2019 LSBC 37
Decision issued: October 8, 2019
Citation issued: September 8, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JEFFREY STEPHEN LOWE

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	July 9, 2019
Panel:	Michelle D. Stanford, QC, Chair Nan Bennett, Public representative Bruce LeRose, QC, Lawyer
Discipline Counsel:	Kathleen Bradley
Counsel for the Respondent:	Henry C. Wood, QC

BACKGROUND

[1] In our decision on Facts and Determination, 2019 LSBC 10, we found that the Respondent had misappropriated $9,107.65 of $74,710.61 received from 43 clients as pre-billed estimated disbursements, by directly depositing the funds upon receipt into his general account and subsequently reclassifying the funds as "disbursement revenue" for "administrative convenience."

[2] We also found the Respondent had committed professional misconduct by failing to deposit the $74,710.61 received from his clients into a pooled trust account and failing to prepare and deliver bills to his clients that contained detailed statements of the amounts of disbursements actually incurred.

POSITIONS OF THE PARTIES

[3] The Law Society submits that the appropriate discipline is a suspension of six to eight months and seeks costs in the amount of $12,338.84.

[4] The Respondent, through his counsel, sought a suspension in the range of two to four months and agreed with the Law Society request for costs.

DECISION

[5] In terms of discipline, where a hearing panel finds that a lawyer's actions constitute professional misconduct, section 38 of the *Legal Profession Act* (the "Act") sets out a range of penalties from reprimand to disbarment from which the panel must choose.

[6] In determining the appropriate penalty to be imposed, it is important to consider section 3 of the *Act*, which provides the Law Society's mandate "to uphold and protect the public interest in the administration of justice." The bencher review panel in *Law Society of BC v. Lessing*, 2013 LSBC 29, at para. 55, confirmed that

> the … objects and duties set out in section 3 of the Act are reflected in the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, at paras. 9 and 10 of the penalty stage
>
> ...
>
> While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
>
> (a) the nature and gravity of the conduct proven;
>
> (b) the age and experience of the respondent;
>
> (c) the previous character of the respondent, including details of prior discipline;
>
> (d) the impact upon the victim;
>
> (e) the advantage gained, or to be gained, by the respondent;
>
> (f) the number of times the offending conduct occurred;

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

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

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

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

(k) the need for specific and general deterrence;

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

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

[emphasis added in *Lessing*]

[7] The bencher review panel in *Lessing*, at para. 56, observed that not all of the *Ogilvie* factors come into play in all cases and "the weight given to the factors may vary from case to case."

[8] Additionally, when considering the appropriate disciplinary action, *Lessing*, at paras. 75 to 78, confirms that, with multiple citations, the nature and the length of the penalty should be determined on a global basis taking into account the nature of all of the misconduct. This approach has been adopted as standard procedure as recognized in *Law Society of BC v. Gellert*, 2005 LSBC 15, at para. 22.

[9] In this case, the disciplinary action for the misappropriation found with respect to allegation 1, as well as the professional misconduct found with respect to allegation 2, will be considered together on a global basis.

[10] The Law Society submits, and the Panel agrees, that the *Ogilvie* factors that should be given prominence in this case are as follows:

(a) the nature and gravity of the misconduct;

(b) the Respondent's experience;

(c) the Respondent's character, including lack of professional conduct record;

(d) the advantage gained and impact on the victims;

(e) the Respondent's acknowledgement of the misconduct;

(f) the public's confidence in the legal profession; and

(g) the range of sanctions imposed in similar cases.

Nature and gravity of the misconduct

[11] In *Law Society of BC v. Gellert*, 2014 LSBC 05, the hearing panel stated at para. 39 that this *Ogilvie* factor should be given special weight:

> … not only because this factor in a sense encompasses several of the others, but also because it represents a principal benchmark against which to gauge how best to achieve the key objective of protecting the public and preserving confidence in the legal profession. Indeed, this key objective is the prism through which all of the *Ogilvie* factors must be applied … .

[12] The nature of the Respondent's conduct is very serious on a number of levels. Over a period of approximately seven years, utilizing a steady pattern of deliberate repeated behaviour, the Respondent misappropriated a total of $9,107.65 and improperly handled a total of $74,710.61 in trust funds received from 43 immigration clients for administrative convenience.

