rule 7.2-1 of the *BC Code* states:

> A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

[17] This Panel summarized the Respondent's conduct in the Determination Decision, at para. 149:

> Perhaps the most revealing comment made by the Respondent to Ms. Horton can be found in his email to her of December 21, 2016. In that email, the Respondent suggested that Ms. Horton had become a potential 'officious intermeddler.' This perception of Ms. Horton's role and conduct permeates his treatment of her. He did not perceive her as counsel but more an interference in his attempts to meet the expectations of his clients.

[18] Importantly, there were other specific findings made with respect to the Respondent's conduct:

(a) on September 14, 2016, Ms. Horton was "rebuffed by the Respondent in an angry and aggressive manner";

(b) the Respondent's correspondence to Ms. Horton contained "accusatory language" and assertions that Ms. Horton was "disqualified to act as counsel";

(c) the Respondent refused to serve the Petition and materials on Ms. Horton;

(d) the Respondent chose to ignore the comments of the Court that it would be a professional courtesy to serve Ms. Horton;

(e) the Respondent ignored Ms. Horton's requests to not take any further steps in the proceeding and instead proceeded with a hearing of the Petition; and

(f) the Respondent did not advise the Court during the hearing on January 12, 2017 that in letters dated January 6 and 10, 2017, Ms. Horton asked the Respondent to confirm, in writing, that he agreed not to take any steps without informing her.

[19] Importantly, the Respondent's conduct resulted in the benefit to him of an uncontested committeeship hearing on behalf of his client. However, Ms. Horton,

her client and the Court all suffered from the actions of the Respondent. Ms. Horton was the target of the Respondent's misconduct. Her client had a committeeship order made against her without the opportunity to have her counsel appear and make submissions. The Court made an order without the benefit of full submissions before it. All of this could and should have been avoided had the Respondent acted in accordance with his professional obligations.

[20] The Respondent's misconduct was serious. It offended the basic boundaries of courtesies we owe to other lawyers, the public and to the Court.

Character and professional conduct record of the respondent

[21] The Respondent was called and admitted to the bar in British Columbia on July 10, 1981. At the time of the misconduct depicted in these proceedings, the Respondent was approximately a 36-year call.

[22] The Respondent is an experienced practitioner who is expected to have knowledge of the expectations placed on lawyers. In recent decisions, disciplinary panels have held that where lawyers facing disciplinary matters have a lengthy experience practising law, that experience is to be considered an aggravating factor: *Law Society of BC v. Wilson*, 2020 LSBC 20, at para. 17; *Lee*, at para. 25.

[23] Further, the Respondent has a professional conduct record ("PCR") consisting of three conduct reviews and two citations:

(a) Conduct Review (January 24, 1991): The Conduct Review Subcommittee found that the Respondent had, on three occasions, acted and spoken "intemperately and rudely" with members of the public and that he had also "exceeded the bounds of appropriate conduct" in his dealings with the police on a fourth matter. No further disciplinary action was imposed.

(b) Conduct Review (November 20, 1997): The Respondent participated in a conduct review respecting two complaints, which led the Conduct Review Subcommittee to discuss with him the importance of courtesy in dealing with members of the public, including opposing litigants, as well as a series of letters sent by the Respondent to opposing counsel, which the Subcommittee described as "bizarrely rude" and "shockingly ill-judged". The Subcommittee recommended that the Respondent consider seeking assistance in developing methods of controlling his responses to others and conducting himself with greater dignity, but did not impose any further disciplinary action at that time.

(c) Conduct Review (January 19, 2004 and continued on November 29, 2004): The Conduct Review Subcommittee considered the Respondent's conduct in one matter with respect to unreasonably pursuing a client for fees, including opposing her discharge from bankruptcy to the point that the Court characterized his actions as a "vendetta", and in another matter, in using the client's confidential medical information to impugn the client's credibility in a taxation proceeding by alleging that the client suffered from psychiatric impairment. The Subcommittee Interim Report noted that the Respondent appeared to pursue matters of a personal legal nature in an unreasonable and excessive fashion and assumed a monitoring role and required him to undertake certain remedial steps to avoid such a pattern of conduct in the future. The conduct review was adjourned for the Respondent to receive treatment and counselling, which he did. The Subcommittee issued its final report on December 13, 2004, finding that it was satisfied that the Respondent had demonstrated a real desire to address the types of problems that "litter his discipline history" and found that no further action was necessary.

