2005 LSBC 11
Report issued: April 4, 2005
Oral Reasons: March 9, 2005
Citation issued: October 20, 2003

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Re: Lawyer 5

Respondent

Decision of the Hearing Panel

Hearing date: March 9, 2005

Panel: Dirk Sigalet, Q.C.

Counsel for the Law Society: Gerald A. Cuttler
Counsel for the Respondent: Dennis Murray, Q.C.

Background

[1] On October 20, 2003, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation as amended directed that this Panel inquire into the Respondent's conduct as follows:

1. That you took $15,000.00 from your client, D.H., in 1997 without documentation that these funds were gifted to you.

2. That you took $10,000.00 as Executor's Fees from the Estate of J.M.H. without rendering a bill, contrary to Rule 835.

3. That you received trust funds from your client, D.H., but did not deposit them forthwith into a pooled or separate trust account, contrary to Rule 803.

4. That you failed to record each trust transaction regarding your client, D.H. within seven (7) days after the transaction, contrary to Rule 844 and Canon 3(8) of the *Professional Conduct Handbook.*

5. That you failed to record each non-trust transaction regarding your client, D.H., within thirty (30) days after the transaction, contrary to Rules 825, 843 and 844 and Canon 3(8) of the *Professional Conduct Handbook.*

6. That you co-mingled money belonging to your client, D.H., with your own money in a bank account, contrary to Canon 3(8) of *Professional Conduct Handbook.*

7. That you failed to preserve adequately and keep safe valuables belonging to your client, D.H., by failing to maintain with your accounting records a complete listing of the valuables of this client in your

custody, contrary to Chapter 7.1, Ruling 5 of the *Professional Conduct Handbook*

8. That you caused funds to be removed from the Estate of J.M.H. for the use of your client, D.H., on the basis that the money would be invested until required for your client D.H., but you did not invest the funds but rather left them in a non-interest bearing account.

9. That you accepted gifts totaling $30,000.00 from your client, D.H., in 1996 and 1997 when you knew that all or part of these gifts were derived from the funds which you caused to be removed from the Estate of J.M.H. for the use of your client, D.H., contrary to Chapter 2, Ruling 1, and Chapter 6, Rulings 1 and 2 of the *Professional Conduct Handbook*.

[2] Pursuant to Rule 5-2(2), the Respondent agreed to a Panel consisting of a single Bencher.

[3] The citation comes before this Panel as a conditional admission of a disciplinary violation and consent to specific disciplinary action pursuant to Rule 4-22. The Respondent admits that his conduct set out in counts 1, 3 through 7 and 9 constitutes conduct unbecoming a member of the Law Society and consented to the following disciplinary action:

(a) a reprimand;

(b) a fine in the amount of $3,500; and

(c) costs in the amount of $2,500, both costs and fine payable over a 24 month period.

[4] An Agreed Statement of Facts was filed as Exhibit 1 in these proceedings. It provides as follows:

1. [A Lawyer] is a barrister and solicitor and has been a member of the Law Society of British Columbia since May 14, 1963.

2. The Respondent was appointed co-executor of the estate of Dr. H who died February 19, 1982. Dr. H's will provided that in any matter of dispute pertaining to his estate the decision of the Respondent would be binding upon his estate and the other co-executors.

3. DH was Dr. H's widow. DH died on March 18, 1997.

4. Mr. and Mrs. [the lawyer] were friends with Dr. and Mrs. H from the mid-1970's. Following Dr. H's death in 1982, the Respondent and his wife became closer friends of Mrs. H, until her death in 1997, including assuming much of the responsibility for arranging her care and assisting her with her day to day affairs from the fall of 1995 to March 1997.

5. Dr. H's will granted a life estate in the residue of his estate to DH and provided a power to encroach upon the capital for her benefit.

6. On February 24, 1993 Mrs. H appointed the Respondent as her attorney by way of a written Power of Attorney.

7. On or about September 26, 1995 the Respondent and Mrs. H decided to encroach upon the capital of Dr. H's estate in the amount of $96,000.00. On September 26 and 27, 1995 the Respondent sent letters to Mr. SH and [the Bank] regarding this decision.

8. As a result, [the Bank] provided an encroachment cheque to Mrs. H in the sum of $96,000.00, delivered on October 4, 1995. This cheque was deposited to Mrs. H's personal chequing account.

9. The $96,000.00 was intended to deal with anticipated home care and general spending needs of Mrs. H, as she had been injured and, as of October 1995, needed home care and some discretionary

money.

10. On or about October 4, 1995, [the Bank] delivered a cheque in the amount of $96,000.00 payable to DH, to the Respondent.

