

**CORRECTED DECISION: PARAGRAPHS [34], [35], [36], [41], [45], [46] AND [65] OF THE DECISION WERE AMENDED ON AUGUST 28, 2019**

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**SUMIT AHUJA**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL  
ON FACTS AND DETERMINATION**

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Hearing dates: March 26 and 27, 2019

Panel: Steven McKoen, QC, Chair  
Nan Bennett, Public Representative  
Shona A. Moore, QC, Lawyer

Discipline Counsel: Irwin G. Nathanson, QC  
Julia K. Lockhart

Counsel for the Respondent: Henry C. Wood, QC  
Sandy Kovacs

**BACKGROUND**

- [1] The Respondent was called and admitted as a member of the Law Society of British Columbia on April 15, 2012. He first practised as an associate with a family law firm until June 1, 2014. He then joined the Langley office of a large firm (“Law Firm No. 2”) and practised as an associate in the area of family, immigration and criminal law until March 2017.

- [2] On March 25, 2017, the Respondent voluntarily removed himself from practice and entered a residential treatment facility for treatment of his addiction to alcohol and cocaine. After he completed the residential portion of his treatment, the Respondent provided successive voluntary undertakings to the Law Society not to practise law. During this period, the Respondent put in place a rigorous program of rehabilitation and drug and alcohol monitoring, which continues today.
- [3] On December 4, 2017, with medical approval, he returned to practice with a new law firm in Langley, BC.
- [4] In this proceeding the Respondent admits, and takes full responsibility for, his professional misconduct but, through counsel, invites this Panel to re-examine the way in which we view and label misconduct where the misconduct has an element of addiction. In particular, counsel for the Respondent suggests that our lexicon ought to expand beyond the usual label of “misappropriation”, a heavily “loaded” term often associated with disbarment, to use less condemnatory language that takes into account that, in some cases, the character of the misconduct may change by the presence of addiction.

## **THE CITATION**

- [5] On December 15, 2017 the Law Society issued a Citation that sets out a total of 11 allegations: one allegation that the Respondent failed to attend a chambers application on March 2, 2017; five allegations that the Respondent misappropriated or improperly handled client funds; and five allegations that the Respondent failed to follow accounting and billing rules, including failures to deposit funds received from a client into a trust account. All conduct alleged in the Citation occurred during a nine-month period immediately before the Respondent entered residential treatment.
- [6] At the commencement of the hearing, the Law Society declined to proceed with one of the allegations of misappropriation.

## **FACTS**

### **Admissions**

- [7] The Law Society and the Respondent entered into an Agreed Statement of Facts that sets out the Respondent’s admissions of fact and admissions of professional misconduct. In summary, the Respondent admits to the conduct at issue in these proceedings and admits, unreservedly, that it constitutes professional misconduct.

- [8] With specific respect to the four allegations that deal with misappropriation, the Respondent admits to the conduct alleged, admits that he improperly handled some or all of the funds in question and admits that he used client funds for his personal expenses, including the purchase of drugs. The Respondent admits that this conduct is professional misconduct, but he refrains from making an express admission of “misappropriation”.
- [9] These admissions are described in the Agreed Statement of Facts in this way:

**Allegation 1: Client AD**

- a. The Respondent was retained by AD in connection with a family law matter, beginning in 2014;
- b. The Respondent was scheduled to attend a full-day chambers application on behalf of AD on March 2, 2017;
- c. On the evening of March 1, 2017, the Respondent spoke with opposing counsel and AD in preparation for the hearing;
- d. After concluding those conversations, the Respondent spoke with his wife, who had informed the Respondent that she wished to end their marriage. During their call, the Respondent’s wife asked the Respondent to prepare a separation agreement;
- e. The Respondent was very upset by this conversation and experienced symptoms of a panic attack. He checked into a hotel and began to consume alcohol and cocaine;
- f. The Respondent continued to drink and to use for the remainder of the evening and through the next day;
- g. The Respondent did not attend the chambers application on behalf of AD;
- h. Because of a shortage of judges, AD’s matter was stood down until the afternoon, when the judge hearing the matter declined to decide the substantive issues without AD’s counsel, but ordered special costs against AD; and
- i. The Respondent made a payment of \$12,500 to AD that was intended to cover any liability she had for special costs.

**Improper handling of funds and accounting rule breaches**

- a. Between June 2016 and March 2017, the Respondent improperly handled funds from ten clients including, but not limited to, his failure to comply with his accounting and record-keeping obligations.

**Allegation 2: Client JV**

- a. JV was a family law client of the Respondent, with a file opened at Law Firm No. 2;
- b. In October 2016, JV provided \$3,200 in cash to the Respondent as a retainer;
- c. In November 2016, JV provided \$1,800 in cash to the Respondent as a retainer;
- d. In relation to both the October and November payments, the Respondent did not:
  - i. deposit the funds into a trust account;
  - ii. make any record of receipt of the funds;
  - iii. issue any receipt to JV; or
  - iv. issue and deliver a bill to JV before taking the funds;
- e. The Respondent admits that *he used the funds from the October and November payments for personal expenses*; [emphasis added]
- f. The Respondent admits that, while he subsequently performed some legal work for JV, the work was not sufficient to justify a fee of \$5,000; and
- g. On or about July 28, 2017, the Respondent repaid \$5,000 to Law Firm No. 2 to the account of JV.

**Allegation 3: Client SR**

- a. SR was a family law client of the Respondent, with a file opened at Law Firm No. 2;

- b. On October 17, 2016, SR provided \$5,000 in cash to the Respondent as a retainer;
- c. The Respondent did not:
  - i. deposit the funds into a trust account;
  - ii. make any record of receipt of the funds;
  - iii. issue any receipt to SR; or
  - iv. issue and deliver a bill to SR before taking the funds;
- d. The Respondent *used the funds for personal expenses*; [emphasis added]
- e. The Respondent provided some legal services to SR in connection with the retainer, but the work was not sufficient to justify a fee of \$5,000; and
- f. The Respondent repaid the funds to SR on or about July 5, 2017.

**Allegation 4: Client AD**

- a. AD was a family law client of the Respondent, with a file opened at Law Firm No. 2;
- b. On or about November 30, 2016, AD provided \$5,000 in cash to the Respondent as a retainer;
- c. The Respondent did not:
  - i. deposit the funds into a trust account;
  - ii. make any record of receipt of the funds;
  - iii. issue any receipt to AD; or
  - iv. issue and deliver a bill to AD before taking the funds;
- d. The Respondent *used the funds for personal expenses*; [emphasis added]

- e. The Respondent provided some legal services to AD in connection with the retainer, but the work was not sufficient to justify a fee of \$5,000; and
- f. On or about July 28, 2017, the Respondent repaid the funds partly by payment to Law Firm No. 2, and the rest by repayment of the balance to AD.

