2019 LSBC 20
Decision issued: June 12, 2019
Citation issued: February 2, 2018
Citation reissued: October 30, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

SEANNA MICHELLE MCKINLEY

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing date:	April 3, 2019
Panel:	Jamie Maclaren, QC, Chair Anita Dalakoti, Public representative John D. Waddell, QC, Lawyer
Discipline Counsel:	Alison Kirby
No-one appearing on behalf of the Respondent	

INTRODUCTION AND PRELIMINARY MATTERS

[1] The citation was initially authorized on January 25, 2018 and issued on February 2, 2018 and was then reauthorized on October 18, 2018 and reissued October 30, 2018 (the "Citation"). The Law Society seeks a finding of professional misconduct with respect to each of the four allegations contained in the Citation.

[2] A summary of the misconduct that the Respondent is alleged to have committed is as follows:

(a) misappropriating $49,000 of the $98,000 received in trust from Client DM by way of 41 trust withdrawals when the Respondent had no entitlement to the funds (allegation 1(a));

(b) knowingly engaging in conduct contrary to a court order by withdrawing $49,000 received in trust from Client DM when the Respondent knew that a court order restrained and enjoined her client from disposing of, encumbering, assigning, or in any similar manner dealing with those funds (allegation 1(b));

(c) breaching an undertaking given to opposing counsel to hold $49,000 in a separate interest bearing trust account pending agreement or court order by failing to promptly transfer the funds into an interest-bearing trust account (allegation 1(c));

(d) misrepresenting to opposing counsel the circumstances surrounding the Respondent's receipt and handling of the $98,000 of trust funds received from Client DM (allegation 1(d));

(e) breaching an undertaking or failing to honour a trust commitment given to opposing counsel to transfer the balance of the $49,000 in trust funds received from Client DM into the same interest-bearing account as the first $49,000, by withdrawing the balance of those funds (allegation 1(e));

(f) misrepresenting to Client DM's new counsel that the Respondent held and would continue to hold $98,000 in trust funds on behalf of Client DM when she knew the representations were not true as she had already misappropriated or improperly withdrawn $49,000 (allegation 1(f));

(g) attempting to mislead the Law Society or improperly obstruct or delay the investigation by providing false or misleading information surrounding her receipt and handling of the trust funds received on behalf of Client DM including providing a redacted client ledger with respect to Client DM (allegation 1(g));

(h) misappropriating a total of $334,593.77 from her pooled trust account by withdrawing funds on 528 occasions in round dollar amounts when her records were not current and without regard to the client to whom they belonged or whether she had billed or rendered sufficient or any legal services to those clients (allegation 2);

(i) attempting to mislead the Law Society or improperly obstruct the compliance audit by: (allegation 3)

(i) preparing 528 backdated bills and 447 backdated cover letters;

(ii) creating 480 backdated electronic transfer forms;

(iii) representing that she did not operate her own trust account when she knew the statement was untrue; and [misstatement about not having separate accounting system from firm]

(iv) representing that she always billed clients prior to making the withdrawals when she knew that statement was untrue;

(j) failing to comply with various accounting obligations under Part 3 Division 7 of the Law Society Rules including: (allegation 4)

(i) making 459 improper withdrawals totaling $288,986.86 by way of touch tone transfers;

(ii) making 70 improper withdrawals totaling $99,444.51 by way of internet transfers;

(iii) failing to maintain proper client ledgers for over one and a half years including keeping two sets of client ledgers;

(iv) failing to record trust transactions for one and a half years;

(v) failing to perform 31 monthly trust reconciliations for periods ranging up to 920 days; and

(vi) failing to disclose the existence of her CIBC trust account on her 2013 and 2014 trust reports.

Service of citation

[3] Before offering any evidence on the allegations, the Law Society sought a determination by the Hearing Panel that the Citation was served in accordance with Rule 4-19 [*Notice of Citation*] of the Law Society Rules ("the Rules").

[4] The Citation in this matter was originally authorized on January 25, 2018. The Respondent did not participate in the disciplinary process nor did she provide updated contact information to the Law Society. As a result, the Law Society obtained an order for substituted service in March 2018. The hearing of the

original citation was cancelled as the original citation was not served on the Respondent within 45 days of authorization as required by Rule 4-19.

[5] The Citation was reauthorized on October 18, 2018 and a new Order for Substituted Service was obtained on November 16, 2018.

[6] On November 20, 2018, the Respondent was served with copies of the Citation and a new Order for Substituted Service by posting the documents on her member's portal and sending letters to the Respondent notifying her that the document had been posted in accordance with the Order of Substituted Service.

[7] Based on these circumstances the Hearing Panel was satisfied that the Citation had been served on the Respondent in accordance with Rule 4-19(2) and issued an order to that effect.

Proceeding in the absence of the Respondent

[8] The Respondent did not attend the hearing, either in person or by legal counsel, and did not file any responding material with respect to this hearing.

