2019 LSBC 15
Decision issued: May 6, 2019
Citation issued: April 20, 2017

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 DISCIPLINARY ACTION

Hearing date:	March 20, 2019
Panel:	Lisa J. Hamilton, QC, Chair Paul Ruffell, Public representative Sandra Weafer, Lawyer
Discipline Counsel:	Mandana Namazi
Counsel for the Respondent:	William G. MacLeod, QC

INTRODUCTION

[1] The Facts and Determination hearing took place before us October 3, 4 and 5, 2018. This Panel determined that the Respondent had committed professional misconduct in relation to five of the six allegations (2018 LSBC 38).

[2] The misconduct related to:

(a) acting 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 the husband in matrimonial proceedings against his wife in which the husband was claiming an interest in real property owned by the wife, while also:

(i) 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 the 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 prepaid from the sale of the real property; and

(ii) 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;

(b) acting 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 by TN by the wife while also representing the husband in the sale of real property owned by the wife that the Respondent knew was the subject of a claim by the husband and when the Respondent knew or ought to have known their interests were or may be adverse;

(c) failing 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*;

(d) contrary to Rule 7.2-9 of the *Code*, failing to do one or more of the following in relation to the wife:

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

(ii) take care to ensure she was not under the impression that her interests would be protected by the Respondent; and

(iii) make it clear that the Respondent was acting in the interests of the husband; and

(e) improperly withdrawing $20,000 of the proceeds of sale of real property held in trust on behalf of the wife and disbursing those funds 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)).

POSITION OF THE PARTIES

[3] The Law Society submits that the appropriate discipline is a fine in the range of $15,000 to $20,000 payable within one year plus costs in the amount of $10,736.43 in accordance with Rule 5-11 of the Law Society Rules and the tariff at Schedule 4 of the Law Society Rules, payable on or before October 31, 2019.

[4] The Respondent submits that the appropriate discipline is a $15,000 global fine. The Respondent agrees that costs in the amount of $10,736.43 be payable by the Respondent.

DECISION

[5] The primary purpose of disciplinary proceedings is the fulfilment of the Law Society's mandate set out in section 3 of the *Legal Profession Act*, namely, to uphold and protect the public interest in the administration of justice.

[6] The purpose and goal of disciplinary proceedings are succinctly set out by the review board in *Law Society of BC v. Nguyen*, 2016 LSBC 21 at para. 36:

> Still, the disciplinary action chosen, whether a single option from s. 38(5) or a combination of more than one of the options listed, must fulfill the two main purposes of the discipline process. *The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. If there is a conflict between these two purposes, the protection of the public and the maintenance of the public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes.*
>
> [emphasis added]

[7] While it is open to the Panel to assess the disciplinary action on a global basis, we must consider that there were multiple breaches of the duty of loyalty, as well as misconduct relating to poor quality of service, failures to ensure the wife understood that the Respondent was not protecting her interests and the improper withdrawal of trust funds. The Panel must assess disciplinary action based on the totality of these circumstances.

[8] *Law Society of BC v. Ogilvie*, 1999 LSBC 17, sets out at para. 10 a non-exhaustive list of factors to be considered in deciding on the appropriate discipline:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[9] The hearing panel in *Law Society of BC v. Dent*, 2016 LSBC 05 consolidated the *Ogilvie* factors as:

(a) nature, gravity and consequences of conduct;

(b) character and professional record of the respondent;

(c) acknowledgement of the conduct and remedial action;

(d) public confidence in the profession including public confidence in the disciplinary process.

[10] We will address each of the consolidated *Ogilvie* factors.

Nature, gravity and consequences of the misconduct

[11] The duties impacted by the proven misconduct strike the core of the solicitor-client relationship and elevate the need to ensure that the sanction imposed is sufficient to uphold and protect the public confidence in the integrity of the legal profession and the Law Society's disciplinary process.

[12] As stated in Commentary 5 to Rule 3.4-1 of the *Code*:

> The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest. This obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

[13] As the hearing panel stated in the case of *Law Society of BC v. Culos*, 2013 LSBC 19, the duty of loyalty to a client is a core value of the profession. Lawyers are trained to think about and recognize conflicts.

[14] Elaborating upon the importance of avoiding conflicts of interest, the hearing panel in *Law Society of BC v. Skogstad*, 2008 LSBC 19, stated at para. 54:

> The evil to which that provision … is directed is the fear that an unsophisticated and unrepresented party in his or her dealings with a lawyer will develop the impression that the lawyer is representing them in circumstances where that impression is not accurate.