[13] In a background letter to a potential character reference, the Respondent identified his clients as from "around the world ... confronting an unfamiliar legal system." (Exhibit 7, tab 2) These are vulnerable clients seeking to immigrate to Canada and needing legal representation to help them navigate a foreign legal system. The Respondent believed these clients wanted to know what their total legal costs would be in advance, and accordingly, he billed them – in advance – and deposited their retainers into his general account, repeatedly failing to adhere to Law Society trust accounting rules on multiple occasions over approximately seven years. It was his standard of practice.

[14] On misconduct of this nature alone, many hearing panels have found that, absent rare and extraordinary mitigating factors, disbarment is the appropriate disciplinary action for repeated misappropriation of client trust funds.

[15] In *Gellert* (2014), at para. 44, the hearing panel found:

> … this sanction [disbarment] is usually imposed for deliberate misappropriation from a client – almost always where the amount is

> substantial (*Harder*, 2006 BCSC 48, para. 9; MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Carswell, 1993), p. 26-1) – because in such cases disbarment is usually the only means of fulfilling the goal of the protecting the public and preserving public confidence in the legal profession. Deliberate misappropriation of funds is among the very most serious betrayals of a client's trust and constitutes gross dishonesty.

[16] In *Law Society of BC v. Tak*, 2014 LSBC 57, at para. 35, the hearing panel stated in clear terms that:

> 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.
>
> [emphasis added]

[17] The hearing panel also affirmed at para. 38:

> … a strong message of general deterrence should be sent to other members of the Law Society in respect of misappropriating funds, and it should be unequivocal that such misconduct will almost certainly result in the revocation of the right to practise law.

[18] A further troubling issue with this conduct is that, prior to the 2013 compliance audit that resulted in the investigation and citation, the Respondent was audited in 2009, and similar exceptions related to his billing process were identified. The Respondent apparently did not change his billing practices maintaining his belief that the "express agreement" made with his clients was an acceptable fee arrangement for lawyers practising immigration law. (Exhibit 3A, tab 4)

[19] In the Respondent's letter dated July 30, 2013 to the Law Society and in his interactions with the auditor, it is clear by the tone of the correspondence that he believed that the Law Society had it wrong and that he had it right. (Exhibit 3A, tabs 4 and 5)

[20] *Tak* and *Gellert* (2014) clearly establish that, absent clear and extraordinary mitigating factors, disbarment is the appropriate disciplinary action for misappropriation of client trust funds.

[21] In our decision on Facts and Determination, we found at para. 31 that "there was no dishonest intent in his misappropriation."

[22] While the Respondent was initially reluctant to admit to the auditor that his long-standing practice of pre-billing and using fixed-fee retainers was in contravention of the Law Society Rules, since 2014 he has adopted corrective procedures in his practice and has taken the initiative to teach and remind other immigration lawyers of his errors.

[23] In light of our findings that the Respondent's misconduct was grounded in gross negligence and an honest but mistaken belief, and that he has taken remedial steps to correct these errors, these are factors of exceptional circumstance and disbarment is not required to protect the public interest.

[24] The nature and gravity of the Respondent's misconduct also includes multiple failures to abide by Law Society trust accounting rules over a prolonged period of time. The hearing panel in *Law Society of BC v. Mann*, 2015 LSBC 48, at para. 43, confirmed that

> … mishandling trust funds is perhaps one of the most serious forms of professional misconduct, because being entrusted to deal honestly with a client's funds goes to the heart of a lawyer's integrity and the fiduciary duties lawyers owe to clients.

[25] As in this case, this misconduct was also due to a longstanding honest but mistaken belief that the Respondent's pre-billed disbursements were not trust funds and not malfeasance.

The Respondent's experience

[26] The Respondent is a senior member of the bar. He was called and admitted as a member of the Law Society of British Columbia on September 13, 1983. (Exhibit 3A, tab 1, para. 1) At the time spanning the period of misconduct in this citation, he had been practising law for over 30 years.

[27] Since 1990, the Respondent has practised law at Lowe and Company, a small firm in Vancouver, British Columbia. His primary areas of practice are immigration law and corporate law. (Exhibit 3A, tab 1, paras. 2 and 3)

[28] The Respondent's resume states that he "has taught Immigration Law, Practice Management and Legal Ethics to lawyers across Canada since 1990." (Exhibit 7, tab 1)

[29] The panel agrees with counsel for the Law Society submission that, as a senior member of the bar and a regular lecturer in practice management and ethics, the Respondent "ought to have known better than to engage in grossly negligent trust accounting practices." The Panel finds that the Respondent's experience is an aggravating factor.