[9] Section 42(2) of the *Legal Profession Act* (the "*Act*") permits a hearing panel to proceed in the absence of a respondent if the panel is satisfied that the respondent has been served with the notice of the hearing.

[10] In applying section 42(2) of the *Act*, hearing panels have considered the following factors:

(a) whether the respondent has been provided with notice of the hearing date;

(b) whether the respondent has been cautioned that the hearing may proceed in her absence;

(c) whether the panel adjourned for 15 minutes in case the respondent was merely delayed;

(d) whether the respondent has provided any explanation for her non-attendance;

(e) whether the respondent is a former member of the Law Society; and

(f) whether the respondent has admitted the underlying misconduct.

Whether the respondent has been provided with notice of the hearing date

[11] In this case, the Respondent was provided with notice of an application by the Law Society to the President to set the date, time, and place for the hearing of the citation. The application requested that the President's Designate set the hearing date for April 3, 2019.

[12] A copy of the Order dated January 16, 2019, setting the date, time, and place of the hearing (the "Order") was served on the Respondent on January 17, 2019, by posting the document on her member's portal and sending a copy of the Order to the Respondent by regular mail.

[13] On March 14, 2019 and on March 21, 2019, the Respondent was mailed reminder letters identifying the date, time, and place of the hearing.

[14] Based on these circumstances and events, the Hearing Panel was satisfied that the Respondent had been provided with notice of the time, place and date of the hearing.

Whether the Respondent has been cautioned

[15] The Respondent had been cautioned by counsel for the Law Society that the hearing may proceed in her absence. The cautions are set out in the Citation and in letters dated January 15, 2019, March 14, 2019 and March 21, 2019.

Adjourned for 15 minutes in case the Respondent is merely delayed

[16] The Hearing Panel adjourned commencement of the hearing for 15 minutes to ensure that the Respondent had not been unavoidably delayed.

Whether the Respondent has provided any explanation for her non-attendance

[17] Discipline counsel advised the Hearing Panel that the Respondent had not communicated with the Law Society with respect to this Citation. The Respondent did not apply for or request an adjournment of the hearing nor had she provided any explanation for her absence.

Whether the Respondent is a former member of the Law Society

[18] The Hearing Panel was advised by counsel for the Law Society that the Respondent was administratively suspended on April 11, 2016. Her suspension continued until she became a former member of the Law Society on January 1, 2017.

Whether the Respondent has admitted the underlying misconduct

[19] Based on the circumstances referred to above, the Hearing Panel found that the Respondent is deemed, for the purposes of the hearing, to have admitted the underlying misconduct by virtue of Rule 4-28(7) of the Rules.

[20] Having regard to all the circumstances, the Panel proceeded with the hearing of the Citation, despite the Respondent's absence.

NOTICE TO ADMIT

[21] Discipline counsel advised the Hearing Panel that, on December 13, 2018, the Respondent was served with a 27-page Notice to Admit document, together with 32 attachments, in accordance with the Order for Substituted Service. The Notice to Admit was admitted as Exhibit 4 at the outset of the hearing and clearly states in bold on the front page that the Respondent was requested to admit the truth of the facts and the authenticity of the documents listed in the notice.

[22] Further, the letters sent to the Respondent informing her that the Notice to Admit had been posted on her member's portal cautioned her that, if she did not respond within the time frame established by Rule 4-28, she would be deemed to have admitted the truth of the facts and the authenticity of the documents listed in the Notice to Admit. The Respondent did not respond to the Notice to Admit in accordance with Rule 4-28(4) of the Rules within 21 days of service or at all.

[23] Pursuant to Rule 4-28(7), the Hearing Panel found that the Respondent is deemed for the purposes of this Citation hearing, to admit the truth of the facts described in the Notice to Admit and the authenticity of the documents attached to the Notice to Admit.

ONUS AND STANDARD OF PROOF

[24] The decision of the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, clarified the law with respect to the standard of proof in civil proceedings. It is now well established that *McDougall* applies to Law Society discipline proceedings

and that the onus is on the Law Society to prove the allegations on the balance of probabilities: *Law Society of BC v. Tak*, 2009 LSBC 25 (para. 7).

Submissions on section 38(4) adverse determination

[25] Section 38(4) of the *Act* sets out the four adverse determinations available to a hearing panel: professional misconduct, conduct unbecoming the profession, breach of the *Act* or Rules, and incompetent performance of duties undertaken in the capacity of a lawyer.

[26] In this case, the Citation alleges that the misconduct constitutes either professional misconduct or a breach of the *Act* and Rules.

[27] The differences between professional misconduct under section 38(4)(b)(i) of the *Act* and breach of the *Act* or Rules under section 38(4)(b)(iii) are discussed below.

