2018 LSBC 38
Decision issued: December 21, 2018
Citation issued: April 20, 2017

Corrected Decision: The decision has been corrected at paragraph [100] on January 15, 2019.

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MICHAEL SHELDON GOLDEN

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	October 3, 4 and 5, 2018
Panel:	Lisa J. Hamilton, QC, Chair Paul Ruffell, Public representative Sandra Weafer, Lawyer
Discipline Counsel:	Sarah Conroy
Counsel for the Respondent:	William G. MacLeod, QC

BACKGROUND

[1] On April 20, 2017, a citation was issued against the Respondent alleging that:

1. Between approximately April 2014 and April 2015, the Respondent acted in a conflict of interest contrary to Rules 3.4-1, 3.4-2 and 3.4-3 of the *Code of Professional Conduct for British Columbia* (the "Code"), by representing a client (the "Husband") in matrimonial proceedings against his wife (the

"Wife"), in which the Husband was claiming an interest in real property owned by the Wife, while also:

(a) preparing a promissory note in favour of TN to secure a debt owed to TN by the Wife and preparing a power of attorney given by the Wife to TN for purposes of selling the real property owned by the Wife, when he knew or ought to have known that the intention of TN and the Wife was that the debt would be repaid from the sale of the real property; and

(b) representing the Wife in the sale of the real property, pursuant to the power of attorney given to TN, but taking instructions from the Husband regarding the distribution of the sale proceeds.

2. Between approximately April 2014 until April 2015, the Respondent acted in a conflict of interest contrary to Rules 3.4-1, 3.4-2 and 3.4-3 of the Code, by representing TN in connection with the preparation of a promissory note in favour of TN to secure a debt owed to TN by the Wife while also representing the Wife in the sale of real property owned by the Wife that he knew was the subject of a claim by the Husband when he knew or ought to have known their interests were or may have been adverse.

3. Between approximately April 2014 until April 2015, when the Respondent represented TN regarding the preparation of a power of attorney and a promissory note in favour of TN to secure a debt owed to TN by the Wife, he failed to advise TN about the sufficiency of the promissory note and the power of attorney to secure the debt owed to her, contrary to Rules 3.1-2 and 3.2-1 of the Code.

4. In or around April 2014, when the Respondent met with the Wife and prepared a promissory note and power of attorney on her behalf, the Respondent failed to do one or more of the following, contrary to Rule 7.2-9 of the Code:

(a) urge the Wife to obtain independent legal representation regarding the promissory note and power of attorney;

(b) take care to ensure the Wife was not under the impression that her interests would be protected by him; and

(c) make it clear to the Wife that he was acting in the interests of the Husband.

5. On or about April 9, 2015, the Respondent improperly withdrew $20,000 of the proceeds of sale of real property held in trust on behalf of the Wife and disbursed those funds to QP without the Wife's authorization or consent, contrary to Rule 3-56(1) of the Law Society Rules then in force (now Rule 3-64(1)).

6. In or around April 2015, the Respondent prepared a Release for TN to sign that was intended to settle a debt owed to her pursuant to a promissory note signed by the Wife for less than the amount reflected on the promissory note and included wording that improperly purported to, upon payment to the Wife of the lesser amount, release any potential claims against Michael Golden Law Corporation, contrary to Rule 2.2-1 of the Code.

[2] The conduct alleged in each paragraph was stated to constitute professional misconduct, or a breach of the Act or rules pursuant to s. 38(4) of the *Legal Profession Act*.

[3] Section 38(4) of the *Legal Profession Act* states that after a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed one or more the following:

(i) professional misconduct;

(ii) conduct unbecoming the profession;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is an individual who is not a member of the society, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming the profession or a breach of this Act or the rules.

[4] The evidence at the hearing consisted of the admissions contained in a Response to Notice to Admit as well as the oral testimony of each of TN, the Respondent and the Respondent's paralegal, RL.

[5] In 2013, the Respondent commenced representing the Husband in relation to family law matters. The Husband and the Wife had previously been married, then divorced. They had subsequently reconciled but were again experiencing difficulties in their relationship. Shortly after being retained by the Husband, the Respondent filed a *Land (Spouse Protection) Act* charge against title to the family residence, a property registered solely in the Wife's name, which had been purchased by the Wife after the parties' previous divorce (the "Property").

[6] In February 2014, the Respondent commenced a Supreme Court Family Law Proceeding on behalf of the Husband against the Wife seeking property division, including an equal division of the Property. Simultaneously with commencing the action, the Respondent filed a Certificate of Pending Litigation ("CPL") against the Property on behalf of the Husband. The Respondent then attempted to have the Wife personally served but was unsuccessful.

[7] On April 2, 2014, the Wife happened to attend the Respondent's offices with her friend TN. The Respondent had represented TN in relation to several matters over the years. On that day, TN and the Wife attended the Respondent's office in order for the Respondent to prepare documents to evidence an arrangement they had reached relating to debts. The Respondent's staff prepared a promissory note and a power of attorney under the Respondent's supervision for the Respondent's review. The Respondent reviewed these documents on April 2, 2014 in his office before meeting with the two women who were waiting for the Respondent in his boardroom.

