2024 LSBC 25
Hearing File No.: HE20200003
Decision Issued: May 7, 2024
Citation Issued: February 7, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

SPENCER OWEN MAY

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	March 15, 2024
Panel:	Dean Lawton, KC, Chair Michael Dungey, Public representative Monique Pongracic-Speier, KC, Lawyer
Discipline Counsel:	Michael D. Shirreff Gregory A. Cavouras
Counsel for the Respondent:	William G. MacLeod, KC

OVERVIEW

[1] These reasons address disciplinary action for professional misconduct and a breach of the Law Society Rules (the "Rules"). They also address the Law Society's claim for costs and disbursements in the proceeding.

[2] In general terms, the misconduct at issue relates to the Respondent's failures to: uphold his duty of candour to the Supreme Court of British Columbia (the "Court") in two *ex parte* Chambers applications; follow the Court's direction to serve the order made in one of the applications; and make reasonable inquiries about his clients, two individuals and two companies (the "Clients"), and the purposes and objects of his retainer with them. The breach of the Rules relates to the Respondent's failure to comply with client identification requirements.

[3] The Law Society argues that the appropriate disciplinary action is a four-month suspension. The Law Society also seeks costs and disbursements of $26,767.71. The Respondent says that the appropriate disciplinary action is a $20,000 fine, and that costs and disbursements should be awarded at 50 percent of the Law Society's claim. For the reasons set out below, the Panel finds that the appropriate disciplinary action is a two-month suspension. We award the Law Society $20,767.81 in costs and disbursements.

FACTS

[4] The facts relevant to the citation against the Respondent (the "Citation") are canvassed in detail in *Law Society of BC v. May*, 2021 LSBC 35 ("*F&D No. 1"*) and 2023 LSBC 43 ("*F&D No. 2").* [1] The following summarizes the essential facts.

[5] In August 2015, the Respondent was retained by the Clients to file a claim in debt and for relief under the *Builders Lien Act*, S.B.C. 1997, c. 45 for unpaid work on a condominium renovation (the "Condo Action"). He did so.

[6] The next year, the mortgage on the condominium went into foreclosure; the Respondent went on record for the Clients in the foreclosure proceedings. He then pressed forward with the Condo Action.

[7] In late 2016, the Clients told the Respondent new facts about, and delivered documents said to be relevant to, the Condo Action. Both should have prompted the Respondent to make further inquiries about the Clients' claim but he did not make them.

[1] *F&D No. 2* arose from a referral back to the Panel of paragraphs 1(c) and 2(c) of the Citation, pursuant to *May v. Law Society of British Columbia*, 2023 BCCA 218 ("*May BCCA*").

[8] The Clients also delivered to the Respondent forms purportedly signed by one of the defendants in late November 2016, in Richmond. By December 2016, the Respondent came to doubt that the defendant had actually signed the forms.

[9] Next, the Respondent applied to amend the Notice of Civil Claim in the Condo Action to reflect the new facts conveyed to him by the Clients (the "Amendment Application"). He filed an affidavit, made by his paralegal, which exhibited a written contract and copies of invoices provided by the Clients. To the Respondent's knowledge, the contract was created when his office combined two different documents provided by the Clients.

[10] During the hearing of the Amendment Application in January 2017, the Respondent stated that the defendants appeared to have left the country, or to have disappeared. He did not advise the Court that one of the defendants had purportedly been contacted in Richmond, in November 2016.

[11] In February 2017, the Court granted judgment in default in the Condo Action.

[12] In March 2017, the Respondent applied for, and the Clients were granted, an order for damages and a builders' lien (the "Remedies Application"). In support of the Remedies Application, the Respondent filed an affidavit made by one of the Clients which exhibited the same invoices and synthetic contract as had been put before the Court in the Amendment Application. During the hearing of the Remedies Application, the Respondent told the Court that his office had been unable to find the defendants, he had no information on how to contact them, and that they appeared to have left the country. As in the Amendment Application, the Respondent did not advise the Court of the Client's possible contact with one of the defendants in November 2016. The Court directed the Respondent to serve the order in the Remedies Application by alternative means of service but the Respondent never did.

[13] The Respondent continued on record for the Clients in the condominium foreclosure proceedings, after the Court made the final order in the Condo Action.

[14] Meanwhile, a solicitor for the Clients had instructed the Respondent to file two additional builders' lien actions. One, filed in February 2016, sought to secure a $450,000 lien for renovations said to have been performed on a house in Richmond (the "Richmond House Action"). The other, filed in April 2016, sought an order for a $2 million lien for the purported construction of a house in Vancouver (the "Vancouver House Action"). The Richmond House Action was settled for full value not long after it was filed; the Respondent was not involved in the settlement transaction. The Vancouver House Action was also settled for full value after the claim was filed but, in that case, the

settlement funds passed through the Respondent's trust account and the Respondent disbursed nearly $1.98 million to the Clients.

[15] The Respondent did not at any time during his retainer with the Clients obtain any business telephone numbers or the individuals' home addresses.

[16] In February 2018, a national newspaper reported that the individual Clients were fentanyl dealers and likely money launderers. They were described as having a scheme whereby they offered high-interest cash loans, probably funded by drug sales, to Chinese nationals in British Columbia. Some of the loans were secured by mortgages against Vancouver-area realty.