Test for professional misconduct

[28] Professional misconduct is not defined in the *Act*, the Rules or the *Code of Professional Conduct for British Columbia* ("*BC Code*"), but has been considered by hearing panels in several cases.

[29] The leading case is *Law Society of BC v. Martin*, 2005 LSBC 16, in which the hearing panel concluded that the test is "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."

[30] In *Martin*, the panel also commented at paragraph 154:

> 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.

[31] The bencher review decision in *Re: Lawyer 12*, 2011 LSBC 35, is the leading pronouncement concerning the test for professional misconduct from a review panel. In the Facts and Determination decision of *Re: Lawyer 12*, 2011 LSBC 11, the single bencher hearing panel had reviewed prior decisions and held at paragraph 14 (in paragraph 7 of the review decision):

> In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the

circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

[32] Both the majority and the minority of the bencher review panel confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test expressed by the single Bencher hearing panel in *Re: Lawyer 12.*

Professional misconduct vs. breach of the Act or Rules

[33] In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel considered the difference between a finding of breach of the *Act* or Rules and a finding of professional misconduct and held:

> [32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
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> …
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> [35] In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

[34] To make findings of professional misconduct with respect to allegations in the Citation involving Law Society Rules, the panel should determine whether the facts, as made out, disclose a marked departure from that conduct the Law Society expects of lawyers, in reference to the factors articulated in *Lyons*.

REVIEW OF EVIDENCE AND ADVERSE DETERMNATIONS

Allegation 1 – Summary of facts and evidence

[35] Allegation 1 of the Citation relates to the Respondent's misconduct in relation to her Client DM. It contains seven very serious sub-allegations of misconduct, any one of which could support a finding of professional misconduct.

[36] The Respondent had been retained by Client DM to assist her in both a family law matter (separation from her husband) and an estate matter (Client DM was executor of the estate of the husband's aunt).

[37] During the course of her retainer, the Respondent was given two cheques by Client DM, each in the amount of $49,000. The Respondent knew at the time of receiving the cheques that the money was withdrawn from the estate funds to which both Client DM and the husband claimed an interest.

[38] The Respondent endorsed the back of the cheques and deposited one of the cheques into her own undisclosed CIBC trust account and the other cheque into the firm's ("WWMK") Trust Account.

[39] As set out in more detail below, the evidence establishes that the Respondent then improperly withdrew all of the $49,000 deposited into her CIBC trust account by way of 41 trust withdrawals when she had no entitlement to the funds and when she knew that the trust funds were subject to a non-disposition order. She did so in breach of her undertakings to transfer and hold the funds (together with the $49,000 in the WWMK Trust Account) in an interest-bearing trust account and while falsely representing to opposing counsel and her client's new counsel that she was continuing to hold the funds in that interest-bearing trust account. She then attempted to mislead the Law Society about her handling of the trust funds during the course of the investigation into her conduct.

[40] The facts underlying allegation 1 are set out in more detail in paragraphs 59 to 135 of the Notice to Admit.

Allegation 1(a) - Misappropriation

[41] In this case, there is clear and overwhelming evidence that the Respondent made 41 unauthorized withdrawals from her trust account totalling $49,000 for her own benefit and when she knew that she was not entitled to the funds.

[42] At the same time as the Respondent was making the 41 improper withdrawals, she was billing and being fully paid by her client for her legal services through WWMK.

[43] There is no evidence from the Respondent as to her reasons for making the 41 unauthorized withdrawals.

[44] There is evidence that the Respondent told Client DM that she would keep the $98,000 received from Client DM in trust until the estate litigation and family law

matter were settled. There is no evidence that Client DM authorized the withdrawal of $49,000 of the $98,000 received.

[45] In *Law Society of BC v. Harder*, 2005 LSBC 48, the hearing panel adopted the following definition of misappropriation, quoting from an American case:

> A useful clarification of the meaning of misappropriation is found in an American authority, in the matter of *Charles W. Summers*, 114 NJ 209 @ 221 [SC 1989] where the Court stated "*Misappropriation is any unauthorized use by the lawyer of client's funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom" [...] as we stated in Re Noonan [..], knowing misappropriation consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking*" [...] The lawyer's subjective intent to borrow or steal, the pressures on the lawyer leading him to take the money, the presence of the attorney's good character and fitness and absence of "dishonesty, venality, or immorality" are all irrelevant.
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> [emphasis added]

[46] In *Harder*, the panel framed the misappropriation issue as whether or not the lawyer was aware of the nature and extent of his encroachment upon his client's funds. Although his doctor gave evidence, albeit largely unaccepted, that the lawyer's ability to formulate intent was compromised, the panel found that the lawyer knowingly took funds without authorization and that was sufficient to label the conduct as misappropriation.

[47] The definition of misappropriation was more recently summarized in *Law Society of BC v. Gellert*, 2013 LSBC 22, where the hearing panel said at para. 71:

> 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, paras. 79-80, 105; *Harder*, para. 56.

