2019 LSBC 10
Decision issued: March 19, 2019
Citation issued: September 8, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JEFFREY STEPHEN LOWE

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	October 23, 25 and 26, 2018
Panel:	Michelle D. Stanford, QC, Chair Nan Bennett, Public representative Bruce A. LeRose, QC, Lawyer
Discipline Counsel:	Alison L. Kirby
Counsel for the Respondent:	Henry C. Wood, QC

INTRODUCTION

[1] A citation was issued against the Respondent containing two allegations of misconduct arising from the Respondent's improper billing and unauthorized and grossly negligent handling of trust funds received from 43 immigration clients over the course of seven years.

[2] Allegation 1 of the citation provides as follows:

> 1. Between approximately February 2006 and June 2013, the Respondent misappropriated some or all of the sum of $9,107.65 received as pre-billed disbursements from one or more of 43 clients, by directly depositing the funds into your general account or improperly withdrawing the funds from his trust

account, when the Respondent knew or ought to have known that some or all of these disbursements were not properly charged to his clients.

This conduct constitutes professional misconduct or breach of the Act or rules pursuant to s. 38(4) of the *Legal Profession Act*.

[3] The Respondent admits that his conduct as alleged in allegation 1, constitutes professional misconduct, such that his inadequate and unauthorized handling of the $9,107.65 was improper and grossly negligent, notwithstanding his honest and mistaken belief at the time.

[4] Allegation 2 of the citation provides as follows:

2. Between approximately February 2006 and June 2013, the Respondent received some or all of the sum of $74,710.61 from one or more of 43 clients in purported payment of filing fees and disbursements, and did one or more of the following:

   (a) failed to deposit the funds into a pooled trust account as soon as practicable, contrary to Rule 3-51(1) of the Law Society Rules [now Rule 3-58(1)];

   (b) failed to prepare and deliver a bill to the client(s) containing a detailed statement of the disbursements actually incurred, contrary to one or more of s. 69 of the *Legal Profession Act* and Rules 3-62 and 3-63 of the Law Society Rules [now Rules 3-71 and 3-72]; and

   (c) failed to account to your client(s) for all funds received as required by Rule 3-48 of the Law Society Rules [now Rule 3-54].

   This conduct constitutes professional misconduct or breach of the Act or rules pursuant to s. 38(4) of the Legal Profession Act.

[5] The Respondent admits that his conduct as set out in allegation 2 constitutes professional misconduct.

ISSUE

[6] Given the Respondent fully admitted allegations 1 and 2, the only issue before the Panel was whether or not the evidence adduced at the hearing supported the joint submission on both allegations namely, that the Respondent's conduct amounted to professional misconduct.

FACTS

Jurisdiction and service

[7] The citation in this matter was authorized by the Discipline Committee on August 24, 2017, and was issued on September 8, 2017.

[8] The hearing took place on October 23, 25 and 26, 2018.

[9] The Respondent admitted that, on September 8, 2017, he was served with the citation through his counsel, and he waived the requirements of Rule 4-19 of the Law Society Rules 2015.

BACKGROUND

Allegation 1

[10] The Respondent billed for "estimated" disbursements in advance as a "pre-bill" of disbursements. These funds were deposited into his general account. If no disbursements were incurred, the client received a refund. However, the Respondent routinely kept any excess funds (the difference between the pre-billed disbursements and disbursements actually incurred) and recorded them as "disbursement revenue".

[11] At the time of depositing the funds into his general account and reclassifying the pre-billed disbursements as disbursement revenue, it was agreed that the Respondent knew that the disbursements had not been fully incurred, and further, there was no detailed accounting of the excess to the clients.

[12] The Respondent submitted that he honestly believed this was a more efficient manner of dealing with excess disbursement funds typically less than $50, given most of his clients resided overseas and to courier this amount of funds did not make business sense. The Law Society did not oppose that submission.

[13] The Respondent was transparent with these transactions in his accounting; however, he admitted that he had inadequate client authorization to manage the funds as he did.

Allegation 2

[14] Between February 2006 and June 2013, the Respondent obtained retainer agreements from the majority of the 43 clients that included a "flat fee" for legal

services, “estimated disbursements” that would be incurred and government filing fees. The clients agreed to pay an “initial payment” as a “1st instalment ... of your legal fees and disbursements.”

[15] It was agreed that the Respondent would prepare and deliver invoices to his clients *after* the client paid the first instalment and *prior* to incurring any disbursements or providing legal services. The citation is related only to the pre-billed disbursement monies.

[16] It was agreed that the Respondent deposited the monies received from these pre-billed invoices into his general account.

[17] The Respondent admitted that he did not prepare and deliver a bill to his clients setting out the amount of disbursements actually incurred, notwithstanding he kept detailed, transparent records of them.

ANALYSIS

[18] The relationship between a lawyer and client is a fiduciary relationship, requiring the lawyer to act at all times in utmost good faith towards the client. It creates a relationship of trust and confidence from which flows obligations of loyalty and transparency, which in turn requires a solicitor to be candid with the client on all matters concerning the retainer, including ensuring that, in any transaction from which the solicitor receives a benefit, the client has been fully informed of the relevant facts and properly advised upon them (see *Nathanson, Schachter & Thompson v. Inmet Mining Corporation*, 2009 BCCA 385 at paras. 48-49 and *Law Society of BC v. Pham*, 2015 LSBC 14 at para. 36).

