2021 LSBC 13
Decision issued: April 8, 2021
Citation issued: March 11, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DESMOND GREG FRIEDLAND

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing date:	January 28, 2021
Panel:	Thomas L. Spraggs, Chair Linda Berg, Public representative John D. Waddell, QC, Lawyer
Discipline Counsel:	Kathleen M. Bradley
Appearing on his own behalf:	Desmond Greg Friedland

INTRODUCTION AND OVERVIEW

[1] The citation in this matter was authorized by the Discipline Committee on March 5, 2020 and was issued on March 11, 2020.

[2] The citation arose out of issues that originate from a 2012 trust compliance audit of the Respondent's practice.

[3] Pursuant to the citation, the allegations against the Respondent, Desmond Greg Friedland, are as follows:

(a) Between approximately February 2015 and February 2018, you misappropriated or improperly withdrew some or all of $825 from your client, AN and DN, by withdrawing the funds from trust when you

were not entitled to the funds, contrary to Rule 3-64 of the Law Society Rules [Rules 3-56 prior to July 1, 2015].

(b) Between approximately April 2014 and May 2018, in relation to the 14 client matters set out in Schedule "A", you maintained more than $300 of your own funds in your pooled trust account, contrary to Rule 3-60(5) of the Law Society Rules [Rule 3-52(4) prior to July 1, 2015], by failing to withdraw funds from trust in payment of your fees as soon as practicable, contrary to Rule 3-58 of the Law Society Rules [Rule 3-51 prior to July 1, 2015].

(c) Between approximately February 2007 and March 2016, in relation to one or more of the 13 instances identified in Schedule "B", you failed to do one or more of the following contrary to one or more of Rules 3-68(a), 3-68(b) and 3-73(2) of the Law Society Rules [Rules 3-60(a), 3-60(b), and 3-65(2) prior to July 1, 2015], and rules 3.5-4 and 3.5-5 of the *Code of Professional Conduct for British Columbia* [Chapter 7.1, Rule 5 of the *Professional Conduct Handbook* prior to January 1, 2013]:

(i) identify and record the source of funds received into your pooled trust account;

(ii) identify and record the identity of the client on whose behalf trust funds were received into your pooled trust account;

(iii) maintain a trust ledger, or other suitable system, showing separately for each client on whose behalf trust funds have been received, all trust funds received and disbursed, and the unexpended balance; and

(iv) maintain a detailed monthly listing to support your monthly trust reconciliation that showed the unexpended balance of trust funds held for each client, and that identified each client for whom trust funds were held.

[4] The conduct alleged, if proven, constitutes professional misconduct or breaches of the *Act* or Rules, pursuant to s. 38(4) of the *Legal Profession Act*.

ISSUES

[5] The issue before the Panel with respect to each allegation is:

(a) whether the conduct admitted by the Respondent amounts to professional misconduct or a breach of the *Act* or Law Society Rules, pursuant to s. 38(4) of the *Act.*

FACTS

Notice to Admit and Response

[6] The facts in this matter are undisputed.

[7] The Respondent was served with a Notice to Admit dated September 25, 2020. The Respondent provided a Response dated October 30, 2020 admitting to the facts as set out in the Notice to Admit and the authenticity of the documents attached.

[8] The Respondent, while admitting the facts, provided further evidence by way of response in relation to para. 79, as well as paras. 97 to 119. This evidence is considered further in these reasons in relation to allegations 3(a) to (d).

[9] In accordance with Rule 5-6(6), the Panel accepts the evidence in the form of the admissions accepted by the Respondent through the Notice to Admit.

The Respondent's background

[10] The Respondent was called and admitted as a member of the Law Society of British Columbia on December 12, 1997.

[11] The Respondent has spent the last 23 years practising primarily as a sole practitioner through Des Friedland & Associates with a focus on immigration and motor vehicle law.

[12] The Respondent admits a detailed chronology of events. The admissions are clear and unambiguous. The Panel has summarized pertinent highlights that support our findings.

