2020 LSBC 05
Decision issued: February 10, 2020
Citation issued: May 11, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

TOVA GRACE KORNFELD

RESPONDENT

DECISION OF THE HEARING PANEL

Written materials:	October 17, 2019
Panel:	Pinder K. Cheema, QC, Chair John Lane, Public representative Shona A. Moore, QC, Lawyer
Discipline Counsel:	Angela R. Westmacott, QC
Counsel for the Respondent:	Howard A. Mickelson, QC

BACKGROUND

[1] On May 11, 2018, the Discipline Committee of the Law Society of British Columbia (the "Law Society") issued a citation against the Respondent pursuant to the *Legal Profession Act* and the Rules of the Law Society alleging that the Respondent acted in a conflict of interest in three loan transactions made between 2013 and 2014, contrary to rules 3.4-1, 3.4-2, 3.4-5, Appendix C, paragraph 2 and rules 3.4-28, 3.4-29 and 3.4-34 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*"). The citation was amended on September 27, 2019 and October 4, 2019 (the "Citation").

[2] In each transaction, the Respondent directly, or indirectly through her family, advanced funds for a short term loan to allow the client to complete a transaction,

the funds were repaid by the client, and the client was grateful for to the Respondent for the assistance she provided.

[3] The facts that gave rise to the Citation came to light during a routine compliance audit. None of the clients reported the Respondent to the Law Society.

[4] The Respondent admits that she was properly served with the Citation.

[5] The Respondent cooperated with the Law Society throughout its investigation, admitted professional misconduct, and consented to the Law Society's request that the Hearing Panel review the materials submitted and make a determination under sections 38(4) and (5) of the *Legal Profession Act.*

[6] On October 22, 2019 the Hearing Panel ordered that the application to conduct the hearing in writing be granted.

[7] The Respondent admits that her conduct constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act* and consents to the Law Society's submission that the appropriate penalty in this case is a global fine of $7,500 and a requirement to take the Law Society of British Columbia trust accounting course.

[8] The Law Society does not seek costs in this case.

ISSUE

[9] The issue before us is whether the Respondent acted in a manner that constitutes professional misconduct and whether the proposed disciplinary action is within the acceptable range for this misconduct.

FACTS

[10] The Law Society and the Respondent reached an Agreed Statement of Facts ("Agreed Facts"). After reviewing the supporting material placed before us, we are satisfied that the Agreed Facts accurately reflect the evidence before us. What follows is drawn from that agreement.

[11] The Respondent was called to the Bar and admitted as a member of the Law Society on September 13, 1983.

[12] Between 2013 and 2014, the Respondent arranged loans for three long-standing clients in circumstances in which each of them was in need of immediate financial

assistance, which the Respondent directly, or through her family, was able to provide on a short-term basis. Common to all of these three transactions is the fact that at no time did the Respondent seek to extract or obtain any undue advantage from these long-standing clients. Each of these three clients repaid the funds with interest, as planned, and was grateful to the Respondent for the assistance that she and her family provided.

[13] As stated earlier, the Respondent was not reported to the Law Society by any of her clients; rather, these transactions were identified in the course of a routine compliance audit, and an investigation was conducted.

[14] We turn now to the three transactions.

Clients: P Ltd. and MP

[15] In or about December 2013, MP, the principal of P Ltd. approached the Respondent to have her family help him in financing the purchase of a property scheduled to be closed on December 16, 2013.

[16] MP had been a client and personal friend of the Respondent for over 30 years.

[17] MP agreed to purchase the property for $5.295 million and paid a $300,000 deposit, but had removed the subject conditions before financing was in place and was at risk of losing his deposit and facing specific performance litigation.

[18] MP required $1 million to complete the purchase and, in seeking assistance, offered a second mortgage as security on another building owned by one of his companies.

[19] The Respondent arranged a loan of $1 million to MP. The funds for the loan came from three sources: (a) $800,000 from C Ltd.; (b) $178,770.37 from the Respondent's brother; and (c) $21,229.63 from the Respondent's law firm account. The Respondent, her parents and siblings are shareholders in C Ltd., which is also the management company for the Respondent's law firm.

