2021 LSBC 20
Decision issued: May 20, 2021
Citation issued: November 1, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

HONG GUO

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	November 6, 2020
Additional written submissions:	March 15, 2021
Panel:	David Layton, QC, Chair Jeevyn Dhaliwal, QC, Bencher Brendan Matthews, Public representative
Discipline Counsel:	Alison L. Kirby
Counsel for the Respondent:	Craig E. Jones, QC

BACKGROUND

[1] In April 2016, the Respondent reported to the Law Society a multimillion-dollar employee theft from one of her trust accounts. The results of a subsequent forensic audit by the Law Society, combined with the Respondent's tardiness in complying with undertakings designed to ameliorate harmful fallout from the theft, led the Law Society to seek an interim order imposing conditions on the Respondent's practice. That August, three benchers made the requested interim order on consent, in part because they had serious concerns regarding the Respondent's operation of her trust accounts. This interim order was modified in March 2017, at which point it contained a term that prohibited the Respondent from handling trust money.

[2] A subsequent compliance audit revealed that, in 2018 the Respondent received cash advances from six clients in relation to work to be performed pursuant to fixed fee agreements. By "fixed fee agreement", we mean an agreement that a lawyer will charge the client a specific, fixed amount in return for completing legal work on a single matter. Here, the single matter involved the Respondent drafting a document or documents for the client, such as a will, a share purchase and transfer, a deed of gift or a marriage agreement. At the time each fixed fee agreement was made, and thus before the legal work was performed, the client provided the Respondent with an advance payment on the fixed fee. The Respondent deposited the advance payment directly into her general account. She then completed the specified legal work, usually within a week or so. At that point, she billed the client the previously agreed upon fixed fee, after which the client paid that amount minus the advance payment previously provided.

[3] The Law Society viewed these advance payments as trust funds because they were received by the Respondent for legal services to be performed in the future. Based on this view, the Law Society issued a citation (the "Citation") alleging that, in receiving the advance payments and in depositing them directly into her general account, the Respondent committed professional misconduct in two ways. First, she breached the interim order that prohibited her from handling client trust funds, contrary to Rule 7.1-1(e) of the *Code of Professional Conduct for British Columbia* ("*BC Code*"). And second, she failed to ensure that the advance payments were deposited into a trust account, and instead put them in her general account prior to delivering a bill for legal services, contrary to Rule 3-58 of the Law Society Rules ("Rules") and/or Rule 3-72 and s. 69 of the *Legal Profession Act* ("*Act*").

[4] In determining whether the Respondent committed professional misconduct as alleged, a key issue raised before us is the proper characterization of advance payments a client provides to a lawyer for work to be performed under a fixed fee agreement. Do they remain the property of the client, and thus constitute trust funds, or do they instead become the property of the lawyer on receipt, in which case the lawyer can deposit them directly into a general account?

[5] The Respondent argues that an advance payment made pursuant to a fixed fee agreement becomes the lawyer's property on receipt, and therefore does not constitute trust money and need not (indeed, must not) be deposited into the lawyer's trust account. If this characterization is correct, the Respondent has breached neither the interim order by accepting the advance payments, nor the Rules and/or the *Act* by not depositing them into a trust account.

[6] Alternatively, the Respondent says that, even if the advance payments are properly seen as trust funds, and she breached the interim order and the provisions of the Rules and/or *Act* regarding the handling of trust funds, these breaches do not constitute professional misconduct because the applicable regulatory provisions were unclear regarding the proper treatment of advance payments made under a fixed fee agreement, and thus, even if mistaken, she acted reasonably in treating these payments as her own property and not as trust funds.

[7] As noted, the Law Society takes a very different view of the matter. It contends that advance payments paid under a fixed fee agreement are impressed with a trust, as are any funds provided by a client to a lawyer for services yet to be performed, at least absent the client's specific agreement otherwise. The Law Society therefore says that, in accepting the advance payments from the six clients, the Respondent breached the interim order prohibiting her from handling trust funds and also breached the provisions in the Rules and/or the *Act* regarding the proper handling of trust funds. The Law Society further argues that these two breaches constitute professional misconduct because they each amount to a marked departure from the conduct expected of lawyers practising in this jurisdiction.

[8] For the reasons set out below, we agree with the position taken by the Law Society. Advance payments made under a fixed fee agreement are received in trust and do not become the lawyer's property on receipt, at least not unless the client provides their informed consent otherwise. As the six clients did not provide their informed consent to the Respondent treating the advance payments as her own property, she received the payments in trust. The Respondent therefore committed the breaches alleged in the Citation. Furthermore, her actions were not reasonable, but rather amounted to a marked departure from the standard the Law Society expects of lawyers. Accordingly, we find that the Respondent committed professional misconduct in each of the two ways described in the Citation.

RECEIPT OF ADDITIONAL WRITTEN SUBMISSIONS

[9] Each party filed extensive written submissions prior to the November 6, 2020 hearing. The Law Society's submissions were dated November 3, 2020, and the Respondent's responding submissions were dated November 4, 2020. We received both written submissions on November 5, 2020. Prior to this, we were generally unaware of the nature of the issues raised by the case, our only information about it having come from the Citation, which we received on September 3, 2020.

[10] In its written submissions, the Law Society took the position that advance payments made to a lawyer on a fixed fee agreement are received in trust but did not refer us

to any case law beyond a number of lawyer discipline decisions. The Law Society also relied on the wording of the definition of "trust funds" in Rule 1 to support its argument that the advance payments to the Respondent had been received in trust.

[11] In her written submission, the Respondent relied on several Canadian cases bearing on when an advance payment on a fixed fee will be received in trust. But none of these cases involved payments to a fiduciary, and more specifically, none of them involved payments to a lawyer by a client. The Respondent did, however, extensively reference and rely on lawyer discipline decisions and related academic writing from the United States. The Respondent also addressed the Canadian discipline decisions that had been relied on by the Law Society and drew our attention to additional such decisions as well.

[12] In mid-February 2021, we sent the parties a memorandum providing them with the opportunity to make further written submissions on two points: first, whether a lawyer owes fiduciary duties regarding fee arrangements made with a client, and if so, how these duties impact the characterization of advance payments made under a fixed fee agreement; and second, the relevance to this characterization of case law regarding a lawyer's entitlement to fees under an entire contract. We drew the parties' attention to several cases bearing on these two points. We also invited them to address in their further written submissions any matters that they felt properly arose from a consideration of the two points, including but not limited to the application of the law to the evidence before us.

[13] In response to our memorandum, the Law Society filed further written submissions, the Respondent filed responding submissions, and the Law Society filed a reply. The Respondent also filed an application to adduce further evidence in the form of an affidavit from a law professor addressing certain aspects of the law of trusts. On March 15, 2021, we received all of these further materials as a single package and have taken them into account in these reasons.

RELEVANT FACTUAL FINDINGS

[14] The relevant factual findings are derived from the Law Society's Notice to Admit dated September 3, 2020 and the Respondent's response to this Notice dated September 25, 2020.

[15] The Respondent was called and admitted as a member of the Law Society of Saskatchewan on September 8, 2000 and of the Law Society on May 4, 2009. Since April 2010, she has been a sole practitioner in Richmond practising primarily

in the areas of residential and commercial real estate and corporate and commercial law.

[16] On April 4, 2016, the Respondent reported an employee theft to the Law Society in the amount of approximately $7.5 million from her CIBC trust account.

[17] Following a Rule 4-55 forensic investigation of the Respondent's books, records and accounts, on August 17, 2016 the Law Society sought and obtained a consent interim order from three Benchers pursuant to Rule 3-10 (the "Rule 3-10 Order"). Paragraph 1(l) of the Rule 3-10 Order required that:

> The Lawyer [*i.e.* the Respondent] ensure that all trust transactions relating to all new client matters are only be [*sic*] handled through TD Canada Trust Account No. [number] and Canada Trust Account No. [number] (US). The lawyer must only operate these new accounts with a second signatory.