**Allegation 5: Client IG**

- a. IG was a criminal law client of the Respondent;
- b. On June 14, 2016, IG provided a cheque for \$1,000 to the Respondent on the understanding that this payment would cover all of the costs associated with a charge of sexual assault;
- c. The Respondent did not:
  - i. deposit the funds into a trust account;
  - ii. make any record of receipt of the funds; or
  - iii. issue and deliver a bill to IG before taking the funds;
- d. The Respondent provided some legal services to IG in connection with the retainer, including several meetings with him. The Respondent says that his time involvement at his normal billing rate would exceed \$1,000, but he acknowledges that he had not completed all of the work contemplated under the terms of his retainer agreement by the time that he deposited the funds into his personal account; and
- e. The Respondent *used the funds from IG for his personal expenses.* [emphasis added]

**Allegation 6: Client JG**

- a. JG was a criminal law client of the Respondent;
- b. In or about February 2017, the Respondent agreed to perform legal services for JG in exchange for a cash payment that the Respondent agreed was to be delivered to the Respondent's home, where he lived with his mother;

- c. In or about March 2017, JG delivered \$2,800 in cash to the Respondent's home, which was received by the Respondent's mother;
- d. On or about June 27, 2017, the Respondent's mother released the \$2,800 in cash to the Respondent's counsel in order that it be used for the purpose of reimbursing JG;
- e. The Respondent did not:
  - i. deposit the funds into a trust account;
  - ii. make any record of receipt of the funds;
  - iii. issue any receipt to JG; or
  - iv. issue and deliver a bill to JG, at any time;
- f. The Respondent provided some legal services to JG in connection with the retainer, but the work was not sufficient to justify a fee of \$2,800; and
- g. The Respondent's counsel was unsuccessful in reaching JG in order to provide him with the reimbursement.

**Allegation 7: Client NS**

- a. NS was a client of the Respondent;
- b. The Respondent assisted NS with an immediate roadside prohibition in December 2015 to January 2016 and related criminal charges laid in March 2016. This work included preparing for and attending a hearing related to the immediate roadside prohibition;
- c. On August 21, 2016, NS paid the Respondent \$1,450 in connection with the services the Respondent had performed. The payment was made by way of electronic bank transfer to the Respondent's personal bank account;
- d. The Respondent did not:
  - i. deposit the funds into a trust account;
  - ii. make any record of receipt of the funds; or

- iii. issue and deliver a bill to NS before taking the funds.

**Allegation 8: Client AS**

- a. AS was a client of the Respondent;
- b. The Respondent assisted AS with two matters: an immediate roadside prohibition and an assault charge;
- c. In connection with the immediate roadside prohibition, the Respondent prepared for and attended an oral hearing;
- d. In connection with the assault charge, the Respondent appeared in court, including conducting a bail hearing. The Respondent also negotiated with the Crown to have the charges stayed;
- e. The Respondent charged AS \$3,000 for each of these two matters;
- f. On each of August 21, 2016 and November 2, 2016, AS paid the Respondent \$3,000 (for a total of \$6,000) by way of cheque made out to the Respondent's law corporation;
- g. The Respondent did not:
  - i. deposit the funds into a trust account;
  - ii. make any record of receipt of the funds; or
  - iii. issue any receipt to JB; or
  - iv. issue and deliver a bill to JB before taking the cash.

**Allegation 9: Client JB**

- a. JB was a family law client of the Respondent;
- b. The Respondent performed a variety of legal services for JB, including at least three court appearances and various correspondence;
- c. In November 2016, JB provided \$2,500 in cash to the Respondent in connection with the services the Respondent had performed;
- d. The Respondent did not:

- i. deposit the cash into a trust account;
- ii. make any record of receipt of the cash;
- iii. issue any receipt to JB; or
- iv. issue and deliver a bill to JB before taking the cash.

**Allegation 10: Client PD**

- a. PD was a criminal law client of the Respondent;
- b. PD was arrested and charged in October 2016. The Respondent represented PD on a contested bail hearing on a Sunday, and assisted PD in having the charges stayed or dropped;
- c. On November 1, 2016, PD paid the Respondent \$2,000 in connection with the services the Respondent had performed. The payment was made by way of electronic bank transfer to the Respondent's personal bank account;
- d. The Respondent did not:
  - i. deposit the funds into a trust account;
  - ii. make any record of receipt of the funds; or
  - iii. issue and deliver a bill to PD before taking the funds.

**Allegation 11: Client TH**

- a. TH was a client of the Respondent;
- b. The Respondent assisted TH with criminal charges that were laid in August 2016. The Respondent appeared in court on behalf of TH seven or eight times in 2016;
- c. In February 2017, TH gave the Respondent \$3,000 in cash, in connection with the services the Respondent had performed;
- d. The Respondent did not:
  - i. deposit the cash into a trust account;

- ii. make any record of receipt of the cash;
- iii. issue any receipt to TH; or
- iv. issue and deliver a bill to TH before taking the cash.

[10] The Respondent admits that the entirety of his conduct described above constitutes professional misconduct, but as stated earlier, he does not make a specific admission to misappropriation, although he admits that conduct would ordinarily be caught by that term.

### **The medical evidence**

#### **Dr. Paul Farnan**

- [11] During the hearing, both the Law Society and the Respondent called evidence from medical practitioners to describe, amongst other things, the nature of addiction, the general course of the disease, how addiction affects individuals physically and mentally and to give their medical opinions pertaining to the Respondent. The doctors' evidence did not significantly diverge.
- [12] Dr. Paul Farnan, a general practitioner, was the only witness called by the Law Society as part of its case. He is a licensed family physician who has obtained certification in addiction medicine.
- [13] Dr. Farnan testified that he had reviewed the medical reports prepared by Dr. Jennifer Melamed (which will be discussed below) and concurred with those reports in regard to the diagnosis, treatment and follow-up requirement for the Respondent.
- [14] In his report dated May 16, 2018, Dr. Farnan opined that there was "no doubt" that the Respondent met the diagnostic criteria for addiction in the past and probably would have met the diagnostic criteria for alcohol dependence in or about 2011/2012 and for cocaine dependence in or about 2014. These were his best estimates, but he readily admitted that it was difficult to be sure of exact dates where misuse or abuse of a drug has transitioned to addiction.
- [15] Dr. Farnan found that the Respondent met the DSM-IV (*Diagnostic and Statistical Manual of Mental Disorders*, 4th edition) diagnostic criteria for addiction in the past and that it appeared the Respondent is now in "stable abstinent remission." The emphasis of Dr. Farnan's testimony was to explain the basis for

acknowledging “addiction” or substance dependence as a genuine primary, chronic progressive brain disease and not simply as a character flaw.

- [16] Dr. Farnan explained that he made his diagnosis and assessment using the DSM-IV. (Dr. Farnan declines to use the DSM-5 diagnostic tool for reasons that are not relevant to the case at hand.) Dr. Farnan stated in his report:

Structural and functional abnormalities in the addicted brain can be demonstrated with advanced radiological techniques. Hence, ‘addiction’ or substance dependence is considered to be a genuine primary, chronic progressive brain disease and not simply a character flaw.