[20] On December 16, 2013, MP executed a mortgage in favour of C Ltd. The Respondent witnessed MP's signature on the mortgage. The mortgage was registered in the Land Title Office and the $1 million was paid to the Respondent's trust account to facilitate the purchase. The Respondent's client ledger card recorded that $1 million was received from C Ltd. and that the amount was paid out on behalf of MP.

[21] The Respondent also acted for MP with respect to the conveyance documents for the transfer of the property. Vancity, represented by third party solicitors, provided

a first mortgage for the purchase of the property. All of the funds to purchase the property, including the mortgage funds from Vancity, were paid into the Respondent's trust account and used to complete the transaction on the scheduled closing date.

[22] On June 16, 2014, MP repaid the principal amount of the loan and $50,000 interest by bank draft. The bank draft was deposited into the Respondent's business account. The second mortgage was discharged from title following repayment of the loan.

Client: DF

[23] DF had been a client of the Respondent for at least 15 years at the time of the subject transaction in December 2013. In 2005, the Respondent acted for DF in her capacity as executrix of her husband's estate. DF was entitled to remain in the matrimonial home; however, once the matrimonial home was sold, the sale proceeds were to be split between DF and her late husband's son (her stepson), subject to certain adjustments.

[24] In or about July 2013, DF advised the Respondent that she wished to sell the matrimonial home and purchase a condominium.

[25] The sale of the matrimonial home was scheduled to complete on December 12, 2013 with net proceeds of approximately $469,000, of which DF believed she was entitled to one-half, representing her share of the estate, executrix fees and estate reimbursements.

[26] On November 21, 2013, DF entered into a Contract of Purchase and Sale to purchase a condominium for $200,000 with a closing date of December 13, 2013 (the "Condominium Purchase").

[27] Shortly before the closing date for the Condominium Purchase, the Respondent learned that she was not to release any funds to DF until there was an agreement on the amount of the executrix's account (the "Estate dispute"). Agreement on the Estate dispute was not reached prior to the closing date for the Condominium Purchase.

[28] As DF did not have sufficient time to obtain institutional financing to complete the Condominium Purchase and may not have qualified for a mortgage, the Respondent offered to help her out with a loan at the under market rate of 1.75% to enable her to complete the Condominium Purchase until the settlement funds could be disbursed.

[29] On December 8, 2013, DF executed a mortgage in favour of C Ltd. for $198,381.51, which was collateral to a promissory note bearing the same date and referenced that the funds were being advanced to close the Condominium Purchase until the Estate dispute was resolved. The Respondent witnessed DF's signature on the mortgage and promissory note and acted for her on the Condominium Purchase.

[30] On December 11, 2013, the Respondent issued a cheque from her general account for the purchase amount of the condominium to the Respondent's law firm "in trust". The cheque was deposited into the Respondent's trust account on December 12, 2013.

[31] The sale proceeds from the matrimonial home were also paid into the Respondent's trust account on or about December 12, 2013. The Respondent placed the sale proceeds in an interest-bearing account pending resolution of the Estate dispute.

[32] A few days later, DF obtained title to the condominium, and the mortgage in favour of C Ltd. was registered on title.

[33] In or about May 2014, the Estate dispute was resolved, and the Respondent was authorized to release to DF the proceeds from the sale of the matrimonial home that she held in trust. At that time, the Respondent paid the mortgage out to C Ltd., provided that balance of sale proceeds to DF, and discharged that mortgage from the title to the condominium. The interest earned on the mortgage was $1,638.67.

Client: AD

[34] AD had been a client of the Respondent for more than 20 years. In or about April 2014, AD asked the Respondent to handle the sale of her condominium and the purchase of her new condominium.

[35] The purchase of the condominium was scheduled to close on June 30, 2014. The sale of the other condominium was scheduled to close on July 8, 2014. AD attempted to get a date change so her sale could close prior to her purchase, thereby making the sale proceeds available to fund her purchase but was unsuccessful in doing so. When she approached her bank for eight days of bridge financing, she learned that the bank required extensive documentation and was going to charge a $1,000 fee for the financing.

