

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**MICHAEL WILSON WAYNE ATMORE**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL**

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Written materials:	September 16, 2019
Panel:	Tony Wilson, QC, Chair Nan Bennett, Public representative Carol Roberts, Lawyer
Discipline Counsel:	Angela R. Westmacott, QC
Counsel for the Respondent:	Andrea N. MacKay

**BACKGROUND AND FACTS**

- [1] On October 17, 2017, a citation was issued to the Respondent pursuant to the *Legal Profession Act* and the Rules of the Law Society. The citation was amended on August 21, 2019 (“the Amended Citation”).
- [2] The Amended Citation alleges that, on or about January 30, 2014, the Respondent authorized the withdrawal of client trust funds to pay fees or disbursements incurred in connection with one or more of the 21 clients identified in Schedule “B”, totalling \$2,753.39, without first preparing and immediately delivering a bill to the client(s), contrary to Rule 3-57(2) [now Rule 3-65(2)] of the Law Society Rules or section 69 of the *Act*, or both.
- [3] The Respondent admits that he was served with the Amended Citation.
- [4] The Respondent applied for, and the Law Society consented to, an order that this hearing be conducted in writing, and such order was made by the Hearing Panel.

- [5] The Respondent admitted that he authorized the withdrawal of trust funds from 21 clients to pay fees or disbursements incurred on behalf of the clients without first preparing and immediately delivering an invoice to the clients, contrary to Rule 3-57(2) [now Rule 3-65(2)] of the Law Society Rules.
- [6] Although the Respondent did so in order to clear each trust balance in circumstances where he knew he had performed additional work to justify the fees or incurred additional disbursements to justify the withdrawals, the Respondent admits that this did not justify the contravention of Rule 3-57 (2) and that his conduct constitutes professional misconduct or a breach of the *Act* and Law Society Rules pursuant to section 38 (4) of the *Act*.
- [7] The Respondent conditionally admitted that he engaged in professional misconduct by authorizing the withdrawal of trust funds from the 21 clients identified in the Amended Citation to pay fees or disbursements incurred on behalf of those clients without first preparing and immediately delivering an invoice to the clients, contrary to Rule 3-57(2) [now Rule 3-65(2)] of the Law Society Rules, or section 69 of the *Act*, or both.
- [8] The Respondent has proposed that the hearing panel:
- (a) accept that the Respondent has committed professional misconduct in relation to the allegations contained in the Amended Citation pursuant to section 38 (4) of the *Act*;
  - (b) require that the Respondent pay a fine of \$2,500;
  - (c) require that the Respondent take the Law Society accounting course;
  - (d) require that the Respondent pay costs of \$1,000; and
  - (e) that the Executive Director record the Respondent's admissions on the Respondent's professional conduct record.

## **PROFESSIONAL MISCONDUCT**

- [9] The issues before the Hearing Panel are whether the actions of the Respondent, as set out in the Amended Citation, constitute professional misconduct and whether the proposed disciplinary action is appropriate in the circumstances.
- [10] The test for “professional misconduct” was established in *Law Society of BC v. Martin*, 2005 LSBC 16. The test is whether the facts disclose a “marked departure

from that conduct the Law Society expects of its members.” In determining whether the Respondent’s conduct meets the test for professional misconduct, the Hearing Panel must consider whether the Respondent’s behaviour displayed culpability grounded in a fundamental degree of fault; that is, whether the Respondent’s conduct displays gross culpable neglect of his duties as a lawyer. This test for professional misconduct has been accepted by subsequent hearing panels.

