THE LAW SOCIETY OF ALBERTA
APPEAL PANEL REPORT

IN THE MATTER OF an appeal to the Benchers of the Law Society of Alberta by Navdeep Singh Virk, a Member of the Law Society, pursuant to section 75 of the *Legal Profession Act* from the sanction imposed by the Hearing Committee in a report dated January 6, 2014

A. Introduction

1. On November 18, 2014, a quorum of seven Benchers (the "Appeal Panel") convened at the Law Society of Alberta ("LSA") office in Edmonton to consider the appeal made by Navdeep Singh Virk of a Hearing Committee decision dated January 6, 2014.

2. Before the Hearing Committee, Mr. Virk agreed to the facts appended to the Hearing Committee Report and admitted conduct deserving of sanction in relation to the following citations:

> 1. It is alleged that you failed to respond to Legal Aid Alberta in a timely manner, and that such conduct is deserving of sanction.
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> 2. It is alleged that you failed to serve your client T.W. in a conscientious, diligent and efficient manner by: failing to respond to T.W. in a timely manner; failing to keep her informed as to developments on her file; and failing to use diligent efforts to expedite the litigation process, and that such conduct is conduct deserving of sanction.
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> 4. It is alleged that you failed to serve your client C.G. in a conscientious, diligent and efficient manner by failing to respond to C.G. in a timely manner; and failing to keep her informed as to developments on her file and that such conduct is conduct deserving of sanction.
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> 6. It is alleged that you failed to serve your client M.W. in a conscientious, diligent and efficient manner by failing to respond to M.W. in a timely manner; and failing to keep him informed as to developments on his file, and that such conduct is conduct deserving of sanction.

3. The Hearing Committee found that the Agreed Statement of Facts and admission of guilt were in a form acceptable to it pursuant to s. 60 of the *Legal Profession Act*, R.S.A. 2000,l c. L-8 (the "LPA") and then heard evidence from Mr. Virk, and argument from counsel for the LSA and from Mr. Virk regarding sanction.

4. The LSA sought a 30 day suspension. Mr. Virk asserted that a reprimand was appropriate. The Hearing Committee concluded that "the public interest would be protected and confidence in the profession maintained through a suspension of 10 days". The suspension

was delayed to February 1, 2014 to give Mr. Virk time to ensure existing client matters were properly looked after and court commitments fulfilled. Mr. Virk was also directed to cooperate with Practice Review and to pay costs in the amount of $5,000.00.

5. Mr. Virk subsequently retained counsel who applied on his behalf to the Hearing Committee for a stay of its Order and appealed the 10 day suspension pursuant to s. 75 of the LPA. A stay was granted on the condition that Mr. Virk cooperate with Practice Review, which he has done. Although Mr. Virk does not seek to avoid the costs ordered by the Hearing Committee, those costs have not been paid pending the outcome of this appeal.

6. Mr. Virk did pay the costs for preparation of the appeal hearing record as required by s. 74(5) of the LPA.

7. The grounds upon which Mr. Virk seeks to have the suspension set aside are that "[t]he Hearing Committee's decision on sanctions was not supported by the evidence; not based on relevant factors; disproportionate to the findings; unduly harsh; failed to consider mitigating factors; and was inconsistent with precedent."

8. The appeal is dismissed for the reasons that follow.

B. Jurisdiction and Preliminary Matters

9. The following Exhibits were entered by consent:

Exhibit 1 - Hearing Committee Report dated January 6, 2014.

Exhibit 2 - Notice of Appeal dated January 15, 2014.

Exhibit 3 - Letter appointing the Appeal Panel signed by the President of the LSA November 16, 2014

Exhibit 4 - Notice to Attend dated August 20, 2014, with receipt acknowledged by Mr. Virk's counsel. In accordance with s. 75(4) of the LPA, the Notice showed the time and place of the appeal hearing and made Mr. Virk aware of his right under s. 78(2) of the LPA to apply to have the hearing held in private.