11. The Respondent deposited the $96,000.00 in Mrs. H's personal chequing account (the "Account") which was a non-interest earning account. The Respondent attempted to convince Mrs. H to consider placing the funds in some form or readily available interest bearing investment, but Mrs. H was firm that she did not wish to do that and wanted to leave the money where it was.

12. Prior to the deposit of $96,000.00, the balance in Mrs. H's Account was $8,406.87.

13. On October 4, 1995 (the date the $96,000.00 was deposited in Mrs. H's Account) Mrs. H also had securities valued at approximately $56,000.00 at [the Bank].

14. The funds were gradually expending during Mrs. H's lifetime, i.e.: until March 8, 1997 at which time the balance in Mrs. H's Account was approximately $2,700.00.

15. On October 6, 1995 Mrs. H signed a cheque on the Account made payable to the Respondent in the amount of $2,500.00. This cheque bears no notation. This cheque was deposited to the Respondent's personal bank account on October 10, 1995.

16. On March 6, 1995 Mrs. H signed a letter addressed to the Respondent. She stated, *inter alia*: "During this year 1996, I confirm my intentions to make a gift to you and your dear wife, M, of $15,000.00.

17. On April 10, 1996 Mrs. H signed a cheque on the Account made payable to the Respondent in the amount of $6,000.00. The cheque bears no notation. This cheque was deposited to the Respondent's personal bank account on April 10, 1996.

18. On May 31, 1996 the Respondent and Mrs. H signed a written authority authorizing [the Bank] to issue a cheque from Dr. H's estate to the Respondent in the amount of $10,000.00. This written authority was delivered to Ms. K on June 7, 1996. The Respondent advised his personal accountant, Mr. WC that the amount was for personal representative executor fees and to include this sum in his 1996 Personal Income Tax statement. This sum was included as personal income on the Respondent's personal income tax return. The Respondent advised the Dr. H Estate accountant, RD of this payment.

19. On September 30, 1996 Mrs. H signed a cheque on the Account made payable to the Respondent in the amount of $4,000.00. The cheque bears no notation. This cheque was deposited to the Respondent's personal bank account on October 1, 1996.

20. On October 30, 1996 Mrs. H signed a cheque on the Account payable to the Respondent in the amount of $400.00 with a notation "reimbursement" noted thereon. This cheque was deposited to the Respondent's personal bank account on November 1, 1996.

21. On November 9, 1996 Mrs. H signed a cheque on the Account made payable to the Respondent's wife in the amount of $2,100.00 with the notation "t.v. and clothes" noted thereon. This cheque was deposited to the Respondent's personal bank account on November 14, 1996.

22. On November 14, 1996 Mrs. H signed a cheque on the Account made payable to the Respondent's wife in the amount of $1,000.00 with the notation "linen and medical supplies" noted thereon. This cheque was deposited to the Respondent's personal bank account on November 14, 1996.

23. On November 23, 1996 Mrs. H signed a cheque on the Account made payable to the Respondent's

wife in the amount of $1,000.00 with the notation "clothes and bathroom accessories" noted thereon. This cheque was deposited to the Respondent's personal bank account on November 26, 1996.

24. On November 28, 1996 Mrs. H signed a cheque on the Account made payable to the Respondent in the amount of $5,000.00. There is no notation on this cheque. This cheque was deposited to the Respondent's personal bank account on December 5, 1996.

25. The Respondent has advised the Law Society that the cheques made payable to him from Mrs. H's Account which were deposited to his personal bank account on April 10, October 1 and December 5, 1996, totaling $15,000.00 were gifts from Mrs. H, as contemplated in paragraph 16 hereof.

26. On January 21, 1997 Mrs. H signed a cheque on the Account made payable to the Respondent in the amount of $10,000.00. There is no notation on this cheque. This cheque was deposited to the Respondent's personal bank account on January 22, 1997. Prior to this deposit the balance in the Respondent's personal bank account was $1,348.55.

27. On January 21, 1997 Mrs. H informed the Respondent that she wanted to proceed with a new Will and advised the Respondent of her wishes. The Respondent prepared Will instructions in typewritten form which Mrs. H acknowledged on January 22, 1997.

28. The Respondent told Mrs. H he would not and could not attend to preparation or finalization of any Will in which she made him a beneficiary, and told her he would find a senior solicitor with whom she could deal. The Respondent made a referral in this regard to GJ, Q.C. and played no part in the question of any possible new Will thereafter.

29. On January 24, 1997 Mrs. H met with GJ, Q.C. regarding her instructions for a new Will. Mrs. H executed a new Will on January 24, 1997. In it she, *inter alia*, bequeathed the residue of her estate to the Respondent.

30. On February 5, 1997 Mrs. H signed a cheque on the Account made payable to the Respondent in the amount of $10,000.00. There is no notation on this cheque. This cheque was deposited to the Respondent's personal bank account on February 5, 1997.