- [17] Dr. Farnan wrote:

Primarily addiction affects brain reward, motivation, memory and related neurocircuitry. Dysfunction in these circuits can lead to characteristic biological, psychological and social manifestations. This is often reflected in an individual pathologically pursuing reward and/or relief by substance use or other behaviours despite negative consequences associated with the addiction. As addiction progresses without treatment, it is characterized by an inability to consistently abstain, impairment in behavioural control and craving, diminished recognition of significant problems with one’s behaviour and interpersonal relationships, as well as a dysfunctional emotional response at times to stress, etc.

To further clarify, all potentially addictive drugs activate reward pathways in our brains and although addiction ultimately begins with a conscious choice to use drugs, the development of addiction is not just “using a lot of drugs.” The brain changes are more complex. Addictive drugs are so rewarding that they can eventually commandeer the neurocircuitry pathways referenced above and indeed our brain. Hence we see the acceptance in medicine that addiction is indeed a brain disease and the drug(s) of choice alter normal brain functioning at several levels.

The problem with the drive to use a drug in an addicted person is that, even though it begins to be associated with negative consequences, the drive to use can become overwhelming. Therefore, despite what might look like negative consequences, the addicted individual appears to be choosing to continue to use the drug, but the reality is that they reach a stage where they are unable to stop.

- [18] In his general statements about the course of the disease and, in particular, reference to the concept of “relapse”, Dr. Farnan stated:

Therefore, relapse is another very important consideration when it comes to addiction. Relapse is almost a defining feature of this disorder and is not a sign of treatment failure or selfish gluttony. It also relates to brain changes and should not be unexpected. Mr. Ahuja tried to abstain from alcohol and cocaine recurrently but without formal treatment he repeatedly relapsed. This concept of repeated relapses helps to explain why the best long-term approach, once the diagnosis of addiction has been confirmed, is to engage in treatment that adopts a chronic disease management lens and has an emphasis on long-term relapse prevention strategies, as opposed to simply trying to ‘quit drinking’ for now.

- [19] Dr. Farnan also addressed the “flawed thinking” associated with those persons in active addiction. He stated:

... another very important core feature of this disease are [sic] the defense mechanisms regularly seen that can be both unconscious and conscious at different times. These include rationalization, minimization and denial that the situation is as bad as it is. Denial is not unique to this disease. Denial can look like ambivalence, self-deception or even blatant lying. Add to all of this the commonly seen stubborn individuality of independent professionals such as physicians and lawyers, along with our inability to ask for help when we are ill; the stigma associated with being sick – especially if it involves mental health issues; the fear of being found out and possibly having to go to residential treatment; as well as the threat of being reported to our regulator bodies, etc., and it is not surprising that addiction in independent professionals is so difficult to deal with, even if the individual is actually aware of its existence. As a result the diagnosis of addiction is typically delayed.

- [20] Dr. Farnan expressed his medical opinion that the Respondent is currently fit to practise law and that his prognosis for the future is good while he continues to engage proactively in a “personal program for recovery.”

- [21] Dr. Farnan was asked about any possible nexus existing between the Respondent’s medical diagnosis of addiction and the behaviours that occurred and that are the subject of the Citation. In his report, he stated:

This is not an easy question to answer in retrospect, but based on the information available to me I would consider Dr. Melamed’s opinion to be

reasonable and that there was, more likely than not, an acceptable connection between Mr. Ahuja's untreated and unstable addiction in 2016 and early 2017, and the behaviours that were considered to be misconduct.

- [22] Dr. Farnan was careful to acknowledge that, while there may be an association between addiction and certain behaviours, there is a difference between correlation and causation. Fortunately, this Panel need not answer that question definitively, but we do accept Dr. Farnan's observations in this passage from his report:

Addiction does create distortions in thinking, feelings, perceptions, and judgments that push people to behave in ways that are not understandable to others around them. Addiction-related behaviours are more commonly a manifestation of the disease, rather than a cause. As addiction progresses, the lives of those effected [sic] can become so unmanageable that they will pursue immediate gratification which might include neglecting work or home responsibilities and borrowing money or illegal activities to access monies, assuming with their flawed thinking that it will be repaid at some ill-defined date in the future.

- [23] In direct relation to the Respondent's circumstances, Dr. Farnan observed that, in untreated addiction that has reached a relatively advanced stage in a relatively young man such as the Respondent, addiction-related behaviour was, in his view, relevant. Dr. Farnan put it this way:

... it is my opinion that relatively advanced addiction, as in Mr. Ahuja's case, can influence certain inappropriate behaviours. This is why I would say that there is a definite correlation between the two in Mr. Ahuja's case but it is difficult for anyone to prove absolute causation even when that is the case.

- [24] Dr. Farnan concluded:

In summary, it is my medical opinion there is a plausible connection between the diagnosis of relatively severe unstable addiction to alcohol and cocaine in Mr. Ahuja's case and the behaviours reportedly exhibited by him in 2016 and 2017, including those relating to his inappropriate use of clients' funds. The sensitivity or quantification of that association is not possible for me to confirm clinically. I found no other explanation for his behaviour based on the history available to me, e.g. no previous reports of similar criminal or sociopathic activity, etc. other than his interaction with police in Australia.

[25] When asked how a person addicted to drugs or alcohol can continue to carry out legal work when their judgment is apparently flawed, Dr. Farnan said that a person's ability to carry on the practice of law or practice of medicine under usual circumstances is not an indication that they are not living with an active addiction. He used the following as an example from the health care sector:

I see physicians or nurses who know how to run an emergency room while they are stealing drugs [to feed their addictions], but if you put them into a "code red" situation, they cannot perform.

Dr. Farnan did not find it surprising that a person with advanced addiction could manage well in the practice of law while, at the same time, stealing from their clients.

### **Dr. Jennifer Melamed**

[26] Dr. Jennifer Melamed was engaged to conduct an independent medical evaluation of the Respondent for Law Firm No. 2. Dr. Melamed is a licensed general practitioner who has practised as a family physician and has obtained certifications in addiction medicine.

[27] Dr. Melamed carried out her first independent medical evaluation on March 13, 2013, immediately before the Respondent entered residential treatment. Like Dr. Farnan, Dr. Melamed diagnosed the Respondent on the DSM-IV – TR guidelines.

[28] Using those guidelines, Dr. Melamed's diagnosis was that, in March 2017, the Respondent had a severe alcohol dependence disorder, a severe cocaine dependence/stimulant use disorder and other conditions not related to these proceedings. In her independent medical evaluation report dated March 20, 2017, Dr. Melamed recommended residential treatment as a priority with ongoing monitoring to be in place after completion.

[29] Dr. Melamed prepared supplementary follow-up reports in respect of the Respondent dated June 21, September 14 and September 25, 2017. In her report of September 14, 2017, she described the Respondent's current diagnosis as alcohol and cocaine dependence and use disorder in early remission.

[30] In specific response to the question of whether the Respondent's medical conditions impaired his capacity to exercise moral, ethical or professional judgment at the time of the events that gave rise to the Citation, Dr. Melamed wrote as follows:

Addiction is defined as a chronic relapsing disorder that is characterized by a compulsion to seek and take drugs, loss of control in limiting intake, and the emergence of a negative emotional state (e.g. dysphoria, anxiety, irritability) when access to the drug is prevented.