Exhibit 5 - Letter signed by the Deputy Executive Director & Director, Regulation of the LSA October 14, 2014 confirming service of private hearing application notices on persons required to receive them under Rule 96(2)(a) of the Rules of the Law Society of Alberta (the "Rules").

Exhibit 6 - Transcript of proceedings before the Hearing Committee on September 5 and 6, 2013.

Exhibit 7 - Record of all exhibits (numbered 1 through 159) entered in the proceedings before the Hearing Committee.

10. Mr. Virk's counsel was not formally served with a copy of the Hearing Committee Report or the Hearing Record in accordance with s. 76(4)(b) of the LPA, but advised the Appeal Panel that he had received copies from Mr. Virk and took no issue with this technical breach.

11. The Parties agreed the Appeal Panel had jurisdiction to hear Mr.Virk's appeal and that they had no concerns with the composition of the Panel. No party applied to have the appeal held in private. As a consequence, the appeal proceeded in public.

C. Standard of Review

12. There was no dispute between the parties that on a sanction appeal, an appeal panel should not interfere with the sanction imposed by the hearing committee unless the sanction is demonstrably unfit or was based on an error in principle.

13. In *R. v. Shropshire,* [1995] 4 S.C.R. 227, the Supreme Court of Canada (per Iacobucci J.) described the test in the context of an appeal of a criminal sentence as follows at para 47:

> I would adopt the approach taken by the Nova Scotia court of Appeal in the cases of *R. v. Pepin* (1990), 98 N.S.R. (2d) 238, and *R. v. Muise* (1994), 94 C.C.C. (3d) 119. In *Pepin*, at p.251, it was held that:
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> > …in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence, we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.

14. The same Court subsequently explained in *R v. C.A.M.*, [1996] 1 S.C.R. 500 at paras 91 and 92:

> This deferential standard of review has profound functional justifications. As Iacobucci J. explained in *Shropshire*, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both *Shropshire* and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. ... The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against

> the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.
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> Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. [citations omitted] But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. [citations omitted] Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

15. Although we are not dealing here with a criminal sentence, the same principles apply in the LSA regulatory context on a sanction appeal under s. 75 of the LPA. This was confirmed in *Law Society of Alberta v. Fong*, 2011 ABLS 24 at para 62, citing *R. v. Shropshire* with approval.

D. The Hearing Committee Decision

16. After setting out the evidence provided by Mr. Virk and summarizing the submissions of the parties in relation to sanction, the Hearing Committee described the fundamental purpose it aimed to achieve with the sanction imposed as follows:

> …The fundamental purpose of the sanctioning process is to ensure the public is protected and that the public maintains a high degree of confidence in the legal profession.

17. This is consistent with the primary purpose of disciplinary proceedings as found in s. 49(1) of the LPA and with the principles aptly summarized by the appeal panel in *Law Society of Upper Canada v. Kazman*, [2008] LSDD No. 46 at paras. 73 to 75, aff'd 2011 ONSC 3008:

> The over-arching philosophy applicable to the deliberations of all law society discipline tribunals has been famously enunciated in *Bolton v. Law Society,*

[1994] 1 W.L.R. 512 (C.A.), beginning at page 518. It is reproduced here with emphases added (but it should be read through):

> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.
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> It is important that there should be a full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards of his profession in order to punish him for what he has done and to deter any other solicitor tempted to behave the same way *[i.e., general deterrence]*. Those are traditional objects of punishment. But often the order is not punitive in intention. Particularly is this so where a criminal penalty has been imposed and satisfied. The solicitor has paid his debt to society. There is no need, and it would be unjust, to punish him again. In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence *[i.e., specific deterrence]*. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that the experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitor's profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession, it is often necessary that those guilty of serious lapses are not only expelled but denied readmission...The profession's most valuable asset is its collective reputation and the confidence which that inspires.
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> Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has

> learned his lesson and will not offend again…and [he] may also be able to point to real efforts to…redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness...The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

A criminal court judge is concerned primarily with specific deterrence, general deterrence, and rehabilitation. She is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the accused licensee's peer group – the legal profession. According to *Bolton*, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law society's discipline process. It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind.