[18] The Benchers' reasons for making the Rule 3-10 Order indicated that they had serious concerns regarding the Respondent's own operation of her trust accounts, including concerns arising from: evidence that she had provided signed blank trust cheques to her bookkeeper, plus other irregularities; a failure to perform trust reconciliations on her trust accounts prior to the alleged theft; a failure to fully cooperate with the Law Society in responding to the alleged theft; and a 2015 conduct review that arose because she disbursed money from trust contrary to an undertaking and subsequently lacked any insight into her conduct (*Law Society of BC v. Guo*, 2016 LSBC 41, at paras. 20, 28).

[19] On March 30, 2017, the three Benchers varied the Rule 3-10 Order, including by replacing subparagraphs 1(i) through (l) with several new subparagraphs. The new subparagraphs 1(i) and (j) stated in part:

> The Lawyer [*i.e.* the Respondent] must ensure that all trust funds received by the Lawyer or the Lawyer's law firm are only handled through TD Canada Trust Account No. [number] and TD Canada Trust Account No. [number] (US) (the "Trust Accounts").
>
> The Lawyer must not be a signatory or co-signatory to any trust account, including the Trust Accounts. The Lawyer must not operate a trust account in her own name or in the name of her law firm and must not supervise any lawyer in the operation of a trust account. *The Lawyer must not handle any* trust transactions or *trust money* or in any way be responsible for recording or documenting trust transactions. …

[emphasis added]

[20] From October 22 to 26, 2018, a Law Society auditor conducted a compliance audit of the Respondent's practice pursuant to Rule 3-85 (the "Compliance Audit").

[21] The Compliance Audit covered a period from March 1, 2017 to October 21, 2018, and included a review of the following six client files in which the Respondent received cash funds (together, the "Cash Funds") that were deposited into her general account prior to issuing an invoice for services rendered: CORP18033, CR18017, MAT18010, WEI18027, WE18031 and WE18032 (collectively, the "Client Files").

Client file CORP18033

[22] On May 4, 2018, the Respondent was retained by AA Corp. in relation to a share purchase and transfer. The same day, she received $500 cash from AA Corp.'s director BB on behalf of AA Corp., for which she issued a handwritten receipt with the notation "Retainer". The Respondent deposited the $500 cash to her general account the same day.

[23] Between May 4 and 7, 2018, the Respondent prepared two Share Purchase Agreements, three Waivers of Independent Legal Advice, various share transfer documents, and two reporting letters. These documents were all dated or signed on May 7, 2018.

[24] On May 7, 2018, the Respondent issued a Statement of Account to AA Corp. in the amount of $3,300 "less amount paid by client" of $500, leaving a balance owing of $2,800. This balance was paid by cheque and deposited to the Respondent's general account the same day.

[25] An excerpt from the Statement of Account to AA Corp. contains the following description of services rendered:

OUR FEES:	
Share Purchase Agreement X2	$900.00
Share Transfer Documents X2	$1,100.00
Central Securities Register	$150.00
Signature Witness	$293.77
Rush Fee	$300.00
Share Certificates X3	$120.00

Client file CR18017

[26] On May 14, 2018, the Respondent was retained by CC in relation to a deed of gift and statutory declaration. She received $400 cash from CC, for which she issued a handwritten receipt with the notation "Retainer CR18017". The Respondent deposited the $400 cash to her general account the same day.

[27] The Respondent's client file includes a Deed of Gift and a Declaration of Gift Acceptance, both dated May 18, 2018.

[28] On May 18, 2018, the Respondent issued a Statement of Account to CC in the amount of $530 "less amount paid from client by cash" of "$450" [*sic*], which was said to leave a balance owing of $80. That same day $80 cash was paid and deposited to the Respondent's general account. As CC had only paid $400 in cash, a further $50 was in fact owing, but on June 18, 2018 the Respondent deposited another $50 cash into her general account, eliminating the remainder of the balance due on the Statement of Account.

[29] An excerpt of the Statement of Account contains the following description of services rendered:

> SERVICES PROVIDED: obtaining instructions; review capacity; prepare and attend to execution of Promissory Note and Statutory Declarations.
>
> LEGAL FEES:
>
> | | |
> |---|---|
> | Gift Deed | $259.15 |
> | Statutory Declaration x2 ($100.00 X2) | $200.00 |

Client file MAT18010

[30] On June 4, 2018, the Respondent was retained by DD in relation to a marriage agreement and received $500 cash from DD, for which she issued a handwritten receipt with the notation "Retainer". The Respondent deposited the $500 cash to her general account the same day.

[31] The Respondent's client file includes a Marriage Agreement dated June 7, 2018.

[32] On June 7, 2018, the Respondent issued a Statement of Account in the amount of $1,080 "less amount paid" of $500, leaving a balance owing of $580. This balance was paid by cash and deposited to the Respondent's general account the same day.

[33] An excerpt of the Statement of Account contains the following description of services rendered:

> Taking your instructions from you; analyzing the various legal issues and implications; providing legal advice; drafting and attending execution of Marriage Agreement; reporting to you and all related services incidental hereto although not specifically mentioned herein:
>
> OUR FEES: $931.48

Client file WEI18027

[34] On August 8, 2018, the Respondent was retained by EE in relation to a will and representation agreement. EE provided her with $300 cash, for which she issued a handwritten receipt with the notation "Retainer". The Respondent deposited the $300 cash to her general account the same day.

[35] The Respondent's client file includes the following documents:

(a) EE's Last Will and Testament dated August 15, 2018;

(b) EE's Representation Agreement dated August 15, 2018; and

(c) a reporting letter to EE dated August 21, 2018, with attached Wills Notice – Receipt of Acknowledgment.

[36] On August 15, 2018, the Respondent issued a Statement of Account to EE in the amount of $660 "less amount paid by client" of $300, leaving a balance owing of $360. This balance was paid by cheque by a third party on behalf of EE and deposited to the Respondent's general account the same day.

[37] An excerpt of the Statement of Account contains the following description of the services rendered:

> Taking all instructions from you, drafting last will and testament, representation agreement and attending to execution, registration of your Will at Vital Statistics Canada, and reporting to you and all related services incidental hereto although not specifically mentioned herein:
>
> OUR FEES:
>
> | | |
> |---|---|
> | Will Drafting and Execution | $280.00 |
> | Will Registration | $50.00 |
> | Representation Agreement | $280.00 |

Client file WE18031

[38] On September 12, 2018, the Respondent was retained by FF in relation to the drafting and execution of a will. FF paid her $200 cash for which she issued a handwritten receipt with the notation "Retainer". The Respondent deposited the $200 cash to her general account the same day.

[39] The Respondent's client file includes the following documents:

(a) FF's Last Will and Testament;

(b) Wills Registration dated September 17, 2019; and

(c) a reporting letter to FF dated October 5, 2018, with attached Wills Notice – Receipt of Acknowledgment.

[40] On September 17, 2018, the Respondent issued a Statement of Account to FF in the amount of $380 "less amount paid by client" of $200, leaving a balance owing of $180. This balance was paid by cash and deposited to the Respondent's general account that same day.

[41] An excerpt of the Statement of Account contains the following description of services rendered:

> Taking all instructions from you, drafting last Will and attending to execution and reporting to you and all related services incidental hereto although not specifically mentioned herein:
>
> OUR FEES:
>
> | | |
> |---|---|
> | Will Drafting and Execution | $280.00 |
> | Wills Notice Registration | $50.00 |

Client file WE18032

[42] On September 13, 2018, the Respondent was retained by GG in relation to a will, enduring power of attorney and representation agreement. GG provided her with $840 cash for which she issued a handwritten receipt with the notation "Will – POA". The Respondent deposited the $840 cash to her general account the same day.

[43] The Respondent's client file includes the following documents:

(a) GG's Last Will and Testament dated September 18, 2018;

(b) Enduring Power of Attorney dated September 18, 2018;

(c) Representation Agreement dated September 18, 2018;

(d) Certificate of Alternative Representative dated September 22, 2018; and

(e) a reporting letter to FF dated October 5, 2018, with attached Wills Notice – Receipt Acknowledgment.

[44] On September 18, 2018, the Respondent issued a Statement of Account to GG in the amount of $840 "less amount paid by client" of $840, leaving a zero balance.