[36] The Respondent offered to assist AD by giving her a loan to cover the bridge financing at a cost of $200. AD agreed.

[37] The Respondent did not take any security for the loan; however, AD signed a Direction to Pay irrevocably directing the Respondent to pay herself back from the sale proceeds of the condominium.

[38] On or about June 28, 2014, the Respondent deposited $294,430.13 into her trust account (the "trust funds") for the purchase of the condominium. The trust funds came partially from the payback of the loan and partially from the Respondent's general account.

[39] On June 20, 2014, the trust funds were used to purchase the condominium.

Admission of misconduct

[40] In respect of each of the three transactions, the Respondent admits the facts set out above and admits that her conduct constitutes professional misconduct under section 38(4) of the *Legal Profession Act.*

ANALYSIS AND LEGAL REASONING

Discussion

[41] Detailed written submissions were made by the Law Society. The Respondent endorsed those submissions in their entirety.

[42] The test for professional misconduct is set out in *Law Society of BC v. Martin*, 2005 LSBC 16. There, the panel articulated the test in this way:

> … whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members

or as restated:

> … whether the respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is, whether it displays gross culpable neglect of [their] duties as a lawyer.

[43] The "marked departure" test does not include or require any subjective element: *Martin;* affirmed in *Re: Lawyer 12*, 2011 LSBC 35.

[44] A core duty owed by every lawyer to a client is one of loyalty. A lawyer's duty not to act in cases where the lawyer's interests are divided is an important component of the duty of loyalty. Where a lawyer is in a conflict of interest, the client is

protected by the Rules, which require the lawyer to obtain the express, fully informed and voluntary consent from the client, before the lawyer proceeds.

[45] In this case, the Respondent ought to have recognized in each of the transactions that she was in a conflict of interest with her client and ought to have taken the steps set out in the *BC Code* to address that conflict of interest. She failed to do so. That failure, in our view, is a marked departure from the conduct the Law Society expects from each lawyer.

[46] Accordingly, after reviewing all of the materials provided to us by the Law Society and the Respondent, including the Agreed Facts and the documents referred to in that document, and given the Respondent's admission of professional misconduct, we are satisfied that a finding of professional misconduct in relation to each allegation in the Citation is appropriate.

APPROPRIATENESS OF PENALTY

[47] The Respondent has consented to pay a fine of $7,500 and to take the Law Society trust accounting course. The Discipline Committee has instructed counsel for the Law Society to recommend to the Hearing Panel that the proposed disciplinary action be accepted.

[48] That is not, however, the end of the matter. In *Law Society of BC v. Rai*, 2011 LSBC 02, the hearing panel observed at paragraphs 6 to 8:

> This proceeding operates (in part) under Rule 4-22 [now 4-30] of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.
>
> This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel

> has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"
>
> This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

[49] What this means is that this Hearing Panel must independently weigh the relevant factors in the context of the particular circumstances of the Respondent and her conduct that led to this disciplinary proceeding: *Law Society of BC v. Faminoff,* 2017 LSBC 04 (on review).

Nature and gravity of proven misconduct

[50] In respect of three separate transactions over an approximate eight-month period, the Respondent arranged loans whereby she directly, or through her family, provided the required immediate financial assistance to three clients. With respect to each client, the Respondent was attempting to assist the client with bridge financing. The Respondent did not obtain any undue advantage from her clients, and each of the three clients was appreciative of the Respondent's assistance.

[51] Having said that, the fact remains that the Respondent failed to disclose her conflict of interest to the clients, recommend and require that they receive independent legal advice and obtain their informed consent. These are serious breaches of the rules put in place to protect clients to whom their lawyers owe a duty of loyalty.

[52] These duties ought to have been recognized by the Respondent, who has been practising law for over 35 years.

Experience, previous conduct and character of the Respondent

[53] The Respondent is an experienced lawyer who should have recognized that lending money directly, or through her family, constituted a conflict of interest and would trigger a requirement to take the steps outlined in the Rules. The Respondent has a disciplinary record. In 2012 she had a conduct review relating to record keeping and trust accounting issues.

Impact on victims

[54] As noted earlier, there has been no adverse impact on any of the clients. Rather, each of the clients was grateful for the Respondent's assistance.