31. The Respondent has advised the Law Society that the money from Mrs. H which he deposited to his personal bank account on January 22 and February 5, 1997 represented a $15,000.00 gift plus $5,000.00 for Mrs. H's maintenance. There is no written confirmation of the said gift or of Mrs. H's intention to make it.

32. On February 14, 1997 the Respondent sent a letter to Mrs. K in his capacity as Mrs. H's attorney. He referred to the Power of Attorney which he had from Mrs. H. The Respondent requested that a cheque in the amount of $20,000.00 "payable to the [a Bank] be provided to him from Mrs. H's personal account. [The Bank] complied with the Respondent's request. On February 21, 1997 the Respondent deposited $20,000.00 from Mrs. H's account to his personal bank account at [a Bank].

33. On May 28, 1997 the Respondent deposited the sum of $7,447.40 (i.e. the balance in his personal bank account) plus $9,500.00 cash (for a total of $16,947.40) to his pooled trust account on a ledger opened in the name of Mrs. H's Estate, after her death.

34. The sum of $9,500.00 referred to in the proceeding paragraph was in the form of cash ($100 bills) belonging to Mrs. H. This cash was in the Respondent's vault on the date of Mrs. H's death. The Respondent did not make any entries in his trust records to document the holding of this cash.

35. At no time from the date of Dr. H's death (1982) to the date of Mrs. H's death (1997) did the

Respondent open a file in his law offices in connection with Mrs. H or legal services to Mrs. H, nor did he open a Trust ledger regarding Mrs. H or legal services to her.

36. At all relevant times Mrs. H was fully competent as confirmed by Mr. J, Q.C. who prepared her Will in January, 1997, and Dr. B, her Gerontologist along with Dr. W, her General Practitioner, both of whom observed her in January and February of 1997, including the time frame involving hip surgery, just prior to her death.

[5] After considering the circumstances set out in the Agreed Statement of Facts, and having heard the submissions of counsel, the Panel finds that the conduct constitutes conduct unbecoming.

[6] The Panel further finds that the penalty proposed by the Respondent and recommended by the Discipline Committee to be appropriate in all of the circumstances.

[7] It is accordingly ordered that the Respondent be reprimanded, pay a fine of $3,500 and costs of the hearing in the amount of $2,500.

[8] The Executive Director is instructed to record the finding of conduct unbecoming on the Respondent's Professional Conduct Record.

Application for Anonymous Publication

[9] The above disciplinary action did not include a penalty of suspension or disbarment. It was therefore appropriate that Respondent's counsel made application that publication of the Panel's decision not identify the Respondent. This application was opposed by Law Society counsel.

[10] Rule 4-38.1(3) is reproduced below.

(3) The panel may order that publication not identify the Respondent if:

a) the panel has imposed a penalty that does not include a suspension or disbarment; and,

b) publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication.

[11] Rule 4-38.1(3) reflects the Law Society's general desire to balance transparency with privacy. The particular application of this Rule requires the Panel to balance the following:

(a) grievous harm to the respondent with;

(b) the interest of the public and the Society in full publication.

[12] For ease of reference the Panel refers to this Rule application as the "Non-Identify Application" . The balancing process in a Non-Identity Application has the below steps.

1. Defining of grievous harm.

2. Determination if publication will cause the grievous harm.

3. Defining the interest of the public and of the Law Society in this particular situation.

[13] Defining of Grievous Harm – Dictionary definitions merely restate the obvious by using such words as "serious" or "severe" . Certainly the nature of the harm must be much more than a one time snub or

exaggerated civility from a colleague or from persons in the Respondent's general community of friends. Grievous harm, given the lack of limiting words in the Rule, must mean any one, some or all of the following:

- deliberate withdrawal of professional courtesy
- loss of clients
- judicial mistrust
- colleague mistrust
- loss of personal friends
- the Respondent's associates or family being the subject of adverse remarks
- medical effects – psychological or psychiatric or both
- loss of self worth and confidence
- loss of reputation

[14] Grievous harm need not be limited to these previous examples of harm. There may well be situations where publication may only cause one or two of the preceding or something not mentioned.

[15] Determination if publication will cause grievous harm – the medical effects of grievous harm deserve further mention. The consequence of the legal profession having a familiarity with using medical-legal expert evidence could be the ready acceptance of medical evidence as the effects of grievous harm for all Non-Identity Applications. Consequently the medical affidavit evidence would be seen as the norm. Or, the lack thereof be seen that no grievous harm occurred. The application of this Rule must not be a battle of expert's medical affidavits. The medical evidence could become trivialized to the point that only evidence of debilitating psychiatric illness or suicide would be viewed as grievous. This would be a deplorable application of the Rule. What is one Respondent's mental pain and outward symptoms of emotional or mental distress that allegedly would arise from the publication process may well be another Respondent's outward stoic acceptance yet in either case the harm may well be grievous.