[45] An excerpt of the Statement of Account contains the following description of services rendered:

> Taking all instructions from you, drafting last will and testament, enduring power of attorney, representation agreement and attending to execution, registration of your Will at Vital Statistics Canada, and reporting to you and all related services incidental hereto although not specifically mentioned
>
> OUR FEES:
>
> | | |
> |---|---|
> | Will Drafting and Execution | $280.00 |
> | Will Registration | $50.00 |
> | Representation Agreement | $280.00 |
> | Enduring Power of Attorney | $180.00 |

Summary of cash funds received regarding the client files

[46] In summary, the Respondent received cash from each of these six clients when she first agreed to provide them with legal services. In five of the six instances, the word "Retainer" was written on the cash receipt issued to the client. There is no evidence in any of the Client Files of work being performed prior to the issuance of the cash receipts, although we infer that an interview had likely occurred at which the Respondent took instructions. In all six instances, the Respondent immediately deposited the cash directly into her general account, without having rendered a bill for any legal services.

[47] While the Respondent takes the position that she had fixed fee agreements with each of the six clients, pursuant to which they agreed to pay a specific, fixed price for drafting a particular legal document or documents, she had no written fee

agreement with any of the clients, nor are there any notes in the Client Files regarding the nature of any fee agreement. We are nonetheless prepared to assume that each client agreed to pay the Respondent a fixed fee for performing the particular work in question. We base this finding on the compliance auditor's conclusion that the Respondent billed her clients on the basis of "lump sum by agreement" and also on her statements to this effect in her June 19, 2019 interview with a Law Society lawyer (discussed below). The Law Society takes no issue with this characterization of the Respondent's fee agreements.

Law Society investigation including statements made by Respondent

[48] As noted, the Client Files came to the attention of the Law Society through a compliance audit conducted in October 2018.

[49] On April 4, 2019, the Law Society wrote to the Respondent asking for information regarding the Client Files and Cash Funds. By letter dated April 26, the Respondent provided the requested information. On June 19, 2019, the Respondent was interviewed by a Law Society investigator and made several statements regarding the Client Files and the Cash Funds.

[50] We will discuss the information provided and statements made by the Respondent in more detail in our analysis of the allegations in the Citation. But the general position the Respondent took in her April 26 letter and the June 19, 2019 interview was that: (a) she had a fixed fee agreement with each of the six clients; (b) once a client agrees to pay a fixed fee for services, any advances made by the client to a lawyer become the lawyer's property even though the services have not yet been provided; (c) the Cash Funds advanced by the six clients prior to the legal work being completed were therefore not trust funds and could be deposited directly into her general account.

ANALYSIS OF ALLEGATIONS

[51] The parties agree on the test to be applied in determining whether a lawyer has committed professional misconduct. They also agree on the importance of lawyers complying both with orders made under the *Act*/Rules and with the Rules governing the handling of trust funds. We will therefore begin our analysis of the allegations in the Citation by addressing these uncontentious matters, after which we will consider the points on which the parties disagree, namely, whether the Rules required that the Cash Funds be deposited in a trust account on receipt and, if so, whether the Respondent's failure to do so amounted to professional misconduct in the two ways alleged in the Citation.

Legal test for professional misconduct

[52] Professional misconduct is conduct that constitutes a "marked departure" from what the Law Society expects of lawyers, a standard that is met where the conduct displays a gross culpable neglect of the respondent's duties as a lawyer (*Law Society of BC v. Martin*, 2005 LSBC 16, at paras. 154, 171-172; *Re: Lawyer 12*, 2011 LSBC 35, at paras. 7-8, 42). Professional misconduct is therefore not restricted to instances where the lawyer has intentionally fallen short of the standard expected of lawyers, nor is a finding of professional misconduct precluded simply because a respondent has acted in good faith or as a result of a mistake or inadvertence (*Law Society of BC v. Gellert*, 2013 LSBC 22, at para. 67; *Law Society of BC v. Sangha*, 2020 LSBC 3, at paras. 73-74).

[53] The Law Society bears the burden, on a balance of probabilities, to meet this objective test for establishing professional misconduct, based on evidence that is "sufficiently clear, convincing and cogent" (*F.H. v. McDougall*, 2008 SCC 53, at para. 46; *Law Society of BC v. Schauble*, 2009 LSBC 11, at para. 43; *Sangha*, at para. 67).

[54] Where the impugned conduct does not meet the test for professional misconduct, it is open to a panel to find that the respondent's actions have nevertheless resulted in a breach of the *Act* or Rules where the conduct is not insignificant and arises from insufficient attention being paid to the administrative requirements of a practice (*Law Society of BC v. Lyons*, 2008 LSBC 9, at para. 32).

Lawyers must comply with Law Society orders

[55] Rule 7.1-1(e) of the *BC Code* states that a lawyer must comply with orders made under the *Act* or the Rules. It is important that lawyers scrupulously adhere to this requirement because, unless they do so, the Law Society's ability to regulate lawyers' conduct in the public interest is significantly undermined and so too is the public's confidence in the profession and the administration of justice more generally. See *Law Society of BC v. Cunningham*, 2017 LSBC 37, at para. 18; *Law Society of BC v. McLean*, 2015 LSBC 9, at paras. 128-129, 131; *Law Society of BC v. Coutlee*, 2010 LSBC 27, at para. 14; *Law Society of BC v. Welder*, 2012 LSBC 18, at para. 19; *Law Society of BC v. Pyper*, 2016 LSBC 01, at para. 65; *Law Society of BC v. Jessacher*, 2016 LSBC 11, at paras. 44-45.

Lawyers must meticulously comply with rules governing handling of trust funds

[56] Lawyers must handle trust funds properly. A failure to do so breaches an obligation owed to the client, and more generally harms public confidence in the ability of lawyers to uphold their fiduciary duties. As stated in *Gellert*, at para. 73:

> [a]n 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.

[57] The Rules governing the handling of trust funds form a central component in the Law Society's regulation of lawyers, and in particular help to ensure that a client's funds are not mishandled. Compliance with these Rules dramatically reduces, if not eliminates, such a possibility because they stipulate that trust funds be handled in a secure, responsible, and orderly manner. Apposite in this respect are the following comments from *Law Society of BC v. Chaudhry*, 2018 LSBC 31, at para. 81, which, while focused on the withdrawal of funds from a trust account, apply equally to the Rules governing when funds must be deposited into a trust account:

> The proper handling of trust funds is an integral part of the practice of law (*Law Society of BC v. Tungohan*, 2017 BCCA 423, at para. 24). The public must be able to entrust property, and particularly money, to members of the legal profession knowing that it will be properly accounted for. Maintaining this confidence is imperative, not only with respect to each client, but also with respect to the public at large. The rules governing the withdrawal of money from a trust account play an important role in helping to ensure that client funds are properly handled and that the integrity of the legal profession is maintained. See *Law Society of BC v. Sahota*, 2018 LSBC 20, at para. 12; *Law Society of BC v. Lail*, 2012 LSBC 32, at para. 10; *Law Society of BC v. Tungohan*, 2015 LSBC 26, at para. 13.

[58] Among other things, the Rules governing the handling of trust funds received in respect of work to be performed by a lawyer generally mandate that: (a) the lawyer deposit the funds into a pooled trust account as soon as practicable after receipt (Rule 3-58(1)); and (b) the lawyer not withdraw the funds to pay for that work until it has been performed (Rule 3-64(1)) and a bill has been prepared and delivered to the client (Rule 3-65(2). Provided the bill has not been disputed, at that point the lawyer must withdraw the funds from the pooled trust account by way of cheque

payable to the lawyer's general account or by electronic transfer to the general account (Rule 3-65(1.1)).

[59] While recognizing that not every breach of a Rule constitutes professional misconduct, hearing panels have held that, because the proper handling of trust funds is fundamental to the practice of law and the integrity of the legal profession, the public interest requires that these accounting Rules be complied with "meticulously" and that a "nonchalant" failure to do so is unacceptable (*Law Society of BC v. Lail*, 2012 LSBC 32, at para. 10; *Law Society of BC v. Johnson*, 2019 LSBC 4, at paras. 10-13, 32; *Law Society of BC v. Atmore*, 2020 LSBC 4, at para. 22).