The principles in *Bolton* and other relevant considerations as to penalty may be summarized as follows:

i. The Law Society regulates the legal profession in the public interest.

ii. Disciplinary orders are directed toward four main purposes:

   a) Specific deterrence;

   b) General deterrence;

   c) In appropriate cases, improved competence, rehabilitation and or restitution; and

   d) Most important of all, maintaining public confidence in the legal profession.

iii. Public confidence in the legal profession is more important than the fortunes of any one lawyer or paralegal.

iv. Public confidence is based on such matters as a licensee's credibility, integrity, character, repute, and fitness. While mitigating factors and compassion for the licensee have their place, they should not compromise an impartial adjudication of those matters.

v. The ability to practise law or provide legal services is not a right but a privilege. (*Universal Truth*)

[Emphasis is original]

18. The Hearing Committee set out the general factors to be taken into account in sanctioning, referring to paragraph 60 of the LSA Hearing Guide as follows:

> 60. A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the [sanctioning] process as outlined above.
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> a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members
>
> b) Specific deterrence of the member in further misconduct
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> c) Incapacitation of the member (through disbarment or suspension)
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> d) General deterrence of other members
>
> e) Denunciation of conduct
>
> f) Rehabilitation of member
>
> g) Avoiding disparity with the sanctions imposed in other cases
>
> In one way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.

19. The reasons for the Hearing Committee's decision to impose a 10 day suspension were thereafter relatively brief. The Committee quoted sub-paragraph 61(a) of the Hearing Guide, and then summarized its analysis as follows at paras 76 - 78:

> The evidence on all of the complaints that Mr. Virk admitted guilt to are similar. It showed a lack of diligence, a lack of appreciation for the client's (sic) needs, admitted failures to serve the client, particularly clients in a vulnerable position. There is some evidence in the materials that some of these clients suffered financial loss as a result of the delays in prosecuting their matter to conclusion. There is evidence in the materials that there continued to be ongoing delay in dealing with matters even after the LSA became involved. In relation to Citation 2, Mr. Virk suggested in correspondence with the LSA, in his submissions to the Hearing Committee and upon questioning by the Hearing Committee that because the Court did not direct him to prepare the Order, that it was open to him to take the position that opposing counsel should have. This is disingenuous. The Rule clearly provides that the successful party prepares the Order unless the Court otherwise directs. Even though Mr. Virk admitted guilt in relation to this citation, he continued to deflect ultimate responsibility. All of these matters

caused the Hearing Committee concern relative to governability. These are all aggravating factors.

In mitigation, Mr. Virk does not have a disciplinary record. He has sought out the assistance of and is participating in Practice Review. He entered into an Agreed Statement of Facts, saving time and saving witnesses from having to attend to testify.

Taking into account all of the foregoing factors, the Hearing Committee concluded that the public interest would be protected and confidence in the profession maintained through a suspension of 10 days. In consideration of Mr. Virk's existing clients and court commitments, the suspension shall not commence until February 1, 2014.

E. Argument

20. Mr. Virk (through his counsel) argues that the Hearing Committee decision was not supported by the evidence, which he says is reflected in the Hearing Committee Report which does not adequately explain the reasons for the sanction imposed. More specifically, Mr. Virk asserts that the Committee made errors in principle in failing to address the specific factors set out in sub-paragraphs 61(b), (c), (d), (e), (f), and (g) of the LSA Hearing Guide as well as the special circumstances set out in sub-paragraph 61(h), which ought to have mitigated against a suspension in his case.