[17] The newspaper reported that the individual Clients had also engaged in a brazen scheme of recharacterizing some of the money-lending debts as trade debts that could be secured through builders' liens. The article specifically mentioned the Vancouver House Action as having been specious. The newspaper reported that records showed that the house was not built by the Clients but by a "registered" builder three years before the Vancouver House Action was filed.

[18] The Respondent read the newspaper article and was "shocked". He wanted to end his retainer with the Clients. He did so in August 2018, after arranging for personal service of a Notice of Intention to Withdraw in the condominium foreclosure proceedings.

[19] The newspaper article triggered an investigation by the Law Society. This investigation led to the issuance of the Citation.

[20] In *F&D No. 1* and *F&D No. 2*, the Panel found the Respondent engaged in professional misconduct as follows:

(a) In the Amendment Application, the Respondent between December 19, 2016 and January 4, 2017 failed to uphold his duty of candour to, and misled, the Court by:

(i) stating that the defendants appeared to have left the country or disappeared, when the Respondent knew that one of the Clients possibly knew the whereabouts of, had contacted, or had the means of contacting, one of the defendants and had purportedly obtained the defendant's signature on documents in or about November 2016;

(ii) failing to disclose material information concerning the whereabouts of, contact with, or means of contacting one of the defendants; and

(iii) filing and relying on an affidavit, made by the Respondent's paralegal, AC, when the Respondent knew or ought to have known that the affidavit was false or misleading in relation to a purported contract document between an unincorporated entity, Z & Co., and one of the defendants in the action.

(allegation 1 of the Citation)

(b) In the Remedies Application, the Respondent between March 3 and 14, 2017 likewise failed to uphold his duty of candour to, or misled, the Court by:

(i) making statements to the effect that one of the defendants had not been or could not be located when the Respondent knew that that one of the Clients possibly knew the whereabouts of, had contacted, or had the means of contacting, one of the defendants and had purportedly obtained the defendant's signature on documents in or about November 2016;

(ii) failing to disclose material information concerning the whereabouts of, contact with, or means of contacting, one of the defendants; and

(iii) offering, presenting or relying upon the affidavit of YZ, one of the Clients, when the Respondent knew or ought to have known that the affidavit was false or misleading in relation to a purported contract document between Z & Co. and one of the defendants in the action.

(allegation 2 of the Citation)

(c) The Respondent failed to comply with the direction of a Justice of the Court to serve the Order made in the Remedies Application (allegation 3 of the Citation).

(d) Between approximately August 2015 and July 2018, in the course of acting for the Clients, the Respondent failed to make reasonable inquires about the Clients or the subject matter and objectives of his retainer (allegation 6 of the Citation).

[21] The Panel also found, in relation to allegation 5 of the Citation, that the Respondent breached the Rules by failing to make reasonable efforts to obtain, or record, client identification information, as required by Rule 3-100(1)(a) and (b).

[22] We found it unnecessary to decide allegation 4 of the Citation, as it was alleged in the alternative to allegation 3.

[23] Allegations 7 and 8 of the Citation alleged that the Respondent had committed professional misconduct, or had breached the Rules, during the Law Society's investigation into the Respondent's retainer with the Clients. These allegations were dismissed in *F&D No. 1*.

ISSUES:

[24] There are two issues for decision:

(a) What is the appropriate disciplinary action for the Respondent's professional misconduct and breach of the Rules?

(b) What costs and disbursements must the Respondent pay to the Law Society?

ISSUE 1: WHAT IS THE APPROPRIATE DISCIPLINARY ACTION?

The Evidence at the Hearing

[25] By consent, the Respondent tendered six letters from colleagues attesting to his good character and professional activities.

[26] The Respondent also gave evidence. He testified that he accepts the findings of the Panel. He said that he understands he was not careful enough in his dealings with the Clients and that he allowed his sense of duty to diligently present the Clients' case to override the need to assess the basis for their claims. He said that he accepts that he did not pay sufficient attention to whether the evidence in the Condo Action made sense and did not appropriately vet the case. The Respondent testified that since the events at issue in the Citation, he has learned to be more critical in assessing retainers; he testified that he has turned away matters he has not been comfortable accepting. His firm has developed more robust client identification procedures.

[27] The Respondent gave evidence about his life circumstances at the time of the events at issue in the Citation. He said that by May 2016, he had four children under 7, including newborn twins. His partner experienced serious health problems after the twins' birth. Simultaneously, the Respondent's father, a senior partner at the Respondent's firm, was experiencing a frightening deteriorating illness. The Respondent testified that he was trying to assist his father to transition out of practice at the time of the events in issue.

[28] The Respondent testified about the impact of the Citation on his family, his professional life, and on his firm. He said that he feels he has let down himself, his family, his partners and the profession.

[29] The Respondent told the Panel that his engagement with the Clients and its aftermath have dissuaded him from taking on court work. He said, for example, that his failure to serve the order in the Remedies Application has undermined his confidence. He is also concerned about appearing in Court, due to the findings that he misled the Court.[2] The Respondent said that since the Citation was issued, he has had conduct of only one application in court, made in the spring of 2022. That was an exceptional matter.

[30] The Respondent testified that he now has a solicitor's practice. One half or more of his practice focuses on corporate and commercial matters and estates planning for farmers. The Respondent confirmed that he had intended to transition to a solicitor's practice in any event of the circumstances that gave rise to the Citation but that he might be doing a little more court work now, had this matter not arisen. He is practising full time.