[60] This stringent standard for compliance means that a lawyer's failure to meticulously follow the trust accounting rules may be found to constitute a marked departure from the standard expected by the Law Society, and thus amount to professional misconduct, even where the lawyer was unaware of the rule that the lawyer breached and was not attempting to convert funds to which the lawyer was not beneficially entitled.

[61] For example, in *Atmore*, at para. 22, the respondent admitted to committing professional misconduct because he withdrew money from his trust account to pay for work that he had properly carried out, but without having first delivered bills to his clients. By contrast, in *Johnson*, at paras. 19-20, 30, the parties agreed that the respondent had not committed professional misconduct by breaching the accounting rules that required him to withdraw money from trust only by way of cheque and to record each trust transaction separately.

[62] The distinction between the results in these two cases may rest in part on the fact that the respondent in *Atmore* breached the rules on numerous occasions, while the breach in *Johnson* occurred but once. As noted in *Law Society of BC v. Johnson*, 2018 LSBC 23, at para. 29, the fact that trust accounting rules have been breached multiple times is a relevant factor in determining whether the impugned conduct amounts to professional misconduct. Another potential distinguishing factor is that the breach in *Atmore* denied the clients the opportunity to contest their bills, and so risked causing them harm, whereas the breaches in *Johnson* appeared not to have created a risk of harm to the affected client.

Do advances made by a client on a Fixed Fee Agreement automatically become the lawyer's property on receipt, or are they instead impressed with a trust?

[63] The main point of dispute between the parties is whether the Cash Funds received by the Respondent from her six clients were trust funds within the meaning of the

Rules. If so, the Respondent's depositing of the Cash Funds into her general account breached Rule 3-58(1), which requires that trust funds be deposited into a pooled trust account, and also breached the Rule 3-10 Order, which prohibited her from handling trust money.

[64] Rule 1 of the Rules defines "trust funds" as follows (emphasis added):

> **"trust funds"** means funds directly related to legal services provided by a lawyer or law firm *received in trust* by the lawyer or law firm acting in that capacity, including funds
>
> (a) received from a client for services to be performed or for disbursements to be made on behalf of the client, or
>
> (b) belonging partly to a client and partly to the lawyer or law firm if it is not practicable to split the funds;
>
> [emphasis added]

[65] The Law Society submits that funds received from a client for services to be performed are "received in trust", and that the Cash Funds are therefore "trust funds" as defined in Rule 1. The Law Society says this conclusion is sound regardless of whether the Respondent had a fixed fee agreement with the six clients. The Law Society accepts that an advance payment for fees to be performed *may* become the property of the lawyer on receipt, and therefore not constitute funds "received in trust" so as to fall within the definition of "trust funds" in Rule 1, but *only* if the client and lawyer specifically agree to this effect, in which case the advance payment must be deposited into the lawyer's general account pursuant to Rule 3-72(2)(b). But the Law Society argues that no such agreement was made here, and so the Cash Funds were "trust funds" within the meaning of Rule 1. Accordingly, says the Law Society, the Respondent: (a) breached the Rule 3-10 Order when she accepted the Cash Funds because it prohibited her from handling trust funds; and (b) breached Rule 3-58(1) because she did not deposit the Cash Funds into a trust account.

[66] The Respondent accepts that money paid by a client for services to be performed is impressed with a trust where the final amount to be charged by the lawyer is uncertain, as is the case where fees are calculated on an hourly basis. She says that this is so because, as she puts it, "the lawyer is acting like a client's bank and holding the client's money for possible future use." But she argues that, if a client provides an advance payment to a lawyer under a fixed fee agreement, then absent an express agreement to the contrary that payment becomes the lawyer's property

immediately on receipt. Because at law the advance payment belongs to the lawyer, and not the client, it cannot be impressed with a trust. The Respondent says the definition of trust funds in Rule 1 cannot change this legal conclusion, but in any event, the plain wording of the definition does not encompass the Cash Funds because funds paid to a lawyer for services to be performed are only defined as "trust funds" if they are "received in trust" by the lawyer, and funds advanced by a client under a fixed fee agreement belong to the lawyer absent an agreement to the contrary and so are not "received in trust."

[67] In making this argument, the Respondent draws an analogy to a customer pre-paying for a pizza. The money is not held in trust by the pizza business pending delivery (a service) of the pizza (a good). Rather, it belongs to the pizza business on receipt, and the customer has in return obtained an enforceable right to delivery of a pizza. In support of this view, the Respondent cites a case where deposits paid by customers to a travel agent were ruled not to be received in trust (*Re H.B. Haina & Associates, Inc.* (1978), 86 DLR (3d) 262, 1978 CanLII 2011 (BCSC)), and another case in which the same conclusion was reached regarding venue rental deposits (*Re Livent Inc.* (1998), 42 OR (3d) 501, 1998 CanLII 14718 (Ont. Gen. Div.).

[68] The Respondent also relies on *New Solutions Financial Corp. v. 952339 Ontario Limited*, 2007 CanLII 183 (ON SC), in which a number of parents paid fixed tuition fees to a school in advance, pursuant to an agreement that expressly stated that the fees were owed by the parents regardless of whether the services were actually provided (para. 23). The Court also noted, apparently in *obiter*, that *amicus curiae* had researched the law in several Anglo-American countries, including Canada, and was "unable to find any cases in which an advance or down payment made on account of future services was presumed to be held in trust *simply* because the payment was made on account of services to be rendered in the future" (para. 24, emphasis added).

The importance of the fiduciary relationship between client and lawyer

[69] The analogy relied on by the Respondent is not persuasive in the context of the client-lawyer relationship, and neither is the case law she cites in support. In *New Solutions*, the court stated that a payment made on future services is not presumed to be held in trust "simply" because the services are to be rendered in the future. But this is not the same as saying that, regardless of the context, such a payment is never presumed to be held in trust. Indeed, as implicitly recognized in *Re Livent Inc.*, an advance payment on a fixed fee contract for future services may be impressed with a trust where the context involves not simply "a commercial

relationship governed by a negotiated contract," but rather involves "the maintenance of the integrity of institutions dependent upon trust-like relationships." In our view, the trust-like relationship between client and lawyer represents just such a context.

[70] Unlike the parties in the commercial transactions the Respondent refers to in her argument, the lawyer and client are in a fiduciary relationship that is recognized at law because the relationship serves an important public purpose (*R. v. Neil*, 2002 SCC 70, at para. 16). The contractual relationship between client and lawyer is thus informed by and overlaid with fiduciary responsibilities that the lawyer owes to the client, which may impose obligations on the lawyer that go beyond the terms expressly bargained for with the client (*Strother v. 3464920 Canada Inc.*, 2007 SCC 24, at para. 34; *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, at paras. 77-78). Not surprisingly, the lawyer's resulting duty of utmost good faith to the client extends to any transaction between the two pursuant to which the lawyer is to receive a benefit (*Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385, at para. 49).

[71] These broad principles regarding the fiduciary aspect of the client-lawyer relationship would, on their own, lead us to conclude that advances paid by the client to the lawyer under a fixed fee contract must be held in trust until the work has been completed by the lawyer absent a fully informed decision by the client otherwise. But this conclusion is in any event dictated by a closely related or derivative set of principles pertaining to "entire contracts" between a client and lawyer, which we will now discuss.

[72] The fixed fee agreements pursuant to which the Respondent agreed to provide services to her six clients were "entire contracts", because they were contracts for a single transaction and it was obviously a term of the contracts that the Respondent would take all steps necessary to complete the tasks requested by the clients (*Grewal v. Singleton Urquhart LLP*, 2016 BCCA 289, at para. 24(a); *Nathanson, Schachter & Thompson*, at para. 47; *Morrison Voss v. Smith*, 2007 BCCA 296, at para. 32; *Nejat v. Rahmanian*, 2020 BCSC 2108, at paras. 13, 18-20). The jurisprudence in this province holds that, absent a client's agreement otherwise, a lawyer is not entitled to be paid fees before he or she fully performs what is required under an entire contract (*Grewal v. Singleton Urquhart LLP*, at para. 24(b); *Nathanson, Schachter & Thompson*, at para. 51). It follows that, if a lawyer and client agree to a fixed fee for completion of particular work, the lawyer is not permitted to convert advance payments to their own use prior to that work being completed, at least not without the informed consent of the client.