21. He characterizes his misconduct as involving mere failures to serve his clients, highlighting the fact that there were no findings of dishonesty or breach of trust. Mr. Virk argues that the 10 day suspension represents a departure from the sanction of reprimand normally ordered in such "failure to serve" cases leading to a lack of uniformity which is one of the factors the Hearing Committee recognized it needed to consider, but didn't.

22. Leaving aside these asserted errors on the evidence and in principle, Mr. Virk also argues that the suspension should be set aside because it is so far outside the range of sanctions in comparable cases as to be demonstrably unfit. He referred the Appeal Panel to numerous cases he argued were comparable on the facts: *Law Society of Alberta v. Renz*, [2007] LSDD No. 140; *Law Society of Alberta v. Lynham*, [2013] LSDD No. 96; *Law Society of Alberta v. Hansen*, [2013] LSDD No. 63; *Law Society of Alberta v. McCullough*, [2013] LSDD No. 61; *Law Society of Alberta v. Condin*, [2012] LSDD No. 66; *Law Society of Alberta v. Fair*, [2012] LSDD No. 47; *Law Society of Alberta v. Westra*, [2010] LSDD No. 204; *Law Society of Alberta v. Holder*, [2009] LSDD No. 87; *Law Society of Alberta v. Wald*, [2007] LSDD No. 147;

Law Society of Alberta v. Warrington, [2014] LSDD No. 118; *Law Society of Alberta v. Hnatiuk*, [2013] LSDD No. 215; and *Law Society of Alberta v. McConnell*, [2014] LSDD No. 116.

23. Counsel for the LSA submits that the Hearing Committee was not required to systematically address each and every factor listed in the Hearing Guide in its reasons. He argues that it is evident from the Hearing Committee Report and the Record that the Hearing Committee identified and addressed the aggravating and mitigating factors which led to the conclusion it reached, and that there is nothing in the Appeal Record, including the Hearing Committee's Report, to suggest that the Hearing Committee actually overlooked relevant evidence. He argues that there is, therefore, no error in principle which would justify the Appeal Panel interfering with the 10 day suspension imposed.

24. In answer to Mr. Virk's submission that the 10 day suspension was demonstrably unfit, counsel for the LSA asserts that Mr. Virk is inappropriately minimizing the nature and effect of his misconduct. He points out that the Hearing Committee had the benefit of submissions in relation to dozens of prior sanction decisions (referenced at para. 70 of its Report) against which to compare the sanction imposed in Mr. Virk's case, including the hearing committee decision in *Law Society of Alberta v. McCullough* [2013] L.S.D.D. No. 61 in which the lawyer received a 30 day suspension for conduct involving failures to serve clients. It is the LSA's position that the 10 day suspension in Mr. Virk's case falls within the known, acceptable range of sanctions.

25. Neither of the parties referred to any hearing committee decisions in which the conduct in question raised concerns about the lawyer's governability.

F. Analysis

1. Did the Hearing Committee make an error in principle in failing to properly consider any relevant factor or factors?

26. The Appeal Panel is unable to conclude that any error in principle was made.

27. This is not to diminish the obligation of a hearing committee to provide reasons that are sufficiently intelligible to permit a meaningful review on appeal.[1] It is the obligation of all hearing committees to do so unless "…the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances" (*R v. Barrett,* [1995] 1. S.C.R. 752

[1] And also to tell the losing party why he has lost and to satisfy the public that justice has been done: *R. v. Sheppard,* [2002] 1 S.C.R. 869 at para. 46.

at p. 753). Rather, it is to say that having regard to all of the circumstances of this case, the functional purpose of explaining the result has been met.

28. As stated by the Supreme Court of Canada (per Binnie J.) in *R. v. Sheppard,* [2002] 1 S.C.R. 869 at para 23:

> …We are speaking here of the articulation of the reasons rather than of the reasoning process itself. The challenge for appellate courts is to ensure that the latter has occurred despite the absence, or inadequacy, of the former.

