

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MARK WILLIAM SAGER

RESPONDENT

**DECISION OF THE HEARING PANEL ON
DISCIPLINARY ACTION**

Hearing date: February 26, 2020

Panel: Nancy Merrill, QC, Chair
Donald Amos, Public representative
David Layton, QC, Lawyer

Discipline Counsel: Kieron G. Grady
Counsel for the Respondent: Henry C. Wood, QC

BACKGROUND

- [1] In a Facts and Determination decision issued July 3, 2019 (2019 LSBC 22), the Panel determined that the Respondent committed professional misconduct as follows:
- (a) by causing to be prepared for his client JB a will that gave him a testamentary gift from JB, contrary to rules 3.4-26 and 3.4-38 of the *Code of Professional Conduct for British Columbia* (the “BC Code”); and
 - (b) by accepting a gift that was more than nominal from his client JB, namely, a gift of \$75,000 in July 2014, when JB had not received independent legal advice, contrary to rule 3.4-39 of the *BC Code*.
- [2] The Panel dismissed a third allegation of professional misconduct against the Respondent, that he accepted a further gift of \$25,000 from JB in December, 2015.

The Panel found that no solicitor-client relationship existed as between the Respondent and JB at the time the gift was made.

- [3] The reasons of the Panel in the Facts and Determination decision set out the basis for the factual background and describe the manner in which the Respondent committed professional misconduct.
- [4] The disciplinary action phase of the hearing took place on February 26, 2020. The Law Society asked that the Respondent be suspended for a period of six weeks, while the Respondent sought a fine of less than \$20,000. At the conclusion of the hearing, we advised the parties that we would not order a suspension. These are our reasons for that decision.

POSITION OF THE PARTIES

- [5] The Law Society submits that the appropriate disciplinary action is a suspension of six weeks commencing 45 days after a decision to suspend or such other time as the Panel may order.
- [6] In addition, the Law Society submits that it had substantial success and as such, seeks costs and disbursements of \$20,225.69 payable within five months or such other time as this Panel may order.
- [7] The Law Society also seeks a non-disclosure order pursuant to Rule 5-8(2) of the Law Society Rules that portions of exhibits filed in these proceedings that contain confidential client or privileged information not be disclosed to the public.
- [8] The Respondent submits that a suspension would be “a wholly unfair and disproportionate sanction in all the circumstances of this case” and that a “heavy fine” would also be unwarranted, by which he meant a fine of \$20,000 or more.

DECISION

General principles

- [9] The primary purpose of disciplinary hearings is to uphold and protect the public interest in the administration of justice pursuant to section 3 of the *Legal Profession Act* (the “Act”). The public interest is protected by ensuring the independence, integrity, honour and competence of lawyers.
- [10] This purpose was expanded upon in *Law Society of BC v. Hill*, 2011 LSBC 16, where the panel stated at paragraph 3:

It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

[11] Section 38(5) of the *Act* provides hearing panels with a number of options for imposing disciplinary action. Those options include a reprimand, a fine not exceeding \$50,000, the imposition of conditions or limitations on the respondent's practice, a suspension or disbarment.

[12] The leading decision on the factors to be considered in determining the appropriate disciplinary action is *Law Society of BC v. Ogilvie*, 1999 LSBC 17. That decision sets out the following non-exhaustive list of factors, not all of which will be applicable in every case, to be considered in imposing sanctions:

- (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.

[13] In *Law Society of BC v. Lessing*, 2013 LSBC 29 at paragraphs 57 to 60, the review panel identified the two most important factors from *Ogilvie* as the need to ensure the public's confidence in the integrity of the legal profession and the possibility of remediating or rehabilitating the respondent. The review panel went on to say that, where there is a conflict between these two factors, protection of the public should be paramount.

[14] In *Law Society of BC v. Dent*, 2016 LSBC 05, the hearing panel consolidated the *Ogilvie* factors into four general factors for determining appropriate disciplinary action:

- (a) the nature, gravity and consequences of the misconduct;
- (b) the character and professional conduct record of the respondent;
- (c) acknowledgement of the misconduct and remedial action; and
- (d) public confidence in the legal profession including public confidence in the disciplinary process.

[15] This Panel has considered each of the four general factors outlined in *Dent* in assessing the appropriate disciplinary action to be imposed upon the Respondent.

Nature, gravity and consequences of the misconduct proved

[16] We find that the Respondent's breach of rules 3.4-26 and 3.4-38 of the *BC Code* is a serious one. While he recognized the conflict in drafting a will in which a client bequeathed a testamentary gift to him, the Respondent's actions to address the conflict were inadequate and unsatisfactory. Delegating the drafting of the will to the Respondent's junior associate who worked for and reported to the Respondent did not cure the conflict.