[15] That statement befits the circumstances in the present case, given the testimony of TN and her understanding that the Respondent was protecting her interests.

[16] This Panel determined that the Respondent failed to recognize the conflict at any time, including as recently as when he testified before this Panel at the Facts and Determination hearing.

[17] The comments of both the review panel, which reversed a finding of no misconduct, and the hearing panel on disciplinary action, in *Law Society of BC v. Coglon*, 2002 LSBC 21 and 2006 LSBC 14, respectively, and are also fitting. As the hearing panel stated at para. 20:

> A lawyer who places himself or herself in a position of conflict can never be sure in advance whether actions taken in this context will result in damage. The conflict avoidance provisions … are not simply remedial: they are preventative for the simple reason that the only safe way to deal with conflicts is to avoid them altogether. A lawyer must not be allowed to gauge the seriousness of a conflict with reference solely to the harm it may cause. Such would turn the avoidance of conflict into a game of probability in which lawyers play the odds, weighing potential benefits and liabilities in each conflict as it arises.

[18] As the review panel in *Coglon* stated at paras. 46 and 47:

> Mr. Coglon did not fail to spot a deer in difficult camouflage; this was a failure to spot an elephant in the living room. The conflicts of interest that Mr. Coglon embraced were serious, flagrant, obvious and indefensible. …
>
> … It is usual in conflict cases that the lawyer will lack some malign motivation and that he or she will have the strong hope that everything will work out for everyone. In a certain sense that is the problem: the Law Society cannot have, and the public interest cannot have, any real assurance that well-motivated actions taken in conflict of interest will cause less harm than those basely motivated. The problems come from the perturbations of thinking processes and judgment which result from acting with comprised loyalties.

[19] As in *Coglon*, the Respondent in this case lacked any malign intention; however, he completely failed to spot the elephant in the room.

[20] The nature and gravity of the Respondent's conduct is serious and require a sanction that sends a message to the Respondent so as to specifically deter such conduct in the future. There also needs to be a strong message to the profession to avoid such conflicts. It is essential that lawyers take the duty of undivided loyalty owing to clients seriously.

[21] The Respondent continues to maintain that there has been no harm done by his actions. We disagree.

[22] The Respondent failed to provide adequate service to TN and failed to ensure the wife knew he was not protecting his interests. The Respondent also improperly released trust funds. TN trusted the Respondent as a lawyer. The Respondent's actions in proceeding to act despite a conflict eroded TN's trust in the Respondent and possibly her trust in lawyers generally. TN has still not received the $200,000 she expected to receive pursuant to the promissory note despite her efforts and her own financial resources expended to ready a property for sale and sell it on behalf of the wife. There are also now two Supreme Court actions outstanding involving the trust funds. The Respondent's decision to act for TN and the husband and his unauthorized payment of a portion of the trust funds to a third party have complicated legal matters for TN, the wife and possibly the husband as well.

Character and Professional Conduct Record of the Respondent

[23] The Respondent has a prior professional record consisting of two conduct reviews and one set of recommendations of the Practice Standards Committee.

[24] The Respondent has practised law for more than 30 years. His first conduct review was in 2002 and related to one of the Respondent's legal assistants advertising in the newspaper and providing assistance in relation to uncontested divorces out of the Respondent's offices on weekends without lawyer supervision. The Respondent was cooperative at the time and confirmed he would address all concerns.

[25] The second conduct review related to the Respondent breaching the no-cash rule. The Respondent deposited into his trust account $8,700 in cash received from a relative for a purchase. He acknowledged his mistake and indicated he would not take significant cash deposits again.

[26] The Respondent was referred to the Practice Standards Committee to improve his systems and practices relating to confirming the capacity of clients and assessing for undue influence in estate planning matters. The Respondent was cooperative in improving his practices.

[27] While the first conduct review in 2002 touched on the potential problem of conflicts that may arise from the Respondent's assistant providing legal services on weekends, the focus appears to have been on ensuring that the legal assistant was not essentially practising law unsupervised. The Respondent's second conduct review and the Practice Standards referral do not involve the types of issues now before us.

[28] This is the Respondent's first citation. The Respondent's past professional record is a mildly aggravating factor as opposed to a seriously aggravating factor in determining the appropriate discipline.

Acknowledgement of misconduct and remedial action

[29] There is no evidence that the Respondent acknowledges his misconduct and he has not taken any remedial action to prevent such conduct in the future.

Need to ensure the public's confidence in the integrity of the profession and the disciplinary process

[30] The Respondent's misconduct requires the Panel to apply the primary purpose of disciplinary proceedings, as set out in section 3 of the *Legal Profession Act*. The need to ensure the public's confidence in the integrity of the profession and the disciplinary process requires a meaningful sanction.