(d) Citation (issued August 19, 2013): The hearing panel determined that the Respondent had breached Chapter 5, Rule 1 of the *Professional Conduct Handbook* then in force, by disclosing confidential client information, and the breaches constituted professional misconduct (*Law Society of BC v. McLeod*, 2014 LSBC 16). The hearing panel imposed a one week suspension and a fine of $2,500 (*Law Society of BC v. McLeod*, 2015 LSBC 03).

(e) Citation (issued June 7, 2018): The hearing of this citation proceeded on September 10 to 12 and December 3, 2019. The hearing panel determined that the Respondent failed to discharge his professional obligations to the Court and to opposing counsel by breaching numerous rules of the *BC Code*, including rules 2.1-2(a), 2.1-2(c), 2.1-4(a), 2.2-1, 5.1-1 and 7.2-1, by misstating facts in Court and/or failing to correct the record, bringing a contempt application and recusal application when he knew or ought to have known that the applications were unfounded, premature and/or without merit, bringing a contempt application against opposing counsel, and personally bringing a contempt application and recusal application when he knew or ought to have known that the applications were unfounded, premature and/or without merit: (PCR, tab 10). The Respondent appealed this finding to the Court of Appeal and the Law Society cross-appealed on a question

> of law. The hearing proceeded on March 16, 2022. The Court of Appeal reserved judgment. As noted below, it is not open to this Panel to consider this citation for the purposes of progressive discipline.

[24] This Panel is of the view that the Respondent's past professional conduct issues are highly aggravating factors in determining the appropriate sanction in this case and, together, engage the principle of progressive discipline, requiring an increase to the sanction imposed beyond the range of sanctions imposed for similar misconduct by lawyers without a disciplinary history: (*Law Society of BC v. Batchelor*, 2013 LSBC 09, at para. 49). This principle was summarized clearly in *Law Society of BC v. Tak*, 2014 LSBC 57, at para. 30, as follows:

> The principle of progressive discipline suggests that a lawyer who has had prior discipline, whether for the same or different conduct and whether that conduct has been joined in one proceeding or dealt with by way of successive proceedings, may have a more significant disciplinary sanction imposed in a subsequent proceeding than someone who has had no prior discipline.

[25] This principle was expanded upon and confirmed in *Law Society of BC v. Lang*, 2022 LSBC 04, at para. 38, and in *Lessing*, at para. 72.

[26] The Respondent has a professional conduct record spanning from 1991 to the present. His most recent citation was in 2013. Each of the matters contained in his PCR are substantively similar to the matter before this Panel.

[27] The Respondent's experience and PCR both mandate in favour of a serious disciplinary action. This is a significant aggravating factor in determining the appropriate sanction by this Panel. Given the Respondent's PCR, this Panel finds it appropriate to apply the principle of progressive discipline and impose on the Respondent a more significant sanction than he has previously received.

Acknowledgement of the misconduct and remedial action

[28] In *Dent*, the hearing panel wrote, at para. 22:

> Does the respondent admit his or her misconduct? What steps, if any, has the respondent taken to prevent a reoccurrence? Did the respondent take any remedial action to correct the specific misconduct? Generally, can the respondent be rehabilitated? Are there other mitigating circumstances, such as mental health or addiction, and are they being dealt with by the respondent?

[29] As set out above, the Respondent appealed the Panel's findings of professional misconduct. A lawyer has a right to launch such an appeal. In assessing the appropriate disciplinary action, the Panel does not find this to be a factor to consider: (*Law Society of BC v. Guo*, 2022 LSBC 03, at para. 47).

[30] The day before this hearing, the Respondent wrote a short and limited apology to Ms. Horton. The apology is as follows:

> Please accept my sincere apology for not serving you personally with the materials served directly on your client, [JS], in connection with the Committeeship that I was pursuing on behalf of her children. I regret not apologizing to you earlier.