[8] The promissory note indicated that the Wife owed TN $200,000 and that the Wife would repay $200,000 on the sale of the Property, provided that the Property was sold for at least $480,000. The power of attorney prepared at the same time as the promissory note gave TN authority to sell the Property on behalf of the Wife.

[9] Both TN and the Wife speak Vietnamese as their first language and speak only limited English. The Respondent does not speak Vietnamese but had a staff member, DM, attend the boardroom to interpret. The Respondent witnessed both women's signatures on the power of attorney and witnessed the Wife's signature on the promissory note on April 2, 2014. The conversations that took place between the Respondent and the Wife and TN took place through the interpreter due to the language barrier.

[10] At the same April 2, 2014 meeting, the Respondent instructed DM to serve the Wife with the Husband's Notice of Family Claim. The Respondent testified that he, through DM as interpreter, advised the Wife to retain independent counsel in relation to the Notice of Family Claim but not in relation to the promissory note or

the power of attorney. The Respondent testified that TN was present when the family law action was served on the Wife.

[11] The Respondent also testified that he told TN she should not assume that the Wife was the only owner of the Property, as the Husband was making a claim to the Property. TN testified that she was never told by the Respondent that he acted for the Husband. She testified that she thought that the Respondent was her lawyer and was protecting her interests in relation to the repayment of the debts from the sale of the Property. The Respondent admits that he represented TN in relation to the preparation of the promissory note and power of attorney; however, he says that TN was aware, through DM and by being present when the family claim was served on the Wife, that the Respondent also represented the Husband. TN testified quite adamantly that she was not aware that the Respondent represented the Husband. TN testified that she would have retained a different lawyer had she known that the Respondent represented the Husband and his interests relating to the Property. DM did not testify at the hearing. He no longer works for the Respondent's firm. The Wife did not testify. The Wife relocated to Vietnam in or about May 2014.

[12] The Respondent testified that he thought from the outset that the promissory note and the power of attorney did not actually represent a debt owed by the Wife to TN but appeared to him to be an assignment of the Wife's interest in the Property to TN. The Respondent maintains that he simply documented the deal reached by the Wife and TN as they requested, using a promissory note in debt and a power of attorney to facilitate the sale of the Property. The Respondent testified that he did not give the Wife nor TN any legal advice in relation to either document but simply drafted the documents. He indicated that DM would have explained in general terms what each document said and would have told both the Wife and TN that the power of attorney would allow TN to sell the Property. Again, these conversations would have occurred through an interpreter, DM, who did not testify. While there was evidence of notes made on the file by the Respondent's staff on other occasions, there were no notes by either the Respondent or DM of the April 2, 2014 meeting, at least none that were brought to our attention.

[13] The Respondent indicated that he did not ask questions of the Wife or TN regarding the $200,000 or any terms of the agreement that they had reached. He testified that he did not know what the deal related to at the time, nor does he fully understand the deal between the Wife and TN to this day.

[14] TN testified that, after the April 2, 2014 meeting, relying on the promissory note and the power of attorney, she set about selling the Property for the Wife. TN also

made the monthly mortgage payments for the Wife (the mortgage was approximately $300,000 against title), hired the realtor, did repairs, readied the house for sale and took all steps required to ensure the Property was sold. The Property sold in or about April 2015 for over $500,000.

[15] TN contacted the Respondent's office to handle the conveyance of the Property. He opened a file under the Wife's name. TN attended the Respondent's office on April 1, 2015 to sign as the Wife's power of attorney the Form A transfer, the GST certificate and the seller's statement of adjustments. The Respondent signed a solemn declaration for Land Title purposes dated April 7, 2015 declaring that he was the solicitor for the Wife.

[16] The Respondent arranged for payment and discharge of the mortgage. After that and normal adjustments, he held approximately $250,000 in trust in the Wife's file. However, despite: (1) his solemn declaration that the Wife was his client; and (2) the fact that the file was opened in the Wife's name as registered owner/transferor of the Property, the Respondent seemed reluctant to admit that the monies he held in his trust account were held on behalf of the Wife. During his evidence, the Panel asked the Respondent who he believed that he held the monies in trust for. At one point, he indicated that he thought he held the trust funds on behalf of the Husband and TN. Later, he indicated that he believed that he held the funds in trust for all three parties. We find that the Respondent was acting for the Wife on the conveyance and held such funds in trust for the Wife. However, the Respondent had also represented TN and was aware from the promissory note and power of attorney that TN had sold the Property for the Wife and expected to be repaid $200,000 from the proceeds of sale in accordance with the promissory note.

[17] We now turn to what happened to the proceeds. Although it is part of his normal practice, the Respondent testified that, in the case of the conveyance of the Property, no direction to pay was signed by the Wife or TN on behalf of the Wife. The Respondent's paralegal, LR, explained that, when TN came in to sign the conveyance documents on April 1, 2015, the bank had not yet provided a payout statement for the mortgage, so no direction was prepared.

[18] Following the sale of the Property in early April 2015, the Respondent took his fees of $1,200 from trust and then, on the instructions of his other client, the Husband, signed and released a cheque for $20,000 to the Husband's girlfriend. The release of $20,000 was done without the advance knowledge or consent from the Wife or the Wife's attorney, TN. The Husband, who was in jail at that time for previously assaulting the Wife, also instructed the Respondent to pay $50,000 to the Husband's brother. The Respondent did not pay the brother $50,000.