[17] In our decision on Facts and Determination, we found at paragraph 151:

Sixth, the seriousness of the conflict that arises when a lawyer is asked to prepare a will in which the lawyer is to receive a substantial benefit is patently obvious. The lawyer is in a fiduciary relationship with the client and must be unremittingly loyal to the client's best interests (rule 3.4-1,

Commentary 5, *BC Code*; *R. v. Neil*, 2002 SCC 70, [2002] 3 SCR 631 at paras. 16, 25-26). This duty of loyalty is necessarily threatened where a lawyer is to be a beneficiary in a will that the lawyer is tasked with preparing for the client. There is a real possibility that the lawyer's duty to act as the client's loyal adviser will be negatively impacted by the lawyer's own interest in obtaining a benefit under the will. This concern is particularly acute where the client is elderly and infirm, and thus vulnerable, which we find as a fact was the case with JB. Even where the lawyer does not act improperly, the mere spectre of undue influence may cause harm to the client's best interests by triggering a challenge to the will or causing disharmony in the client's family. The risk of such harm is particularly acute where the introduction of the lawyer as beneficiary concomitantly works to reduce or eliminate the share of the estate left to other family members under a previous will.

- [18] The Respondent's other instance of professional misconduct, namely, accepting a \$75,000 gift from JB when she was his client and had not received independent legal advice, was a serious breach of rule 3.4-49 of the *BC Code*. The gift was very substantial, and JB was vulnerable and quite dependent on the Respondent. It was therefore particularly important that the Respondent comply with rule 3.4-49 so as to counter the risk of harm that arises where a client makes a gift to a legal advisor.
- [19] We accept that the Respondent had a very close relationship with his client JB and that they enjoyed a genuine, affectionate relationship that was akin to that of nephew and aunt. The Respondent submits that, while this may not have been an exculpatory factor at the Facts and Determination phase, it should be considered a mitigating factor at the Disciplinary Action phase.
- [20] The Respondent submits that the existence of a familial relationship minimizes concerns over what may be seen as predatory conduct by lawyers; the mischief at which the relevant rules are aimed is deemed largely removed by the presence of a close family relationship.
- [21] The Respondent points out that this Panel did not find that the Respondent acted with the intent to manipulate his client JB or exercise any undue influence over her. We did find, however, that JB was an elderly client who, because of her physical limitations, was vulnerable and had become very dependent on the Respondent.
- [22] While we do find that the absence of any evidence of intent to manipulate or exercise undue influence over his client are factors that somewhat mitigate the Respondent's conduct in this matter, the breaches were nonetheless serious.

- [23] The nature and gravity of the Respondent's conduct is such that it requires a clear message to be sent both to the Respondent and to the profession that such conflicts must be avoided.

Character and professional conduct record of the Respondent

- [24] The Respondent has been a member of the Law Society of British Columbia for 29 years since his call to the bar in March, 1991. At the time of the misconduct, the Respondent had been a practising solicitor for 22 years, and part of his practice included wills and estates. We find his experience in this area coupled with his years at the bar to be an aggravating factor.
- [25] The Law Society maintains that the Respondent does not have a professional conduct record. The Respondent confirms he has no previous citations but does volunteer that he has one previous and relatively dated disciplinary matter. We do not find this dated disciplinary matter to be an aggravating factor, particularly as it was not raised by the Law Society.
- [26] The Respondent provided 20 character references. The authors of these references included health care and other professionals, lawyers, friends, previous constituents and municipal council members. The common themes among these letters were the Respondent's integrity, philanthropy, kindness, desire to help others and community involvement.
- [27] The majority of these character references confirmed that the writers were aware of the findings of professional misconduct made against the Respondent in this matter.
- [28] In *Law Society of BC v. Johnson*, 2016 LSBC 20, the review panel stated at paragraph 46:
- No one wants to see harm come to their friends and colleagues, to put too much weight on character letters would, in effect, put the friends and colleagues of the Respondent in the place of the members of the hearing panel and would detract from the Law Society's duty to protect the public interest. In this case the character letters were one factor among many that the hearing panel had to consider and weigh. We see no error in either the manner or the weight given by the hearing panel to the character letters.
- [29] This Panel agrees that the character references constitute one factor among many that we must weigh, but they are not determinative of the matter. In this case, we find that the diverseness of the authors, the volume and the content of the character references are a mitigating factor.