[31] The Panel does not find this "apology" to be an acknowledgment of the Respondent's misconduct. The apology was many years late, was limited in scope and arrived on the eve of this hearing. It makes no comment on his incivility. Even if the Respondent had intended to wait until after the appeal of the finding of misconduct was determined prior to apologizing, he could have apologized at least six months earlier. In our view, the Respondent has refused to acknowledge his misconduct in any meaningful way and the absence of any evidence of meaningful or consequential actions by the Respondent is an aggravating factor. Public confidence in the legal profession including public confidence in the disciplinary process

[32] In *Dent*, the hearing panel identified the following questions when considering how to account for the Law Society's mandate to protect the public when determining an appropriate disciplinary action (at para. 23):

> Is there sufficient specific or general deterrent value in the proposed disciplinary action? Generally, will the public have confidence that the proposed disciplinary action is sufficient to maintain the integrity of the legal profession? Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

[33] The Respondent's misconduct goes to the root of public confidence in the legal profession. As stated in Chapter 2 of the *BC Code*, the Canons of Legal Ethics, which include 2.1-4(a), reflect the critical role of the lawyer in the legal system:

> 2.1 Canons of Legal Ethics

> These Canons of Legal Ethics in rules 2.1-1 to 2.1-5 are a general guide and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned …
>
> 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.
>
> *In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.*
>
> [emphasis added]

[34] Similarly, the Commentary to rule 7.2-1 makes clear the importance of the requirement of courtesy and good faith for public confidence in the legal profession:

> [1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. *The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly*.
>
> [2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. *Personal remarks or personally abusive tactics interfere with the orderly administration of justice* and have no place in our legal system.
>
> [emphasis added]

[35] The Supreme Court of Canada in *Groia v. Law Society of Upper Canada*, 2018 SCC 27, wrote, at para. 63:

> … The duty to practice with civility has long been embodied in the legal profession's collective conscience — and for good reason. Civility has been described as 'the glue that holds the adversary system together, that keeps it from imploding' … Practicing law with civility brings with it a

> host of benefits, both personal and to the profession as a whole. Conversely, incivility is damaging to trial fairness and the administration of justice in a number of ways.

[36] This Panel accepts the submissions of the Law Society that the misconduct committed by the Respondent goes to the heart of public confidence in the integrity of the legal system and the administration of justice. The Respondent's failure to adhere to such fundamental professional duties – the very canons of the legal profession – cannot be condoned.

Range of sanctions in other cases

[37] This Panel is not bound to follow previous determinations of the appropriate disciplinary action found in earlier cases. However, we ought to consider whether the disciplinary action sought falls within the range of penalties found in similar decisions: (*Dent*, at para. 39).

[38] For this purpose, we have considered the following:

(a) In *Law Society of BC v. Greene*, 2003 LSBC 30, the lawyer committed professional misconduct in making inappropriate comments about another lawyer and members of the judiciary in a series of three letters. The hearing panel imposed a fine of $3,000 (current value: $4,332).

(b) In *Law Society of BC v. Lanning*, 2009 LSBC 02, the lawyer committed professional misconduct in sending a series of 12 letters to an unrepresented opposing party in a matrimonial dispute that contained personal criticisms of the recipient and name calling, and were deliberately intended to "defeat" or "crush" her to advance his client's interests. The hearing panel imposed a reprimand and a fine of $2,500 (current value: $3,265).

(c) In *Law Society of BC v. Laaraker*, 2012 LSBC 02, the hearing panel found the lawyer guilty of professional misconduct for posting comments on the internet criticizing another lawyer as a "sleazy operator" and faxing a letter to another lawyer describing that lawyer as a "bully" and suggesting that he graduated from the "bottom of his class" as detailed in the facts and determination decision (2011 LSBC 29). The hearing panel imposed a fine of $1,500 (current value: $1,835).

(d) In *Law Society of BC v. Hudson*, 2017 LSBC 17, the lawyer made a conditional admission of professional misconduct arising from a verbal altercation with opposing counsel during a Provincial Court family case conference, including threatened violence, contrary to duties to the Court and to opposing counsel as set out in rules 2.1-2(a), 2.1-4(a), 5.1-1 and 5.1-5 of the *BC Code*. The hearing panel accepted the proposed disciplinary action and imposed a $5,000 fine (current value: $5,700).