[48] Misappropriation of trust funds is among the clearest of marked departures from conduct the Law Society expects of lawyers and is thus professional misconduct.

[49] As the hearing panel explained in *Law Society of BC v. Tak*, 2014 LSBC 57 at para. 35:

> Misappropriation of client trust funds is perhaps the most egregious misconduct a lawyer can commit. Wrongly taking clients' money is the plainest form of betrayal of a client's trust and is a complete erosion of the trust required for a functional solicitor-client relationship. The public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. In the absence of multiple, significant mitigating factors, public confidence in the profession and its ability to regulate itself would be severely compromised if anything short of disbarment is ordered for misappropriation of client funds.

Allegation 1(b) – Acting contrary to a court order

[50] In this case, there is clear evidence that the Respondent improperly withdrew $49,000 of the $98,000 held in trust on behalf of her client after having received a copy of a court order dated March 18, 2014 and after having undertaken to hold the funds pending agreement or court order respecting their disposition. The court order restrained Client DM from disposing of, encumbering, assigning, or in any similar manner dealing with the funds. The court order covered any assets in which the Client DM or her ex-husband had or may have had an interest.

[51] The Respondent was aware at the time of receiving the $98,000 from Client DM that the funds were estate funds to which both Client DM and the ex-husband were making a claim in the estate litigation and that those funds were subject to the non-disposition order. The Respondent acknowledged her obligation to hold the funds pursuant to the court order in correspondence with opposing counsel, but she nevertheless continued to withdraw the $49,000 deposited to her CIBC trust account.

[52] The Respondent's conduct in withdrawing $49,000 in trust funds that she knew were subject to the court order was in blatant disregard to her client's obligation to comply with the court orders and her own obligation not to knowingly engage in conduct contrary to a court order.

[53] Compliance with court orders is fundamental to the administration of justice and strikes to the heart of the rule of law. As stated by the BC Court of Appeal in *Larkin v. Glase*, 2009 BCCA 321 at para. 7:

> A court order must be obeyed until and unless it is reversed. Refusal to obey court orders strikes at the heart of the rule of law, at the core of the organization of our society. If court orders can be disregarded with impunity, no one will be safe. Our free society cannot be sustained if citizens can decide individually what laws to obey and what laws to disregard. …

[54] There are several provisions of the *BC Code* that underscore lawyers' obligation to comply with court orders and ensure that their actions do not facilitate the breach of a court order by a client. For example:

(a) Rule 2.1-1 (a) of the *BC Code* states:

> A lawyer owes a duty to the state to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

(b) Rule 2.2-1 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.

[55] The Respondent's obligation not to knowingly act contrary to a court order is directly related to one of the most important responsibilities that every lawyer assumes when he or she takes the oath on admission to the Bar, namely, the lawyer's obligation to the state to maintain its integrity and its laws (see *Law Society of BC v. Berge*, 2007 LSBC 07 at paras. 34-35).

[56] In *Law Society of BC v. Scholz*, 2009 LSBC 33, the review board quoted with approval the following statement made by the hearing panel on the importance of complying with court orders (cited at para. 59):

> [8] All citizens have a duty to observe Court Orders. This is particularly true for members of the Law Society, who are Officers of the Court and owe a duty to maintain the integrity of our legal system. Courts and Court Orders are at the core of our legal system.

[57] In *Law Society of BC v. Barron*, [1997] LSDD No. 141, the lawyer held trust funds from the sale of a matrimonial home that were subject to an undertaking to opposing counsel and subject of a court order restraining the parties from disposing of the family assets. The lawyer withdrew the funds to pay his client and his fees

on two separate occasions. The panel held that the respondent knowingly released funds to his client and paid his fee from the trust monies prior to the conclusion of an agreement or the obtaining of a court order in breach of an undertaking and the court order. The lawyer's conduct was found to constitute professional misconduct.

Allegation 1(c) and 1(e) - Breach of undertaking

[58] There is also clear evidence that the Respondent failed to comply with: (a) an undertaking given on April 24, 2014 "to hold in a separate interest-bearing account the amount of $49,000 pending agreement or Court Order respecting its disposition"; and (b) an undertaking or commitment given on April 30, 2014 that she would ensure that the balance of the trust funds held in connection with the second $49,000.00 would be "transferred into the same interest-bearing account as the first cheque on the family file" and that the funds would "not be drawn on" until it was decided that the funds are the rightful property of Client DM.

[59] The Respondent did not transfer the $49,000 (which had been deposited into the WWMK Trust Account) into a separate interest-bearing trust account until September 16, 2014, five months after giving her undertaking to do so.

[60] As of April 30, 2014, the Respondent still held $31,400 of the second $49,000 in her CIBC trust account. She did not transfer this balance into the WWMK Trust Account with the first $49,000 as she had stated she would do. Instead, between May 3, 2014 and June 30, 2014, the Respondent withdrew the $31,400 for her own benefit.