[73] The Respondent argues that the entire contract case law speaks of a lawyer's "entitlement" in the context of fee disputes, and does not mention the imposition of a trust over advances paid by a client with respect to fees. She therefore argues that the term "entitlement", as used in this case law, relates to a question of contract and taxation, and simply recognizes that the client has a legal right to repayment of money paid to the lawyer in advance of completion of the work.

[74] We disagree with this narrow reading of the entire contract case law, which in our view clearly holds that, absent a client's agreement otherwise, a lawyer is not entitled to be paid fees before the legal work is completed. If the lawyer is not entitled to fees until the work is completed, then given the fiduciary nature of the client-lawyer relationship it surely follows that funds that a client pays in advance in respect of fees cannot become the lawyer's property on receipt, but rather must be held by the lawyer in trust for the client.

[75] In sum, we reject the Respondent's submission that the Cash Funds became her property immediately on receipt simply because they were paid as an advance under a fixed fee agreement. Rather, the Cash Funds remained the clients' property and had to be held in trust until the work was performed and a bill issued, unless the clients provided their informed consent otherwise.

[76] We discuss whether the clients provided their informed consent in this regard starting at paragraph 110 below. Before doing so, however, we will provide some further reasons regarding our conclusion that, absent informed consent by a client, an advance paid to a lawyer under a fixed fee agreement is impressed with a trust and does not become the lawyer's property on receipt.

Case law from the United States

[77] The Respondent relies heavily on case law from the United States in support of her position. While some case law in the United States appears to assist the Respondent in this regard (e.g., *In re Kendall*, 804 NE 2d 1152, 1156-1158 (Ind. 2004)), other cases hold that advances made under a fixed fee agreement do not become the lawyer's property on receipt but rather must be held in trust absent the client's informed consent to the contrary. See, for instance, *In re Sather*, 3 P 3d 403, 410-412 (Colo. 2000); *In re Dawson*, 8 P 3d 856, 859 (N.M. 2000); *Attorney Grievance Comm. v. Zuckerman*, 872 A 2d 693, 711-712 (Md. 2005); *In re Mance*, 980 A 2d 1196, 1202-1205 (D.C. 2009). We find the reasoning in cases such as *In re Mance* to be much more persuasive and also to be much more consistent with the Canadian case law discussed at paragraphs 69-75 above and the discipline case law discussed at paragraphs 87-103 below.

[78] This same reasoning is in line with the American Law Institute's *Restatement (Third) of Law Governing Lawyers*, vol. 1, §38, commentary "g", which states that, "a fee payment that does not cover services already rendered and that is not otherwise identified is presumed to be a deposit against future services." Similarly, the American Bar Association Center for Professional Responsibility's *Annotated Model Rules of Professional Conduct*, 9th ed., 2019, at p. 274, while noting that jurisdictions differ regarding the point at which legal fees paid to a lawyer become the lawyer's property, states that "[i]n general, fees paid in advance of the performance of legal services are client funds until earned and therefore must be placed in a client funds account," citing several authorities including the fixed fee agreement case of *In re Sather*.

Policy considerations

[79] Our conclusion is further justified given the risk of harm to the client that would arise if, as the Respondent argues, advances on future services paid under a fixed fee agreement were to automatically become the lawyer's property, instead of being treated as trust funds absent the client's informed consent otherwise.

[80] For one thing, if the advance payment is treated as the lawyer's property and is spent by the lawyer, then the client will be much less likely to be able to get the money back if the lawyer is subsequently unable or unwilling to perform the work, for instance because of suspension, disbarment, illness, or death. And if the lawyer becomes bankrupt, the client will be treated as just another creditor and may face similar difficulty in recouping the payment. In addition, if a dispute arises as to whether the fee should be paid, and the advance payment has been treated as the lawyer's property on receipt, the client will not have the benefit of Rule 3-65(1.1), which prevents a lawyer from taking money out of trust to pay a bill where there is a disagreement regarding the fees.

[81] These points are, by themselves, sufficient to justify our conclusion. But a further consideration is that clients have a right to discharge their lawyers at any time, this being a necessary corollary to the fiduciary nature of the relationship in which the client must have absolute trust and confidence in the lawyer (*R. v. Cunningham*, 2010 SCC 10, at para. 9). Under the Respondent's approach, a client who wished to discharge the lawyer before the work had been performed would arguably have no right to recover the advance payment. Rather than suffer this loss, the client might decide not to change lawyers, even though the client preferred another lawyer and perhaps even lacked confidence in current counsel. In some cases, the client may actually be precluded from changing lawyers because all available funds were advanced to current counsel under the fixed fee agreement. It follows that

permitting lawyers to treat advance payments on fixed fee agreements as earned on receipt, before any work is done, risks impermissibly restricting the right of a clients to discharge their lawyers.

[82] This position is endorsed in *In re Mance,* at pp. 1203-1204, where the District of Columbia Court of Appeals stated:

> Preserving the client's unfettered right to discharge an attorney protects the fiduciary relationship between lawyer and client. *See In re Cooperman,* 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069, 1071 (1994) ("This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf – "giving counsel" – is imbued with ultimate trust and confidence.") (citations omitted). A fee arrangement that "substantially alter[s] and economically chill[s] the client's unbridled prerogative to walk away from the lawyer" strikes at the "core of the fiduciary relationship." *Id.* at 1072. "To answer that the client can technically still terminate misses the reality of the economic coercion that pervades such matters." *Id.*

[83] The Respondent points out that, even if an advance fee becomes the lawyer's property on receipt, the client can challenge the fee if it is unreasonable, for example because the lawyer has performed the work incompetently, too slowly or not at all, or because the client has exercised the right to terminate the relationship before much in the way of services have been performed. But requiring a client to rely on the good graces of the lawyer to provide a refund, or to launch a legal action and/or make a complaint to the Law Society in order to force one, places too onerous a burden on the client and runs counter to the solicitude that the law shows clients on account of the fiduciary nature of the client-lawyer relationship. It is true that lawyers with integrity will provide refunds quickly where justified and if not precluded from doing so because of their own financial circumstances. But as a matter of general policy, treating advance payments on fixed fee agreements as impressed with a trust provides considerably more protection for clients and is more consistent with the fiduciary obligations that lawyers owe to their clients.

[84] The concerns mentioned in the previous four paragraphs are particularly significant where a client is in a financially precarious position, whether by reason of his or her legal predicament or otherwise. To expect a client to bear the risk of financial loss or hardship in the above-mentioned scenarios is not in keeping with the fiduciary nature of the client-lawyer relationship. Nor is it realistic or fair to assume that clients can always fall back on the remedy of suing the lawyer to recover their funds, as the Respondent would have it. While some clients may have

the resources and time to pursue such remedies, many do not. The utility of doing so may be especially low where the amount in dispute is modest, as will often be the case with advances made under fixed fee agreements. The unfairness in simply leaving the client to pursue their legal remedies is all the more acute where the client is vulnerable and there is a power imbalance between client and lawyer.

[85] The Respondent nonetheless argues that providing this level of protection to clients may be unfair to lawyers. Specifically, she says that treating advances paid under fixed fee agreements as still belonging to the client, so as to require their deposit into a trust account, will be a hardship on the lawyer, requiring an extra bank transaction for what in some instances may be a small amount of money. While this might represent an inconvenience where small amounts of money are in issue, it is an inconvenience that is justified in order to protect the interests of clients and the integrity of the legal profession when it comes to lawyers handling money received from clients for services not yet performed under a fixed fee agreement.

[86] Finally, the Respondent contends that fixed fee arrangements will, in many instances, benefit the client and the lawyer, and so should be encouraged. We agree that fixed fee agreements may hold benefits for both a client and a lawyer. Some clients want the assurance of knowing with certainty how much money will be needed to pay legal fees, and a fixed fee agreement can reward a lawyer for delivering legal services efficiently. But treating advance payments made under fixed fee agreements as trust funds absent the client's informed consent otherwise does not place any obstacle to clients and lawyers attaining these benefits. There is no significant correlation between the Respondent's argument that such advances should automatically become the lawyer's property, and not be held in trust, and the benefits she says fixed fee agreements can bestow on clients and lawyers.