(e) In *Lang*, the lawyer admitted to having committed professional misconduct with respect to communicating with an unrepresented party, contrary to rule 7.2-6(a) and (b), and communicating in a discourteous and uncivil manner in contravention to rule 7.2-1. The lawyer used offensive and profane language in communicating at the courthouse with opposing counsel and her adult son (a member of the public) who was present at a courthouse. The hearing panel accepted the proposed joint submission of a fine of $10,000.

(f) In *Law Society of BC v. Foo*, 2014 LSBC 21, the lawyer committed professional misconduct in making discourteous or threatening remarks to a social worker while at a courthouse. Specifically, he told the social worker that he "should shoot" her. The hearing panel imposed a suspension of two weeks.

(g) In *Law Society of BC v. Johnson*, 2014 LSBC 50, the lawyer was found to have committed professional misconduct when he said "fuck you" to a police witness outside a courtroom. The hearing panel imposed a suspension of one month.

[39] These cases outlined illustrate that there is no fixed range of discipline for incivility amounting to professional misconduct. Sanctions imposed in these similar cases range from fines to suspensions, depending on the severity of the misconduct. The imposition of a fine of $10,000 more recently in *Lang*, and of suspensions in *Foo* and *Johnson*, suggest an increasing tendency of hearing panels to impose serious disciplinary action in situations where lawyers breaching the core requirements of the legal profession threaten public confidence in lawyers.

[40] The Respondent's misconduct is serious and the severity falls within the range of cases outlined above. Further, the Panel finds that the repeated nature of his misconduct, together with the existence of a significant, related professional conduct record, places this matter in the category of cases that resulted in the imposition of a significant fine or a suspension.

[41] Counsel for the Law Society directed the Panel's attention to decisions by hearing panels in Ontario. Counsel suggested that these decisions offer guidance on the appropriate period of suspension. While this Panel has taken note of those decisions, our decision on disciplinary action finds ample justification in the BC decisions referred to above.

Submissions on behalf of the Respondent

[42] The Respondent acknowledged the non-exhaustive considerations set out in the "consolidated *Ogilvie* factors", and analyzed this matter based on those considerations.

[43] With regard to the issue of whether or not the Respondent had to serve Ms. Horton with the committeeship application, counsel for the Respondent argues that the Respondent had an honest but mistaken belief that JS did not have the capacity to retain counsel. Further, counsel points out that the concern in this matter was not with the nature or tone of correspondence or communications as cited in the authorities submitted by Law Society counsel. Rather, the issue was the Respondent's failure to serve Ms. Horton with the application materials for a committeeship.

[44] This issue was addressed in paras. 135 and 136 of the Determination Decision. There, the Panel determined that "it is impossible to assess the conduct of the Respondent without some awareness of the circumstances that led to his decision making." We take the same approach to this decision on Disciplinary Action.

[45] The heart of the Respondent's submissions focusses on the 12 letters of reference and character offered by the Respondent's colleagues and clients, the Respondent's extensive commitment to *pro bono* work and discipline decisions that suggest lesser penalties for similar conduct by members of the profession.

[46] The letters tendered by colleagues and clients were very complimentary about the Respondent's good deeds, his professional skills and his personal qualities. Most of the correspondence acknowledged the writer's awareness of the allegations presented by the Law Society. What was missing was any stated knowledge of the Respondent's disciplinary history.

[47] Of further concern are the steps that the Respondent offers as assurance that the conduct displayed in this matter would not be repeated. Through his counsel, the Respondent indicated that he now has an improved system to remind him of the need to serve opposing parties with legal process. This was a perplexing reference. The behaviour of concern in this matter involved a conscious decision on the

Respondent's part to not serve Ms. Horton with the application materials based on his belief that JS did not have the capacity to give instructions to Ms. Horton. The Respondent did not forget or neglect to serve Ms. Horton. A reminder would have been of no use to any participant in the scenario at play here. In truth, there is no evidence before this Panel that the Respondent has taken any meaningful remedial actions to correct the misconduct nor effective steps to prevent a recurrence of such conduct.

[48] It is also of concern that the Respondent ignored the Master's indication in open Court that the appropriate practice would be for him to serve the Master's Order upon Ms. Horton.

[49] In the end, the Panel is not persuaded by the Respondent's submissions. The Respondent's conduct was serious. His PCR and his failure to apologize or take remedial action are aggravating factors. Many lawyers with long careers can find references to acknowledge their good work. At times, this will mitigate the required disciplinary action. For the reasons expressed, in this case, it does not.