Acknowledgement of the misconduct and remedial action

- [30] The Respondent acknowledged at the Facts and Determination phase that he breached the provisions of the *BC Code*. However, he did not acknowledge that these breaches constituted professional misconduct.
- [31] Furthermore, at paragraphs 97 to 104 of our decision on Facts and Determination, we found that the Respondent's initial response to the Law Society contained incomplete and evasive answers regarding the impugned conduct.

Public confidence in the legal profession including confidence in the disciplinary process

- [32] In assessing the appropriate sanction, the hearing panel in *Ogilvie* stated at paragraph 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.

- [33] The Respondent's conduct created a risk of harm to his client's interests. When a lawyer creates this kind of risk and breaches rules regarding professional conduct, public confidence suffers.
- [34] As the panel in *Law Society of BC v. Dent*, 2014 LSBC 04 at paragraph 33, quoted from *Bolton v. Law Society*, [1994] 2 All ER 486, protection of the public means "the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness."
- [35] In this case, the Respondent did not maintain these high standards.

RANGE OF SANCTIONS IMPOSED IN SIMILAR CASES

- [36] There are a limited number of similar cases from British Columbia that can provide guidance with respect to the appropriate disciplinary action in this case.
- [37] In *Law Society of BC v. Lloyd*, 2002 LSBC 14, the client executed a codicil naming the respondent as beneficiary of one-half of the residue of his estate, with the intent that the respondent would use his discretion in distributing that bequest to charity.

The codicil was executed without ensuring that the client first received independent legal advice.

- [38] Upon the client's death, the respondent received \$300,000 as his share of the estate. From that he paid \$250,000 to a school to establish a trust in the name of his deceased client. He paid the remaining \$50,000 to settle a claim against the estate by a relative of the deceased client.
- [39] The respondent's conduct in failing to ensure his client received independent legal advice prior to executing the codicil constituted professional misconduct as he breached chapter 7, rule 1 of the *Professional Conduct Handbook* in force at the time. He was fined \$10,000 and ordered to pay costs of \$2,500.
- [40] In *Lloyd*, the hearing panel noted that the respondent derived indirect financial benefits in the form of a large tax benefit for the donation to the school, as well as the use of the funds for a time, which he paid on his personal line of credit.
- [41] The hearing panel took into account a number of mitigating factors, including that the respondent readily acknowledged the impropriety of his conduct and had an unblemished professional conduct record. The hearing panel found the respondent's conduct constituted a serious breach of the rules but nonetheless concluded a suspension was not appropriate under the circumstances.
- [42] In *Law Society of BC v Albas*, 2015 LSBC 21, the respondent was fined \$7,000 and ordered to pay costs where he had committed professional misconduct by causing a will to be prepared for a client naming the respondent himself as a beneficiary and, four years later, causing a new will to be prepared naming the respondent's wife as a beneficiary.
- [43] The respondent made a conditional admission of professional misconduct. The hearing panel found that, in both instances, the respondent took steps to benefit himself directly or indirectly without ensuring that his client received independent legal advice and that this was a serious breach of duty to a client.
- [44] In addition to these cases, the Law Society relies upon *Nova Scotia Barristers' Society v. Romney*, 2004 NSBS 8,¹ where part of the conduct in question involved receiving gifts from two clients without ensuring those clients received independent legal advice. The respondent was suspended for 12 months, ordered to make restitution, pay costs of \$45,000, attend a professional responsibility course and abide by the guidelines for suspended lawyers.

¹ Facts as provided by counsel for the Law Society given the Book of Authorities contained only the order made and not the written reasons including factual background.

- [45] In *Nova Scotia Barristers' Society v. Savoie*, 2005 NSBS 6, the respondent benefited from a number of gifts from a client without ensuring that the client received independent legal advice. He was suspended for four months, ordered to pay a fine of \$2,500, ordered to pay costs of \$15,000 and required to take a professional responsibility course and practise under supervision after completing his suspension.
- [46] The Respondent relies on the following cases in support of his position that a fine, rather than a suspension, is more appropriate under the circumstances.
- [47] In *Law Society of BC v Golden*, 2019 LSBC 15, the respondent was found to be in a conflict of interest in acting for the husband in matrimonial proceedings and also acting for the wife regarding both sale of property and settling a debt owed by the wife to the husband. The hearing panel noted that the respondent did not benefit from the professional misconduct. The respondent was ordered to pay a \$20,000 fine and costs of approximately \$10,000.
- [48] In *Law Society of BC v. King*, 2019 LSBC 07, the citation originally alleged that the respondent was in a conflict regarding the sale of real property and disposition of the sale proceeds. The hearing panel found that there was no actual conflict, but rather a failure to appropriately advise the unrepresented opposing party to obtain independent legal advice so as to ensure that the opposing party understood the respondent was not acting for him. In this case, the respondent also altered a document to be filed with the Land Title Office. The global fine was \$8,000 and \$750 in costs.
- [49] In *Law Society of BC v. Culos*, 2013 LSBC 19, the respondent admitted professional misconduct in two separate matters. He acted for an estate and then acted for a funeral home in collecting a debt owing by the estate. In the second matter, he acted for a client who took advantage of an elderly person, became suspicious of that client, and then acted for the elderly person against the client. The hearing panel ordered a fine of \$15,000, costs of \$6,748 and required that the respondent retain a practice supervisor. The hearing panel stated that the fine was higher than normal because there were two different complaints arising at the same time and the respondent had demonstrated a sporadic but continuing lack of judgment. A higher fine was supported by the principle of progressive discipline.
- [50] In *Law Society of BC v. Rutley*, 2013 LSBC 32, the respondent prepared Powers of Attorney for a married couple who later separated. He then assisted one of the separated spouses to use the Power of Attorney to dispose of shares in a company. The hearing panel found that, although there was no sharp practice and no prior