2012 compliance audit and trust accounting deficiencies and resulting conduct review

[13] In 2012, the trust assurance department of the Law Society performed a compliance audit of the Respondent's firm. The compliance audit revealed that the Respondent was not complying with numerous trust accounting rules, including the following:

(a) failing to support monthly trust reconciliations with monthly client trust listings;

(b) not preparing trust reconciliations in time;

(c) maintaining 76 old balances (totalling $37,339.14) in trust;

(d) failing to withdraw billed funds from trust;

(e) recording unknown client deposits as part of the float balance and maintaining those funds in trust; and

(f) maintaining funds for two personal matters in trust.

[14] In 2017, the Respondent was ordered to attend a conduct review in relation to some of the issues identified by the 2012 compliance audit. The conduct review subcommittee's discussions included the Respondent's failure to prepare monthly trust reconciliations, failure to correct trust shortages and failure to provide an accurate trust report for 2011.

[15] The Respondent acknowledged that his conduct in dealing with his trust account was below the standard expected of him, and the subcommittee determined that the Respondent's conduct was not deliberate but was due to a lack of understanding of his obligations for trust account record keeping and to not paying appropriate attention to his administrative obligations.

[16] While determining the Respondent's conduct was not deliberate, the subcommittee communicated to the Respondent that better attention must be paid to the administrative obligations that operating a trust account requires.

2018 compliance audit

[17] The Respondent underwent a further Law Society audit in 2018. The audit period covered October 1, 2016 to January 28, 2018. The compliance audit revealed numerous exceptions, some of which were issues previously identified in the 2012 compliance audit.

[18] In an email to the Law Society dated April 24, 2018, the Respondent explained that he was not satisfied with the Compliance Audit Summary Report and would not sign it for a number of reasons, including a disagreement about the rule requiring a practice having no more than $300 of a lawyer's own funds in trust.

[19] In a letter to the Law Society dated May 10, 2018, the Respondent wrote an explanation relating to the issue of having more than $300 of his own funds in trust. The Respondent also expressed frustration with his bank and the inability to specifically identify which client made a deposit into his trust account.

[20] The Respondent proposed to set up a "dummy client file" and pay himself from that account. Additional explanation about the Respondent's accounting processes revealed that it was not his practice to render a final account to the client prior to withdrawing fees from trust.

[21] In response to this communication, the Law Society replied:

> You are not permitted to generate a 'dummy client file'. Lawyers are required to identify the source of all funds received before preparing a bill, delivering the bill and transferring the funds to the general account. As indicated in our letter to you dated March 19, 2018, if you are not able to identity the payer, you will need to contact your financial institution to reverse the transaction and have the funds returned to the source.

[22] In response to the audit team leader's direction that the Respondent was not to create a "client dummy file" and that unidentified deposits should be returned to the source, the Respondent wrote:

> As advised, the issue of my having more than $300 in my float has been an on going [*sic*] concern for many years, and dealt with a number of times in previous audits. The build up [*sic*] of funds in this account is mostly related to amounts being deposited to my account by clients, with the bank not being able to advise me as to the name of the payee. the [*sic*] bank would not be able to return these funds to who ever [*sic*] deposited them. Obviously if they could do that, they would also be able to advise me of the name of the client which they are unable to do.
>
> Given that these funds are clearly owed to me for work done, my proposal that I be allowed to generate a 'dummy client file' and pay myself from that account, I believe to be the best.
>
> If you are not satisfied with this suggestion, please recommend another workable solution for me.

[23] The Panel accepts that the Respondent prepares an invoice at the beginning of a file when he is retained. The issue of concern is that the Respondent does not send his client any further invoices, but rather generates an invoice for internal bookkeeping

purposes only and no other invoice or documentation is provided to the client when a transfer from trust occurs.