- [11] It is also well established that not every breach of the Law Society Rules necessarily amounts to professional misconduct. However, as per *Law Society of BC v. Lail*, 2012 LSBC 32, a breach of trust accounting rules is a serious matter because trust accounting obligations go to the heart of confidence in the integrity of the legal profession. The hearing panel concluded in that decision that the respondent’s breach of accounting rules constituted professional misconduct.
- [12] When considering whether a breach of the *Act* or the Rules constitutes professional misconduct, the hearing panel must consider the gravity of the conduct, its duration, the number of breaches, whether or not there was bad faith on the part of the lawyer and whether the conduct caused harm.
- [13] The Panel has determined that the Respondent committed professional misconduct in his handling of trust funds for the 21 clients. He was not authorized to remove trust funds without first delivering an invoice to each of the clients. His failure is a marked departure from the conduct the Law Society expects of lawyers. The Panel finds that the Respondent contravened Rule 3-57(2) [now Rule 3-64(1)], which states in part as follows:

**Withdrawal from trust**

- 3-64(1)** A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are
- (a) properly required for payment to or on behalf of a client or to satisfy a court order,
  - (b) the property of the lawyer,
  - (c) in the account as the result of a mistake,
  - (d) paid to the lawyer to pay a debt of that client to the lawyer,
  - (e) transferred between trust accounts,
  - (f) due to the Foundation under section 62 (2) (b) [*Interest on trust accounts*], or
  - (g) unclaimed trust funds remitted to the Society under Division 8 [*Unclaimed Trust Money*].

## DISCIPLINARY ACTION

- [14] Having found that the Respondent has committed professional misconduct, the Hearing Panel must determine if the disciplinary action proposed by the Respondent and specified in paragraph [8](a) to (e) above reflects a fair and reasonable disciplinary action in the totality of the circumstances of this case and will serve the purposes of general and specific deterrence.
- [15] The leading decisions on the factors to be considered in determining the appropriate disciplinary action are: *Law Society of BC v. Ogilvie*, 1999 LSBC 17; *Law Society of BC v. Lessing*, 2013 LSBC 29 (on review); and *Law Society of BC v. Faminoff*, 2017 LSBC 04 (on review). *Faminoff* confirms that the proper approach to determining the appropriate disciplinary sanction is to apply those *Ogilvie* factors that are relevant to the particular circumstance of the misconduct and the respondent. In this case, the *Ogilvie* factors that are most relevant to a determination of the appropriate sanction are:
- (a) the nature and gravity of the proven misconduct;
  - (b) the experience and previous character of the respondent;
  - (c) the advantage gained, or to be gained, by the respondent;
  - (d) the number of times the offending conduct occurred;
  - (e) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating factors;
  - (f) the need for specific and general deterrence and the need to ensure public confidence in the integrity of the profession; and
  - (g) the range of sanctions imposed in similar cases.
- [16] This case concerns the improper withdrawal of trust funds to clear aged residual trust balances without first preparing and delivering invoices to clients. The Respondent has admitted authorizing the withdrawal of trust funds in relation to 21 clients without first delivering bills to them. The evidence establishes that the Respondent was beneficially entitled to the funds that were withdrawn from trust. In *Law Society of Ontario v. Deonarain*, 2019 ONLSTH 89, [2019] LSDD No. 138, the hearing panel described the distinction between the improper withdrawal of trust funds and misappropriation in the following way:

The Law Society submitted that there is a distinction to be drawn between misappropriation and unauthorized withdrawal of trust funds. In misappropriation ... there is no justification whatsoever for the withdrawal and use by the Lawyer of funds held in trust. It is tantamount to theft. In the case of unauthorized withdrawal of trust funds there is a purported justification for the withdrawal on the basis that legal services have been rendered by the lawyer to the client. The misconduct arises from the absence of adequate dockets, invoices and accounting records to explain and justify the amounts withdrawn.

In this case the Law Society was careful to distinguish between allegations of misappropriation and allegations of unauthorized withdrawal of trust funds. We accept the distinction; however, both activities are equally abhorrent and show a lack of integrity, probity and trustworthiness that is required of the Lawyer.