[31] The Respondent testified that the Citation affected the work that he and his firm were eligible to perform. He was unable to do title insurance work for a while. The Citation also caused one of the partners at his firm to be taken off a list of lawyers eligible to perform work for banks. He worries that he or his firm will continue to be affected by the Citation.

[32] The Respondent testified that he declined to take on a role with a prominent community organization in Richmond, due to the publicity associated with the discipline proceedings and the fear that it would cause the organization reputational harm.

[33] The Respondent testified about the heavy personal toll of the Citation and these disciplinary proceedings. He has experienced stress and embarrassment. He fears that he has not been able to be present for his family, in ways that he ought to have been. He has engaged in counselling, to cope with the impact of the Citation and the proceedings.

The Law on Disciplinary Action

[34] Section 38(5) of the *Legal Profession* Act, SBC 1998, c 9 (the "*Act*") requires the Panel to impose disciplinary action for the proven misconduct and the breach of the

[2] *F&D No. 1* at paras. 160, 167 to 175.

Rules. The disciplinary action is within the discretion of the Panel and may include a fine, a suspension, or both; and other remedies not sought by the parties.[3]

[35] The statutory objects of the Law Society underly all disciplinary action.[4] These objects, set out in section 3 of the *Act*, are aimed at upholding and protecting the public interest in the administration of justice. They include:

(a) preserving and protecting the rights and freedoms of all persons;

(b) ensuring the independence, integrity, honour and competence of the profession; and

(c) regulating the practice of law.

[36] Disciplinary action is to be approached purposively. Its dominant purposes are to protect the public and to maintain public confidence in the legal profession. It should additionally promote rehabilitation of the lawyer, where possible. Often, the same disciplinary action will serve all these purposes.[5]

[37] A panel's discretion over disciplinary action is informed by well-established criteria. *Law Society of BC v. Ogilvie*, 1999 LSBC 17 set out 13 criteria for consideration. *Law Society of BC v. Dent*, 2016 LSBC 5, consolidated these into four categories:

(a) the nature, gravity and consequences of the conduct;

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

(c) the Respondent's acknowledgement of the misconduct and any remedial action; and

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

[38] The assessment of disciplinary action has traditionally involved an analysis of aggravating and mitigating elements in the factual matrix. This analysis assists in identifying similar cases and determining disciplinary action that fits the case.[6] The parties made submissions on aggravating and mitigating factors; we include them in our analysis.

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[3] *Act*, ss 38(5) and (7).
[4] *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 54.
[5] *Lessing* at paras. 57 to 60; *Law Society of BC v. Gellert*, 2014 LSBC 5 at para. 36; *Law Society of BC v. Nguyen*, 2016 LSBC 21 at para. 36.
[6] *Law Society of BC v. Faminoff*, 2017 LSBC 4 at para. 87.

[39] Two other principles guide our analysis. First, disciplinary action should be individualized to the facts of the case and the lawyer concerned. As the Review Board found in *Law Society of BC v. Faminoff*, 2017 LSBC 4, decisions on disciplinary action "are an individualized process that requires the hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to disciplinary proceedings".[7]

[40] Second, where, as here, multiple allegations have been proved, disciplinary action should be assessed globally.[8] Global discipline tends to simplify proceedings and will, in most cases, be suited to arriving at a result that fosters protection of the public.[9] The parties in this case agree that the Panel should adopt a global approach to the disciplinary action.

The Parties' Submissions

[41] The Panel has benefitted from the parties' detailed written and oral submissions. In summary form, these were as follows.

Nature, gravity and consequences of the misconduct

[42] In advocating for a four-month suspension, the Law Society urges us to bear in mind that it has established eight instances of four distinct types of misconduct:

(a) multiple breaches of the duty of candour in the Amendment and Remedies Applications;

(b) a failure to comply with a direction of the Court to serve the Order made in the Remedies Application;

(c) a breach of the Rules governing client identification; and

(d) a "general and broad failure" to make reasonable inquiries about the Clients and the subject matter and objectives of the Respondent's retainer.

[43] The Law Society says that each of these warrants a serious disciplinary sanction. The global sanction must account for the combined findings.

[7] *Faminoff* at para. 84.
[8] *Lessing* at para. 77.
[9] *Gellert* at para. 37.

[44] The Law Society referred the Panel to decisions characterizing failures to abide by the duty of candour as "serious" matters.[10] It also notes that we found the Respondent "utterly inattentive" to his obligation to serve the Order in the Remedies Application and that the Respondent's failure to comply with the client identification Rules was a "not insignificant" breach of the Rules.[11] The Law Society stresses that the client identification rules guard against fraud, money laundering and other unlawful activities.

[45] Relying on *Law Society of BC v. Uzelac*, 2020 LSBC 58 and *Law Society of BC v. Hsu*, 2019 LSBC 29, the Law Society characterizes the Respondent's failure to make adequate inquiries into his Clients and the subject matter and objectives of his retainer as "serious misconduct"; the Law Society says that this aspect of the Respondent's misconduct should be "assessed on the basis of the obviously problematic information provided to Mr. May [by the Clients] and his inadequate consideration of it".

[46] In arguing for a $20,000 fine as appropriate to the nature, gravity and consequences of the misconduct, the Respondent makes several points.

[47] First, the Respondent says that the evidence led at the facts and determination phase of the hearing of the Citation does not show that his actions adversely affected anyone. He says in submissions that "it appears that money was owed" to the Clients and that the defendants in the various actions "did not take any steps to oppose payment".