Addiction erodes healthy moral judgment and, in my opinion, could have resulted in Mr. Ahuja having lost the capacity to exercise healthy moral, ethical or professional judgment.

- [31] During her oral evidence, Dr. Melamed remarked that “a hallmark of addiction is dishonesty.”
- [32] On the question of causation, that is, whether there is a link or a nexus between the illness and the dishonest decision or act, Dr. Melamed opined that a person with a normal moral compass will not steal while a person in addiction cannot make normal moral decisions.

### **The Respondent**

- [33] The Respondent and his wife both gave evidence. As well, as discussed, the Respondent called oral medical evidence from Dr. Melamed.
- [34] The Respondent was in a family of two boys and one daughter. He was born and grew up in Surrey, BC.
- [35] The Respondent testified that he saw a lot of violence in his home as a child. His father drank a lot. As a youth, his mother took her three children to a shelter to avoid violence in the home. The Respondent’s father drank heavily and died when the Respondent was in his early teens.
- [36] The family moved around a lot with the result that the Respondent remembered going to five elementary schools.
- [37] On a number of occasions throughout his evidence, the Respondent referred to cultural norms. The Respondent stated that, in his culture, an older son is responsible to take on many of the “head of the household” responsibilities in the absence of a father. For example, when his father was in decline and on his deathbed, the Respondent described how it felt to make decisions about when to stop life support, to clean and prepare his father’s body for burial and to initiate the incineration of his body.
- [38] When his father died, the Respondent started working after school at the age of 13. He stated that it was at that age he first began to drink.

- [39] The Respondent was a hard-working and able student. He graduated early from high school. He first went to BCIT in 2001 and studied electrical and computer engineering.
- [40] With the encouragement of his wife, the Respondent went to Douglas College and later transferred to UBC where he graduated in 2006. The Respondent said that he did not drink as much while studying at UBC.
- [41] In 2006, the Respondent attended Bond Law School in Australia where he graduated in 2008.
- [42] The arc of the Respondent's drinking and drug use began in 2007 when he was attending law school in Australia.
- [43] While studying in Australia, the Respondent met someone he described as his best friend. This friend died in the Respondent's arms after a motorcycle accident.
- [44] This tragic loss of his best friend was traumatic. During his evidence, the Respondent testified that he was having trouble sleeping and was plagued by visions of his friend in his arms, lying, dying on the pavement.
- [45] The Respondent returned to Vancouver in 2008 and completed the National Accreditation examinations while he worked as a registry clerk in the New Westminster Supreme Court Registry. At the same time, he continued drinking.
- [46] The Respondent began articling in 2010, and in June, he married. While articling, he continued to drink a lot. In his application for admission the Respondent informed the Law Society that while driving with a suspended licence in 2007, he was pulled over by the police in Australia and gave the police a false name. He was required to meet with the Credentials Committee in respect of his conduct.
- [47] The Respondent was called and admitted on April 15, 2011. He practised as an associate with a small firm until he joined Law Firm No. 2 in June 2014.
- [48] The Respondent testified that he believed he was able to regulate his drinking when he came back to Canada but that he started to use cocaine occasionally and drink with colleagues after work. This limited drug use started in 2010 and increased over time.
- [49] By 2012, the Respondent described using cocaine monthly and regularly drinking to excess. When he drank with people he worked with, he would get drunk, and it was in this context that he started to use cocaine regularly.

- [50] After the Respondent was married, he started to stay out all night on Fridays to drink and use cocaine.
- [51] In 2014, the Respondent was the top billing associate at his law firm. He was approached by a second law firm and offered a job.
- [52] Throughout this entire period and, indeed, up until the last day he drank alcohol or used drugs in 2017, the Respondent did not think he had a problem. He did not think he was addicted to either alcohol or cocaine. After his move to Law Firm No. 2, his drinking and cocaine use increased. He both drank and used drugs with people he worked with and said that there was a subculture at the firm of drug and alcohol use.
- [53] We wish to pause here to emphasize that the Respondent did not suggest directly or indirectly at any point in his evidence before the Panel that others caused or contributed to his addiction or his professional misconduct.
- [54] By all “public” measures, the Respondent’s practice at Law Firm No. 2 flourished, and on April 4, 2016, the partners voted to admit the Respondent as a partner.
- [55] When the Respondent was called with the news, he went out with others from Law Firm No. 2 to celebrate. That celebration included alcohol. He slept in and missed a court date set for the following day. When he woke up and realized he was late, he called his secretary to say his flight was overbooked, and on the strength of that advice, she wrote that excuse in a requisition to have a court appearance set down later in the day. In other words, the Respondent caused his office to lie to the Court and to his clients.
- [56] Later that day, the Respondent was called in by the partners and they withdrew the offer of partnership. He was devastated.
- [57] By this point in his career, the Respondent had two young sons, he was billing 1,800 hours a year, his use of alcohol and cocaine was becoming unmanageable, and he was deeply ashamed at the law office.
- [58] The Respondent’s life started to spiral out of control. In June 2016, his mother was diagnosed with cancer. One and a half months later, his mother’s brother died on the same day as his mother’s first day of surgery. As a young father of two children, the Respondent described himself as trying to survive the moments until he could use alcohol or cocaine to make himself “feel normal.”
- [59] The Respondent gave evidence that, by June 2016, he was attempting to avoid using alcohol during the week. But, his professional life was busy, he had two

young children and family problems with his wife and his mother's cancer. The Respondent described himself as experiencing fear just trying to survive in the moment and constantly being in a state of "anxiousness, depression, and panic." His personal finances were out of control, exacerbated by the fact that he was diverting significant amounts of money to alcohol and cocaine.

- [60] In June 2016, the Respondent was held at gunpoint and ordered to take out \$10,000 on his credit card to pay a debt incurred by a family friend who had purchased drugs on credit. A similar incident occurred in October of the same year.
- [61] The Respondent described himself as "absolutely destroyed after May 2016" and stated that "I found myself crying during breaks in court." He testified that he felt as if he was falling deeper and deeper into himself and was unable to, or did not want to, communicate with anyone, including his family, his wife and his colleagues at work.
- [62] The Respondent described his work as an escape that allowed him to mood-alter until he could use drugs.
- [63] By the summer of 2016, the Respondent's drinking and using had reached a stage where his wife left the family home and moved with the children to her parents. The Respondent was using or drinking weekly.
- [64] Yet, the Respondent did not realize that he had any "problem".
- [65] The Respondent's wife returned to the family home at Christmas 2016 on the promise that he would stop drinking. He relapsed in January 2017 when he learned that the father of his Australian friend had died. He went to Toronto to see the family, and when he returned, his wife and children had left the family home. He had spent all of their money, maxed out all of his credit cards and had no control over the amount of alcohol or cocaine he consumed. On March 1, 2017, his wife phoned him and told him that she was not coming home and wanted a separation. The Respondent stated that, after that call, he had difficulties breathing and seeing. He parked his car and went into a hotel. He called friends and asked them to bring over alcohol or drugs. The Respondent stated that the sole idea in his head while he was sitting on the balcony in the hotel in downtown Vancouver was simply the recurring thought of "just kill yourself."
- [66] The Respondent distinctly remembered thinking of his children and, within minutes, his brother-in-law and security guards kicking down the door of his hotel room and finding him on the balcony.

