2019 LSBC 04
Decision issued: February 8, 2019
Citation issued: July 13, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

BARCLAY WAYNE JOHNSON

RESPONDENT

DECISION OF THE HEARING PANEL

Written materials:	November 28, 2018
Panel:	Jeffrey T. Campbell, QC, Chair Gillian M. Dougans, Lawyer Mark Rushton, Public representative
Discipline Counsel:	Mandana Namazi
Counsel for the Respondent:	Peter Firestone

BACKGROUND

[1] Mr. Barclay Johnson (the "Respondent") is before the Hearing Panel with respect to allegations that he infringed the Law Society Rules in his handling of trust funds on four occasions between June and September 2015.

[2] Pursuant to Rule 4-30(1) of the Law Society Rules, the Respondent has made a conditional admission of the discipline violation and consents to a proposed disciplinary action. The Discipline Committee has considered the proposed resolution pursuant to Rule 4-30(3). The Discipline Committee accepted the proposed resolution on September 20, 2018 and the citation has been referred to this Panel for a hearing.

[3] The proposed resolution is jointly supported by the Respondent and counsel for the Law Society. This Panel retains the independent discretion to accept or reject the proposed resolution. If the hearing panel does not accept the proposed resolution, the hearing panel is to return the matter to the Discipline Committee and it would then proceed to a hearing before a new panel.

[4] The Respondent and the Law Society have also presented a joint application to conduct the hearing on the written record rather than an oral hearing, pursuant to a Law Society Practice Direction issued April 6, 2018.

THE CITATION

[5] The citation alleges that:

1. On or about September 17, 2015, the Respondent received trust funds of $4,500 by cheque from opposing counsel on behalf of his client DI, and he did one or both of the following:

    (a) failed to deposit the trust funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules; and

    (b) negotiated the cheque for cash when he knew or ought to have known that the client disputed his entitlement to the funds, contrary to Rule 3-65(5) of the Law Society Rules.

2. On or about June 11, 2015, the Respondent received trust funds of approximately $1,500 on behalf of his client DI, and he failed to do one or both of the following:

    (a) deposit the trust funds into a pooled trust account, contrary to Rule 3-51 (now Rule 3-58) of the Law Society Rules; and

    (b) issue a receipt to his client as required by Rule 3-61.1 (now Rule 3-70) of the Law Society Rules.

3. On or about July 22, 2015, the Respondent received trust funds of approximately $1,000 in cash on behalf of his client DI, and he failed to deposit the funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules.

4. On or about September 18, 2015, the Respondent withdrew trust funds in the amount of $4,500 on behalf of his client AT, and he did one or more of the following:

    (a) transferred $3,500 from his trust account to his general account by way of branch to branch transfer;

    (b) withdrew $1,000 from his trust account in cash; and

    (c) recorded the $3,500 transfer from trust and $1,000 withdrawal from trust as a single transaction,

    contrary to Rules 3-64 and 3-68 of the Law Society Rules.

[6] In each allegation, the conduct described is stated to constitute professional misconduct or a breach of the Act or Rules pursuant to s. 38(4) of the *Legal Profession Act*.

AGREED STATEMENT OF FACTS

[7] The Respondent has been a member of the Law Society of British Columbia since 2005. He previously practised in Alberta from 1976 to 1997. He practises as a sole practitioner in Victoria. His practice consists almost entirely of legal aid work, although he occasionally accepts clients who pay directly for the legal services. The allegations in the citation arise from the Respondent's relationship with two private-retainer clients.

Allegations 1 through 3: DI's Funds

[8] The allegations in 1 through 3 arise from the Respondent's conduct in relation to his client DI. The Respondent was retained by DI in June 2015. DI was facing imminent eviction from her apartment as her landlord had obtained an Order for Possession. On June 11, 2015, DI provided the Respondent with a cash retainer in the amount of $1,500. The Respondent did not issue a receipt to DI for the cash payment, and he did not deposit the funds into his trust account.