Character and lack of professional conduct record

[30] The Respondent does not have a prior professional conduct record, and as acknowledged in our decision on Facts and Determination at para. 28, the Respondent tendered a number of character reference letters from lawyers attesting to his "ethics, conscientiousness, legal/community/charitable supports, strong Christian beliefs and reputation as a solid, respected professional." His character is a mitigating factor.

Advantage gained and impact on the victims

[31] The Respondent gained a direct financial benefit through his misappropriation.

[32] We have not been provided with documentary evidence to confirm that the Respondent has repaid the funds to his clients, the victims. The impact on the victims is that they were deprived of money that was rightfully theirs.

[33] This is an aggravating factor as the Respondent profited from his misconduct while in a position of trust.

[34] Even if the Respondent were to repay the misappropriated funds to his clients, this factor would remain as an aggravating one, as the clients would have been out of those funds for at least five years, from June 2013 to the date of any refund made.

Acknowledgement of the misconduct

[35] The Respondent took steps to correct his accounting practices once his attention was drawn to the impropriety of his conduct by a Law Society investigation in January 2014 and admitted his misconduct part way through the Facts and Determination hearing.

[36] This is a moderately mitigating factor.

The need to ensure public confidence in the integrity of the profession

[37] In *Ogilvie*, the hearing panel emphasized the importance of public confidence in the integrity of the legal profession, stating at para. 19:

> The public must have confidence in the ability of the Law Society to regulate and supervise the conduct of its members. It is only by the maintenance of such confidence in the integrity of the profession that the self-regulatory role of the Law Society can be justified and maintained.

[38] Whether misappropriation is intentional or not, public confidence in the integrity of the profession is irreparably harmed if lawyers are not held accountable for taking client funds. More recently, transparency in billing practices has become especially important because the cost of legal services is one of the major hurdles to access to justice. The public must have confidence that, when a legal bill is rendered by a lawyer, the fees are fair and reasonable, there are no hidden fees, and charges for third-party disbursements accurately reflect any costs incurred. Even if the client is comfortable with an overall estimate for fees or disbursements, it is clear that, if any expenses are not subsequently incurred, excess client funds must be returned to the client. The Law Society cannot be seen to condone behaviour that deviates from this practice.

Range of sanction imposed in similar cases

[39] There are a number of disciplinary decisions relating to "unintentional" misappropriation and the charging of marked-up disbursements or the charging of disbursements that were not incurred. Generally, a distinction is drawn between cases involving "administrative convenience" and those involving intentional dishonesty.

[40] The closest case to the Respondent's is perhaps *Law Society of BC v. Sas*, 2015 LSBC 19. In *Sas,* a hearing panel found that the lawyer had misappropriated a total of $1,947.39 in trust funds, belonging to 22 clients, by billing and transferring the funds to her general account when she knew or was wilfully blind to the fact that those clients had been improperly billed for disbursements that were not incurred or, alternatively, was reckless as to whether those billings for disbursements were proper. In addition, in 43 instances, the lawyer withdrew funds from trust prior to delivering bills to her clients. The Court of Appeal commented that "the motive appears to have been administrative efficiency rather than theft." (*Law Society of BC v. Sas,* 2016 BCCA 341)

[41] In *Sas*, the lawyer had no discipline history and had made stellar contributions to both the legal profession and the public; she filed 46 letters of reference; had remediated her conduct; and was unlikely to reoffend. The proceedings had a profound effect on her practice and her personal life. The lawyer resigned as a bencher of the Law Society and was forced by her law firm to resign as a partner. The lawyer also explained that the proceedings and the panel's findings took a toll on her financially, physically, and emotionally, and led her to consider suicide. There was no financial gain as the lawyer refunded or otherwise credited to the clients the funds that had been taken.

[42] Nonetheless, the panel concluded that it was important to send a clear message to the profession to deter lawyers who may be tempted to improperly take monies (even of relatively small amounts) held in trust for clients for administrative convenience and to assure the public that the Law Society will protect clients of lawyers against misappropriation of monies held in trust for them. The hearing panel imposed a four-month suspension, which was upheld on review.