- [67] His friend drove him back to his car and then home. He called his office.
- [68] That day, March 2, 2017, the Respondent failed to appear in chambers.
- [69] One of the partners of Law Firm No. 2 came to his home on Saturday. The firm sent the Respondent to the Lawyers Assistance Program. Its executive director worked with the Respondent and sent him to Dr. Melamed. On March 25, the Respondent was booked into a residential treatment facility on Vancouver Island where he remained until May 17.
- [70] The Respondent's wife gave evidence during the hearing. She recounted the painful decline she witnessed in her husband's inability to engage with his family and his increasing obsession with work. During the last number of months they were together prior to his treatment, she described him as looking like he was "starting to break." After a night out, he would come home looking ashamed and lock himself in a room. She described him as appearing paranoid and socially withdrawn. She also noticed that he had developed a tremor in his hands. By the time he went into treatment between 2016 and March 2017, she said her husband had lost 40 pounds.
- [71] The Respondent's wife described how her mental health suffered. She avoided going anywhere because she was afraid and embarrassed because she worried that her husband either would not show up or would show up and get drunk. She was ashamed of what he might do. By March 2017, she described her husband as not himself anymore. "... he was broken ... he was lost ... he had no empathy ... at that stage, it seemed to me he had lost his soul."
- [72] With the assistance of his firm, the Respondent went to residential treatment and continued his rehabilitation after he was discharged. The Respondent entered into an agreement for ongoing monitoring, which involves checking in online every morning to discover whether he must report for a random drug test. He also agreed to attend at least three AA meetings per week. Further, he participates in group therapy through the treatment facilities of the aftercare program in Vancouver and meets with the director of the Lawyers Assistance Program once a week. At the time of the hearing, he had a lawyer as a sponsor.
- [73] In addition to his formal post-residential treatment agreement, the Respondent acquired a device that measures his alcohol level. He blows into the device three times per day. He described to the Panel that he decided to add the "Sober Link" to his aftercare program because he wanted to do everything available to him and place every obstacle before him to avoid returning to the use of alcohol. Lastly, he incorporates a strong meditation practice through a local Buddhist centre.

[74] On cross-examination, the Law Society probed the Respondent's evidence that he was living in chaos but still appeared to be able to properly perform his duties in court. The Respondent readily admitted that he was attending to his court appearances and meeting with clients. He was pressed for an explanation about how he could be performing well while being in the throes of serious acts of addiction. Specifically, the Respondent was asked whether, at the time he took money from his clients and used it for his own personal purposes, he knew that the money should go into a trust account. If so, he was asked his reason for not putting the money into trust.

[75] The Respondent struggled with this question. He clearly and firmly agreed that he knew all money should go into trust. His explanation was "I was desperate. I can't let my wife or firm down or find out. My mind was everywhere. I am using alcohol and cocaine, the most I had." He was asked about his state of mind when he made his self-report to the Law Society in March 2017. That self-report was limited to his failure to attend court and his admission with respect to alcohol and cocaine use. In an interview with a Law Society investigator, the Respondent was asked and answered:

Q When you made your self-report to the Law Society in March 2017, and clearly at that time you made some admissions with respect to alcohol and cocaine, did you not think at that time to come forward to the Law Society about the cash and consideration you took from people without recording it?

A I was so caught up with what was going on then I didn't even think about it. It didn't cross my mind. I think about it now, why didn't I say something then? It didn't cross my mind. That was a really — March 2nd, that's the last day I was drinking. I wanted to kill myself. That's how bad it got me to. I don't know what I was thinking. Should I have told you guys? Yeah. I just didn't.

[76] The investigator pressed the Respondent to explain whether or not he knew the funds he received from clients were to be deposited into trust, and if so, why he did not do so. Again, the Respondent struggled to put an explanation into words. He answered, in part:

A ... It was everything that was going on at the time. The alcohol and cocaine – my mind was so off. I don't know. Do I know that I shouldn't have been doing that? Yeah. But there's this – I was trying to survive and that's all it is. It's like you have a moment and you – I can't speak for anyone else, but for me it was like this immediate reaction to things that

have to happen and it's just sort of a vital instinct where this has to happen now and you have to do this next. It gets worse over time ... the way it kind of builds. It's not just when I was drinking or high because that was on the weekends and then I'd be working and drinking during the week, but it's between those times it's even worse. You get sober and you feel more and you start to realize what's going on and then you have this little bit of time – because it takes a couple of days to get right again, and you have this day in between, “Oh my god, what's going on?,” and the drinking would help me stay calm until I got back to the weekend. It's this ridiculous cycle of just poisoning my body and my mind and then it keeps building. It becomes this massive rock of just fear, anxiety, not knowing to do, not having anyone to reach out to because of the fear. What am I going to do with my life? I have nothing. I have kids I have to take care of. How is my wife going to react to this? My mother, she's so sick with the cancer. ... There was this inability to feel. Then when I would feel, feeling so uncomfortable in the feeling that there's this immediate need – and that's the obsession – need and obsession to mood alter and that's what the drugs and alcohol are for. It's non-stop. It's a two-way obsession. There's an obsession not to drink and use and there's an obsession to drink and use. Even when I'm not using I'm thinking about not using and using at the same time. So there's this battle that goes on and there's life in between that. There's working to catch up to this ridiculous notion that if I'm not a partner I'm nothing. The self-esteem, inadequacy. ... I thought I was in control and I wasn't. It's now being able to look back at it that's what it was. It was nuts, that's the only thing I can say to you. It was the scariest thing. That's what keeps me wanting to stay so far away from anything like that, is that now healthy fear of what it was. When I think back to that sometimes it scares me. That's why I put so many things into my aftercare plan, because I want as much as possible between me and that first drink. That's the ultimate battle. ... I do not want to go back there. I'll go for hair drug tests. I do not want to go back to where I was. I'm free from that now. I have my life back with my kids, my wife, my mom, my brother, my sister. I got a second chance to be honest and I'm very thankful for that. I don't know how to answer your question.

[77] The Respondent was then asked the following question:

Q During the time period that we talked about ... you're doing a lot of legal work, your calendar we can see is full. I've seen your file, a lot of work is getting done, good work is getting done. You're functioning. ...

Generally it looks like you're functioning along, and it's helpful to explain that you think you are in control and you are in control in some things. I'm trying to – whatever stage this gets to ... people are going to have a hard time understanding why it seems that you're functioning on so many levels doing legal work and operating and what your intent was over a long period of time taking cash and consideration from clients. It's not all the chaos that you've described. Do you understand what I'm saying? ...