Advantage to the Respondent

[55] The Panel accepts the Respondent's statement that she was motivated by a desire to assist her long-standing clients; however, the fact remains that she and her family did obtain a benefit from arranging the loans: $50,000 in interest for eight months on the $1 million loan advanced to MP; over $1,600 in interest for five months on the loan advanced to DF; and $200 for nine days on the approximate $295,000 loan advanced to AD.

Other considerations

[56] We accept the Law Society's submissions that mitigating factors in this case include:

1. the bona fides of the Respondent's intention of attempting to assist her clients who were in need of bridge financing;

2. the Respondent is contrite and has apologized for her misconduct;

3. the Respondent understands that she must comply with rules governing conflict of interest in the future; and

4. the Respondent has been cooperative with the Law Society in its investigative and disciplinary processes and admitted the misconduct.

Deterrence and public confidence

[57] We agree with the submission made by counsel for the Law Society:

> It is unlikely that the Respondent will repeat the conduct, as she now understands the requirements and recognizes that she failed to comply with her obligations under the *BC Code.*

[58] Our consideration of deterrence is not focused solely on the Respondent. Rather, it is important that our disciplinary response takes into account the factor of deterrence of other members of the profession from failing to avoid conflicts of interest and, when they are present, to take the steps mandated by the Rules to protect the clients' interest.

Other discipline cases

[59] In cases dealing with lawyers who are found to have acted in a conflict of interest, disciplinary action usually ranges from fines to a suspension. Those cases in which a suspension is imposed:

> … tend to include further aggravating factors that are not present here, such as the respondent lawyer:
>
> (a) acting in a conflict where there is a personal or familial aspect;
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> (b) acting surreptitiously or deceptively;
>
> (c) having a serious discipline history where the concept of progressive discipline requires a suspension; or
>
> (d) having at least one prior related citation where the concept of progressive discipline requires a suspension.
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> *Law Society of BC v. Golden*, 2019 LSBC 15

[60] In the case before us, the Respondent did not act surreptitiously or deceptively, nor does she have a serious disciplinary history or prior citation that would trigger a suspension having regard to the concept of progressive discipline. While the Respondent directly, or indirectly through her family, received the benefit of interest on the loan transactions, there is no evidence that the rate of interest was other than in line with an arm's-length financial arrangement.

[61] We were provided with a number of decisions dealing with conflict of interest where the respondent received a fine. Those decisions include *Law Society of BC v. Sprague*, 2002 LSBC 26; *Law Society of BC v. Culos*, 2013 LSBC 19; *Golden*; and *Law Society of BC v. Van Twest*, [1994] LSDD No. 129.

[62] After considering the decisions put before us and, in particular, the decisions in *Sprague*, *Golden* and *Van Twest*, we are satisfied that the proposed penalty of a $7,500 fine and a requirement to complete the Law Society accounting course is a disciplinary action that falls within the range of similar cases decided by this and other law society Tribunals.

[63] Given the facts of this case, the requirement that she take the trust accounting course will bring home to the Respondent her obligations under the Rules in respect of conflicts of interest in handling trust funds and management of her law firm's trust account.

CONCLUSION

[64] After considering all of the written materials before us and considering the submissions of the Law Society and the Respondent, we are satisfied that the Respondent committed professional misconduct under section 38(4) of the *Act* in relation to all allegations in the Citation.

[65] We are also satisfied that the disciplinary action that the Respondent proposed and to which the Law Society has agreed, that is, a $7,500 fine and a requirement that the Respondent take the Law Society trust accounting course, is appropriate in all of the circumstances. Finally, we instruct the Executive Director to record the Respondent's admissions on her professional conduct record.

[66] We agree with both counsel that no order for costs should be made in this case in light of, among other things, the Respondent's cooperation throughout the investigation and citation processes.

SUMMARY OF ORDERS MADE

[67] The Panel makes the following orders:

a. The Respondent must pay a fine in the amount of $7,500; and

b. The Respondent must take the Law Society trust accounting course.

[68] The Panel further directs the Executive Director to record the Respondent's admission on her professional conduct record.