[43] This case is comparable to *Sas* in that the Respondent's sending of "pre-bills" and his later reclassification of the excess funds in his general account as disbursement revenue is analogous to the creation of false invoices to facilitate the clearing out of aged trust balances. Both methods of misappropriation appear to have been done for "administrative convenience" rather than a dishonest intent to steal from clients. Also, in both cases, the lawyers had no discipline history, enjoyed good reputations in the legal community and were unlikely to reoffend.

[44] However, this case is distinguishable from *Sas* in that it involves almost double the number of clients, substantially more money and occurred over a much longer period of time. In addition, the funds were never properly deposited into trust in the first instance, and the pre-billing and reclassification of the excess disbursements was done as part of the Respondent's routine operating procedure. In *Sas*, the misappropriation and improper billing occurred on two occasions at a time when the lawyer was trying to close her practice.

[45] As well, it is significant that, in *Sas*, the $1,947.39 that had been taken was refunded or otherwise credited to the clients from whom the funds were taken, within approximately 18 months. In the Respondent's case, we have not received documentary confirmation that the $9,107.65 that was taken has been returned to or credited to the clients. As a result, it cannot be said that the Respondent has fully remediated his misconduct.

CONCLUSION ON APPROPRIATE DISCIPLINARY ACTION

[46] The Law Society's mandate to protect the public interest in the administration of justice requires that the appropriate disciplinary action reflect the severity of the misconduct.

[47] This Hearing Panel finds that a suspension of five months is the appropriate disciplinary action in all of the circumstances having regard to:

(a) **the nature and gravity of the misconduct**: Any unauthorized use of client trust funds amounts to misappropriation, and misappropriation is the worst type of conduct a lawyer can engage in. Whether or not it is done deliberately, the nature and gravity of the misconduct is at the most serious end of the spectrum of misconduct and calls for a serious meaningful sanction;

(b) **the number of times the offending conduct occurred**: The misconduct occurred in relation to 43 separate clients over at least seven years;

(c) **the need for general deterrence**: A significant sanction is required in order to emphasize to the profession that the misappropriation of client funds will not be tolerated;

(d) **the need to ensure public confidence in the integrity of the profession**: At the very least, a lengthy suspension is required to uphold public confidence in the integrity of the profession and trust in lawyers and their billing practices; and

(e) **the range of sanctions imposed in similar cases**: The starting point for sanctions in cases of misappropriation is disbarment. Here, there is an exceptional circumstance, as the conduct was grossly negligent as opposed to knowingly intentional. As such, disbarment is not required, and a lengthy suspension is appropriate. In this case, a five-month suspension is appropriate for the misuse of trust funds.

COSTS

[48] The parties have agreed to an order for costs in the amount of $12,338.84, which has been calculated in accordance with Schedule 4 – Tariff for Discipline Hearing and Review Costs.

[49] Panels derive their authority to order costs from section 46 of the *Act* and Rule 5-11 of the Rules. Under Rule 5-11, a hearing panel must have regard to the tariff when calculating costs. The costs under the tariff are to be awarded unless, under Rule 5-11(4), the panel determines it is reasonable and appropriate to award no costs or costs in an amount other than that permitted by the tariff.

[50] In this case, there is no reason to deviate from the application of the tariff. The Respondent has not provided any evidence with respect to his current financial circumstances, including any information about his assets, net worth or ability to pay costs. The total effect of the order for costs and a suspension is not inordinate or out of proportion to the misconduct.

NON-DISCLOSURE ORDER

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

[52] The Law Society has the right to override a lawyer's duty to keep client confidentiality and to maintain solicitor-client privilege by compelling lawyers to produce confidential and privileged information to the Law Society during its investigation and hearing processes. Sections 87 and 88 of the *Act* are the sections that compel disclosure to the Law Society, and protect confidential and privileged information from disclosure.

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

[54] In order to prevent the disclosure of confidential or privileged information to the public, and with the consent of both parties, the Hearing Panel grants an order under Rule 5-8(2) excluding all confidential or privileged information before being provided to the public.

ORDERS

[55] The Hearing Panel has therefore made the following determinations:

1. pursuant to section 38(5)(d) of the *Act*, an Order that the Respondent be suspended from the practice of law for a period of five months, commencing November 1, 2019 ;

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

3. pursuant to Rule 5-11 of the Rules, an Order that the Respondent pay costs to the Law Society of $12,338.84, on or before December 31, 2019.