29. The Appeal Panel is satisfied that there is a sufficient basis in the Hearing Committee Report, having regard to the Hearing Record, to discern the Hearing Committee's thinking and to justify the sanction it imposed.

30. The Hearing Committee did not quote paragraph 61 of the Hearing Guide in its totality or specifically address each and every one of the factors and considerations listed therein independently. But, it was not required to do so. What the Hearing Report (to which was appended the 40 page Agreed Statement of Facts) and Record reveal is that the Hearing Committee responded to the live issues and the parties' key arguments as it was required to do (*R v. Walker*, [2008] 2 S.C.R. 245 at para 20).

31. Mr. Virk was admitted to the Bar in 2007. He commenced full time practice as a sole practitioner in August 2009. The conduct deserving of sanction admitted by Mr. Virk began shortly thereafter in 2010 and continued through 2012, even after both Legal Aid and the LSA had received complaints from Mr. Virk's clients about his failure to serve and communicate with them.

32. To be more specific, in 2010, Mr. Virk represented three vulnerable individuals through Legal Aid. They filed complaints with Legal Aid alleging that Mr. Virk failed to keep them informed, respond to their inquiries and perform the work he indicated he would do.

33. Legal Aid wrote to Mr. Virk six times between October 20, 2010 and May 6, 2011 asking for his response to the complaints. He admits that he did not substantively respond. In June, 2011, Legal Aid advised Mr. Virk that the three complaints were being referred to the Roster Committee and that a hearing had been set for July 6, 2011. On June 23, 2011, Mr. Virk sent a letter to Legal Aid advising he would not be attending the hearing and only then did he provide his replies to each of the complaints. The Roster Committee proceeded with its hearing on July 6, 2011 without Mr. Virk in attendance. It determined that he should be removed from the Legal

Aid roster. He was given until December 31, 2011 to resolve and bill his other Legal Aid files, following which all of his outstanding Legal Aid Certificates were to be cancelled.

34. The CEO of Legal Aid also reported the matter to the LSA.

35. In responding to the Legal Aid complaint to the LSA, Mr. Virk equivocated. He acknowledged on the one hand that his failure to respond to Legal Aid was not excusable, but on the other asserted that the eight months it took him to respond to the inquiries of Legal Aid was reasonable in the circumstances given the other client and court commitments he had at the time. He did not acknowledge the negative effect his failure to respond to Legal Aid had on its ability to preserve the confidence of the public in the quality of the legal services it provides until after Citation 1 was directed to a hearing on April 12, 2012.

36. As noted in the Hearing Committee Report, the hearing in relation to this first citation was postponed at Mr. Virk's request because additional complaints had in the meantime been received by the LSA from three more clients which ultimately resulted in Citations 2, 4 and 6 being directed to hearing. Mr. Virk understandably sought to have all of the Citations dealt with at one time.

37. A pattern of neglect in protecting his clients' interests and responding to their inquiries was demonstrated by Mr. Virk in the latter cases as well. In each case, Mr. Virk took many months, if not years, to complete the work he was retained to do. In each case, he failed to keep his clients informed and compromised their interests as well as their faith in the legal profession. It was not until complaints were made on March 22, 2011 and May 17, 2012, respectively, by T.W., and on June 12, 2011 by C.G. that Mr. Virk attended to their outstanding needs. Even then, the Hearing Committee found ongoing unreasonable delay on Mr. Virk's part.

38. In C.G.'s case, it took from January 10, 2010, when Legal Aid appointed Mr. Virk to assist C.G. in completing her divorce and dealing with outstanding custody and maintenance issues, until March 2012 to enter a Divorce Judgment. C.G.'s husband did not defend the action and had been noted in default prior to Mr. Virk's retainer.

39. Despite his admissions of conduct deserving of sanction, Mr. Virk maintained in his submissions to the Hearing Committee that in T.W.'s case, opposing counsel should have prepared the delayed orders. In doing so he deflected his own responsibility for failures

between September 10, 2010 and April 27, 2011 and between March 16, 2012 and October 5, 2012 to keep T.W. informed and use diligent efforts to provide her with filed orders for child support, expenses and arrears which she needed to obtain payment from her ex-husband.