[19] The lawyer’s duty of candour to his client with respect to billing is reflected in the *Legal Profession Act* and the *Professional Conduct Handbook*, in force for nearly all of the relevant time:

(a) Section 69(4) of the *Legal Profession Act* provides that a lawyer’s bill must contain “a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursement”; and

(b) Chapter 9, Rule 7 of the Law Society of British Columbia’s *Professional Conduct Handbook* prohibited a lawyer from charging a hidden fee. It provides that a lawyer must fully disclose to the client “any fee that is being charged or accepted.” *Pham*, at para. 38.

[20] The Law Society has issued a number of publications with respect to a lawyer's responsibility to properly bill disbursements:

(a) **Discipline Advisory, August 10, 2012 – "Proper Recording and Billing of Disbursements Required by Rules,"** which provided that lawyers must properly record and bill disbursements in accordance with section 69(4) of the *Legal Profession Act* and that, for billing purposes, disbursements must be:

(i) reasonably incurred or be authorized by the client under s. 71(2)(b) of the *Legal Profession Act*;

(ii) billed at their actual, rather than estimated costs, and properly described in detail in a statement of account; and

(iii) properly recorded to comply with trust accounting rules.

(b) ***Benchers' Bulletin*, 2001: No. 5 September to October – "The Practice Management Advisor,"** in which the Law Society addressed the issue of whether a "handling fee" for disbursements is allowed. In the article, the Society cautioned lawyers to carefully consider the following cases before adding any disbursement surcharges to a bill:

(i) *Pierce van Loon v. Russell* (1994), 32 CPC (3d) 277: A handling fee or surcharge on disbursements is not recoverable, especially when it is sought to be justified as a way of avoiding the limit on contingent fee agreements fixed by the Law Society Rules;

(ii) *Knock v. Owen* (1904), 35 SCR 168: Lawyers must not charge their clients more for disbursements than the amounts they actually incur on their clients' behalf; and

(iii) *Girardet v. Crease & Co.* (1987), 11 BCLR (2d) 361 (SC) at p. 362: which provides that a lawyer commits a breach of fiduciary duty by sending a client a bill claiming disbursements never made.

(c) **Ethics Committee, October 2, 1997 – "Surcharges on Disbursement"** stated that surcharges on disbursements are proper if they:

(i) reasonably reflect actual costs incurred by the lawyer on behalf of the client, and

(ii) are disclosed in the statement of account to the client in accordance with Chapter 9, Rule 7 of the *Professional Conduct Handbook*.

[21] Clients deserve to have confidence that a lawyer's accounts for disbursements accurately reflect the costs actually incurred. As stated by the hearing panel in *Pham* at para. 42, when commenting on a lawyer's conduct in, among other things, billing for disbursements not incurred:

> However, clients deserve more. They deserve thoughtful and honest billing practices by their lawyers. They deserve to know that they have the full attention of their lawyers in all matters relating to their retainers, including billing matters. They deserve to know that the amounts they are billed for disbursements actually reflect the costs incurred by the lawyer issuing the bill.

Professional misconduct

[22] Professional misconduct is not a defined term in the *Legal Profession Act*, the Law Society Rules or *Professional Conduct Handbook.* The test for whether conduct constitutes professional misconduct was established in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 171 as:

> … whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[23] In *Martin*, the panel observed at paragraphs 151 through 154 that a finding of professional misconduct did not require behavior that was disgraceful or dishonourable. It concluded:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[24] The *Martin* test was affirmed by a review panel in *Re: Lawyer 12*, 2011 LSBC 35.

Misappropriation

[25] Misappropriation of a client's trust funds occurs where the lawyer takes those funds for a purpose unauthorized by the client, whether knowingly or through negligence

or incompetence so gross as to prove a sufficient element of wrongdoing. As this definition indicates, there must be a mental element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in the criminal law. See *Law Society of BC v. Ali*, 2007 LSBC 18 at paras. 79-80, 105; *Law Society of BC v. Harder*, 2005 LSBC 48 at para. 56.

[26] In this case, the Respondent knew at the time of depositing the funds into his general account and at the time he reclassified the excess disbursements as "disbursement revenue", that the disbursements he had pre-billed his clients had not actually been incurred.

[27] His conduct in doing so, while not knowingly dishonest, was improper and grossly negligent and provides the sufficient element of wrongdoing to constitute misappropriation.

Character

[28] With leave of the Panel, counsel for the Respondent specifically placed the Respondent's character in issue and filed a book of documents marked as Exhibit 6. The book of documents included 12 letters of support that consistently noted the Respondent's ethics, conscientiousness, legal/community/charitable supports, strong Christian beliefs and reputation as a solid, respected professional.

[29] Counsel for the Respondent submitted these letters as indicators that the Respondent's misappropriation of his clients' funds over the years was not motivated by malice, greed or intent.

[30] Counsel for the Law Society took no issue with the Respondent's good character, but argued that similar to the facts in *Law Society of BC v. Sas,* 2016 LSBC 03, while the Respondent may be of good character, his misappropriation was motivated by "administrative convenience".

[31] The Panel had no difficulty in finding that the Respondent's character is not in issue here and that there was no dishonest intent in his misappropriation.

RESULT

[32] The Panel finds that there was clear evidence of the Respondent's longstanding practice of handling pre-billed or pre-paid clients' funds in a manner that disregarded the trust accounting rules and the *Legal Profession Act* for the admitted "convenience" of both the client and the Respondent.

[33] Based on this, both counsel invited the Panel to make a finding of misappropriation based on gross negligence amounting to professional misconduct on both allegations.

[34] Having heard submissions of both counsel and following a review of the detailed evidence, the Panel finds that the Respondent's conduct as it relates to allegations 1 and 2 of the citation, constitutes professional misconduct.