- [17] The Law Society acknowledged that the Respondent provided documentary evidence and other information to verify that he would have been entitled to the fees or disbursements that were removed from trust if he had first prepared and delivered bills in accordance with then Rule 3-57(2). That evidence and information confirmed that the Respondent had performed additional, and in some cases unanticipated, work for clients after billing them in accordance with a fee estimate. The value of the additional work that was identified would have, in all cases, equalled or exceeded the amount withdrawn from trust. However, the fact remains that the Respondent failed to deliver invoices to 21 clients prior to withdrawing the funds from trust. The Panel agrees that the nature and gravity of the Respondent's conduct, while serious, does not constitute misappropriation. The Respondent was motivated by administrative expedience in attempting to clear up dormant residual trust balances by authorizing withdrawals of funds to which he knew he was entitled.
- [18] As to his experience and previous character, the Respondent was called to the Bar in 2001. He is an experienced real estate lawyer who should have been familiar with the Law Society Rules. He does not have a professional conduct history.
- [19] We turn to any advantage gained and impact upon victims. The Respondent gained the advantage of clearing a relatively small amount of residual trust balances before delivering invoices. We have read and considered the written submission of the Law Society, as well as the Respondent's written submissions on a Rule 4-30 admission and his admission letter, from which we conclude that accessing trust funds early was of little or no advantage to the Respondent and each of the 21 trust

withdrawals has been reversed with reimbursement to 20 of 21 clients (one cannot be located, and the unclaimed trust funds have been paid to the Law Society).

- [20] There was no evidence of repetition of the conduct after January 30, 2014.
- [21] The Respondent acknowledged and accepted responsibility for his breach of the rule in relation to the 21 withdrawals and cooperated with the Law Society investigation. Moreover, the Respondent confirmed that his firm has changed its practice to ensure that trust funds are not withdrawn prior to preparation and delivery of a bill to the client.
- [22] With respect to specific and general deterrence and the need to ensure public confidence in the integrity of the profession, it is the Panel's view that, although breaches of the Law Society's accounting rules require specific and general deterrence, the Respondent was not attempting to withdraw funds that he was not beneficially entitled to. Moreover, he was unaware of the rule prohibiting the withdrawal of trust funds prior to delivery of a bill to the client. Consequently, these proceedings are a stern warning to the Respondent regarding the importance of perfect compliance with the Law Society Rules. We agree with the Law Society that it is unlikely that the Respondent will repeat the conduct. However, there is a need to ensure that lawyers are sufficiently deterred from engaging in similar behaviour, particularly since the proper handling of trust funds is an integral part of the practice of law and goes to the heart of confidence in the integrity of the legal profession. Accordingly, there is a clear public interest in ensuring that such accounting rules are complied with meticulously and not nonchalantly. The public must be able to trust money to lawyers knowing that it will be properly accounted for. The public interest requires that a clear message be sent to the legal profession that the withdrawal of trust funds in contravention of the Law Society Rules, even relatively small amounts to which a lawyer is beneficially entitled, will not be tolerated.
- [23] Fines for breaching Law Society accounting rules generally range from \$1,000 - \$3,500, depending on the number of violations. Cases involving breaches of accounting rules where there is evidence of dishonesty or negligence, have resulted in higher fines and/or suspensions. In the Panel's view, the Respondent's misconduct falls at the less serious end of the spectrum for accounting rule breaches. The 21 withdrawals took place in one day, and the conduct was not repeated. Moreover, the Respondent was beneficially entitled to the funds that were withdrawn.

- [24] The Panel agrees with the Law Society that a \$2,500 fine, plus payment of \$1,000 costs and completion of the Law Society accounting course, reflects a fair and reasonable disciplinary action in all the circumstances.
- [25] Accordingly, and pursuant to Rule 4-30, the Hearing Panel accepts that the Respondent has committed professional misconduct in relation to the allegations in the Amended Citation pursuant to section 38(4) of the *Act* and that the Respondent must pay a fine of \$2,500 and costs of \$1,000, and must complete the Law Society accounting course, on or before February 29, 2020. The Executive Director is directed to record the Respondent's admissions on the Respondent's professional conduct record.