[19] In the meantime, TN contacted the Respondent's office to find out when she would receive her monies from the sale. LR, the paralegal, phoned TN at the Respondent's request and told her that she would receive less than $200,000 and that she would need to sign a release in advance of receiving the monies. LR, who was called as part of the Respondent's case, testified that TN was very upset on the telephone that she would receive less than $200,000.

[20] The Respondent testified that TN came to the office and they had a brief meeting regarding the amount she would receive, namely, $124,967.39 (not $200,000). TN refused to accept that sum. The Respondent testified that he then told TN to get independent legal counsel. The Respondent had not told TN to retain independent counsel prior to this. The Respondent testified that he did not show TN the Release he had prepared, which released his law firm from any and all liabilities as it was clear TN would not accept the $124,967.39 figure.

[21] The Respondent continues to hold approximately $229,000 in trust. To date, TN has still not received any monies from the sale of the Property. She testified that she believes her friend, the Wife is still going to take steps to help her get repaid from the trust monies.

[22] The Wife has now hired a lawyer, who has filed a Response and Counterclaim in the family file brought by the Husband. In the Wife's Response to the Notice of Family Claim, she disagrees with the property claims made by the Husband, and in her Counterclaim, she claims a determination of her excluded property, equal division of family property and makes a civil claim against the Husband for damages for personal injuries caused by his assault. The Wife has also commenced a separate Supreme Court civil action against the Respondent for conversion in relation to the $20,000 trust funds disbursed to the Husband's girlfriend. Both the family law claim and the civil claim have yet to conclude.

FACTS AND DETERMINATION

[23] The Law Society has the burden of proof to establish on a balance of probabilities that the facts it alleges constitute professional misconduct: *Foo v. Law Society of BC*, 2017 BCCA 151 at para. 63.

Allegations 1 and 2

[24] With respect to Allegation 1, the Law Society alleges that the Respondent acted in a conflict by representing the Husband in a family law action by:

(a) preparing a promissory note in favour of TN to secure debt so owed by the Wife and preparing a power of attorney to permit TN to sell real property owned by the Wife while he knew (or ought to have known) that the monies were expected to be repaid by the sale proceeds;

(b) representing the Wife in relation to the sale of the Property pursuant to the power of attorney given to TN while taking instructions from the Husband regarding distribution of the proceeds.

[25] Allegation 2 is that the Respondent acted in a conflict of interest by representing TN in preparing a promissory note to secure a debt owed to her by the Wife while also representing the Wife in the sale of Property owned by the Wife but which he knew was the subject of a claim by the Husband.

[26] The relevant Code provisions are 3.4-1, 3.4-2 and 3.4-3:

> Rule 3.4-1 of the Code states that a lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.
>
> Rule 3.4-2 of the Code provides that a lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client and:
>
> (a) Express consent must be fully informed and voluntary after disclosure.
>
> (b) Consent may be inferred and need not be in writing where all of the following apply:
>
> (i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
>
> (ii) the matters are unrelated;
>
> (iii) the lawyer has no relevant confidential information from one client that might reasonably affect the other; and
>
> (iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

Rule 3.4-3 of the Code provides that despite rule 3.4-2, a lawyer must not represent opposing parties in a dispute.

Allegation 1

[27] Commencing in 2013 and continuing beyond the sale of the Property, the Respondent was counsel for the Husband. From the outset, the Respondent was focused on protecting the Husband's interest in the Property. The Respondent was aware that the Property was in the Wife's name, hence the need to initially file a *Land (Spouse Protection) Act* lien and later a CPL against the title to protect the Respondent's interest in the Property.

[28] We find, based on the evidence that, when TN and the Wife attended the Respondent's offices on April 2, 2014, the Respondent ought to have known that he was in a conflict of interest in providing any services to the Wife or TN that in any way related to the Property. The conflict arose on April 2, 2014. The Respondent should not have proceeded to prepare and witness the signatures on the promissory note and power of attorney. The Respondent ought to have sent both TN and the Wife for independent legal advice.

[29] Instead, the Respondent proceeded to prepare a promissory note evidencing debt of $200,000 owed by the Wife to TN as well as a power of attorney permitting TN to sell the Property on behalf of the Wife in order to realize payment of the $200,000. The power of attorney prepared by the Respondent (or his staff but overseen by the Respondent) indicated that the Property would be sold for a minimum of $480,000. At that meeting, the Respondent knew that the Husband was seeking a one-half interest in the Property. Had the Property sold for $500,000, for example, once the mortgage of approximately $300,000 (which would have been easily known from a title search and copy of the mortgage or making inquiries) was paid out, the net return would be about $200,000. The Respondent knew that the Husband was seeking one-half of the equity, namely $100,000 in that scenario. The Respondent also knew from the promissory note that TN was expecting to be paid $200,000 from the sale of the Property. Already, the Husband's claim and TN's claim in that scenario totaled more than the available equity. The Respondent did not know at that time what the Wife's position was with respect to the Property. However, as a family law lawyer, he would have known that, under the *Family Law Act* ("FLA"), the Wife might claim that the Property was her excluded property or that, even if family property, the Wife might claim more than 50 per cent of the Property if she felt it was significantly unfair to divide the Property equally based on factors set out in the FLA. The bottom line was that the Respondent ought to have known that

each of the three people had different and competing claims to the same Property and that it may not be possible to satisfy all of them.