Canadian discipline decisions

[87] The discipline case law in Canada provides added support for the conclusion that, absent a client's informed agreement to the contrary, an advance paid under a fixed fee agreement is impressed with a trust until the lawyer has done the work necessary to earn the fee.

[88] In *Law Society of Saskatchewan v. Tapp*, 2011 SKLSS 1, the respondent and a client orally agreed on a fixed fee of $5,500 for him to handle her family law matter, and she advanced him $1,100 the next day. This advance was deposited into the respondent's general account, and he issued an invoice and receipt. The panel held that, even though the respondent had sent the client an invoice regarding the advance payment, he was not authorized to do so in respect of a fixed fee

agreement without her consent, which she had not provided. The panel therefore concluded that the respondent had not earned the $1,100 and that, by depositing the payment directly into his general account, he committed professional misconduct by breaching the rule requiring that trust funds be forthwith deposited into a lawyer's trust account.

[89] At the time *Tapp* was decided, the term "trust funds" was defined under the Law Society of Saskatchewan's rules to mean any monies received by a lawyer in his or her capacity as a lawyer that are not intended to immediately become the lawyer's property, including funds for services to be performed for the client. The definition was thus somewhat similar to that currently found in Rule 1.

[90] In *Law Society of Alberta v. Schneider*, 2014 ABLS 53, the lawyer was granted permission to resign as part of an agreement with the Law Society under which, in return for his resignation, the Law Society would not proceed with a large number of allegations of professional misconduct. The panel noted that, although the lawyer did not admit to any intentional wrongdoing in the agreed statement of facts, those facts revealed a pattern of unacceptable neglect by the lawyer (para. 29). The facts, set out in Appendix B to the decision, included the lawyer's admission that billing clients on a flat fee basis and paying himself before the work was completed was not appropriate under the rules.

[91] The Law Society of Alberta ("LSA") rules in place when *Schneider* was decided, and now, define "trust money" to include not only money received by the lawyer in connection with the provision of legal services and that belongs in whole or part to the client, but also any money received by the lawyer on account of services not yet rendered (rule 119(1)(v)). The LSA definition thus encompasses advance payments on fees in all circumstances and, with the exception of so-called "general retainers", which are extremely rare and not relevant to the issue before us, does not permit an exception where the client consents to the advance payment becoming the lawyer's property on receipt.

[92] In *Law Society of BC v. Arndt*, 2013 LSBC 38, the respondent negotiated a fixed fee of $10,000 for representing a client in a criminal matter, which was paid in advance of that matter being resolved. He did not put the funds in his trust account, but instead kept them in a desk drawer until the client was sentenced, at which point he rendered a bill and used the funds for his own purposes. The respondent admitted to committing professional misconduct by failing to deposit the cash in his trust account and not recording the transaction in his accounting records (paras. 14-17, 24). It is worth adding that, had the respondent deposited the advance fees

in his general account, they would have been subject to garnishment by the Canada Customs and Revenue Agency (para. 8).

[93] In *Law Society of BC v. Faminoff*, 2014 LSBC 22, the respondent deposited advances received from clients pursuant to fixed fee agreements directly into his general account. He admitted to professional misconduct by doing so but explained that he had believed that he was permitted to "pre-take" advances provided under a fixed fee agreement. The panel held that the pre-taking of fees in such circumstances is not permitted under the Rules (paras. 38-40).

[94] In *Law Society of Upper Canada v. Secker*, 2017 ONLSTH 116, the respondent invoiced the client a fixed fee for all services yet to be performed in a litigation matter, and deposited the client's payment into his general account even though the requisite services has not yet been provided. The respondent admitted that he committed professional misconduct by not depositing these funds into his trust account (paras. 1(e), 8-10, 15).

[95] In *Law Society of Upper Canada v. Roper*, 2020 ONLSTH 74, the respondent was an undischarged bankrupt and so did not operate a trust account. He entered into fixed fee agreements with three clients. In one instance, a written agreement was signed at which time the respondent received a substantial partial payment for which the client was invoiced. In a second instance, the initial payment was received, and an invoice prepared, a few days before a written agreement was signed. In the third instance, a written agreement was provided to the client but never signed, and the client provided an initial payment for which she was invoiced. In all three instances, the initial payment was deposited into the lawyer's general account and spent by the lawyer before any legal services had been provided. The panel held that the lawyer committed professional misconduct by depositing the money into his general account because, under the applicable rules, money received for legal services only ceased to be trust monies once the lawyer had performed the services and delivered a bill (paras. 65-74).

[96] The Law Society of Upper Canada (now Law Society of Ontario ("LSO")) rules applicable when *Secker* and *Roper* were decided are still in force. These LSO rules are similar to the LSA rule described in paragraph 91 above, insofar as they *always* require that a lawyer deposit into trust any funds advanced for services to be rendered in the future (see By-Law 9, s. 7(2)(d) and 9(1)). The LSA and LSO rules thus do not permit an exception where the client consents to the advance payment becoming the lawyer's property on receipt. This approach is different from that taken in the definition of "trust funds" in Rule 1, at least when read in conjunction with Rule 3-72(2)(b).

[97] The Respondent makes several arguments as to why neither the result nor the reasoning in any of the above-mentioned discipline cases should be followed in her case.

[98] To begin with, she argues that the LSO decisions deal with rules that, by their express terms, always require that a lawyer hold advance payments for fees in trust. She says the wording in Rule 1 is less broad and operates to render money received from a client "trust funds" only where the money is "received in trust" at law. She contends that advance payments made under a fixed fee agreement are not "received in trust" at law, and so do not fit within the definition in Rule 1.

[99] Given our conclusion that advance payments made under a fixed fee agreement are "received in trust" unless the client has provided informed consent to the contrary, this argument does not undermine our conclusion that the Cash Funds were trust funds. We would nonetheless add that nothing said in the LSO decisions suggests that, but for the broader scope of the applicable rules, advances paid under a fixed fee agreement would automatically become the lawyer's property on receipt and therefore not be treated as trust funds.

[100] The Respondent's next argument regarding the discipline case law is that the Law Society does not have the authority to designate as trust funds money that would not otherwise be impressed with a trust at law. That is, even if Rule 1 is read as broadly as the LSO and LSA rules, so as to treat advances paid by a client to a lawyer under a fixed fee agreement as "trust funds" regardless of whether they would otherwise be impressed with a trust at law, the Law Society lacks the authority to adopt this definition. Rather, says the Respondent, legislation would be needed to effect such a change to the law, because the rule-making power set out in s. 33(3) of the *Act* regarding establishing standards of accounting for and management of funds held in trust by lawyers is not broad enough to permit the Law Society to make a rule that, as the Respondent frames it, "depriv[es] a lawyer of the propriety rights to their beneficially-owned fees."

[101] As with the Respondent's previous argument, this submission is moot because we have concluded that advances paid under a fixed fee agreement are "received in trust" at law, and for this reason alone come within the definition of "trust funds" in Rule 1. Though not necessary to our decision, we nevertheless make two observations regarding the Respondent's submission that the Law Society has no power to make rules that affect whether funds are impressed with a trust. First, she has not referenced s. 11(1) and (2) of the *Act*, which provides a broad rule-making power that is expressly said not to be limited by any specific power to make rules given elsewhere in the *Act* (*e.g.* s. 33(3)). Second, the argument could be made that

the fact that a regulatory scheme imposes a prohibition on commingling received funds strongly supports the conclusion that the received funds are impressed with a trust at law (*Air Canada v. M & L Travel Ltd.*, [1993] 3 SCR 787 at 804“c”-“h”).

[102] The Respondent’s final argument regarding the Canadian discipline case law is that some of the decisions, especially those from British Columbia, engage in no analysis of the issue and mostly arise in circumstances where the respondent has admitted professional misconduct. She asserts that none of the decisions considers the legal principles she contends operate to make advance payments by a client the lawyer’s property where paid pursuant to a fixed fee agreement. She says that once these legal principles are acknowledged, it becomes obvious that these decisions are all in error.

[103] As explained at paragraphs 63-86 above, we reject the Respondent’s articulation of the legal principles, and instead conclude that, applying the jurisprudence governing the fiduciary relationship between client and lawyer, advances paid by a client to a lawyer for future services under a fixed fee agreement are presumptively impressed with a trust at law. The discipline cases from British Columbia are consistent with our conclusion, and the discipline cases from other Canadian provinces contain nothing to call it into question.