[48] Second, the Respondent says in connection with allegations 1 and 2 of the Citation that it is not obvious how his failure to disclose to the Court the possible presence of a defendant in British Columbia, or the reliance on faulty affidavit evidence "regarding the timing of the signature [on the contract]" and "the correction of the first page of the agreement", would have made a difference to the outcome of the Amendment or Remedies Applications.

[49] In reply to these two arguments, the Law Society urges the Panel to resist the Respondent's results-based reasoning. It says that the most important aspect of the first consolidated *Dent* factor is the *nature* of the misconduct; the Respondent's submission debases the importance of the duties he breached.

[50] The Respondent additionally submitted that we found that he did not "intentionally mislead" the Court in the Amendment and Remedies Applications. He says, pointing to *Law Society of BC v. Lee*, 2022 LSBC 5, that where misleading conduct, such as that at issue in allegations 1 and 2 of the Citation, has been found to be unintentional, the case law shows that a fine may be appropriate disciplinary action.

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[10] See, *e.g.*, *Law Society of BC v. Vlug*, 2014 LSBC 9 ("*Vlug 2014*") and 2015 LSBC 58.
[11] *F&D No. 1* at paras 202 and 217.

[51] We interpret the Respondent as using the phrase "intentionally mislead" to mean "intentionally deceive". We say this because we did, in fact, find that the Respondent's decision to rely on misleading affidavit evidence in the Amendment and Remedies Applications was intentional; what we did not find is that he intended to deceive the Court by doing so.[12]

[52] With respect to the finding that he failed to make reasonable inquiries, the Respondent compares his conduct to the "more problematic" misconduct at issue in *Law Society of BC v. Gregory*, 2021 LSBC 34 ("*Gregory F&D*"). As in the case before us, *Gregory F&D* involved allegations that the lawyer had failed to obtain or record client identification information and had failed to make reasonable inquiries about the subject matter and objective of his retainer, the client (who was one of the individual Clients) and an associate of the client. The panel found Mr. Gregory deliberately proceeded with litigation although he did not have evidence to support his client's claim; that he turned a blind eye to the client's lack of financial information; and that he was contemptuous of the Law Society's investigation and warnings to him about the client's activities, in the wake of the newspaper article.[13] The Respondent points out that, notwithstanding the severity of the misconduct proven in *Gregory F&D*, the lawyer was suspended for two months only.[14]

The Respondent's character and professional conduct record

[53] The Law Society acknowledges that the Respondent does not have a professional conduct record; it says this is a neutral factor in determining the appropriate disciplinary action. The Law Society also acknowledges that it is not aware of "any broader concerns" with the Respondent's character.

[54] For his part, the Respondent alludes to past volunteer work with the Canadian Bar Association and relies on the character reference letters tendered into evidence to show his good character.

Acknowledgement of the misconduct and remedial action

[55] The Law Society submits that the Respondent chose to mount a vigorous defence to the Citation, rather than admitting or acknowledging misconduct. The Law Society says that while the Respondent's decision to defend against the Citation is not an aggravating factor in the assessment of disciplinary action, his refusal to admit misconduct "deprives

[12] *F&D No. 2* at para 95.
[13] *Law Society of BC v Gregory,* 2022 LSBC 17 ("*Gregory DA*") at paras 34 to 37.
[14] See: *Gregory DA*. This decision has been appealed to the Court of Appeal.

him of a potentially powerful mitigating factor and influences the appropriate penalty to be assessed".

[56] The Respondent says that he cannot be fairly criticized for defending himself as he did. He points out that "the most serious" allegations against him, that he failed to act with honour and integrity, were not proven.

[57] Although the parties made submissions about specific deterrence in connection with the *Dent* category of public confidence in the profession and the disciplinary process, it is convenient for us to consider them here. The Respondent denies that the Panel need be concerned with specific deterrence. He says that the Citation arose from unusual facts that do not give rise to a real risk of a recurrence of professional misconduct. The Law Society says that while specific deterrence may not be the most prominent concern in the case, there is clearly a need to reinforce that the Respondent's conduct was not appropriate and that he needs to take significantly more care in all areas of practice.

Public confidence in the legal profession and the disciplinary process

[58] The Law Society argues that a four-month suspension is called for to maintain public confidence in the integrity and trustworthiness of the legal profession and to deter against the type of reckless and irresponsible conduct proven against the Respondent.

[59] The Respondent argues that a large fine is fit disciplinary action. He says that the public's confidence in the legal profession and the disciplinary process "would not be shaken knowing that a lawyer who was not himself dishonest, nor self-benefitting but who was negligent in failing to uncover a novel kind of questionable business activity would nonetheless get a $20,000 fine and a substantial costs penalty".

[60] The Respondent points out that the use of builders' liens as a potential money laundering tool was not identified until the newspaper story in 2018. He also says that the Law Society does not appear to have issued notices or warnings about the potential misuse of builders' liens until after the events at issue in the Citation. He quotes in part from Peter German's 2019 report for the Attorney General, *Dirty Money – Part 2: Turning the Tide – An Independent Review of Money Laundering in B.C. Real Estate, Luxury Vehicle Sales & Horse Racing* for the propositions that "the use of builders liens as a money laundering instrument first came to light in a February 2018" newspaper article; that Mr. German had found "no indication of widespread misuse of builders liens as instruments by which to launder money or enforce debts for criminal loans"; and that "[t]he unique example of builders' liens re-enforces [that] … organized crime … is extremely innovative and not encumbered by the niceties of law … [and] quick to shift

commodities and processes when its activities are exposed …".[15] The Respondent also alludes to the release of the report of the Cullen Commission of Inquiry into Money Laundering, in June 2022.