- A I completely understand what you're saying. Working itself and overworking like I was trying to do is mood altering on its own. When I was dealing with other people's problems I wasn't dealing with my problems. If you look at Dr. Melamed's report she thought I had workaholism as well. The work became – it was easier for me to deal with other people's problems because my stuff was to the side. That's why I was working so much more. There was times I had nine to 13 court appearances in one week. I was overworking to even try more to stay away from my own head. It's the isolation that is the scariest part of addiction. When I did have it, which was few and far between, the moments to myself – that's why the binges would happen, staying away for a couple days a time or overnight, the binging is the only "alone time" and I put that in air quotes, because that's where you're alone, you're high or drunk and it's ridiculous and it felt like a reprieve from all of my feelings but it wasn't because it would create worse situations for me.

To answer your question, the workaholism was part of this whole thing and that's the only time I could concentrate on anything else other than me. It became part of the fuel for it.

[78] When the Respondent was asked directly during the hearing whether he was drunk or high on occasions he took money from clients and did not put it in his trust account, he thought that he was not drunk or high on those occasions, but he emphasized that he was not certain.

[79] Perhaps pivotal to the policy question that has been raised by counsel in this case is the question put to the Respondent about whether or not part of his explanation for his misconduct is that addiction or alcoholism is an excuse for what he had done. During his interview with the Law Society, he answered:

- A I'm not making any excuses for what I've done. What I've done is very serious and I understand that. Please forgive me if I've tried to make an excuse for any of that.

[80] And later:

There's no excuse. I can just say it's all this big – everything that was happening is the explanation. I don't know what else to say. ... I'm not trying to excuse my behaviour is what I'm trying to say. I'm trying to give you insight as to what was happening. I apologize if it's coming off as an excuse.

[81] When pressed during his evidence at the hearing, the Respondent tried to describe what he called a two-way obsession: an obsession to use and drink and an obsession to not use and drink. At the time the events occurred leading up to his voluntary removal from practice, he described being in a constant vicious cycle and there was no time to think about what was going on. He used the phrase “I couldn't think globally.” By the end, he was not sleeping, and he was crying and unable to do anything other than to focus and survive in the moment. And in spite of all that, until March 2, 2017, he was able to show up at court, receive instructions from clients and practise law.

### **The position of the Law Society**

[82] The Law Society acknowledged the Respondent's considerable efforts to deal with his addiction as laudable and relevant to penalty, but argued forcefully that they should not be taken into account as a factor to refrain from describing the Respondent's use of client trust funds for his personal expenses as “misappropriation.”

[83] Counsel reminded us that “misappropriation” has been defined broadly as any unauthorized use of clients' funds. The Law Society directed us to *Law Society of BC v. Sahota*, 2016 LSBC 29, where the panel set out at paras. 61 to 63 an overview of misappropriation:

... Any unauthorized use qualifies. It does not need to amount to stealing, as long as there is an unauthorized temporary use for the lawyer's own purpose. Personal gain or benefit to the lawyer is not required.

Further, the panel in *Law Society of BC v. Harder*, 2005 LSBC 48, provided at para. 56 the following helpful language to the quest for clarity on this issue:

A useful further 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 clients’ 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.” ...

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.

Thus, all that is required is for the lawyer to take the money entrusted to him or her knowing that it is the client’s money and that the taking is not authorized.

[84] As to the mental element required to find misappropriation, counsel for the Law Society directed us to *Law Society of BC v. Gellert*, 2013 LSBC 22, where the panel stated at para. 71, in part:

Misappropriation ... 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.

[85] Counsel for the Law Society argued that the range of misconduct that has been described as misappropriation includes:

- a. taking client funds and returning them in short order or doing so under severe personal financial pressures: see *Gellert* at para. 72;
- b. taking client funds by repeated negligence and careless inattention to trust accounting obligations: see *Sahota*; and
- c. wilful blindness about whether “clients had been billed for disbursements that were not incurred and that [the lawyer] was therefore not entitled to withdraw monies held in trust for them to pay those bills ...”: see *Law Society of BC v. Sas*, 2015 LSBC 19 at para. 226.

[86] The Law Society argues that the mental element of misappropriation is present on the facts of this case and points to the Respondent’s evidence that he took the funds

for personal expenses knowing that all monies should go into trust. The Law Society emphasized the circumstances surrounding the Respondent's receipt of the client funds in allegations 2, 3 and 4 – he took the funds in cash, at his home, at a Starbucks and, in the case of allegation 4, at his office.

### **The position of the Respondent**

- [87] At the hearing, counsel for the Respondent explained that the Respondent admitted that he used certain clients' money for "his personal expenses" but did not explicitly admit "misappropriation" so that this Panel could re-examine the manner in which the profession views misconduct in the context of addiction. Where, as here, there is a nexus between the lawyer's misconduct and the lawyer's active addiction, and even though the misconduct could be caught by the traditional term of "misappropriation", counsel for the Respondent urged us to acknowledge that nexus by describing the misconduct with language that is less condemnatory or stigmatizing of the lawyer living with addiction.

## **ANALYSIS AND LEGAL REASONING**

- [88] The Respondent admitted to the conduct in the Citation and, further, that the conduct constituted professional misconduct.
- [89] We must determine whether the facts as made out disclose a "marked departure" from the standard the Law Society expects of lawyers and therefore amounts to professional misconduct: *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 140, and *Law Society of BC v. Kaminski*, 2018 LSBC 14 at para. 43.

### **Allegation 1: missed court date**

- [90] In the case of the Respondent's failure to attend court on March 2, 2017, he exposed his client to significant potential consequences and failed in his duty to the court. This failure is a marked departure from the standards the Law Society expects of lawyers and constitutes professional misconduct.

### **Allegations 2 through 11: breaches of accounting rules**

- [91] We turn now to the accountancy rule breaches.
- [92] The Citation includes ten allegations that the Respondent accepted monies from a total of nine clients and did not comply with the accounting and billing rules in respect of those cash payments.

- [93] The Respondent admits that, in each case, he failed to deposit the funds into a pooled trust account as soon as practicable after receiving the funds from a client, contrary to Rule 3-58; he failed to make a proper record of his receipt of the funds as required by Rules 3-67(2) and 3-72; and, in cases of cash receipts, he failed to maintain a cash receipt book or a duplicate receipt and make a receipt in the cash receipt book for the amounts of cash received, all contrary to Rule 3-70.
- [94] The Respondent's misconduct prejudiced his clients and created the possibility of confusion in cases where clients' matters were ongoing when the Respondent entered treatment for his addiction, depriving other lawyers who stepped in to provide services to the Respondent's clients of any accurate records about the clients' accounts.
- [95] After considering all of the evidence and hearing the submissions of the parties, we are satisfied that the Respondent's failure to follow the accounting rules in connection with the receipt of trust funds from his clients as set out in allegations 2 to 11, and described in detail in the Agreed Statement of Facts at paras. 83 to 92, amounts to professional misconduct.