Respondent’s argument regarding constructive trusts

[104] In her additional written submissions, the Respondent argues that the jurisprudence pertaining to “remedial constructive trusts” and “substantive constructive trusts” does not justify viewing the Cash Funds as having been received in trust, because she did not receive these funds through dishonesty, mistake or breach of a fiduciary duty, and her clients suffered no harm such as would “compel Equity to intervene.” As part of this argument, she contends that to impose a constructive trust over the Cash Funds would be to decide the matter on an entirely different theory from that initially proffered by the Law Society and would radically change the case that she is required to meet.

[105] However, in our view the jurisprudence cited by the Respondent regarding constructive trusts is largely irrelevant to the issue before us given the existing body of case law and statutory provisions expressly related to fees paid by a client to a lawyer.

[106] Nor do we agree that the Law Society’s reliance on the lines of authority referenced in our memorandum asking the parties for further written submissions constitutes a material change in the general thrust of its case so as to unfairly prejudice the Respondent. The Law Society has always asserted that advances on legal fees are

received by a lawyer in trust, whether or not paid pursuant to a fixed fee agreement, absent the client's informed consent otherwise. While the Law Society's initial written submissions did not address the Canadian and American authorities relied on by the Respondent in arguing that such advances are not received in trust, it appears that the Law Society only became aware of this aspect of the Respondent's argument on receipt of her written submissions the day before the hearing. Regardless, in making this argument the Respondent put squarely in issue the legal question as to whether advances on fixed fee agreements become the lawyer's property on receipt. We cannot ignore law that is relevant to that legal question, and we perceive no unfairness to the Respondent in relying on this law, especially given that she has had an opportunity to make additional written submissions on it.

Respondent's application to adduce further evidence from an expert witness

[107] At the same time as she filed her additional written submissions, the Respondent applied to adduce as further evidence an affidavit from Dr. Robert Chambers, who is a professor of law at Thompson Rivers University ("TRU") and the author or co-author of several books on property and trusts. In this affidavit, Dr. Chambers opines that an advance payment received by a lawyer from a client under an agreement for a certain fee is not impressed with a trust unless the client intends otherwise or the lawyer chooses to place the money in trust.

[108] Yet Dr. Chambers' opinion is inadmissible because the correct interpretation of questions of domestic law is not the proper subject of expert opinion where, as here, the adjudicative body has the expertise and responsibility to answer those questions. See *Notario v. Canada (Citizenship and Immigration)*, 2014 FC 1159, at para. 49; *Eco-Zone Engineering Ltd. v. Grand Falls – Windsor (Town)*, 2000 NFCA 21, at paras. 15 and 16; *Walsh v. BDO Dunwoody LLP*, 2013 BCSC 1463, at paras. 23-90.

[109] But even were we to admit Dr. Chambers' opinion, we would give it no material weight for either or both of the following two reasons. First, the actual opinion, which is very brief, comprising only five paragraphs and taking up slightly more than a single page, cites no authorities, and in particular does not address the impact of the case law and policy considerations reviewed at paragraphs 69-103 above. Second, the opinion does little more than summarily state the conclusion reached in the Respondent's much more extensive written submissions and thus adds nothing to assist our understanding of the relevant law (*Walsh*, at para. 87-88).

Did the six clients provide informed consent to the Respondent treating the Cash Funds as her own property on receipt?

[110] A client and lawyer may agree to treat an advance payment by the client under a fixed fee agreement as earned on receipt by the lawyer, and hence the lawyer's property and not impressed with a trust, even though the lawyer has not yet performed the services required under the agreement. This conclusion is supported by Rule 3-72(2)(b), which provides that client funds paid to a lawyer must be deposited directly into a lawyer's general account where the funds are "subject to a specific agreement with the client allowing the lawyer to treat them as his or her own funds." It is also consistent with the case law in this province, which holds that, unless the client agrees otherwise, a lawyer is not entitled to any fee under a contract for a single matter until the lawyer has completed the work (*Nathanson, Schachter & Thompson*, at para. 47; *Grewal v. Singleton Urquhart LLP*, at para. 27). The same approach is taken in some of the American cases discussed above, for example *In re Mance*, at pp. 1206-1207.

[111] However, because of the fiduciary nature of the client-lawyer relationship, the client's consent to treating an advance payment as earned on receipt is only valid where the client has been fully and fairly informed regarding the nature of the arrangement and the effect it may have on his or her interests (*Nathanson, Schachter & Thompson*, at para. 49; *In re Mance*, at pp. 1206-1207; *In re Sather*, at pp. 413-414). To hold otherwise would be to ignore the well-established principle, reviewed at paragraph 70 above, that the lawyer's duty of utmost good faith to the client extends to all matters regarding the terms of the retainer agreement. As stated in *BC Code*, rule 3.6-1, commentary 2, "[t]he fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them." Several discipline decisions recognize, "a lawyer's fiduciary obligation to be candid with his or her 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 and properly advised" (*Law Society of BC v. Perrick*, 2014 LSBC 25, at para. 13; *Law Society of BC v. Pham*, 2015 LSBC 14, at para. 36; *Law Society of BC v. Penty*, 2015 LSBC 51, at paras. 45-48; *Law Society of BC v. Lowe*, 2019 LSBC 10, at para. 18).

[112] On the evidence before us, we find as a fact that the six clients did not provide their informed consent to the Respondent treating the Cash Funds as her own property on receipt, instead of holding them in trust as would occur in the usual course for advance payments made under a fixed fee agreement. This finding is based on the following considerations, although the consideration mentioned in paragraph 116 by itself would have led us to reach this finding.

[113] First, there is no written agreement or confirmation in writing indicating that the clients consented to the Respondent treating the Cash Funds as her own property instead of putting them in a trust account. While not determinative on the issue, one would expect a responsible lawyer to memorialize in writing such an important decision by the client, given that it may inure to the client's detriment and confers a benefit not otherwise permitted upon the lawyer.

[114] Second, in her April 26, 2019 letter answering questions posed by a Law Society investigator, the Respondent told the Law Society that in her view the Cash Funds were not trust funds and could therefore be placed directly in her general account. But she never said that the clients had provided their informed consent to her treating the Cash Funds in this manner.

[115] Third, in the June 19, 2019 interview the Respondent told the Law Society interviewer that the clients agreed to pay a fixed amount for her work. But she did not state that they also provided their informed consent to her treating the Cash Funds as earned on receipt instead of placing them in trust until the work was completed. In fact, she told the Law Society investigator that, if the client agreed to pay a fixed fee, "we understand" that the advance payment can be treated as earned on receipt. This statement indicates that the Respondent believed that a fixed fee agreement necessarily and without anything more operates to render all advance payments the lawyer's property on receipt.

[116] Fourth, in the June 19, 2019 interview the Respondent told the Law Society interviewer that her clients did not understand trust funds. If her clients did not understand trust funds, it necessarily means that they did not provide their informed consent to the Respondent treating the Cash Funds as her own property immediately on receipt instead of keeping the Cash Funds in a trust account until the work was completed.

[117] Fifth, the Respondent's comment to the Law Society interviewer on June 19, 2019 that her clients "always want to have services provided and then pay," suggests that they did not provide informed consent to her treating the Cash Funds as her own property on receipt.

[118] Sixth, in the June 19, 2019 interview the Respondent suggested that, if the advance payment had been for a larger amount, such as $1,000, she probably would have deposited it in a trust account. This statement indicates that the Respondent's decision to deposit the Cash Funds directly into her general account depended, not on whether the client provided informed consent to allow her to treat the funds as her own immediately on receipt, but rather on the size of the advance payment.

[119] Seventh, at another point in the June 19, 2019 interview the Respondent suggested she was entitled to treat the Cash Funds as earned on receipt because they constituted a consultation fee based on her hourly rate of $500. This statement is arguably inconsistent with her having treated the Cash Funds as her own property on receipt because her clients provided their informed consent to her doing so. (It also appears to be inconsistent with her position that she had a fixed fee agreement with each client and did not charge by the hour.)