[61] The Hearing Panel accepts the Law Society's contention that it is an aggravating factor that the Respondent made the improper withdrawals at the same time as she was corresponding with opposing counsel about the transfer and holding of the trust funds in a separate interest-bearing trust account.

[62] The fundamental importance of undertakings to the profession is well-established. The Court of Appeal commented on this importance in *Law Society of BC v. Heringa*, 2004 BCCA 97, in which it cited with approval the following comments made by the Law Society Hearing Panel (cited at para. 10):

> Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.

> The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. *Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.*
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> [emphasis added]

[63] Similarly, in *Hammond v. Law Society of British Columbia*, 2004 BCCA 560, the Court made an equally strong statement on the importance of undertakings to the profession at paras. 55 and 56:

> The heading of Chapter 11 [of the *Professional Conduct Handbook*] might suggest that the Law Society is concerned only with undertakings given by one lawyer to another and not with undertakings given by lawyers to members of the public. Neither counsel suggested that such a restrictive interpretation was warranted. This is not surprising *given the paramount responsibility of the Law Society to the public (s. 3 of the Act) and the primary importance which the Law Society and its members attribute to lawyers' undertakings*. These undertakings are regarded as solemn, if not sacred, promises made by lawyers, not only to one another, but also to members of the public with whom they communicate in the context of legal matters. These undertakings are integral to the practice of law and play a particularly important role in the area of real estate transactions as a means of expediting and simplifying those transactions.
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> When a lawyer's undertaking is breached, it reflects not only on the integrity of that member, but also on the integrity of the profession as a whole. For that reason, the importance of undertakings is also stressed by the Canadian Bar Association in its *Code of Professional Conduct* (Ottawa: C.B.A., 1996) at Chapter 16.
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> [emphasis added]

[64] Likewise, in *United Mining & Finance Corp. Ltd. V. Becher*, [1910] 2 KB 296, the court wrote:

> … those undertakings are given in their capacity as solicitors, and money is entrusted them under those undertakings largely because they are solicitors and are deemed therefore, and found to be, especially worthy of trust.

(as quoted in *Law Society of BC v. McRoberts*, 2010 LSBC 17, at para. 10)

[65] It is within this context – the exacting and well-established legal culture regarding undertakings – that the Respondent's misconduct should be considered.

[66] Rule 7.2-11 of the *BC Code* sets out the obligations of lawyers with respect to undertakings:

> 7.2-11 A lawyer must
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> (a) not give an undertaking that cannot be fulfilled;
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> (b) fulfill every undertaking given; and
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> (c) honour every trust condition once accepted.

[67] The review panel in *Law Society of BC v. Richardson*, 2009 LSBC 07, considered the question of what constitutes an undertaking and concluded, relying on *Witten v. Leung* (1988), 148 DLR (3d) 418 (Alta. QB); and *Carling Development Inc. v. Aurora River Tower Inc.*, 2005 ABCA 267, that an undertaking may be imposed through the imposition of trust conditions, and undertakings are not restricted to those voluntarily given. The review panel stated at para. 23:

> In summary, the combined effect of the written ethical guidelines for lawyers together with the case law is that no distinction can or should be drawn between the effect of an imposed trust condition and a solicitor's undertaking; they are equivalent. …

[68] The unequivocal expectation is that a lawyer will "fulfill every undertaking given" and "honour every trust condition once accepted." There is no exception or limitation in this expectation.

[69] The importance of undertakings is further underscored by the requirement in rule 7.1-3(a.1) of the *BC Code* that lawyers report to the Law Society a breach of undertaking or trust condition that has not been consented to or waived.

[70] It is worth noting that the only other two categories of conduct that a lawyer is required to report to the Law Society are shortage of trust funds and "other conduct that raises a substantial question as to the other lawyer's honesty or trustworthiness as a lawyer." The fundamental importance of fulfillment of undertakings is demonstrated by the inclusion of breaches with these other types of conduct.

Allegation 1(d) and 1(f) - Misrepresentations to other lawyers

[71] There is clear evidence that the Respondent made misrepresentations to other lawyers surrounding her receipt and handling of the $98,000 she had received from Client DM including statements that:

(a) **April 30, 2014 to Lawyer L**: she had received the trust funds as a "*retainer*", which she deposited on the civil file, so she "wasn't immediately aware of it"; when she knew that the funds were estate funds subject to a non-disposition order, she had personally deposited the funds into her own trust account, and her client had provided her with separate retainer funds, which had been deposited into the WWMK trust account to cover her legal bills;

(b) **April 30, 2014 to Lawyer L**: the $49,000 retainer "was used to pay an account and I will need to address that with our accountant," when she knew that her client's legal bills were being paid through the WWMK trust account;