#### **Allegations 2 through 5: misappropriation**

- [96] We turn now to allegations 2, 3, 4 and 5 that, in addition to improperly handling some or all of the trust funds received from his clients, the Respondent misappropriated these clients' trust monies. The Law Society proceeded on four allegations that, between June 2016 and February 2017, the Respondent misappropriated client trust monies (allegations 2, 3, 4 and 5).
- [97] We will summarize the conduct in date order.
- [98] On or about June 14, 2016, the Respondent received \$1,000 by cheque from his client, IG, on the understanding that this payment would cover all of the costs associated with the charge of sexual assault (allegation 5).
- [99] In or about October and November 2016, JV, a family law client of the Respondent, paid the Respondent retainers in the amounts of \$3,200 and \$1,800, respectively, in respect of a file opened at Law Firm No. 2 (allegation 2).
- [100] On or about October 17, 2016, SR, a family law client of the Respondent, paid the Respondent a cash retainer in the amount of \$5,000, in respect of a file opened at Law Firm No. 2 (allegation 3).

[101] On or about November 30, 2016, AD, a family law client of the Respondent, paid the Respondent a cash retainer of \$5,000, in respect of a file opened at Law Firm No. 2 (allegation 4).

[102] After hearing all of the evidence, we are satisfied that, by early summer 2016, the Respondent's life had started to spiral out of control. We accept Dr. Farnan's assessment in his report that:

There is no doubt that Mr. Ahuja met the diagnostic criteria for addiction in the past and that it would now appear to be in stable remission. He probably would have met the diagnostic criteria for alcohol dependence in or about 2011/2012 and for cocaine dependence in or about 2014 ... [Dr. Farnan Report at p. 7]

[103] This is consistent with the fact that, in her first report dated March 20, 2017, Dr. Melamed diagnosed the Respondent as having a severe alcohol use and stimulant (cocaine) use disorder and dependence.

[104] In the Agreed Statement of Facts, the Respondent admits that he used the trust funds received from his clients IG, JV, SR and AD for personal expenses. During his evidence, he agreed that some of those personal expenses included the purchase of drugs or alcohol or the payment of debts he incurred because of his use of drugs and alcohol.

[105] Although the Respondent makes a full admission of his misconduct, he declines to make his admission to misappropriation and, instead, characterizes the misconduct as using the clients' trust monies "for his personal expenses."

[106] As set out earlier, the Law Society submits that we have facts before us to support a finding that the Respondent misappropriated funds as alleged in four of the allegations in the Citation.

[107] On the evidence before us, when the Respondent received cash from clients and diverted that cash to his own personal use, that conduct can be caught by the definition of "misappropriation."

[108] We recognize that a finding of misappropriation does not require a mental element that rises to the level of dishonesty as that term is used in criminal law: see *Gellert* at para. 71; and *Harder* at para. 56. As the panel in *Gellert* put it at para. 73:

The definition of misappropriation, and in particular its mental fault element, is driven by a recognition that the proper handling of trust funds is one of the core parts of the lawyer's fiduciary duty to the client. ...

Because of the sacrosanct nature of trust funds, removing a client's trust funds is and should always be a memorable, conscious and deliberate act that a lawyer carefully considers before carrying out (*Law Society of BC v. Ali*, 2007 LSBC 18, paras. 104, 106).

[109] In each case, when the Respondent accepted money from his clients, he understood that those funds must be put into trust. However, we also conclude that, when he received the trust funds from his clients, either at his home or elsewhere, he did not turn his mind to his serious responsibility to deposit those funds into a trust account and immediately comply with the other rules for handling trust funds.

[110] As the Respondent explained in his evidence, on these occasions, he would realize with a moment of clarity that what he was doing was terribly wrong and that the realization would contribute to “running right back to the alcohol and drugs” and creating new problems for himself. He used the term “chaos” to describe the state of his mind at the time of the misconduct.

[111] Addiction was described by both doctors as a condition that affects the brain. See the quotation from Dr. Farnan's report in para. 17 above.

[112] Dr. Melamed, in her report dated September 25, 2017, also referred to the neuro-biologic changes to the brain. She wrote:

The neuro-biologic changes involved in the brain in the disease of addiction have been well studied. The scientific attempt to explain addiction continues to be investigated.

A scientific paper published in 2016 by Volkow and Koob<sup>1</sup>, reviews the findings on the desensitization of reward circuits, which dampens the ability to feel pleasure and the motivation to pursue everyday activities; the increasing strength of conditioned responses and stress reactivity, which results in increased cravings for alcohol and other drugs and negative emotions when these cravings are not sated; and the weakening of the brain regions involved in executive functions such as decision making, inhibitory control, and self-regulation that leads to repeated relapse.

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<sup>1</sup> Neurobiologic advances From the Brain Disease Model of Addiction, Volkow, Koob and McLellan, *New England Journal of Medicine* 374:4. NEJM.org January 2016.

As stated by Volkow and Koob, “these advances also provide insight into the ways in which fundamental biologic processes, when disrupted, can alter voluntary behavioral control”.

[113] She continued:

This explanation provides insight as to why, even when an individual is not actually in a state of intoxication, because addiction is a disease with well-defined brain changes, function does not return to pre-drug use levels of neuro-biologic proficiency. It has been said that the brain has been hijacked.

[114] Both doctors emphasized that the neuro-biologic changes affect the person’s decision-making and judgment even when they are not in a state of intoxication.

[115] The doctors’ characterization of addiction as a disease is consistent with the description found in the British Columbia Medical Association 2009 policy paper, “Stepping Forward: Improving Addiction Care in British Columbia.” There, addiction is described in this way:

Addiction is a chronic, generally progressive, and treatable biological disease. Addiction has been recognized as a disease by the Canadian and American Medical Associations as far back as 1976. ...

... Although this report often uses the word “addiction,” the BCMA fully recognizes that there can be a range of harms associated with substance use. This spectrum includes episodic intensely heavy use (“bingeing”). ... It also includes consumption over time that counts as hazardous use due to the risk it poses for chronic physical and mental disorders. Finally, the spectrum includes addiction, which is itself a chronic disorder characterized by an inability to control use ... Within the population, these three forms of problematic substance use may occur independently or in combination.

[116] In her September 25, 2017 report, Dr. Melamed considered whether the Respondent’s misconduct could be attributed to his addiction. She wrote:

In summary, addiction as a disease is subtle, deceptive and constantly changing. Once the disease is established, the loss of control becomes hardwired with a change in personality and self-concept. In an individual in addiction, there appears to be an accommodation related to the disruptive effects of the emerging addiction disorder i.e. the individual can

make excuses for their behavior that, despite being quite patently absurd to others, make perfect sense to the addicted individual. The brain appears to compensate, rearranging cause and effect in order to sustain continued addictive chemical use.

Taking these changes into account, it can be seen why even during periods of no acute intoxication, healthy decision-making still does not occur.

Taking this explanation into account, it is my opinion, on a balance of probabilities, that the behavior exhibited by Mr. Ahuja may be attributed to the neurobiological changes that have been found to take place in the brain in an individual who has been diagnosed with a Substance Use Disorder.