[120] Eighth, if the clients had agreed to allow the Respondent to treat the Cash Funds as her property immediately on receipt, we would have expected her to deliver a bill at the time the funds were received, as required by Rule 3-72(3). However, she did not do so and instead merely issued the clients receipts for the cash. In this respect, it is worth adding that the Respondent strongly objected to any suggestion that the use of the term "retainer" on five of the six receipts could be used to support the inference that the advance was intended to be held in trust. Because it is not necessary to our decision, we need not decide whether her argument on this point is persuasive.

[121] As a further aside, Rule 3-72(3) states that the lawyer who receives funds under subrule (2) must deliver a bill *or* "issue to the client a receipt for the funds received, containing sufficient particulars to identify the services perform*ed*" [emphasis added]. The option of issuing a receipt containing sufficient particulars to "identify the services performed" was not an option here because the Respondent does not suggest that she was being paid for services already performed. In any event, the receipts issued to five of the six clients did not contain "sufficient particulars to identify the services performed." (The possible exception relates to client file WE18032, for which the receipt stated "Will – POA.)

[122] In sum, we conclude that the evidence clearly, convincingly and cogently establishes that the six clients did not provide their informed consent to the Respondent treating the Cash Funds as her own property immediately on receipt. In arguing against this finding, the Respondent noted that the Law Society did not call the six clients as witnesses and appeared not even to have interviewed them. However, the absence of any testimony from the clients does not prevent us from making the finding that we have based on the evidence properly before us.

[123] Before moving on to the next section of our reasons, we wish to make two final points.

[124] First, it is not necessary for us to decide whether the Law Society or the Respondent had the onus of proving that the clients did not provide their informed consent to the Cash Funds being treated as the Respondent's own property

immediately on receipt. This is so because, even if the onus to disprove such consent remained with the Law Society, it has met this onus based on the evidence, as explained at paragraphs 113-122 above.

[125] Second, the Law Society's Notice to Admit takes the position that, on October 30, 2018, the Respondent told the compliance auditor that the Cash Funds were not deposited into trust because the work was performed promptly and so making a single deposit into her general account saved time. In her response to the Notice to Admit, the Respondent denies making this statement to the auditor. She also denied making this statement in her June 19, 2019 interview, where she explained that the only step skipped to save time was issuing bills on receiving the Cash Funds from the clients. Because the auditor was not called to testify at the hearing in this matter, we are unable to find that the Respondent made the statement attributed to her in the Notice to Admit.

Did the Respondent's handling of the trust funds constitute professional misconduct?

[126] Given our conclusion that the Cash Funds were trust funds, it follows that, in accepting them, the Respondent breached the prohibition against handling trust money contained in the Rule 3-10 Order, and that she also breached Rule 3-58(1) by failing to deposit them into a pooled trust account as soon as practicable after receipt. The question therefore becomes, do each of these two breaches constitute a marked departure from the conduct the Law Society expects from lawyers so as to amount to professional misconduct?

[127] We conclude that professional misconduct has been established with respect to each of the two breaches for the following reasons.

[128] Lawyers must adhere strictly or meticulously to the rules governing the proper handling of trust money, and they must also scrupulously comply with orders made under the *Act* or the Rules. Here, the Respondent failed to do either, with the result that Rule 3-58(1) and the Rule 3-10 Order were each breached six times, not just once.

[129] What is more, the breaches exposed the Respondent's clients to the risks we have outlined at paragraphs 79-86 above. This is therefore not a case, like *Johnson* discussed above at paragraph 62, where there was no possibility that the rule breach could inure to the client's detriment. As noted in *Atmore*, at para. 22, the mere fact that a lawyer's breach of the trust accounting rules did not result in actual loss to a client and was not motivated by greed does not preclude a finding of professional misconduct. It is worth adding that in *Atmore*, the facts of which are set out at

paragraph 61 above, the lawyer was beneficially entitled to the funds when he breached the rules by withdrawing them from his trust account without delivering a bill. By contrast, in this case the Respondent was not beneficially entitled to the funds when she deposited them into her general account.

[130] Also relevant is that, as discussed at paragraphs 17-19 above, the Rule 3-10 Order prohibited the Respondent from handling trust funds because of the Law Society's serious concerns about her own operation of trust accounts following the Rule 4-55 forensic audit. In these circumstances, she should have had a significantly heightened sensitivity to the importance of handling trust funds in strict compliance with Rule 3-58(1) and the Rule 3-10 Order.

[131] Yet there is no evidence to suggest the Respondent took any steps to ascertain whether her handling of the Cash Funds was permissible, such as by making inquiries of the Law Society or a senior and respected colleague, examining the discipline jurisprudence, or looking at the case law pertaining to a lawyer's fiduciary obligation to clients in matters regarding the payment of fees. At the hearing before us, the Respondent relied on selected case law from the United States to argue that her conduct was permitted under the Rules and did not breach the Rule 3-10 Order, but she did not suggest that she was aware of this case law at the time she deposited the Cash Funds directly to her general account. In fact, had she looked at the United States case law, the Respondent would have discovered that a significant line of authority, arguably representing the preponderance of the court cases in this area, holds that advances paid under fixed fee agreements are impressed with a trust unless the client provides the lawyer with informed consent to treat them as the lawyer's own property on receipt.

[132] The Respondent asks us to find that she did not commit professional misconduct because the operation of the law and the meaning of the Rules were unclear and so she should not be faulted for having made a mistake. In this respect, she asks us to follow the approach taken in *In re Mance*. There, the District of Columbia Court of Appeals concluded that advances paid under fixed fee agreements are impressed with a trust absent the client's informed consent otherwise, overturning the decision of the District of Columbia Board on Professional Responsibility (the "DC Board") to the contrary. But the Court applied its ruling only prospectively because the respondent and the respondent's expert witness had testified that the understanding among lawyers with the respondent's type of practice was that advances on fixed fees belong to the lawyer on receipt. The Court therefore held that the respondent's mistaken interpretation of the rules was reasonable and not deserving of discipline. Notably, this result was urged upon the Court by both the DC Board and the

disciplinary counsel who had succeeded in having the DC Board's decision overturned (*In re Mance*, at pp. 1206-1207).

[133] The circumstances here are different from those in *In re Mance,* which leads us to conclude that the Respondent did not act reasonably in depositing the Cash Funds into her general account and that her conduct meets the standard required to establish professional misconduct. In particular:

(a) there is no evidence before us to suggest that there is an understanding among lawyers who engage in the Respondent's type of practice that advances on fixed fees paid by a client become the property of the lawyer on receipt and therefore need not be held in trust;

(b) a Discipline Advisory on the Law Society's website, dated December 7, 2011, and entitled "Bills and retainers are frequent sources of complaints," states that funds received from a client for services to be performed are received in trust and that the existence of a fixed fee agreement does not in itself entitle the lawyer to treat the funds received as his or her own property where the services have not yet been performed;

(c) at the time the Respondent received the Cash Funds, the discipline case law in this province, in the form of *Arndt* and *Faminoff,* indicated that a failure to deposit an advance payment made under a fixed fee agreement into trust constitutes professional misconduct;

(d) the jurisprudence from the Supreme Court of Canada and the BC Court of Appeal concerning the lawyer's fiduciary obligations to a client in respect to fees strongly supports the conclusion reached in the above-mentioned Discipline Advisory and *Arndt*/*Faminoff*; and

(e) when the Respondent accepted the Cash Funds, she was subject to a Rule 3-10 Order made at least in part because of serious concerns regarding her operation of her trust account, which should have made her acutely aware of the need to avoid any actions that might breach the Rules as they pertain to trust funds and the Rule 3-10 Order.

[134] We therefore conclude that the Respondent committed professional misconduct with respect to both of the breaches described in the Citation, and that her actions do not justify us taking the approach adopted in *In re Mance*.

CONCLUSION AND ORDER

[135] We conclude that the Respondent has committed professional misconduct in the two ways alleged in the Citation: first, by breaching the Rule 3-10 Order that prohibited her from handling trust money when she accepted the Cash Funds from the six clients; and second, by breaching Rule 3-58 when she failed to ensure that these Cash Funds were deposited into a trust account and instead depositing them in her general account.