[9] At the time that he accepted the cash payment, the Respondent had already completed work on DI's case. He believed that he had completed enough work to be entitled to the funds. However, the Respondent had not yet rendered an account. The Respondent was accordingly required to deposit the funds into his trust account and issue the client a receipt pursuant to Law Society Rule 3-51 (now Rule

3-58) and Rule 3-61.1 (now Rule 3-70). The Respondent used the $1,500 to cover business and personal expenses.

[10] On June 11, 2015, the Respondent filed a petition for judicial review on behalf of the client. He also filed a requisition seeking an interim stay of the Order for Possession. The application for a stay was heard the following day and the Order for Possession was stayed.

[11] As the judicial review hearing approached, the Respondent asked DI for a further $1,000 retainer. He provided DI with a "pre-bill", which appears to be an estimate of the costs of the work to be performed. On July 22, 2015, DI provided $1,000 in cash to the Respondent's articled student and was provided with a receipt. The Respondent did not deposit the $1,000 into his trust account. He believed that he had completed enough work at that time to be entitled to the funds, but he had not rendered an account. He acknowledges that he knew at the time that the funds should have been deposited into his trust account as required by Rule 3-58.

[12] The judicial review was heard in August 2015. DI was successful in the review and was awarded costs. On August 24, 2015, opposing counsel emailed an offer to settle the bill of costs for $4,500. The Respondent states that this offer was explained to DI in a telephone call on August 26, 2015. DI does not recall being advised about the offer to settle but does not take issue with the amount that was agreed to by counsel.

[13] The costs award in favour of DI led to a fee dispute between the Respondent and DI. The Respondent took the position that the costs award should go toward legal fees as the value of the work done by his office on DI's case was far greater than the amount of funds that DI had provided. DI believed that the costs award should go to her.

[14] The Respondent prepared an account dated September 3, 2015 for all of the work on DI's case. The account totaled $7,100.34, including fees and disbursements. The amount owing was reduced by $2,500, to reflect the funds that had been previously provided by DI in the form of cash payments. The outstanding amount was $4,600.34.

[15] The Respondent delivered his account to DI with a cover letter dated September 4, 2015. In the cover letter, the Respondent offered to reduce his account by $600.34. This would have resulted in DI's account being fully covered by the costs award, and DI would receive $500 of the remaining costs award once the legal account was paid.

[16] DI subsequently made a counter-offer to settle the fee dispute by the Respondent reducing his account by a greater amount so that DI received $1,000 of the costs award. Although they were apart by only $500, the Respondent and DI did not reach an agreement.

[17] On September 17, 2015, the Respondent received a cheque from opposing counsel in the amount of $4,500 in payment of the costs award. The Respondent did not deposit the $4,500 into his trust account, although he acknowledges that he knew at the time that he should have done so. There was an ongoing disagreement between the Respondent and DI, and the Respondent knew that DI disputed the Respondent's entitlement to all of the costs award. The Respondent cashed the cheque and used the funds for his own expenses.

[18] The Respondent admits that his conduct in relation to his handling of the cash payments and costs award was contrary to Law Society Rules 3-58 and Rule 3-65(5). The Respondent also admits that this conduct constitutes professional misconduct contrary to s. 38(4) of the *Legal Profession Act.*

Allegation 4: AT's funds

[19] On September 18, 2015, the Respondent made two withdrawals from his trust account, both in relation to his client AT. The Respondent had issued an account to AT and was entitled to the funds that were withdrawn as payment for the account. However, the funds were withdrawn as follows:

(a) $3,500 was transferred from the Respondent's trust account to his general account by way of a branch to branch transfer; and

(b) $1,000 was withdrawn from the trust account in cash.

[20] The Respondent agrees that this conduct was contrary to Law Society Rule 3-64, which requires that the withdrawal from the trust account be done with a trust cheque. Although the funds were partially withdrawn in cash and partially transferred to another branch, the withdrawals were recorded in the Respondent's trust journal as a single transaction. This was contrary to Rule 3-68 of the Rules, which sets out the requirements for recording trust transactions.