[24] It is also pertinent that the Respondent does not maintain separate trust ledgers for each client matter. That is, if a client has more than one file, the trust accounting is recorded on only one trust ledger.

[25] With respect to the 16 inactive trust balances totalling $8,845.65, the Respondent explained that they were funds that he had billed but had not withdrawn from trust.

ANALYSIS AND LEGAL REASONING

[26] Issue: Does the admitted conduct of the Respondent amount to professional misconduct or a breach of the *Act* or Law Society Rules, pursuant to s. 38(4) of the *Act*?

Onus and standard of proof

[27] The onus of proof in Law Society hearings is well known and consistently applied. The standard was articulated by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53. In *Law Society of BC v. Schauble*, 2009 LSBC 11 at para. 43, the panel cited the court in *McDougall* and held:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: " ... evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test …"

[28] The onus is, therefore, on the Law Society to prove on a balance of probabilities that the Respondent's conduct amounts to professional misconduct or a breach of the *Act* or Law Society Rules, pursuant to s. 38(4) of the *Act*.

Test for professional misconduct

[29] The term "professional misconduct" is not defined in the *Act*, the Rules or the *Code of Professional Conduct for British Columbia* (the "*BC Code*"). The leading case regarding what constitutes professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16. In *Martin*, the panel held at para. 171 that the test is:

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

[30] The panel commented at para. 154 of *Martin*:

> The real question to be determined is essentially 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 his duties as a lawyer.

[31] The test is an objective one: *Law Society of BC v. Sangha*, 2020 LSBC 03 at para. 67.

Application of legal test

[32] As indicated earlier in these reasons, the Respondent admits to the conduct that provides the factual foundation for the behaviour described in the citation.

[33] The evidence establishes that the Respondent's conduct constitutes a marked departure from the conduct that the Law Society expects of lawyers. His behaviour displays gross culpable neglect of his duties as a lawyer (*Martin*, paras. 154 and 171).

[34] The Law Society submitted a number of cases in support of its position. *Law Society of BC v. Uzelac*, 2003 LSBC 35, is of assistance. The hearing panel noted that, while individual breaches of trust accounting rules may not meet the threshold, "a continuing course of action evidencing a complete neglect of the Respondent's obligations to maintain trust records" does amount to professional misconduct.

[35] Similarly, in *Law Society of BC v. Lail*, 2012 LSBC 32, a hearing panel found that the respondent's breach of trust accounting rules, including the withdrawal of trust funds without first delivering accounts, amounted to professional misconduct.

[36] At para. 10 of *Lail*, the panel states:

> Trust accounting obligations go to the heart of confidence in the integrity of the legal profession, and there is clear public interest in ensuring that they are performed meticulously and not, as here, nonchalantly.

[37] The Respondent's explanations for long-standing non-compliance do not excuse or relieve a lawyer of the responsibility to fully comply with the positive obligations set out by the Rules governing the privilege of operating a trust account as a lawyer. It is our view that his explanations of accounting practices highlight the substantial degree to which the Respondent is non-compliant and misguided about how to correctly operate his accounting.

[38] As noted in *Law Society of BC v. Reith*, 2018 LSBC 23, and other decisions, Law Society hearing panels have found multiple breaches of trust accounting rules to constitute professional misconduct.

[39] The Panel finds *Reith* applicable in these circumstances. The Respondent has demonstrated a prolonged disregard for trust accounting rules and a lack of appreciation for the special character of a lawyer's trust account. We agree with the Law Society's submission that the Respondent has demonstrated an indifference to the public confidence placed in lawyers to properly handle trust funds.

[40] *Reith* is instructive in differentiating between insignificant bookkeeping and accounting irregularities and those that attract serious attention and sanction.

[41] At para. 26 of *Reith*, the panel references *Law Society of BC v. Van Twest*, 2011 LSBC 09 at para. 39:

> There have been, and there will continue to be, minor mistakes on Trust Reports that do not properly attract the sanction of the Law Society. The distinction between these different types of mistake in respect of the Rules was also discussed in *Law Society of BC v. Lyons*, 2008 LSBC 32, at para. [32]:
>
> > A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).