discipline record, a significant fine was warranted due to the nature and severity of the breach. The respondent was ordered to pay a \$7,500 fine and costs of \$7,400.

- [51] In *Law Society of BC v. O'Neill*, 2013 LSBC 23, the respondent negotiated a finder's fee when he had a direct financial interest in the subject matter and subsequently received compensation without informing his original client. There was no evidence that there was a negative consequence for the victim. The hearing panel rejected the respondent's argument that he had been stigmatized by the negative publicity surrounding the citation and, as such, it should be a factor in reducing the sanction to be imposed by the hearing panel. The hearing panel ordered a fine of \$5,000, costs of \$4,124 and a reprimand of the respondent.

DECISION

Disciplinary action

- [52] We have considered all of the law, evidence and submissions before us. We are mindful of the need to ensure the public is protected, maintain high professional standards among lawyers, and preserve public confidence in the legal profession.
- [53] Taking into consideration the totality of the circumstances, we do not view a suspension as an appropriate sanction, in particular because neither instance of professional misconduct involved dishonesty or repetitive acts of deceit or negligence and because the Respondent does not present with a significant personal or professional conduct history.
- [54] We find that a fine in the amount of \$20,000 payable by the Respondent and payment of costs is appropriate and fitting and will ensure the public's confidence in the integrity of the legal profession.

Costs

- [55] The Law Society has presented a Bill of Costs totalling \$20,225.69. The Respondent takes no issue with the amount of costs being sought. He does, however, submit that there was divided success in that one of the three allegations of the citation was dismissed. As a result, the Bill of Costs should be reduced by one-third.
- [56] The Law Society submits that it had substantial success, not divided success, in this matter. The Law Society further submits that the allegation that was dismissed (a second gift to the Respondent from JB) was more akin to a sub-issue and that very little hearing time, perhaps an hour, was dedicated to dealing with that issue.

[57] We find that the Law Society had substantial success in this matter and therefore conclude that the Respondent should pay the total sum of \$20,225.69 in costs pursuant to the Bill of Costs presented by the Law Society.

Non-Disclosure

[58] The Law Society seeks an order pursuant to Rule 5-8(2) that portions of the exhibits that contain confidential client information or privileged information not be disclosed to members of the public, and further, the transcript of these proceedings not be released to a non-party. In our view, it is not necessary to close the entire transcript of a public hearing, but we will order that portions of the transcript that contain privileged or confidential material not be disclosed to a non-party.

[59] The Respondent consents to this order, but seeks to expand it by including an additional term that the letters of reference provided in support of the Respondent in these proceedings not be disclosed to members of the public. The Law Society did not oppose this request.

[60] Rule 5-8(5) requires a hearing panel to give written reasons for its decision to make an order, or decline to make an order, under this rule.

[61] The Panel agrees that confidential client information and privileged information should not be disclosed to the public, nor should a transcript of these proceedings. We also agree that, given the content of some of the letters of reference, disclosure of them would be overly invasive of the writers' privacy and could cause harm to innocent third parties.

ORDER

[62] The Panel orders that:

- (a) the Respondent pay a fine in the amount of \$20,000 on or before September 1, 2020;
- (b) the Respondent pay costs in the amount of \$20,225.69 on or before October 31, 2020;
- (c) portions of the exhibits that contain confidential client information or privileged information must not be disclosed to members of the public or any third parties;

- (d) portions of the transcripts of the Facts and Determination Hearing and the Disciplinary Action Hearing that contain confidential client information or privileged information must not be released to members of the public or any third parties; and
- (e) the letters of reference submitted on behalf of the Respondent in these proceedings must not be disclosed to members of the public or any third parties.