POSITION OF THE PARTIES

[21] The Respondent and counsel for the Law Society have presented a joint submission that the disciplinary action should be a $2,000 fine. The parties acknowledge that the fine is at the low end of the range of disciplinary action for the conduct at issue.

However, the proposed penalty is intended to reflect exceptional circumstances that will be set out later in these Reasons.

APPLICATION FOR HEARING IN WRITING

[22] The parties also apply pursuant to the Practice Direction of April 6, 2018 for the hearing to be conducted by written record rather than an oral hearing.

[23] The Practice Direction allows for the efficient resolution of a citation without the need for an oral hearing in circumstances where the proceedings can be properly resolved based on a written record.

[24] In determining whether a hearing panel should exercise its discretion to proceed with a hearing in writing rather than an oral hearing, we consider that the following factors may be relevant:

(a) The evidentiary record: A hearing based on written materials will generally require substantial agreement on the facts underlying the citation. If there is a conflict in the evidence or if the parties do not agree on the key facts, then an oral hearing may be required to hear *viva voce* testimony, weigh the competing evidence and make findings of fact. There may be some cases where it is possible to conduct a hearing in writing notwithstanding that there is conflicting evidence, but in practice we consider that such cases will usually require an oral hearing.

(b) Whether the parties have provided comprehensive submissions and a complete evidentiary record: If the hearing is to be conducted on written record, it is important that the hearing panel be provided with comprehensive materials with respect to all the relevant issues in the proceedings. If the hearing panel has questions that cannot be resolved on the basis of the written materials, it may be necessary to proceed with an oral hearing.

(c) Whether the public interest requires an oral hearing: Some cases may raise public interest concerns that weigh in favour of holding an oral hearing. For example, some cases may involve significant media interest. In some cases there may be complainants or other parties who wish to attend a public hearing. Third party interests are not determinative, but they may be considered by the hearing panel when deciding whether an oral hearing is required. It is not necessary to exhaustively define the circumstances in which the public interest

requires a public hearing, but there are some cases where an oral hearing open to the public is necessary.

[25] While the public interest may in some cases require a public hearing, this is not to suggest that a hearing based on written materials is not open or transparent. In all cases, the decisions are issued in writing. The reasons for the decision will be explained in the same manner as an oral hearing. The decisions will be reported. The objectives of disciplinary action can be achieved as effectively by hearings based on written materials as by an oral hearing.

[26] In this case, the parties have provided an agreed statement of facts and have agreed on the proposed disciplinary action. Counsel have filed comprehensive materials, including written submissions and all exhibits relevant to the citation. The material that has been filed is sufficient to permit this Panel to properly consider the allegations and the proposed resolution. We exercise our discretion to conduct the hearing in writing.

[27] The Joint Book of Exhibits, which includes the citation and Agreed Statement of Facts, will be marked as an exhibit in these proceedings.

ANALYSIS

Test for professional misconduct

[28] In accepting the proposed resolution, we must be satisfied that the conduct in relation to allegations 1 through 3 amount to professional misconduct. A breach of the Law Society Rules does not necessarily constitute professional misconduct: *Law Society of BC v. Lyons*, 2008 LSBC 9 and 32. Professional misconduct is established where there is a fundamental degree of fault amounting to a "marked departure" from the conduct that is expected of the profession: *Law Society of BC v. Martin*, 2005 LSBC 16. In determining whether the conduct constitutes professional misconduct, there are a number of relevant considerations including the gravity of the misconduct, its duration, whether there is a pattern of behaviour or a solitary incident, the presence or absence of *mala fides*, and any harm caused by the misconduct: *Lyons* at para. 35.

[29] In this case, we accept the Respondent's admission that the conduct related to DI was professional misconduct. The pattern of behaviour demonstrated a consistent disregard for the rules regarding trust funds. It occurred over a period of approximately three months. The Respondent knew at the time that his handling of the trust funds was contrary to his professional obligations.

[30] We agree with counsel that the conduct underlying allegation 4 should not be considered professional misconduct. It involved a breach of the accounting rules in how the transactions involving AT's funds were withdrawn and recorded. There was no question that the Respondent was entitled to the funds, unlike the situation with DI where there was an ongoing fee dispute. The transactions with respect to AT's funds involved a breach of the Rules, but it was not so serious as to amount to professional misconduct.