(c) **April 30, 2014 to Lawyer L**: she would transfer the balance of the funds "into the same interest-bearing account as the first cheque on the family file,", when she knew that the first $49,000 had not been transferred into a separate interest-bearing trust account;

(d) **April 30, 2014 to Lawyer L**: the funds would "not be drawn on," when she drew on the funds deposited to her CIBC trust account the next day and continued to do so until those funds were depleted;

(e) **July 4, 2014 to Lawyer M**: Client DM had a "significant outstanding account with our office," when she knew that Client DM had no outstanding accounts;

(f) **July 4, 2014 to Lawyer M**: she was "holding trust funds for [Client DM] in a separate interest bearing account but [was] not able to release same to cover her account," when she knew that she was not holding trust funds for Client DM in a separate interest-bearing account, when she continued to draw on the funds and when she had no outstanding account; and

(g) **July 14, 2014 to Lawyer M**: "We confirm that we will continue to hold [Client DM]'s funds in our trust account in the amount of $98,000,"

> when she knew that she was not holding trust funds for Client DM in a separate interest-bearing account and that she did not hold $98,000.

[72] In *Law Society of BC v. Karlsson*, 2009 LSBC 03, the panel commented that the practice of law was based on honesty and that the profession could not function at all if judges, other lawyers, and members of the public could not rely on the honesty of lawyers (at para. 7). Anything that undermines the trust that society places on lawyers is a serious blow to the entire profession.

[73] In *Law Society of BC v. Nejat,* 2014 LSBC 51, the lawyer admitted he failed to disclose that he no longer held any funds in trust for his clients and admitted professional misconduct for failing to correct the misapprehension he had created with the court and opposing counsel. The panel commented at para. 37:

> As officers of the court, lawyers have an overriding duty to ensure that they provide accurate information to the court, opposing counsel and self-represented litigants. When lawyers fail in this duty, the integrity of the profession and the administration of justice are compromised. It is no excuse that a lack of candour may inure to a client's benefit. A legal system in which the courts and other actors cannot trust a lawyer to be accurate in his or her representations cannot hope to achieve justice or maintain the respect of the public.

[74] *Nejat* was referred to with approval in *Law Society of BC v. Albas*, 2016 LSBC 18. The panel found the lawyer to have committed professional misconduct for misleading opposing counsel and commented at paras. 111 and 116:

> The Respondent's … failure to advise the court and opposing counsel of the results of the company search and the non-receipt of the deposit are all breaches of his duty of candour and good faith to the court and opposing counsel and constitute professional misconduct. The information withheld had the potential for either the court to reach a different decision or for other counsel to change their positions. The Respondent deliberately left the court and other counsel with only part of the complete picture.
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> …
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> Counsel should be able to rely on assertions of other counsel without the need for suspicious reassessments. The duty of candour advances a common professional interest in fair and even dealings. Such conduct of the Respondent constitutes professional misconduct … . It reveals a

deliberate failure to candidly inform the other counsel involved of matters of fact that could affect their decisions, deliberations and conduct.

[75] Misleading other counsel, whether directly or by omitting to correct what she knows to be a misapprehension, constitutes professional misconduct. The Respondent has made numerous untruthful statements to opposing counsel that she must have known were incorrect and would result in a misapprehension.

Allegation 1(g) – Misleading the Law Society

[76] Finally, there is clear evidence that the Respondent made representations to the Law Society in an attempt to mislead or improperly obstruct or delay the investigation into the Client DM matter.

[77] The Respondent provided the Law Society forensic auditors with a copy of her client file relating to Client DM containing copies of fabricated bills dated April 16 to July 7, 2014 totalling $49,000, purportedly delivered to Client DM.

[78] The client file did not contain copies of invoices rendered to Client DM through WWMK nor copies of her correspondence with opposing counsel about the second cheque for $49,000.

[79] In a letter to the Law Society dated December 1, 2015, the Respondent made the following misrepresentations to a lawyer in the Investigations, Monitoring and Enforcement Group, about her receipt and handling of the two trust cheques for $49,000 received from Client DM:

(a) she was “not present” when the cheques were delivered and “did not know that [Client DM] gave two cheques for some time”, when she had personally been handed the two cheques from Client DM;

(b) the “purpose of the payments was as a retainer” but she “does not believe she asked for a specific amount of retainer,” when she knew the funds were estate funds;

(c) the “funds were not subject to any orders or trust conditions restricting Mrs. McKinley’s or [Client DM]’s ability to deal with them,” when she knew that the estate funds were held subject to the court order and her undertakings to opposing counsel; and

(d) she was not aware until “the end of June” that the funds had been deposited to the two different trust accounts and had been used to pay accounts, when she knew that Client DM had provided true retainers and

had been properly billed through WWMK and she had communicated in April with opposing counsel about the funds.

[80] The Respondent also redacted the client trust ledger relating to Client DM removing the words "DO NOT USE FOR BILLS" from the line item description of the April 16, 2014 deposit of $49,000 to the WWMK trust account before providing it to the Law Society staff lawyer investigating the misconduct.