[30] The Respondent did not forget that he acted for the Husband nor that he had commenced an action that related to the Property when he met with TN and the Wife on April 2, 2014. In fact, when he realized that he had the Wife in his offices, he used the opportunity to serve her with the FLA action. It was in the forefront of his mind that he was acting for the Husband when he met with the Wife and her friend.

[31] Instead of sending TN and the Wife away to have someone else prepare and witness the promissory note and the power of attorney, the Respondent prepared both documents and witnessed both TN's and the Wife's signatures on the documents on April 2, 2014.

[32] The Respondent's evidence was that TN was aware that he was acting for the Husband. He stated that his Vietnamese-speaking legal assistant, DM, would have informed TN on April 2, 2014 that the Husband had commenced an action and was claiming an interest in the Property. He also pointed to the fact that TN was in the room when the Wife was served with the family law action.

[33] However, TN testified that she was unaware that the Respondent was counsel for the Husband until after the sale of the Property in 2015. She testified, as did the Respondent, that she had known the Respondent for many years and had retained him to do various things for her over the years. We find TN credible when she testified that she expected to be paid $200,000 from the sale proceeds. She was adamant that she understood that the documents that the Respondent prepared on April 2, 2014 to protect her interests in this regard and that, had she known that the Respondent acted for the Husband, she would have hired another lawyer to prepare the documents and later handle the sale of the Property. We prefer TN's testimony on these points. We find that TN would not have hired the Respondent to prepare the documents nor handle the Property conveyance had she known that the Respondent was acting for the Husband.

[34] We find that TN relied on the promissory note and power of attorney prepared by the Respondent, went about the onerous task of preparing the Property for sale and selling it. She paid the mortgage pending sale, paid for and oversaw repairs and dealt with the realtor. The sale of the Property was challenging as it had previously been used as a marijuana grow op. The Respondent and his paralegal, LR, testified as to TN being interested in the sale proceeds and being very upset when she realized only after the conveyance had taken place that the Respondent was not going to release the full $200,000 from trust to her.

[35] The Respondent testified that, even though the documents prepared on April 2, 2014 are labelled and purport to be a "promissory note" and a "power of attorney", they do not in reality reflect a debt owing by the Wife to TN. He testified that, in reality, the documents represented an assignment of the Wife's interests in and rights to the Property to TN. We find that the Respondent's explanation does not make logical sense. The Respondent is an experienced lawyer. If he was instructed to prepare an assignment of interest, we find that he would have done so. If he was unsure of the arrangement between TN and the Wife, he should have asked details regarding the alleged debt. He did not.

[36] In any event, even if the Respondent were correct that the documents he prepared actually represented the Wife's assignment of her interest in the Property to TN, the Respondent would still have been acting in a conflict by representing the Husband who claimed an interest in the Property as well as TN, who by an assignment, would have then stood in the Wife's shoes, so to speak, as the owner of the Property.

[37] To make matters worse, in 2015 when TN had secured a binding contract to sell the Property, the Respondent handled the conveyance of the Property on behalf of the Wife while continuing to represent the Husband in his claim against the Property. The Respondent opened a file in the Wife's name but claims that she was only the "nominal" client. The Respondent and his staff dealt with TN in relation to the conveyance of the Property as the Wife's attorney. The proceeds of sale were received and placed into an account in trust for the Wife. The Respondent was paid his conveyancing fees from the trust funds held within the Wife's file. In addition, the Respondent signed a solemn declaration he prepared as part of the conveyance file in which he states that he was solicitor for the Wife. For all these reasons, despite the Respondent's denials, we find that the Respondent acted for the Wife with respect to the conveyance of the Property. The Respondent was in a position of conflict acting for the Wife for the conveyance while he continued to act for the Husband and taking the Husband's instructions with respect to the distribution of the trust funds, including the release of the $20,000 payment to the Husband's girlfriend on April 9, 2015.

[38] We find that a conflict originally arose on April 2, 2014 when the Respondent agreed to act for TN to document and, in her mind, secure payment for $200,000 from the sale of the Property while representing the Husband who was simultaneously seeking an interest in the Property. The conflict continued when the Respondent acted for the Wife, on TN's instructions by power of attorney, in relation to the conveyance of the Property. The Respondent then took instructions from his other client, the Husband.

[39] The Respondent did not have informed consent of TN or of the Wife (or possibly even the Husband) to act in a conflict of interest. To the contrary, TN would clearly have used a different lawyer had she been informed that the Respondent was acting for and taking instructions from the Husband.

[40] We find that the Law Society has proven the facts in Allegation 1 on the balance of probabilities.

Allegation 2

[41] This allegation deals with a conflict that arises in representing TN in preparing a promissory note and in acting for the Wife in relation to the sale of the Property, knowing that the Wife was going through a divorce and that the Wife's Property was subject to another claim.

[42] TN retained the Respondent on April 2, 2014 to prepare a promissory note to document debt of $200,000 and a power of attorney to assist her to sell the Wife's Property and be repaid the $200,000 from proceeds. The documents were prepared and TN clearly acted on them in going about readying the Property for sale and achieving a sale price of $560,000 well above the minimum sale price required by the Wife.