[61] The Respondent's submissions on these matters garnered a pointed reply from the Law Society. The Law Society countered that the misconduct is not that the Respondent "failed to uncover a novel kind of questionable business activity" but that he failed to comply with fundamental professional obligations. The Law Society argues that the failure to inquire was, in large measure, the driver of the Respondent's overall misconduct. The Law Society says that the public interest is clearly engaged by the failure to make reasonable inquiries. It emphasizes that case law indicates that a lawyer's failure to make reasonable inquiries should result in a suspension from practice.

[62] The Law Society also points out that it is well-established that an order for costs is not a "penalty".

The range of penalties in other cases

[63] *Dent* suggests that guidance from "similar cases" is the primary factor to be considered under the inquiry into public confidence in the legal profession and the disciplinary process.[16]

[64] The Law Society says that a suspension is usually warranted for breach of the duty of candour to, and misleading of, the Court. It relies on the following decisions as providing guidance for the appropriate length of a suspension:

(a) *Vlug 2018*, the lawyer was suspended for four months for seven counts of professional misconduct, which included five counts of misleading the Court of Appeal or the Law Society, when the lawyer knew or ought to have known that his statements were false. The lawyer had a professional conduct record.

(b) *Law Society of BC v Galambos*, 2007 LSBC 31, the lawyer negligently misled a Master during a Chambers application. When it was later confirmed to the lawyer that his statement was, in fact, wrong, he failed to return to Court to correct himself. The lawyer admitted to misconduct. The panel imposed a one-month suspension, finding that "something more than a fine" was required because the misrepresentation was "a serious matter" and the

[15] We note that Mr. German's report was not tendered into evidence but the Law Society did not object to the Respondent's reliance on it as evidence of what Mr. German concluded.
[16] *Dent* at para 39.

case called for disciplinary action that would be regarded by members of the public as more than a cost of doing business.[17]

(c) *Law Society of BC v Penty*, 2015 LSBC 51, the lawyer billed a client for time spent by his legal assistant on the client's matter, without the client's consent, and then misled the Court about the legal assistant's involvement in the file in a review of his bill. The lawyer made a conditional admission of misconduct. He and the Law Society jointly submitted that an appropriate disciplinary action would be a four-month suspension. The panel accepted the proposal "with some reservations".[18] Of note, the lawyer had a professional conduct record which included two previous citations for dishonest behaviour, one of which had led to a two-month suspension.[19]

(d) *Law Society of BC v Samuels*, [1999] LSBC 36, while representing two young people on criminal charges in Provincial Court, the lawyer implied in submissions that he had recent contact with the mothers of his clients when, in fact, that was not true. He later wrote to the Court acknowledging his misrepresentation and apologizing for it; his apology was accepted by the judge. In the disciplinary proceedings which followed, the lawyer admitted that he had misled the Court and that his actions amounted to professional misconduct. The panel accepted the parties' joint proposal of a 90-day suspension.

(e) *Law Society of BC v Ahuja*, 2017 LSBC 26, the lawyer made misrepresentations to the court to cover up the fact that he had missed a flight to attend court because he had overslept his alarm. His personal conduct record disclosed previous issues with dishonest behaviour. The panel concluded that the lawyer's recurring misbehaviour called for a suspension; it ordered a one-month suspension.[20]

(f) *Law Society of BC v Albas*, 2016 LSBC 36, the Respondent was found to have committed professional misconduct with respect to an eight-paragraph citation that included allegations of misleading other counsel and failing to disclose material facts to the Court. He also acted in a conflict of interest, in a matter in which he had a personal interest. The panel imposed a four-month suspension, on a global basis, for the lawyer's professional misconduct.

[17] *Galambos* at paras 6 and 7.
[18] *Penty* at para 8.
[19] *Penty* at para 71.
[20] *Ahuja* at paras 36 and 38.

(g) *Law Society of BC v Edwards*, 2020 LSBC 57, the lawyer, a 12-year call, was found to have committed professional misconduct by, among other things, misusing the court process to harass and intimidate his ex-spouse in matrimonial proceedings. The lawyer's misconduct included filing two requisitions, purportedly by consent, although no such consent had been given. The lawyer was suspended from practice for two months.

[65] The Law Society relies on the following cases, which concern failures to comply with a court order, to provide guidance on the appropriate sanction for the Respondent's failure to serve the order made in the Remedies Application:

(a) *Law Society of BC v Kirkhope*, 2013 LSBC 35, the lawyer committed professional misconduct by withholding spousal support payments that were due to his client's ex-spouse, pursuant to a court order, to pressure the ex-spouse to settle the division of family property. The lawyer had a professional conduct record. He was, however, quick to recognize and rectify the misconduct in the case before the panel. The panel imposed a 45-day suspension.