[117] Dr. Farnan agreed. He commented:

... on the issue of a possible nexus existing between Mr. Ahuja's medical diagnosis of addiction and alleged behaviours that occurred relating to his professional behaviors, particularly his handling of clients' monies. This is not an easy question to answer in retrospect, but based on the information available to me I would consider Dr. Melamed's opinion to be reasonable and that there was, more likely than not, an acceptable connection between Mr. Ahuja's untreated and unstable addiction in 2016 and early 2017, and the behaviours that were considered to be misconduct.

[118] Dr. Melamed gave evidence that, if the Law Society uses the highly condemnatory language of "misappropriation" in cases involving lawyers in active addiction, lawyers may be less likely to come forward, with the result that their condition of addiction will worsen and they will be farther along the road and beyond the limits of recovery.

[119] Counsel for the Respondent invited us to consider how we characterize what occurred in this case, that is, a lawyer taking clients' monies for the lawyer's personal use while in active untreated addiction.

[120] In summary, counsel for the Respondent acknowledged that the Respondent engaged in conduct that could be caught by the traditional term of "misappropriation" but urged this Panel to use less condemnatory language to describe that professional misconduct.

[121] In this respect, he directed us to the decision of the panel in *Sas*, a case where the absence of wilfulness would have been enough to remove the misconduct from the

category of “misappropriation”, even though it would remain serious professional misconduct.

[122] There, the panel found that the respondent misappropriated monies held in trust and concluded, at para. 225, that “the misappropriation of trust funds from these 22 clients constitutes professional misconduct.” At para. 226 the panel stated:

If we had not made a finding of fact that Ms. Sas was wilfully blind and therefore knew, or was deemed to know, that clients had been billed for disbursements that were not incurred and that she was therefore not entitled to withdraw monies held in trust for them to pay those bills, we would have found that her conduct was nevertheless reckless. We would have also made a finding that this reckless conduct was a marked departure from the standard of conduct the Law Society expects of lawyers and therefore constituted professional misconduct.

[123] We agree that this passage is an example of a hearing panel suggesting that less “condemnatory” language might be used to characterize misconduct where the mental element, necessary for a finding of misappropriation, is absent.

[124] We agree that some hearing panels have used different language to describe serious professional misconduct without reference to “misappropriation” where the lawyer’s mental element in relation to the conduct does not rise to the level of active dishonesty or wilful blindness. In the case before us, no one suggests, and we do not find, that the Respondent was reckless, nor do we suggest that he had no awareness that what he was doing was wrong. He did.

[125] That does not mean that the Respondent’s severe addiction at the time is irrelevant to an assessment of the nature of the misconduct.

[126] Rather, in our view, we are satisfied that the existence of a severe addiction is relevant to our assessment of the nature of the misconduct before us. Both doctors characterized addiction as a brain disease that “alters normal brain functioning at several levels.”<sup>2</sup> In Dr. Farnan’s report he writes:

Addiction does create distortions in thinking, feelings, perceptions, and judgments that push people to behave in ways that are not understandable to others around them.

[127] As well, both doctors found a nexus between the Respondent's disease of addiction and his misconduct. Dr. Farnan found:

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<sup>2</sup> Dr. Farnan Report at page 7; Dr. Melamed Report September 25, 2017 at page 3

... it is my opinion that relatively advanced addiction, as in Mr. Ahuja's case, can influence certain inappropriate behaviours. ... there is a definite correlation between the two ... but it is difficult for anyone to prove absolute causation even when that is the case. ...

In summary, it is my medical opinion there is a plausible connection between the diagnosis of relatively severe unstable addiction to alcohol and cocaine in Mr. Ahuja's case and the behaviours reportedly exhibited by him in 2016 and 2017, including those relating to his inappropriate use of clients' funds. [Report at page 10]

[128] Dr. Melamed put it this way in her report dated September 25, 2017:

Addictive chemicals hijack the neural circuits in the brain, creating a persistent urgency to use, which causes addicted individuals to ensure alcohol or other chemicals are available. ...

In summary, addiction as a disease is subtle, deceptive and constantly changing. Once the disease is established, the loss of control becomes hardwired with a change in personality and self-concept. In an individual in addiction, there appears to be an accommodation related to the disruptive effects of the emerging addiction disorder. ...

[129] While the Respondent did not suggest in any way in his evidence before us that he is not responsible for his actions, we are persuaded by the doctors' expert evidence that there is a "definite correlation"<sup>3</sup> or nexus between the Respondent's severe addiction and his misconduct. This correlation or nexus, in our view, is an important factor that goes to a determination of the nature of the misconduct itself, rather than a factor only potentially relevant as a mitigating factor at the penalty phase of the hearing.

[130] In the *Legal Profession Act*, the term "misappropriation" is used solely in s. 16 with respect to participation by the Law Society in programs to compensate victims of inter-provincial misappropriation or wrongful conversion by lawyers. In the Law Society Rules, the term "misappropriation" is used in a reference in Rule 1 to a section of the *Act* that has been repealed and in Rule 3-46, to permit (but not obligate) the executive director to make disclosure of misappropriation where a claim under trust protection insurance has been made. The term "misappropriation" is not used in the *Code of Professional Conduct*.

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<sup>3</sup> Dr. Farnan Report, at page 10

[131] Given the limited extent to which the term “misappropriation” is used in the *Act*, *Rules* or *Code*, and the fact that no claim under trust protection insurance has been made in this case due to the Respondent having made all of his clients whole, this Panel finds that describing the Respondent’s actions without using the term “misappropriation” will not result in any real or substantial degradation in the authority of the Law Society to effectively govern the Respondent or in its ability to respond to his past behaviour.

[132] After considering all of the evidence before us and the submissions of the parties, we conclude that the Respondent’s behaviour and decision-making processes at the time of the misconduct was sufficiently different from a lawyer unaffected by active addiction that it is appropriate to avoid the term “misappropriation” in this case. The Respondent’s misconduct, because of the effect of the disease, was “wilful” but it was not “wilful” in the same sense that one speaks of the conduct of one who is not in a severe or advanced state of untreated addiction. Accordingly, we conclude that it is appropriate to characterize the Respondent’s conduct as a marked departure from the standard of conduct the Law Society expects of lawyers. It therefore constitutes serious professional misconduct, which we characterize as “conversion of client funds to his personal use while in active addiction.”

### **NON-DISCLOSURE ORDER**

[133] The parties requested that we make an order protecting disclosure of the exhibits filed at this hearing in order to protect the private information of the Respondent and his family, and to protect certain information subject to solicitor-client privilege.

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

[135] We find that the exhibits filed in this hearing, as well as any transcript of the hearing, that contain confidential information respecting the Respondent and his family and privileged information of the Respondent, should not be disclosed. We therefore make the following order:

- a. If any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, any information protected by solicitor-client

privilege and private contact information of the Respondent and his family must be redacted from the exhibit before it is disclosed to that person; and

- b. If any person, other than a party, applies for a copy of the transcript of these proceedings, any information protected by solicitor-client privilege must be redacted from the transcript before it is disclosed to that person.