[43] The Respondent says that he informed the Wife that he could not be her counsel on the family law file. However, the Respondent witnessed both TN's and the Wife's signatures on the power of attorney and witnessed the Wife's signature on the promissory note on April 2, 2014. It is clear from TN's evidence that she was not informed on April 2, 2014 or at any time prior to the sale of the Property that she might receive less than $200,000 on the sale due to the Wife having other "creditors", namely the Husband. LR's evidence corroborates TN's evidence that TN was very upset when she heard on the telephone after the sale that she was to receive less than the $200,000 stated in the promissory note.

[44] TN has still not received any monies in payment of the promissory note. The bulk of the sale proceeds of approximately $229,000 (approximately $250,000 less the $20,000 paid to the Husband's girlfriend) remain in the Respondent's trust account within the Wife's file more than three-and-one-half years after the Property was sold. By preparing the promissory note and the power of attorney for TN, the Respondent in effect encouraged TN to proceed to sell the Property for the Wife (and, as it turned out, the Husband's benefit) but in turn TN did not receive what she and the Wife had agreed upon on its sale.

[45] The Respondent submits to this Panel that there is no evidence that TN and the Wife are adverse in interest. However, this is inconsistent with his own testimony that TN is a shrewd businesswoman who would not do something for nothing. Yet that is exactly the position that the Respondent put TN in preparing and signing her and the Wife up on the promissory note and power of attorney that TN relied upon in paying the Wife's monthly mortgage, repairs to the Property and spending her time and energy over the next year to sell the Property. These actions may well have assisted the Wife and the Husband (as well as the Husband's girlfriend to the extent of the $20,000) but certainly have not benefitted TN to date.

[46] The Law Society has proven the facts underlying Allegation 2 on the balance of probabilities.

Allegation 3

[47] Allegation 3 is that the Respondent failed to advise TN about the sufficiency of the promissory note and power of attorney to secure the funds owing to her.

[48] The relevant Code provisions are 3.1-2 and 3.2-1:

> Rule 3.1-2 of the Code provides that a lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.
>
> Rule 3.2-1 of the Code states that, before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

[49] The Respondent prepared the promissory note for repayment of $200,000 by the Wife to TN on condition that the Property be sold for a minimum price of $480,000. The Respondent testified that the promissory note, along with the power of attorney were provided for his review on April 2, 2014, the same day TN and the Wife attended his office to sign the documents. The Respondent testified that he provided no legal advice to TN or the Wife regarding the documents. He also testified that, because the promissory note was conditional (i.e., it required the sale of property for a price before the debt is payable), it is likely invalid under the *Bills of Exchange Act*. The Respondent also did not ask for any details of TN's arrangement with the Wife to ascertain what alternative options existed to the documents he prepared.

[50] TN speaks little English. It is clear to us from TN's testimony and her actions that, from April 2, 2014 and throughout, she expected to receive $200,000 on the sale of the Property. The Respondent should not have proceeded to sign TN on the promissory note and power of attorney. The documents did not protect TN's interest. Yet, the Respondent gave TN a false sense of security that, if she sold the Property for more than $480,000, she would be paid $200,000 on sale. The potential insufficiencies of the documents were not discussed. Alternatives were not discussed. We find that the implications of the family law action in relation to the promissory note and power of attorney were not discussed. It appears that the Respondent was clouded from providing sufficient and objective advice to TN because he represented the Husband who wanted the Property sold. When TN approached the Respondent on April 2, 2014 also appearing to want the Property sold, the Respondent thought this was good for everyone. He failed to provide adequate advice to TN regarding the adequacy of the documents or the alternatives, however. Another lawyer may have done a search on the property and informed her of the CPL filed on behalf of the Husband by the Respondent and informed her of the family law action between the Husband and the Wife. Another lawyer may have negotiated with both the Husband and the Wife for repayment of debt and for other amounts on the sale of the Property. At the very least, even if the negotiations were not fruitful, TN could have decided whether she wanted to become involved in paying for the Wife's mortgage and repairs to the house and expending her energies in selling the Property, knowing that she had no real security.

[51] We find that the facts in Allegation 3 are proven by the Law Society on the balance of probabilities.

[52] TN was not informed of the sufficiencies of the promissory note and power of attorney contrary to Rules 3.1-2 and 3.2-1 of the Code.

Allegation 4

[53] Allegation 4 is that the Respondent failed to:

(a) urge the Wife to obtain independent legal advice regarding the promissory note and power of attorney;

(b) take care to ensure the Wife was not under the impression that the Respondent was protecting her interests; and/or

(c) make it clear to the Wife that the Respondent was acting in the interests of the Husband.

[54] The relevant Code provision is 7.2-9, which states that, when a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

> (a) urge the unrepresented person to obtain independent legal representation;
>
> (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
>
> (c) make it clear to the unrepresented person that a lawyer is acting exclusively in the interests of the client.

[55] The Respondent testified that, if there had to be a client in relation to the promissory note and power of attorney, it was TN. He did not consider the Wife to be his client with respect to the preparation of the promissory note or power of attorney. The Wife was therefore not represented by counsel in relation to the preparation and signing of these documents.