(b) *Lessing*, the lawyer failed to report to the Executive Director of the Law Society eight judgments against him. He had also breached three court orders in his own family law proceedings, in which he was self-represented. He had been held in contempt of court for the breaches but had purged the contempt. Mr. Lessing was a senior lawyer with a disciplinary record. Poor mental health was a factor in his misconduct in the family law matter. The Review Panel found that the lawyer's mental health was a mitigating factor in determining the appropriate disciplinary action. It imposed a one-month suspension and a condition for the lawyer's return to practice. A fine was rejected as an appropriate disciplinary action because it "would not inspire confidence in the legal profession or the disciplinary process".[21]

(c) *Mayer and The Legal Profession Act*, 2020 MBLS 3, the lawyer failed to comply with directions given at a case planning conference, which resulted in his client's statement of claim being struck. The lawyer then failed to report these circumstances to his insurer. The disciplinary panel found that both omissions constituted professional misconduct. The lawyer had a professional conduct record. The disciplinary action was a one-month suspension.

[21] *Lessing* at para 17.

[66] With respect to the Respondent's failure to make reasonable inquiries about the Clients and his retainer, the Law Society relied on the following:

(a) *Gregory DA*, as discussed above, the lawyer acted for one of the Clients in a foreclosure proceeding. He was suspended for two months for failing to make reasonable inquiries about his client and about the subject matter and objectives of his retainer, and for failing to properly identify the client. The lawyer's work was performed mainly in 2018 and 2019, after the newspaper article had been published and during a Law Society investigation into the lawyer's retainer. The lawyer pressed ahead with work on the client's file despite warnings from the Law Society that the client's claim may be in furtherance of illegal activity. He did not make meaningful efforts to understand the transaction giving rise to the client's claim but "blind[ly] accept[ed]" it.[22] He expressed contempt for the Law Society's investigation. The lawyer was a senior member of the profession and had an unblemished professional record. He was affected by symptoms of major depressive disorder at the relevant times, although this was not found to have adversely affected his judgment or to have contributed to his misconduct.

(b) *Law Society of BC v Rai*, 2011 LSBC 2, the lawyer made conditional admissions of misconduct in connection with 12 real estate transactions involving fraudulent mortgages. He acted for various parties in the transactions. The lawyer was found to have committed professional misconduct by failing to disclose material facts to his lender clients, and by failing to provide adequate legal advice or protect the interests of lender and purchaser clients. At the time of the decision, the lawyer was a ten-year call, and had a professional conduct record with seven entries on it, one of which had led to a $3,000 fine. The panel accepted the recommendation of a three-month suspension, which was jointly proposed by the Law Society and the Respondent.

(c) *Re Moores*, 2013 CanLII 67543 (NL LS), the lawyer was cited for failing to make reasonable inquiries and for failing to adequately supervise legal assistants in connection with 12 suspicious mortgage transactions over a period of two years; 11 of these were determined to be fraudulent. The lawyer cooperated in the investigation, admitted misconduct in connection the transactions, and was characterized as being an unknowing participant in mortgage fraud. He was a senior member of the bar whose reputation was described as "impeccable" by referees.[23] There was, however, a three-item

[22] *Gregory DA* at para 29(h).
[23] *Re Moores* at paras 86, 121 and 129.

> professional conduct record for matters which had not been referred to a discipline panel. The Law Society sought a direction to cause the member to resign. In the alternative, the Law Society sought a suspension of 15 to 24 months. The panel imposed a three-month suspension. The case raised a matter of first impression in Newfoundland and Labrador.

[67] While not commenting on all cases cited by the Law Society, the Respondent distinguishes many of them, especially *Gregory*. The Respondent says *Gregory* involved various aggravating factors not present in the Respondent's case.

[68] The Respondent also submits that we ought to carefully consider the disciplinary action imposed in *Law Society of BC v Lee*, 2022 LSBC 5. The Citation in *Lee* arose, in part, from events during the continuation of the foreclosure proceedings on the condominium at issue in the Condo Action. Ms. Lee, while acting for the Clients, unintentionally misled the Court in October 2018 by saying that the mortgagors had been served with her clients application to have funds paid out of court when, in fact, the mortgagors had not been properly served.[24] The lawyer's error went undetected until July 2019, when she was interviewed by the Law Society. She then attempted to correct her misrepresentation in a letter to the applications judge but the Court registry declined to accept the letter for filing. The panel imposed a fine of $2,500. The fine accounted for the isolated nature of the misrepresentation, the fact that there was no evidence of prejudice to the mortgagors, the fact that the lawyer did not seek or receive a benefit, the lawyer's financial circumstances and lack of a professional conduct record, and the fact that the lawyer's misrepresentation was unintentional.[25]

Discussion

[69] The appropriate approach when there is a finding of more than one allegation and type of professional misconduct is to first determine whether a fine or a suspension is warranted.[26] The appropriate amount or duration is then determined.

The appropriate disciplinary action is a suspension, not a fine

[70] In the Panel's view, the extent, duration and nature of the Respondent's professional misconduct warrants a suspension from practice.

[71] The Respondent's professional misconduct is multidimensional. The Respondent failed to make reasonable inquiries about the Clients' retainer; this misconduct touched

[24] See decision on facts and determination at 2021 LSBC 31.
[25] *Lee* at paras 48 to 51.
[26] *Faminoff* at para 115.

three separate actions: the Condo Action, the Richmond House Action and the Vancouver House Action.[27] The Respondent also failed to uphold his duty of candour to the Court in two *ex parte* applications; there were three aspects to the breach of the duty of candour in each instance.[28] Another dimension of the misconduct is that the Respondent failed to respond to the Court's direction to serve the order in the Remedies Application.[29] On top of this misconduct, the Respondent breached the Rules by failing to comply with client identification requirements.[30]

[72] It is also relevant to the assessment of disciplinary action that the Respondent's misconduct unfolded over a period of years. The case does not involve an isolated instance of professional misconduct, such as was the case in *Lee*, with respect to the allegation of misleading the Court. Instead, the Respondent's inattention to his professional obligations began when he was retained in the summer of 2015 and continued for the next three years.