Allegation 1

[42] The Law Society alleges misappropriation in the first allegation of the citation.

[43] The admitted facts establish that the Respondent received $825 from an immigration law client for anticipated disbursements that consisted of three government application processing fees. The disbursements were never incurred by the Respondent or his firm. The client subsequently provided the Respondent with his credit card information so that the client would incur the fees directly.

[44] Instead of refunding the $825 to his client, the Respondent withdrew the funds as payment for legal fees and deposited them to his general account. After the Law Society raised the issue with the Respondent, he eventually refunded the full amount to his client in two separate payments.

[45] The Panel agrees with the submission from the Law Society that the misappropriation appears to have occurred because of the Respondent's unconventional trust accounting practices. At the outset of a retainer, the Respondent issues a "statement of account" that, for immigration law clients, normally includes a flat-fee amount for legal services and an amount for anticipated disbursements. Upon receiving their statements, clients provide the Respondent with a retainer, which is put into trust. The Respondent then works on the file.

[46] After work has been completed, the Respondent issues a second bill for internal accounting purposes but does not send a copy of the bill to the client. His position is that he is entitled to withdraw the funds from trust on the basis of the first "statement of account".

[47] Although the Respondent's processes were questioned by a compliance auditor in 2012, the Respondent declined to amend them, explaining that he felt they were adequate and that issuing a second bill to clients was inconvenient for him.

[48] The Panel does not accept that inconvenience is a reason to avoid compliance with the sequencing requirements of billing funds from a trust account.

[49] While the misappropriation may have occurred through recklessness or gross negligence, it remains that the Respondent took the funds when he was not entitled to do so. In doing so, he committed misappropriation.

[50] The Panel agrees with the submission of the Law Society that the public is entitled to rely on lawyers to properly handle trust monies. Trust accounting constitutes one of the core elements of a lawyer's fiduciary duties to clients. Any improper handling of trust funds risks harm to the client and has a serious negative impact upon the reputation of the legal profession.

[51] The special status of funds held in trust by a lawyer has been discussed in a number of previous decisions. In *Law Society of BC v. Sahota*, 2016 LSBC 29 at para. 60, a hearing panel began its analysis by considering the following definition of misappropriation:

> Misappropriation is defined in *Black's Law Dictionary*, 6th Edition as follows:

> The unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended. Misappropriation of a client's funds is any unauthorized use of clients funds entrusted to an attorney, including not only stealing but also unauthorized temporary use for lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom …

[52] In *Law Society of BC v. Gellert*, 2013 LSBC 22, a hearing panel commented on the importance of properly handling trust funds in the context of a misappropriation of client funds, explaining at para. 73:

> An unauthorized use of trust funds harms or risks harming the client, undermines the client's confidence in counsel, and has a seriously deleterious impact on the legal profession's reputation in the eyes of the public. 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.

[53] In *Law Society of BC v. Lowe*, 2019 LSBC 10, a hearing panel considered the respondent's misconduct in billing estimated disbursements in advance as a "pre-bill", and then keeping any difference between the estimate and the actual amount of the disbursements as "disbursement revenue". The respondent knew that the disbursements had not been fully incurred and did not account to his clients for the excess amounts. The respondent submitted that he had an honest belief that his method was a more efficient way to deal with the excess disbursement funds. In its analysis, the hearing panel in *Lowe* stated at paras. 18 and 19:

> The relationship between a lawyer and client is a fiduciary relationship, requiring the lawyer to act at all times in utmost good faith towards the client. It creates a relationship of trust and confidence from which flows obligations of loyalty and transparency, which in turn requires a solicitor to be candid with the client on all matters concerning the retainer, including ensuring that, in any transaction from which the solicitor receives a benefit, the client has been fully informed of the relevant facts and properly advised upon them (see *Nathanson, Schachter & Thompson v. Inmet Mining Corporation*, 2009 BCCA 385 at paras. 48- 49 and *Law Society of BC v. Pham*, 2015 LSBC 14 at para. 36). The lawyer's duty of candour to his client with respect to billing is reflected in the *Legal Profession Act* and the *Professional Conduct Handbook*, in force for nearly all of the relevant time:

(a) Section 69(4) of the *Legal Profession Act* provides that a lawyer's bill must contain "a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursement"; and

(b) Chapter 9, Rule 7 of the Law Society of British Columbia's *Professional Conduct Handbook* prohibited a lawyer from charging a hidden fee. It provides that a lawyer must fully disclose to the client "any fee that is being charged or accepted." *Pham*, at para. 38.

[54] In the present case, the Respondent has admitted that he was not entitled to withdraw the $825 held in trust for his client, as those funds had been provided to him to pay for disbursements that he ultimately did not incur.

[55] The problematic aspects of the Respondent's accounting practices were brought to his attention following the 2012 compliance audit, but for reasons that remain unclear, the Respondent continued to neglect the requirements of the trust accounting rules.

[56] Having considered all of the evidence and the submissions of the Law Society and the Respondent, the Panel finds professional misconduct in relation to allegation 1.

Allegation 2: maintaining more than $300 of his own funds in trust

[57] Allegation 2 alleges that, in relation to 14 client matters, the Respondent maintained more than $300 of his own funds in his pooled trust account, contrary to Rule 3-60(5).

[58] This issue arises because the Respondent failed to withdraw funds from trust in payment of his fees as soon as practicable, contrary to Rule 3-58. The Respondent's reasoning and approach to billing files has been set out in these reasons. The Panel finds that these accounting practices were initially addressed through an earlier Law Society audit process, but there was no material change in the approach to non-compliant billing practices.

[59] The evidence shows that withdrawals were deferred for periods of time ranging from four months to five years. As of February 1, 2018, there were 14 client matters with funds in the Respondent's trust account totalling $9,442.03 that represented the Respondent's fees.

[60] The Respondent admits that, as a result of delaying in withdrawing his fees from his trust account, he maintained more than $300 of his own funds in his pooled trust account from April 2014 to May 2018.

[61] It is hard to understand why the Respondent, who was advised to modify accounting practices during a compliance audit in 2012 on this same issue, did not discontinue his practice of leaving fees in the trust account and allowed further inactive trust balances to accumulate when they should have been billed and the funds transferred.

[62] The rules governing lawyers' conduct in relation to withdrawal of fees from trust for services rendered are unambiguous.

[63] Accordingly, the Law Society has met the burden of proof in relation to allegation 2 and the Panel finds that the Respondent has committed professional misconduct.

Allegation 3: unidentified trust deposits

[64] Allegation 3 of the citation alleges that, in 13 instances, the Respondent failed to do one or more of the following:

(a) identify and record the source of funds received into his pooled trust account;

(b) identify and record the identity of the client on whose behalf trust funds were received into his pooled trust account;

(c) maintain a trust ledger, or other suitable system, showing separately for each client on whose behalf trust funds have been received, all trust funds received and disbursed, and the unexpended balance; and

(d) maintain a detailed monthly listing to support his monthly trust reconciliation that showed the unexpended balance of trust funds held for each client, and that identified each client for whom trust funds were held.

[65] The issue of unidentified trust deposits was also identified during a prior compliance audit in 2012 but was not corrected by the Respondent.

[66] Following the 2012 compliance audit, an auditor advised the Respondent that any unidentified funds could be remitted to the Law Society under Rule 3-82, and that if he did not wish to exercise the provision of Rule 3-82, he had a continuing responsibility to locate his clients and return any remaining balances to them. The

auditor advised that unknown deposits had to be followed up on promptly in order to determine the client for whom trust funds were held.