[56] The Respondent testified that, when he served the Wife with the Husband's family law action, he told the Wife she needed to retain her own counsel and that he could not act for her in relation to that. Yet, that same day, the Respondent witnessed the Wife's signature on the promissory note and power of attorney. The Respondent admits he did not tell the Wife that he was not acting for her with respect to the preparation of the documents. The Respondent also admits that he did not tell the Wife that he was not protecting her interests with respect to the preparation of the documents. The Respondent further admits that he did not tell the Wife to get independent legal advice or representation with respect to the preparation of the documents.

[57] The Law Society has proven the facts in support of Allegation 4 on the balance of probabilities.

Allegation 5

[58] Allegation 5 is that the Respondent withdrew $20,000 of the sale proceeds of the Property held in trust on behalf of the Wife and disbursed them to the Husband's girlfriend without the Wife's authorization or consent, contrary to Rule 3-56(1) of the Law Society Rules then in force (now Rule 3-64(1)).

[59] Rule 3-56(1) (as it was then) stated a lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are:

> (a) properly required for payment to or on behalf of a client or to satisfy a court order,

(b) the property of the lawyer,

(c) in the account as a result of a mistake,

(d) paid to the lawyer to pay a debt of that client to the lawyer,

(e) transferred between trust accounts,

(f) due to the Foundation under section 62(2)(b) of the Act, or

(g) unclaimed trust funds remitted to the Society under Division 8.

[60] The Respondent admits he withdrew $20,000 from the sale proceeds of the Property held in trust and disbursed them to the Husband's girlfriend on the Husband's instructions. The Respondent, however, disputes that the funds were withdrawn improperly or contrary to Rule 3-56 (now Rule 3-64).

[61] We agree with the Law Society's submission that the withdrawal of the $20,000 payment was improper. The proceeds were received on the conveyance file and held for the Wife. The disbursement was made from the Wife's file to the girlfriend on the Husband's instructions. Neither the Wife nor TN as the Wife's attorney authorized the withdrawal by signing an Order to Pay or otherwise. In fact, no Order to Pay was ever prepared.

[62] The Respondent testified that it was fine for him to release $20,000 on the Husband's instructions as the Husband would be entitled to more than $20,000 of the proceeds on the basis of his FLA claim. However, the Respondent admitted that the FLA only provides that a party has a presumptive one-half interest in family property at the time of separation. Under the FLA, this presumptive claim may be subject to the other spouse claiming the property is excluded property as opposed to family property or claiming more than 50 per cent of the family property. There is no court order in the family law action in this case that determines the Husband and the Wife's respective shares to the Property nor any separation agreement between the Husband and the Wife resolving the issue.

[63] It is entirely improper for the Respondent to have, on the Husband's unilateral instructions, released any portion of the trust funds held in the Wife's real estate file without the Wife's or TN's agreement as power of attorney of the Wife. The facts underlying Allegation 5 have been proven on the balance of probabilities.

Allegation 6

[64] Allegation 6 is that the Respondent prepared a Release for TN's signature that was intended to settle a debt owed to her pursuant to the promissory note for less than the amount reflected in the promissory note and release any potential claims against the Respondent's law corporation contrary to Rule 2.2-1 of the Code.

[65] Rule 2.2-1 of the Code states a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

[66] The Respondent admits that he prepared the Release and that it was intended to settle the claims of TN against the sale proceeds held in trust and against the Respondent.

[67] When TN attended the Respondent's offices to sign the conveyance documents to transfer the Property to the new owners as power of attorney for the Wife, the Respondent's office had not yet received a pay-out statement with respect to the mortgage registered against title.

[68] Soon after the property transfer went through, TN was calling the Respondent's office regarding when she would be receiving the $200,000. LR testified that TN called the office and was very interested in receiving her share of the proceeds. LR spoke to the Respondent and was instructed to inform TN regarding the amount TN would receive (i.e., that it would be less than the $200,000 set out in the promissory note) and that TN would have to sign paperwork (the Release) before receiving funds. LR testified that she spoke to TN on the telephone and that TN was very upset when she heard the amount. LR, however, testified that at no time did she herself show TN the Release and TN next attended the office in person but dealt with the Respondent. The Respondent confirmed in his testimony that TN attended his office and was upset that the amount she was to receive was less than $200,000. The Respondent was clear that, before TN attended his office, he had prepared a Release for her to sign but he never actually showed TN the Release as she was upset and would not accept the amount of approximately $124,000. The Respondent at this point told TN to obtain independent legal advice.

[69] TN's evidence as to the number of times she attended the office for the conveyance and thereafter was somewhat inconsistent. She appeared to be unclear about whether she spoke with LR on the telephone or in person and unclear as to other such details relating to the events after the sale of the Property. We prefer LR and the Respondent's evidence with respect to TN's attendance at the office after the sale of the Property, and we find that she was not shown the Release.

[70] However, the Law Society's position is that the Respondent's mere preparation of the Release in the circumstances is an issue. For his part, the Respondent stated that he prepared the Release as a normal matter of course. His counsel submitted that it is not at all unusual for firms to include in a Release of claims a release of future claims against the firm when the firm has held trust monies. Further, as soon as the Respondent knew there was an issue with the amounts, he told TN to obtain independent legal advice in relation to her claim to the trust monies and did not proceed to force her to sign the Release. We agree with the Respondent that, in all of the circumstances, the Law Society has not proven on the balance of probabilities that the Respondent acted dishonourably or without integrity in relation to preparing the Release.