[73] Finally, there is the nature of the professional misconduct. It is serious. The seriousness of a lawyer's professional misconduct has been acknowledged as the "prime determinant" in assessing disciplinary action. The Panel notes the seriousness of the following conduct:[31]

(a) Misleading and not being candid with the Court is a matter of moment, due to the "high place" the duty of candour occupies in a lawyer's professional responsibilities; it must be respected "at all times";[32] its demands are particularly strict in *ex parte* applications. Given the exigencies of the duty of candour, breaches of it have been repeatedly described as "serious" matters. For example, the review panel in Faminoff characterised misleading the Court as "abhorrent" because courts, having no powers of inquiry or investigation, are vulnerable to being misled.[33] In Penty, the panel characterized the lawyer's dishonest billing and his misrepresentations to the Court during the assessment of his invoice as "not as serious as stealing money from a trust account; … [but] in the next level of seriousness".[34] Similarly, in Vlug 2014, the panel emphasized that knowingly filing documents that contain errors or false

[27] *F&D No. 1* at paras 240 – 253.
[28] *F&D No. 1* at paras 167 – 175 and *F&D No. 2* at paras 76 – 113.
[29] *F&D No. 1* at paras 196 to 204.
[30] *F&D No. 1* at paras 213 to 217.
[31] *Law Society of BC v Edwards*, 2020 LSBC 57 at para 18.
[32] *May BCCA* at paras 8 and 9.
[33] *Faminoff* at para 118; see also *Law Society of BC v Nejat,* 2014 LSBC 51 at para 37.
[34] *Penty* at para 88.

statements is a "very serious matter".[35] Galambos characterized recklessly failing to uphold the duty of candour as "a serious matter".[36]

(b) Failing to follow the Court's direction, the Respondent's persistent, prolonged and utter inattention to the Court's direction to serve the order in the Remedies Application[37] is a legally consequential omission. In our view, it is fairly characterized as serious misconduct. Such obliviousness, particularly in the context of an ex parte application, is injurious to public confidence in the lawyer's role in the administration of justice.

(c) Failing to make reasonable inquiries, the Respondent was imperceptive to the obviously problematic aspects of the facts and the evidence presented to him by the Clients in the Condo Action especially, but not exclusively, in the autumn of 2016.[38] The Respondent accepted, without question, the Clients' evolving narrative, despite its drift from what he was told when first retained and despite the narrative's increasingly bizarre features. The Respondent was complacent in his consideration of the documents.[39] His recklessness in failing to exercise even a modicum of critical judgment in these matters led him to place manifestly untrustworthy evidence before the Court in the Amendment Application and the Remedies Application.[40] The Respondent's actions manifest a significant failure of professional judgment.

The Respondent also failed to make even the most basic inquiries into the Clients' connection to the plaintiff in the Richmond and Vancouver House Actions. The Respondent's lack of diligence in this aspect of his retainer is abject; in *F&D No. 1*, we concluded that it was egregious, reckless and cavalier.[41]

In our view, the Respondent's misconduct in failing to make reasonable inquiries about the Clients and the purposes and objects of his retainer with them is most accurately characterized as obviously negligent. We agree with the Law Society that the decisions support the imposition of a suspension for the misconduct.[42]

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[35] *Vlug 2014* at para 32, quoting from *Law Society of BC v Foo*, [1997] LSDD No. 197.
[36] *Galambos* at para 6.
[37] *F&D No. 1* at para 202.
[38] *F&D No. 1* at paras 243 to 247.
[39] *F&D No. 1* at para 244.
[40] *F&D No. 1* at para 245.
[41] *F&D No. 1* at para 251.
[42] *Gregory DA*; *Rai*; *Re Moores*.

[74] We disagree with the suggestion, made by Respondent's counsel, that the Respondent was taken unawares by novel conditions, and that this diminishes the gravity of his misconduct. The context for the Respondent's misconduct between 2015 and 2018 may have been novel but his acts and omissions were not. The Respondent failed to uphold established professional obligations in ordinary ways. He failed to review documents. He did not ask questions about the Clients or the information they presented to him, when the need for inquiry was obvious. He led false evidence. He withheld relevant information from the Court in *ex parte* applications.[43] He made negligent misstatements to the Court and did not correct them. In short, the Respondent's breaches of his professional obligations were prosaic.

[75] In our view, the seriousness of the Respondent's combined misconduct warrants significant disciplinary action. Public confidence is served if serious misconduct is met by a commensurate disciplinary response. It is not served by disciplinary action that fails to reflect the scope, duration and gravity of the misconduct.

[76] In this case, a suspension is the form of disciplinary action most suited to maintaining public confidence. As the review board noted in *Nguyen*, a suspension sends a stronger message of disapprobation than does the imposition of a fine and is, therefore, a more suitable form of disciplinary action to address serious misconduct.[44]

[77] We disagree with Respondent's counsel that a fine would be appropriate because the evidence does not suggest that the Respondent caused harm to anyone. It would be more accurate to say that it is unknown on the evidence whether the Respondent's misconduct harmed any individual. As we said in *F&D No. 1*, the evidence gives ample reason to be concerned about the *bona fides* of the Client's claims;[45] a risk of harm inheres in litigation not brought for a proper purpose. We therefore do not view the absence of information about whether harm occurred as a mitigating factor in determining the appropriate disciplinary action.