[16] Instead, the determination of grievous harm of any nature, would be the test of a reasonable and informed member of the public applying her or his own experiences to the offence and to the situation of a Respondent. If there is a possibility of grievous harm in the context of a Respondent's own representations then that reasonable and informed member of the public can find that publication will cause grievous harm.

[17] It is sufficient for this Panel to consider and weigh the Respondent's representations without the need for corroborating medical evidence. As stated in *A Lawyer*, 2004 LSBC 19, at paragraph 8:

> "The panel is of the opinion that medical evidence is not always required to establish grievous harm and that each case is to be decided on its own facts and circumstances." and
>
> "While medical evidence may in some case be helpful, it is not necessary here given our observations of the Respondent's demeanor."

[18] This principle was approved in *A Lawyer*, 2005 LSBC 06, paragraph 18 although the application in that case was denied because the offence (failing to remit PST and GST for more than a ten year period) was more serious than *A Lawyer*, 2004 LSBC 19. Although neither of these cases cite *Bell* [2001] LSBC a case, as pointed out by Law Society counsel, decided under the previous Rule, they do, by inference, disagree with the ruling in the *Bell case* which stated:

> "The common places of experience of the panel of the Review benchers are insufficient to find such a conclusion. It must be founded on expert or other compelling evidence as to the special or

undue prejudice that may affect the Member."

[19] This Panel disagrees with the *Bell* case and states that resolving the possibility of causing grievous harm depends on the above test of a reasonable and informed member of the public.

[20] Now, to apply this test to the case at hand, the Panel has considered the nature of the Respondent's practice before the offence occurred. This is relevant because:

(a) it forms the basis for predicting the future harmful effect the publication may have on the Respondent; and

(b) it is the benchmark for determining what difference may occur if publication was permitted.

[21] Before the offence occurred, the Respondent's Law Society record was unblemished. The Panel concludes that the Respondent offered, with integrity, to the public, legal services that were honourable and competent. He contributed to his community and was Mayor of a small urban community at age 28. The Respondent met Dr. H as a colleague of the local Hospital Board. Over time the friendship of this meeting extended to the spouses and, as couples, their friendship and trust developed from the 1970's onward. It was only natural that Dr. H appoint the Respondent executor with the particular task of administering the life estate for Mrs. H. This description establishes the height from which a fall from grace could occur if this Non-Identity Application were not successful.

[22] The offence itself is set in the context of this friendship. The offence was a one time occurrence of Accounting Rules which did not in any manner benefit the Respondent. The Respondent's client was never at risk and nor was the public. All funds were accounted for. Throughout the Law Society's investigation the Respondent remained cooperative, helpful and open. The Law Society, for no adverse reason to the Respondent, took eight years to bring this matter to a hearing. During the eight year period, this 67 year old Respondent continued providing with integrity, the same honourable and competent legal services. The Respondent's 41 year practice has now developed to a point where he enjoys the retainer of one significant client for most of his fees.

[23] The Respondent contritely admitted his wrong doing, was accordingly humbled and is obviously the wiser. If this Non-Identity Application is unsuccessful, then likely grievous harm, being loss of reputation, especially the possible loss of a major client, is certainly not a deserving ending to the Respondent's respected legal career.

[24] This is a situation where a reasonable member of the public, now duly informed, would decide that publication could cause grievous harm to this Respondent.

[25] Defining the interest of the public and the interest of the Law Society – the Law Society's interest, to the extent that it is not coincident with the public interest, is to see that its discipline cases are dealt with in a cost effective manner but without compromising the process. In addition to punishment, there is the compassionate application of the Law Society's Rules so that rehabilitation can occur. An admission to a relatively minor and one time offence from this Respondent who is contrite and reflective is a Respondent who satisfies the interests of the Law Society.

[26] The public interest was addressed by the Law Society's counsel when he pointed out in his useful and cogent presentation, that the fundamental task of the Law Society is to protect the public interest by having, amongst other qualities, a profession that is competent. The Law Society achieves this competence by using a variety of techniques, one of which is recognizing that the public interest (as well as its own member) expects wrongdoing, duly adjudicated, to be met with punishment.

[27] In this situation the inherent punitive nature of this eight year discipline process as well as the inherent lack of privacy is enough to satisfy that element of public interest requiring punishment. Law Society counsel stated that the public must know that, eight years ago and without harming any client, the Respondent committed a breach of Law Society Accounting Rules. The public interest is not so focused on punishment that it does not have elements of compassion, decency and respect for privacy. The benefit to the public interest to further punish by possibly causing grievous harm in this Respondent's situation is minor relative to the possibility of grievous harm to the Respondent.

Decision

[28] This Panel orders that publication not identify the Respondent.