[67] The Panel finds that the Respondent did not provide a sufficient explanation to the auditor about what steps he would take to rectify this issue.

[68] The compliance audit findings revealed approximately 13 unknown client deposits totalling $2,768.60 in what the Respondent describes as “the float account”.

[69] The Respondent had a practice of providing his trust account information to anyone wishing to pay him by direct deposit. The result for the Respondent is that anonymous deposits were made to the Respondent’s trust account that cannot be matched to specific clients.

[70] In relation to this allegation, the Law Society relies on *Law Society of BC v. Skogstad*, 2008 LSBC 19, *Sahota* and *Reith.* In *Skogstad*, the hearing panel determined that the repeated violation of Rule 3-60 amounted to professional misconduct.

[71] In *Sahota*, the hearing panel determined, *inter alia*, that the respondent’s failure to identify the source of funds received into trust amounted to professional misconduct.

[72] The Respondent, by way of reply to the Notice to Admit, specifically addressed the challenges he experiences with his current accounting arrangements.

[73] In response to paras. 97 to 119 of the Notice to Admit, the Respondent states:

> However with regards to unknown deposits received by my bank, although this does not happen often at all, it still does from time to time. It occurred twice this year so far. A cash deposit of $3480 and a cheque deposit of $1500. My bank was unable to provide any information regarding the name of the depositors. I have since been able to establish the identity of the depositor for the $1500. The cash deposit of $3480, currently parked in my Float account has not yet been identified. You will see from my attached queries to the bank that they have been unable to assist in identifying the name of the depositor. I have repeatedly requested that they not accept deposits to my account from anyone whose identity is not provided. My account has been “noted” to this effect. Hopefully there will be no further instances of this, but it is something beyond my control.

[74] The Respondent’s statement above articulates the practical challenges lawyers often meet in accounting and the cumulative protection that following the trust

rules can provide a lawyer. The challenge the Respondent faces is multifactorial accounting failures. Full compliance by a lawyer, or delegation of those tasks with oversight, is a necessity. Given a misguided billing practice and the treating of the trust account as a "float" for fees when needed and a lack of required monthly trust reconciliations, the Respondent's accounting simply misses the mark.

[75] The Respondent justifies non-compliance with the trust accounting because they are too onerous for commercial reality, and he has created alternative processes that meet his needs. We find this lack of compliance is not done out of any dishonesty but a genuine but misguided belief in how his accounting practices must align to support his practice.

[76] In *Reith*, the respondent admitted to a number of trust accounting breaches, including that he failed to record adequate source information in his trust accounting records. The hearing panel determined that he had "displayed culpability grounded in a fundamental degree of fault by repeatedly disregarding trust accounting rules for the sake of convenience", and that his "behaviour therefore constituted professional misconduct as admitted."

[77] In the present matter, the trust accounting rules must be fully complied with, and anything less fails to serve the public interest. As already noted in these reasons, non-compliance and minor accounting mistakes will happen, but that is not the nature of the behaviour here. The Respondent was given a chance to correct repeated accounting deficiencies. He then repeated the deficiencies in further instances. This conduct is a marked departure from the standard expected of lawyers.

[78] Accordingly, the Panel finds the evidence establishes professional misconduct in relation to allegations 3(a) through (d).

[79] At the Respondent's request, the Panel admitted a letter from a client for whom the Respondent performed immigration services spanning a period of 11 years. This letter is marked as exhibit 4 in these proceedings. The essence of this letter explains the client was satisfied with the Respondent's service and that, after the Law Society audit, the fees were returned to the client.

[80] This letter highlights that the Respondent has good client management and relationship skills but that is of no bearing on the lack of compliance with the accounting rules.

CONCLUSION

[81] For the reasons set out in this decision, the Panel finds that each of the allegations in the citation, and admitted by the Respondent, is a marked departure from the standard that the Law Society expects of lawyers. Accordingly, the citation is proven, and we find that the conduct set out in relation to all three allegations constitutes professional misconduct.