[78] In any event, what is certain is that the Respondent's misconduct is inconsistent with the proper administration of justice and his obligations as an officer of the Court.

[79] We are persuaded that a suspension is required to reflect the gravity, multifaceted nature and continuance in time, of the Respondent's professional misconduct.

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[43] See *May BCCA* at para 70.
[44] 2016 LSBC 21 at paras 41 and 42.
[45] *F&D No. 1* at para 236.

The suspension will be of two months' duration

[80] Having determined that a suspension is appropriate, the next question is one of duration. In our view, the suspension should last for two months, for the following reasons.

[81] The seriousness, scope and extent of the misconduct supports a suspension of this length. In our view, a lesser suspension would be insufficient to acknowledge the range, number of instances, duration and gravity of the misconduct. Disciplinary action that fails to signal the seriousness of the proven misconduct would not fulfil the general deterrence function of disciplinary action or promote public confidence in professional regulation.

[82] A two-month suspension is, moreover, appropriate individualized discipline. Given the following factors, we are not persuaded that a longer suspension would be appropriate. The Respondent did not have a discipline history leading up to the demonstrated professional misconduct. There is compelling evidence that the Citation and the disciplinary proceedings, in and of themselves, have made an impact on the Respondent. The Respondent was a mid-career lawyer at the time of the events in the Citation, not a senior lawyer. His practice has evolved in a different direction since the events at issue in the Citation. The Law Society's concedes that specific deterrence is not a prominent concern in the case. The Law Society has no broader concerns with the Respondent's character.

[83] We have considered the Law Society's submission that a four-month suspension is necessary for general deterrence, and to demonstrate to the public that the Law Society condemns reckless lawyering, including lax client identification practices. Respectfully, we disagree. It is neither necessary nor appropriate to make the Respondent an object lesson to others by imposing disciplinary action that is not otherwise fit to the circumstances of the case.

[84] Finally, we will address the character evidence tendered by the Respondent. We have not found the reference letters to be of assistance in determining the appropriate disciplinary action. As other panels have noted, such letters tend to be of limited value because many lawyers will find referees who can sincerely attest to the lawyer's good character and laudable contributions to the profession and the broader community.[46] Lawyers, like other people, have their merits and demerits; they can excel in the profession in some respects and make serious mistakes in others. Attestations to a lawyer's worthiness tend to offer little assistance as to what is required to protect the public interest or facilitate the lawyer's rehabilitation.

[46] *Gregory DA* at paras 45 to 48.

ISSUE 2: WHAT COSTS AND DISBURSEMENTS ARE PAYABLE?

The Parties' Submissions

[85] The Law Society claims 194 units in costs (at $100 per unit), plus disbursements of $4367.71, comprised of Court Reporter's fees and courier and photocopying costs. The Respondent does not dispute the allocation of units or the disbursements but argues that both should be reduced by 50 percent of what the Panel otherwise would award because the Law Society did not prove each allegation in the Citation. The Respondent also argues that the case was somewhat of a "test case" concerning a lawyer's responsibilities in respect of the prosecution of builders' liens, and that this characteristic warrants a reduction in costs.

Discussion

[86] Rules 5-11(1) and (5) provide that the Panel may order a party to pay the costs of a hearing, and disbursements reasonably incurred, and may set a time for payment.

[87] Rule 5-11(3) provides that, in calculating the costs payable, the Panel must have regard to the tariff of costs set out at Schedule 4 to the Rules. Rule 5-11(4) provides that the Panel may order costs in an amount that departs from the tariff, if the Panel is satisfied that it is reasonable and appropriate to do so.

[88] The Citation made eight allegations against the Respondent, although allegations 3 and 4 were set out in the alternative. As noted above, the Law Society proved allegations 1 to 3, 5 and 6.

[89] Allegations 7 and 8 of the Citation, which alleged that the Respondent committed professional misconduct, or breached the Rules, in connection with the Law Society's investigation of his retainer with the Clients, were dismissed. Evidence and argument related to those allegations absorbed significant hearing time in the Facts and Determination phase of the proceedings.

[90] Under item 15 of the tariff, attendance at hearing, the Law Society has claimed 150 units. We award 120 units for item 15. In our view, the reduction is warranted by the Law Society's failure to prove the investigation-related allegations in the Citation.

[91] Apart from item 15, the Law Society is entitled to the units claimed in its bill of costs. We disagree with the characterization of the proceedings as a "test case", for the reasons discussed above.

[92] The Law Society therefore will have costs assessed at 164 units. The disbursements are reasonable and are awarded as claimed.

[93] The Respondent will have six months from the date of issuance of these reasons, or such other period of time as the parties may agree, to pay the costs and disbursements.

ORDER:

[94] The Respondent is suspended from the practice of law for two consecutive months. The suspension will commence on June 1, 2024, subject to any application under Rule 5-12 to change the start date.

[95] Within six months of the date of this decision on disciplinary action, or within such other time as the parties may agree, the Respondent will pay the Law Society costs and disbursements of $20,767.81.