[31] The disciplinary action imposed in cases where lawyers have acted in a conflict of interest range from a fine to a suspension. We find that the cases involving suspensions are distinguishable on their facts from the present case, as they also tend to include further aggravating factors that are not present here, such as the respondent lawyer:

(a) acting in a conflict where there is a personal or familial aspect;

(b) acting surreptitiously or deceptively;

(c) having a serious discipline history where the concept of progressive discipline requires a suspension; or

(d) having at least one prior related citation where the concept of progressive discipline requires a suspension.

[32] In this case, there was no personal or familial aspect or gain relating to the conflict. Furthermore, there was no deception or malice on the Respondent's part. Finally, the Respondent has not previously been cited for similar issues. We find that a fine is sufficient both to protect the public and to deter the Respondent from engaging in such behaviour in the future. Indeed, the cases that are closest to the circumstances are ones in which significant fines have been imposed.

[33] For example, in *Culos*, a lawyer was ordered to pay a fine of $15,000 and to obtain the services of a Practice Supervisor for one year to assist with conflict decisions.

The lawyer had acted in a conflict of interest on two separate client files: (1) by acting for an estate administrator and later agreeing to act for a funeral home in collecting a debt owed by the same estate; and (2) by acting for both the administrator and the beneficiary of an estate and creating a charitable trust at the direction of the beneficiary without advising the administrator. In *Culos*, the lawyer had been practising for 25 years and had a professional record similar to the Respondent, having previously undergone a Conduct Review, and having been referred to the Practice Standards Department.

[34] In the case before us, however, in addition to the serious conflict issues, the Respondent also provided poor service to TN and did not ensure that the wife understood that the Respondent was not protecting her interests. In addition, there is also a finding of improper withdrawal of $20,000 from trust funds. The professional misconduct, particularly in regard to the latter, is serious on its own. As well, the Respondent's multiple counts of misconduct are further aggravated by their connection to his initial misconduct relating to the duty of loyalty. Finally, the Respondent's misconduct is also aggravated because the Respondent did not ever rectify the problem, such as by returning the funds.

[35] As such, considering the Respondent's various breaches, the fine should be higher than was ordered in *Culos*.

CONCLUSION

[36] Considering the totality of circumstances, we find that a global fine of $20,000 is the appropriate disciplinary action. The allegations involving breaches of the duty of loyalty and the improper handling of trust funds mandate an elevated sanction despite the fact that the Respondent did not stand to gain anything personally from his conduct and despite the fact that this is his first citation.

COSTS

[37] The Law Society seeks costs pursuant to s. 46 of the *Legal Profession Act* and Rule 5-11 in the amount of $10,736.43 inclusive of fees and disbursements. The costs are calculated in accordance with the tariff and include a reduction of one-quarter to take into account that the sixth allegation was dismissed.

[38] We agree with both counsel that the amount sought is reasonable and appropriate.

NON-DISCLOSURE ORDER

[39] The Law Society also seeks an order under Rule 5-8(2) of the Law Society Rules that portions of the exhibits and transcripts that contain confidential client information or privileged information not be disclosed to members of the public.

[40] The Law Society has the right to override a lawyer's duty to keep client confidentiality and to maintain solicitor-client privilege by compelling lawyers to produce confidential and privileged information to the Law Society during its investigation and hearing processes. Sections 87 and 88 of the *Legal Profession Act* compel disclosure to the Law Society and protect confidential and privileged information from further disclosure. When using that power, however, the Law Society inherits the same obligations as a lawyer to keep the information confidential and protect privilege.

[41] Rule 5-9(1) allows any person to obtain a transcript of a hearing. Rule 5-9(2) allows any person to obtain a copy of an exhibit that was tendered in a Law Society hearing that was open to the public, subject to solicitor-client privilege. Rule 5-9 is subject to any orders made under Rule 5-8(2).

[42] In order to prevent the disclosure of confidential or privileged information to the public, we hereby make an order under Rule 5-8(2) excluding that information from disclosure to the public.

SUMMARY OF ORDERS MADE

[43] The Panel makes the following orders:

(a) the Respondent must pay a global fine of $20,000 on or before June 1, 2020;

(b) the Respondent must pay costs of $10,736.43 to the Law Society on or before October 31, 2019; and

(c) pursuant to Rule 5-8(2)(a) of the Rules, if any person, other than a party, seeks to obtain a copy of a transcript or any exhibit filed in these proceedings, client names and identifying information, and any confidential or privileged information must be redacted before it is disclosed to that person.