ALLEGATION 1 – ADVERSE DETERMINATON

[81] The Law Society seeks findings that the Respondent intentionally misappropriated client funds, facilitated the breach of a court order, breached undertakings, made misrepresentations to other lawyers, and attempted to mislead the Law Society, and an adverse determination of professional misconduct with respect to allegation 1 of the Citation. Based on the evidence before us, this Panel makes the findings sought and a corresponding adverse determination.

ALLEGATION 2 – SUMMARY OF FACTS AND EVIDENCE

[82] Allegation 2 of the Citation relates to the Respondent's conduct between January 2012 and July 2014 in misappropriating a total of $334,593.77 by making 528 withdrawals from her trust account when her accounts were not current and/or she had not rendered a bill for the services.

[83] The facts underlying the misconduct are set out in paragraphs 20 to 40 and 136 to 140 of the Notice to Admit.

[84] In essence, the Respondent used her trust account as her own personal account and withdrew funds as needed to cover her operating and personal expenses. The amounts withdrawn were round dollar amounts that were withdrawn from the pooled trust account without regard to the client to whom they belonged and without regard to whether she had rendered sufficient or any legal services to those clients.

[85] The Respondent later fabricated invoices and electronic fund transfer forms to hide her misconduct.

ALLEGATION 2 – ADVERSE DETERMINATION

[86] The Hearing Panel finds that the Respondent misappropriated client funds and makes an adverse determination of professional misconduct with respect to allegation 2 of the Citation.

[87] There is evidence that the Respondent was aware of her obligation not to withdraw trust funds prior to billing her clients and evidence of her deliberately fabricating invoices and other accounting documents to cover up her misconduct. In other words, there is evidence that the Respondent knew that she had made unauthorized use of the trust funds.

[88] In any event, as found by the review board in *Law Society of BC v. Sahota*, 2018 LSBC 20 at para. 3, a finding of misappropriation may be made where the sheer volume of delicts establishes the necessary element of fault.

[89] The total of 528 improper withdrawals totalling $334,593.77 performed over a prolonged period of time is behaviour that, on its own, would establish fault and, combined with the Respondent's knowledge, is sufficient evidence to prove misappropriation.

ALLEGATION 3 – SUMMARY OF FACTS AND EVIDENCE

[90] Allegation 3 of the Citation relates to the Respondent's conduct in attempting to mislead the Law Society by creating or causing to be created 528 back-dated bills, 447 back-dated cover letters and 480 back-dated Electronic Transfer Forms and falsely representing to the Law Society that she did not operate her own trust account or have a separate accounting system and that she always billed prior to making withdrawals from trust.

[91] The facts underlying the misconduct are set out in paragraphs 12 through 51 of the Notice to Admit and can be summarized as follows:

(a) On numerous occasions between September 2012 and July 2014, the Respondent withdrew trust funds without issuing statements of accounts and while her trust accounting records were not current;

(b) The Respondent received a Notice of Compliance Audit on or around April 28, 2014 notifying her that the Law Society would conduct a compliance audit of her practice starting on June 25, 2014. It was subsequently rescheduled to commence on August 27, 2014;

(c) The Respondent corresponded with her assistant about the fabrication of documents referring to it as "cooking of the books to do in pretty short order" and stating that they would need to "redo" the invoices "to match transfers from trust to general" and that she would get her transfer sheets "so we can start filling them in …";

(d) When told by her assistant that she could not complete the trust accounting by the audit date, the Respondent attempted to delay the audit by falsely stating to the auditor that she operated her "trust accounts through WWMK" and did not "have a separate accounting system or reconciliations, etc." She also falsely stated that she did not "have a trust account in operation and McKinley Law Corporation doesn't have a general account either.";

(e) Between August 12 and August 27, 2014 the Respondent and her assistant created 159 client ledgers for 81 different clients. Also, between August and September of 2014, they created back-dated invoices, cover letters and Electronic Fund Transfer forms to correspond with the dates of withdrawals made from the CIBC Trust Account;

(f) The Respondent provided the back-dated documents to the Law Society's compliance auditor in September 2014 and did not inform her that the documents had been created in August or September 2014;

(g) In March 2015, the Respondent sent a letter in response to a compliance audit results letter in which she stated that she understood that trust funds must not be transferred until the client has been billed for services, and falsely represented that "this has not happened in my practice." At the time of making the representation the Respondent knew it was false. In her email to her assistant in August 2014 instructing her to "redo" the invoices, the Respondent had stated "There will be LOTS of them as you know I often transfer prior to billings."

ALLEGATION 3 – ADVERSE DETERMINATION

[92] The Hearing Panel finds that the Respondent attempted to mislead the Law Society, and/or improperly obstructed the audit. It therefore makes an adverse determination of professional misconduct with respect to allegation 3 of the Citation.