[71] We therefore dismiss Allegation 6.

Whether the Respondent's behaviour constitutes professional misconduct

[72] The test for whether conduct amounts to professional misconduct is whether it constitutes a marked departure from the conduct the Law Society expects of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16. It is also well understood that conduct that is in breach of the Law Society Rules or the Act is not necessarily professional misconduct.

[73] The determination of whether certain conduct, rule breach or not, constitutes professional misconduct is based on a number of factors. The factors that may be appropriate to consider, depending on the particular case, include the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the misconduct: *Law Society of BC v. Lyons*, 2008 LSBC 09.

[74] We disagree with the Respondent's argument that the presence of *mala fides* is a required element in professional misconduct. The leading case of *Martin* itself was based upon a determination of misconduct based on negligence (in that case, gross negligence) without the presence of dishonesty, deceit or significant personal or professional conduct issues.

[75] The intention behind the multi-factorial approach that involves a listing of potential elements (as in *Lyons*, at para. 35) was addressed in the review decision of *Law Society of BC v. Boles*, 2016 LSBC 48, at paras. 54-57. In *Boles*, the all-Bencher panel emphasized a case-by-case approach and confirmed that no single factor is necessarily determinative of what constitutes a marked departure in any given case.

[76] At para. 57 of its decision in *Boles*, the review panel quoted with approval the hearing panel in *Law Society of BC v. Harding*, 2014 LSBC 52 at paras. 76 to 79:

> In our view, given all the cases and the guiding principles from *Stevens v. Law Society (Upper Canada)*, (1979) 55 OR (2d) 405 (Div. Ct.), and the marked departure test from *Martin*, there must be culpability in the sense that the lawyer must be responsible for the conduct that is the marked departure. The words "marked departure" are where one finds the requirement that the nature of the conduct must be aggravated or, to use the words of *Stevens*, outside the permissible bounds.
>
> As *Stevens* and *Re: Lawyer 12* (both the single-bencher hearing decision, 2011 LSBC 11, and the review decision, 2011 LSBC 35) make clear the panel must look at all of the circumstances. In *Lyons*, the panel set out the following factors to consider in determining whether given conduct rises to the level of professional misconduct:
>
> (a) the gravity of the misconduct;
>
> (b) the duration of the misconduct;
>
> (c) the number of breaches;
>
> (d) the presence or absence of *mala fides*; and
>
> (e) the harm caused.
>
> The requirement that all the circumstances be considered and the factors set out in *Lyons* preclude an assertion that particular factors are determinative or trump factors.
>
> Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of

an assessment that the impugned conduct did not cross the permissible bounds.

Allegation 1

[77] The Respondent should have known on April 2, 2014 that he was in a conflict situation. A lawyer owes every client the duty of undivided loyalty. Acting in a conflict divides loyalties. Accepting a retainer when a lawyer is unable to fulfil his duty of undivided loyalty to the client can bring our profession into disrepute and erode the trust people place in lawyers.

[78] The Respondent should have recognized on April 2, 2014 when TN and the Wife attended his office that he could not provide undivided loyalty to the Husband while providing legal services to TN and to the Wife relating to the same Property.

[79] The Respondent repeatedly and forcefully tried to justify his actions by stating that:

(a) all three parties wanted the same thing, namely, the Property sold; and

(b) the Respondent himself is providing "security" or is the security for all three parties' claims.

[80] This completely misses the point. Had the Wife gone to a different lawyer and learned that her ex-Husband was making a claim against the Property, she may have been better off taking a different course of action such as only agreeing to list the Property for sale on the basis that a comprehensive deal was reached dealing with her own claims to the Property, other claims (such as damages for the Husband's assault of her (which she is claiming now as part of her family law action)) and debts (family debts and her own debts) before listing.

[81] Had TN been told to retain another lawyer, TN may have insisted on another form of documentation of the debt owing to her by the Husband and the Wife and by the Wife. Alternatively, had TN known all the potential complications of being embroiled in litigation between the Husband and the Wife, she may have saved herself much time, money and stress and decided not to sell the Property for the Wife. Or, even if she had decided to sell the Property, she would not have had the monies held in trust by the Respondent if she knew he would take instructions from the Husband to release the funds.

[82] The Husband wanted the Property sold. The Respondent acted for the Husband. The Respondent was unable to see the alternatives open to TN and the Wife for the very reason that he acted in a conflict.

[83] We agree with the submissions of the Law Society that the conflict of interest was obvious, serious, flagrant and indefensible. It is a marked departure and constitutes professional misconduct.

Allegation 2

[84] The same reasons as in Allegation 1 apply with respect to Allegation 2. The Respondent should have recognized on April 2, 2014 that, while both TN and the Wife wanted TN to receive $200,000 from the sale of the Property, TN and the Wife had different interests. TN was a third party owed money by the Wife. TN may have been told by another lawyer to sue the Wife for monies owed and register her judgment against the Property as security for repayment. The Wife may have been told not to expect that TN would be repaid the $200,000 from the Property based on a promissory note and a power of attorney, particularly in light of the Husband's action. TN and the Wife, however, no doubt trusted the Respondent to prepare something adequate and in their best interests.

[85] Acting for TN as the lender and the Wife in the circumstances is a clear and obvious, serious conflict and is a marked departure constituting professional misconduct.