40. M.W. made his complaint in December 15, 2011, after finding himself in contempt of a Court Order (the final provisions of which he had not been told about), having a lien placed on his house, and waiting over six months for Mr. Virk's promised advice about how best to proceed. M.W. learned in May, 2011, that he had failed to make certain retroactive child support payments he had been ordered to make. He made immediate arrangements directly with opposing counsel to rectify this. He then asked for Mr. Virk's advice about dealing with the lien. Mr. Virk suggested on May 17, 2011 that M.W. consider negotiating a lump sum settlement with his ex-wife. Mr. Virk said he would get back to M.W. within 2 - 3 days with further advice in this regard. M.W. followed up, but heard nothing further before turning to the LSA for help.

41. Mr. Virk's evidence and the factors which he argues ought to have mitigated against a suspension were all summarized in the Hearing Committee Report.[2] So too, however, were the Committee's concerns about: a) Mr. Virk's clients having been in particularly vulnerable positions;[3] b) Mr. Virk's lack of diligence and appreciation for his clients' needs;[4] c) the evidence of financial loss suffered by T.W. as a result of Mr. Virk's inattention;[5] d) continued delay even after the LSA had become involved;[6] and, e) continued deflection of ultimate responsibility in relation to at least one of the Citations.[7] These findings were supported by the evidence and caused the Hearing Committee to specifically express concern about Mr. Virk's governability.[8]

42. The Appeal Panel can find no relevant evidence or factor that the Hearing Committee overlooked. No error in principle was made warranting interference with the Hearing Committee's decision to impose a 10 day sanction.

[2] See paras 58, 59, 68 and 70. The Hearing Committee identified the following mitigating factors raised by Mr. Virk in his submissions in relation to sanction: there were no misleading or dishonesty factors at play and no breach of trust (s. 61(b) and (g) of Hearing Guide); he had changed his practice setting from a sole practice to an office sharing arrangement (s. 61(h)); despite admitted failures, all clients eventually received what they were entitled to (s. 61(c)); he had been involved in a major trial (from May 2 - 12, 2011) and had some trying times in his personal life during the relevant time period (s. 61(h)); he had no discipline record (s. 61(h)); he had co-operated as fully as he could (s. 61(h)); and, he had apologized to the complainants (s. 61(h)). He also asserted that the case summaries he had provided did not justify a suspension, that there was little risk of recurrence and that a suspension would impact him financially.
[3] Para 76 and as per s. 61 (a) and (c) of the Hearing Guide
[4] Para 76 and as per s. 61(b)
[5] Para 76 and as per s. 61(c) and (d)
[6] Para 76 and as per s. 61 (b), (e) and (f)
[7] Para 76 and as per s. 61 (h)
[8] Para 76 and as per s. 61 (a)(iv)

2. Is the sanction demonstrably unfit?

43. No.

44. Although it is the case that a hearing committee must consider whether a contemplated sanction falls within an acceptable range of sanctions, it is also the case that:

> Although most participants in the discipline process might agree that similar penalties should be imposed for similar cases of misconduct, the penalties imposed for similar misconduct differ widely, both within and among jurisdictions. This is largely due to the fact that one of the main purposes of the process is to protect the public. It may be entirely appropriate that a lawyer who has proven to be incorrigible be disbarred for the same conduct for which a different lawyer is reprimanded if the discipline hearing panel is reasonably satisfied that the likelihood of recurrence is minimal in the latter case.
>
> G. MacKenzie in Lawyers & Ethics: Professional Responsibility and Discipline, looseleaf ed. (1993 as updated)

45. It is for this reason, and because a hearing committee is in the best position to determine what is a just and appropriate sanction in all of the circumstances, that the discretion of the Hearing Committee cannot be interfered with lightly.