Conclusion on appropriate disciplinary action

[50] Apparent in the *Dent* factor analysis set out above are a number of aggravating factors which, in this case, weigh strongly in favour of an imposition of a significant sanction by this Panel on the Respondent. In particular:

(a) The Respondent's misconduct is serious. His breach of foundational duties of members of the legal profession resulted in Ms. Horton being unable to represent JS, an elderly, vulnerable adult, in an important application to the Court.

(b) The Respondent is a very experienced practitioner with a lengthy, relevant professional conduct record which illustrates a consistent pattern of transgressing foundational principles of professional conduct.

(c) The Respondent has made only passing acknowledgement of his misconduct. His purported steps at remediation – for example, the creation of a reminder system for serving opposing parties – are both inadequate and miss the point of the concerns with the history of his conduct in this matter.

(d) There is a need for measures of general deterrence to deter other lawyers from failing to practise law with civility.

(e) The Respondent's misconduct strikes at the heart of public confidence in the legal profession.

[51] The Respondent's experience as a practising lawyer for many years is an aggravating factor to be considered at this stage of the disciplinary process. As an experienced practitioner, the Respondent ought to have known of the fundamental expectations of lawyers to act with courtesy, civility and in good faith.

[52] Taking into account all of the above-noted factors, coupled together with the principle of progressive discipline and the range of sanctions imposed in prior cases, the Panel finds that the appropriate disciplinary action to be imposed upon the Respondent is a suspension of six weeks, as authorized by section 38(5) of the *Act*. A six-week suspension is appropriate and consistent with the Law Society's public interest mandate.

COSTS

[53] The Law Society seeks costs in the amount of $16,503.41, inclusive of disbursements.

[54] In accordance with the authority in section 46(1) of the *Act*, the Benchers have established rules governing the costs to be ordered in discipline proceedings. Rule 5-11 provides as follows:

> **Costs of hearings**
>
> 5-11 (1) A panel may order that an applicant or respondent pay the costs of a hearing referred to in Rule 5-1 *[Application]*, and may set a time for payment.
>
> …
>
> (3) Subject to subrule (4), the panel or review board must have regard to the tariff of costs in Schedule 4 *[Tariff for hearing and review costs]* to these Rules in calculating the costs payable by an applicant, a respondent or the Society.
>
> (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 *[Tariff for hearing and review costs]*,

> if, in the judgment of the panel or review board, it is reasonable and appropriate to so order.
>
> (5) The cost of disbursements that are reasonably incurred may be added to costs payable under this rule.
>
> (6) In the tariff in Schedule 4 *[Tariff for hearing and review costs]*,
>
> (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 or amount payable applies.

[55] Pursuant to Rule 5-11, the Panel must have regard to the tariff in Schedule 4 when calculating costs and costs under the tariff are to be awarded. The tariff not only gives guidance to hearing panels on the items to consider when calculating costs, but it provides a respondent with guidance on the range of costs to be expected.

[56] However, under Rule 5-11(4), the panel may deviate from the tariff if it determines it is reasonable and appropriate to award no costs or costs in an amount other than that permitted by the tariff.

[57] This Panel sees no reasonable and appropriate basis to deviate from the tariff in this case. The Panel has found that the Respondent committed professional misconduct as alleged in the Citation, based on subsection (a). While we declined to find that the Respondent's actions rose to the level of sharp practice, we nonetheless made a finding of professional misconduct on the Citation as a whole.

[58] Moreover, we accept the Law Society's submission that the deeply interconnected nature of the Respondent's acts, the investigations and the evidence that gave rise to both parts of the Citation, mean that the costs incurred by the Law Society in establishing that the Respondent failed to act with courtesy and civility and a finding of professional misconduct were necessarily incurred also with respect to the question of whether he committed sharp practice. The same evidence was led in relation to both parts of the Citation.

ORDER

[59] Applying the factors discussed, the Panel orders that the Respondent:

(a) is suspended for six weeks, with such suspension to commence on a date to be agreed to provided it is no later than November 1, 2022; and

(b) must pay costs in this matter to the Law Society in the amount of $16,503.41, payable within 60 days of the date of the release of this decision.