Allegation 3

[86] A lawyer must provide legal services in a competent, timely, conscientious and diligent manner. The lawyer must perform all services undertaken on a client's behalf to the standard of a competent lawyer. At the core of a lawyer's duty is provision of "quality and appropriate legal services": *Law Society of BC v. Menkes,* 2016 LSBC 24 at para. 11.

[87] The Respondent knew the Husband had made a claim to one-half of the Property. The Respondent also knew that TN was expecting to be paid $200,000 from the Property and that would not likely be possible in light of the Husband's claims. Despite this, the Respondent drafted a promissory note and power of attorney without providing any legal advice whatsoever as to the inadequacy of this security or possible alternatives.

[88] The Respondent's conduct is a marked departure that constitutes professional misconduct.

Allegation 4

[89] The Wife was unrepresented in relation to the preparation of and signing of the power of attorney and promissory note. The Respondent told the Wife he could not represent her in relation to the family law action. However, the same day, he prepared and witnessed her signature on the power of attorney and promissory note. The Respondent took no steps verbally or in writing to ensure the Wife knew he was not protecting her interests nor did he tell her to obtain independent legal advice.

[90] This is a marked departure and constitutes professional misconduct.

Allegation 5

[91] We have found that the Respondent's conduct in distributing $20,000 of the monies held in trust for the Wife and disbursing it to the Husband's girlfriend is a breach of Rule 3-54(1) (as it was) of the Law Society Rules. Therefore, we make an adverse determination of a breach of the Act or Rules pursuant to s. 38(4)(b)(iii) of the *Legal Profession Act*.

[92] As stated above, we must consider the *Lyons* factors. The Respondent's counsel emphasizes the absence of *mala fides* in this case. The Respondent was under the assumption that he was entitled to release funds on the basis that the FLA gave the Husband an interest in the proceeds on separation and that the amount released was far less than what the Husband was entitled to. However, just because the Respondent believed that he was entitled to disburse the trust funds does not mean that his conduct cannot constitute professional misconduct. There are of course other factors to consider. No particular factor is determinative.

[93] In terms of the other *Lyons* factors, the conduct is very serious. Trust funds are sacrosanct: *Law Society of BC v. Ali*, 2007 LSBC 18 at para. 104. In terms of the duration of the conduct, the funds have not been replaced by the Respondent some three-and-one-half years later. The disbursement of funds occurred on one occasion, the Respondent having actually refused the Husband's second request for release of a further $50,000. However, the release of funds occurred within the context of the Respondent putting himself in serious, blatant and indefensible conflicts of interest. The Respondent should never have been in a position to have handled the conveyance on behalf of the Wife and been holding the proceeds in trust for her on the real estate file. The Respondent himself said in the hearing that he is not sure for whom he held the funds in trust. At one point, he said he held the trust funds on behalf of the Husband and TN. At another point in his testimony, he claimed to have held the trust funds for all three of the Husband, TN and the Wife.

On April 7, 2015, the Respondent signed a statutory declaration that his client on the conveyance was the Wife. Yet a mere couple of days later the Respondent released the $20,000 of his client the Wife's funds on the instruction of another client, the Husband.

[94] The harm caused by the Respondent's release of $20,000 to the Husband's girlfriend includes:

(a) the Wife still does not have the $20,000 returned. The Wife has had to hire a lawyer to seek her interest in the funds. The Wife's lawyer has commenced a separate action in conversion with respect to the $20,000, in addition to pursuing her claims in the family law action;

(b) the Respondent, by his conduct undermines the fundamental principle that trust funds are sacrosanct. This conduct can erode the trust that clients place in lawyers.

[95] On weighing the relevant factors above, we find that the Respondent's breach of Rule 3-54(1) constitutes professional misconduct.

NON-DISCLOSURE ORDER

[96] Discipline counsel applied for a sealing order in these proceedings to protect confidential information about the clients from being disclosed. The Respondent consented to this application.

[97] Rule 5-8(2) of the Law Society Rules provides that, upon application or on its own motion, a panel may order that specific information not be disclosed to protect the interests of any person. Rule 5-8(5) requires that, if the panel makes such an order, it must give its written reasons for doing so. In the absence of such an order, Rule 5-9(2) of the Law Society Rules permits a person to obtain a copy of an exhibit entered into evidence when a hearing is open to the public.

[98] We find that the citation, the Notice to Admit and the other Exhibits filed in this hearing as well as any transcript of the hearing contain confidential and privileged information of the clients that should not be disclosed. We therefore make the following order:

(a) should anyone apply for a copy of the Exhibits in this matter, all confidential or privileged client information must be redacted prior to being provided; and

(b) should anyone apply for a copy of the transcript of these proceedings, the clients' names, any identifying information about the clients and any confidential solicitor-client information must be redacted prior to being provided.

CONCLUSION

[99] We have found that the Respondent has professionally misconducted himself in relation to Allegations 1 through 5 pursuant to s. 38(4)(b)(i) of the Act.

[100] We find in addition with respect to Allegation 5 that the Respondent has committed a breach of the Rules pursuant to s. 38(4)(b)(iii) of the Act.

[101] Allegation 6 is dismissed.

[102] There is a disclosure order with respect to the Exhibits and transcripts of this hearing.