46. Mr. Virk provided both the Hearing Committee and this Appeal Panel with a number of decisions which he submits establish that a reprimand is the only acceptable sanction in a "failure to serve" case. But, his argument illuminates the danger in approaching the sanctioning exercise an any formulaic basis, and it is contrary to the point made at paragraph 65(d) of the Hearing Guide that "*[t]here is no single correct sanction: R v. Shropshire (1995), 102 C.C.C. (3d) 193 at paragraph 48 (S.C.C.)*"

47. Every hearing committee must assess the unique body of evidence it receives and exercise its best judgment about the likelihood of recurrence in order to protect the public interest and the reputation of the profession as a whole. This involves the difficult task of assessing the lawyer's appreciation of the responsibility that comes with the privilege of membership in the legal profession, which, in turn, informs the assessment of the risk of recurrence.

48. Here, the Hearing Committee expressed concern about Mr. Virk's appreciation for the nature and consequences of his failures. Mr. Virk's breaches were neither minor nor isolated. He admitted a concerning pattern of neglect, but did not satisfy the Hearing Committee that he fully appreciated the duties owed to his clients and his responsibility to uphold the standards

and reputation of the legal profession as a whole. To paraphrase the English Court of Appeal in *Bolton*, the Hearing Committee plainly perceived the experience of suspension as necessary to make Mr. Virk meticulous in his future compliance with the required standards.

49. Contrary to Mr. Virk's arguments, suspensions are not unheard of in cases where governability concerns arise. The hearing committee decision in *Law Society of Alberta v. Hermo Pagtakhan*, 2007 LSA 14 at page 17 is instructive. In that case, a lawyer with no prior discipline record was suspended for 30 days and ordered to pay costs based on the hearing committee's "greatest concern" about:

> …the member's apparent lack of understanding that his obligation to his clients did not end once he thought that the work had ended, but rather when he had fully reported to his clients. The member clearly did not understand the comfort a client receives by a proper reporting letter and documentation that their home has been successfully transferred.
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> The second concern that the Hearing Committee had was that the member was a hostage to his own self-defeating conduct. He would not respond to his clients or complete the job (which includes reporting to clients and forwarding copies of all documentation) as result of being too busy. …
>
> The third concern that the Hearing Committee found was his procrastination in responding to the Law Society. He failed to appreciate the priority that members must demonstrate in responding to their governing body. Failure to appreciate this principle always raises issues about a member's governability.

50. In Mr. Virk's case, the LSA did not lead evidence in relation to the citations concerning the timeliness of Mr. Virk's responses to the LSA regarding the complaints, but other factors raised governability concerns.

G. Decision

51. Mr. Virk's appeal is dismissed.

52. The stay granted by the Hearing Committee is hereby set aside and Mr. Virk shall be suspended effective January 15, 2015 for a period of 10 days. This should give him time to ensure client matters are properly attended to before his absence.

53. Mr. Virk is also directed to pay the costs ordered by the Hearing Committee in the amount of $5,000 and costs for this appeal in the amount of $750 (see paras 18 (b) and (d) of the Member Conduct Appeal Guideline) by January 30, 2015.

54. This report and the exhibits entered in this appeal shall be made available to the public, subject to redaction to protect privileged and confidential personal information.

55. Notice of this decision shall be published by the Executive Director in accordance with Rule 106 of the Rules of the LSA.

56. Finally, we wish to acknowledge the excellent written and oral submissions provided by counsel for both parties. Their submissions were of great assistance to the Appeal Panel in resolving the issues raised on this appeal.

Dated at Edmonton, Alberta as of December 8, 2014.

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Anne Kirker, Q.C. (Chair)

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Glen Buick, BA

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Rose Carter, Q.C.

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Brett Code, Q.C.

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Robert Dunster, BA

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Derek Van Tassell, Q.C.

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Anthony Young, Q.C.