[93] Honesty and integrity in the legal profession, as discussed in *Karlsson*, is of particular importance when dealing with the Law Society, which is mandated to uphold and protect the public interest in the administration of justice by, among other things, regulating the legal profession.

[94] One of the functions undertaken by the Law Society as regulator is the compliance audit of the books, records and accounts of a lawyer for the purpose of determining whether the lawyer meets standards of financial responsibility in accordance with Part 3 Division 7 of the Rules. The compliance audit is one of the core functions undertaken by the Law Society in fulfillment of its regulatory function.

[95] Any attempt to deliberately undermine the Law Society's ability to regulate the profession should be strongly discouraged, and a clear message should be sent to the legal profession that there will be no tolerance of lawyers attempting to undermine the Law Society's investigation of complaints.

[96] The leading cases on misleading the Law Society during the course of a compliance audit are the decisions of *Law Society of BC v. Faminoff*, 2014 LSBC 22 and *Law Society of BC v. Nguyen*, 2016 LSBC 21. In both of these decisions, the lawyers fabricated accounting records and provided the false documents to the Law Society during the course of the audit.

[97] In *Law Society of BC v. Tak*, 2014 LSBC 27, the panel found that the lawyer made a "*deliberate misstatement to the Law Society [that] was an attempt to cause the Law Society investigator to have a wrong idea or impression*" about the deposit of retainer funds (para. 172). In all three of *Faminoff*, *Nguyen* and *Tak*, the panel found professional misconduct where the lawyer attempted to undermine the Law Society's investigation by providing false information and/or failing to provide correct information during a compliance audit.

ALLEGATION 4 – SUMMARY OF FACTS AND EVIDENCE

[98] Allegation 4 of the Citation relates to the Respondent's conduct between January 2012 and July 2015 in failing to comply with various Part 3 Division 7 trust accounting rules.

[99] The facts underlying the misconduct are set out in paragraphs 141 to 149 of the Notice to Admit and can be summarized as follows:

(a) The Respondent improperly withdrew funds from trust on 459 occasions by way of touch-tone transfers totaling $288,986.86 and on 70 occasions

by way of internet transfers, totaling $99,444.51, contrary to Rules 3-56(1.3), (3) and (3.1) [now Rules 3-64(4), (6) and (7)];

(b) The Respondent failed to properly maintain client trust ledgers for the period January 1, 2013 to July 31, 2014, including keeping two sets of client ledgers;

(c) The Respondent failed to record any withdrawals from trust from February 2, 2013 onwards until August or September 2014, contrary to Rule 3-63;

(d) The Respondent failed to perform monthly trust reconciliations for the period January 31, 2012 to July 31, 2014 until September 2014. In other words, the Respondent was late in preparing 31 trust reconciliations for up to 920 days, contrary to Rule 3-65 [now Rule 3-73];

(e) The Respondent failed to disclose the existence of her CIBC trust account on her 2013 and 2014 trust reports, contrary to Rule 3-72 [now Rule 3-79].

ALLEGATION 4 – ADVERSE DETERMINATION

[100] The Hearing Panel finds that the Respondent failed to comply with her accounting obligations, and therefore makes an adverse determination of professional misconduct with respect to allegation 4 of the Citation.

[101] As in the *Lyons* case, in more egregious cases, breaches of Part 3 Division 7 trust accounting rules may also amount to professional conduct. The Panel noted that, when considering whether a breach of the *Act* or Rules amounts to professional misconduct, a number of factors are considered including: gravity of the conduct, duration, number of breaches, whether or not there was *mala fides*, and whether the conduct caused harm.

[102] The Panel in *Lyons* also noted that, although Trust Assurance staff may provide some information and guidance to the lawyer, "ultimately, it is the [lawyer's] responsibility to inform himself regarding the Rules" (para. 43).

[103] In *Tak,* the panel reviewed the factors in *Lyons* and found that the lawyer failed to comply with numerous accounting rules over an 18-month period. The panel concluded that the lawyer's breaches were serious and resulted in numerous misappropriations and found the lawyer to have committed professional misconduct.

[104] Similarly, the Respondent's accounting rule breaches are numerous - breaching Rules more times than the lawyers in *Lyons, Tak,* and *Gellert* combined. The breaches occurred over an extended period of time. The Respondent's accounting rule breaches allowed her numerous opportunities for misappropriation. Finally, as can be seen in the Respondent's conduct and comments to her assistant following contact from the Law Society's compliance auditor, she was aware of her numerous rule breaches and only took steps to address them once she realized they would be uncovered.

CONCLUSION

[105] For each allegation, the Law Society has established that the Respondent committed professional misconduct on the balance of probabilities. This Hearing Panel therefore makes an adverse determination under section 38(4)(b)(i) of the *Act* that the Respondent has committed professional misconduct with respect to each of the allegations.