The proposed penalty

[31] The proposed disciplinary action is a fine in the amount of $2,000.

[32] The nature and gravity of the conduct is a key factor in determining the appropriate penalty. The misconduct in this case involves the handling of clients' trust funds. There is a strong public interest in ensuring that lawyers handle trust funds in compliance with the Law Society Rules. The integrity of the legal profession relies on the public having full confidence that lawyers can be trusted to properly deal with clients' funds.

[33] The Panel has reviewed the authorities provided by counsel with respect to the range of penalty. *Law Society of BC v. Ogilvie*, 1999 LSBC 17, sets out the factors that are generally taken into account in deciding the disciplinary penalty. The Panel has also reviewed cases dealing with breaches of trust accounting rules, including *Law Society of BC v. Liggett*, 2009 LSBC 36; *Law Society of BC v. Cruickshank*, 2012 LSBC 27; *Law Society of BC v. Lail*, 2012 LSBC 32; and *Law Society of BC v. Tungohan*, 2016 LSBC 45. These cases often involve a fine that is higher than what is suggested in this case and sometimes involve a suspension from practice.

[34] In this case, the proposed penalty is intended to reflect the Respondent's personal circumstances. The Respondent's financial circumstances are limited. His practice consists primarily of criminal law legal aid cases. The Respondent and his wife do not own their own home and do not have any significant savings or assets. His wife is employed as a cook. He is the primary support for his mother, aged 86.

[35] The Respondent was recently diagnosed with a very serious health condition and is scheduled to undergo surgery. The Respondent's ability to work throughout this period will be affected. In short, the Respondent's ability to pay a fine is constrained by his present circumstances. This is one of the factors that should be considered in calculating the appropriate amount of costs or a fine: *Law Society of BC v. Tungohan*, 2018 LSBC 15 at para. 15.

[36] We consider that there are other circumstances that are mitigating in nature in this case. The Respondent voluntarily self-reported his conduct with respect to DI's trust funds. He has admitted to the misconduct and agreed to the penalty, which has spared the costs associated with a contested hearing in this matter. Finally, the Respondent has no prior disciplinary record in over 30 years of practising law.

[37] We consider that the penalty that has been proposed in this case is at the low end of the range of disciplinary action for misconduct related to clients' funds. However, we accept it is appropriate in this case given the exceptional mitigating factors in relation to Mr. Johnson, and in particular that he is currently suffering from a serious health condition that will impact his ability to pay a fine.

[38] In accepting the proposed penalty, we also place weight on the fact that this is a joint submission pursuant to Rule 4-30.

[39] Joint submissions in the form of conditional admissions pursuant to Rule 4-30 are important to the resolution of Law Society proceedings. They are the product of informed discussions between the parties, who are familiar with their respective cases and have agreed on a particular result. Counsel for the Law Society are entrusted to protect the public interest in Law Society disciplinary matters. Joint submissions pursuant to Rule 4-30 are based, at least in part, on a consideration of the public interest. Further, if a matter comes before a hearing panel as a conditional admission pursuant to Rule 4-30, it has been approved not only by counsel for the Law Society but also by the Discipline Committee. Finally, there are often significant costs associated with a contested hearing, not only to the parties but also to the profession. By agreeing to a joint submission, counsel have saved the significant costs associated with a contested hearing.

[40] The final decision remains within the discretion of the hearing panel, but for the reasons set out above it is important to place significant weight on a joint submission by counsel pursuant to Rule 4-30.

CONCLUSION

[41] We accept the proposed resolution. The Respondent is ordered to pay a fine in the amount of $2,000, payable within one year of this decision.

[42] The materials that have been filed in this proceeding include confidential client information. Pursuant to Rule 5-8(2) of the Law Society Rules, we order that any information with respect to the clients' identities and any information protected by

solicitor-client-privilege or confidentiality not be disclosed. This information must be redacted from the Exhibit prior to disclosure.