2021 LSBC 44
Hearing No.: HE20170096
Decision Issued: October 28, 2021
Citation Issued: December 15, 2017

LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

SUMIT AHUJA

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	December 17, 2020
Panel:	Steven McKoen, QC, Chair Nan Bennett, Public representative Shona A. Moore, QC, Lawyer
Discipline Counsel:	Irwin G. Nathanson, QC Julia K. Lockhart
Counsel for the Respondent:	Henry C. Wood, QC Sandra L. Kovacs

BACKGROUND

[1] In our decision on Facts and Determination, 2019 LSBC 31, we found that the Respondent had committed professional misconduct on ten occasions over a nine-month period while in active addiction: once by failing to attend a chambers application; four times through conversion of client funds to his own use; and five times by failing to follow accounting and billing rules, including by failing to deposit funds received from a client into a trust account. All of the conduct at issue

in the hearing was set out in an Agreed Statement of Facts which included the Respondent's unreserved admission of professional misconduct.

[2] The Law Society applied for a review under s. 47 of the *Legal Profession Act*, SBC 1998, c. 9 (the *"Act"*) of the characterization by this Panel of four of the instances of professional misconduct involving taking client funds, and sought to have them labelled as simply "misappropriation" rather than "conversion of client funds to his personal use while in active addiction." A review board considered the application and found that the four instances of taking client funds should be characterized as misappropriation of funds (2020 LSBC 31 at para. 53). The review board otherwise left our decision on Facts and Determination intact stating:

> [54] We do not disturb the factual finding of the hearing panel that, whatever the legal term used, the Respondent took funds for his personal use while in active addiction. As counsel for the Law Society concedes, this will be a factor that should be considered by the hearing panel at the Disciplinary Action phase of the hearing.

[3] These are our reasons on the disciplinary action to be taken.

POSITION OF THE PARTIES

[4] The Law Society submits that the appropriate discipline is an eight-month suspension. Further, the Law Society seeks an order imposing various practice conditions on the Respondent upon his return to practice. The Law Society also seeks an order for costs in the amount of $21,046.25, payable on or before the first day of the month following the issuance of the Panel's decision, or such other date as this Panel may order.

[5] The Respondent has accepted that a suspension is the likely outcome of this matter. While the Respondent did not make a submission with respect to the actual length of suspension that may be imposed here, he did submit that the length of the suspension should be on the shorter end of the range due to several significant mitigating factors.

[6] Further, the Respondent submits that he should be given credit for the approximately six months he spent voluntarily withdrawn from practice while he was engaged in rehabilitation. The Law Society responded to that submission by acknowledging that while it can be the case that credit be given for voluntary withdrawal from practice, the determination of whether to give credit must take into account whether the Respondent was fit to practise during any time spent not

practising. The Law Society submitted that this Panel should not give credit for time spent not practising if the Respondent was not fit to practise during that time. The Respondent acknowledged that position but submitted that the Panel should take into account the significant financial loss that resulted from his withdrawal from practice.

[7] The Respondent also submitted that this Panel should consider the public interest in recognizing the disease context of the Respondent's professional misconduct and the public interest in the effect our decision may have on the behaviour of other lawyers who may be practising while in active addiction.

DECISION

[8] Section 38(5) of the *Act* states that where a hearing panel finds, as this Panel did, that a respondent's actions constitute professional misconduct, the panel must do one or more of the following:

(a) reprimand the respondent;

(b) fine the respondent;

(c) impose conditions or limitations on the respondent's practice;

(d) suspend the respondent for a period of time or until any conditions or requirements imposed by the panel are met;

(e) disbar the respondent; or

(f) require the respondent to do one or more remedial actions or make submissions respecting their competence to practise law.

[9] The Law Society submits that of the actions this Panel can take, a suspension followed by an imposition of conditions on the Respondent's practice are the most appropriate and we find that we have the authority to take those actions.

[10] When making a determination as to disciplinary action, this Panel is guided by s. 3 of the *Act* which states that it is the object and duty of the Law Society to uphold and protect the public interest in the administration of justice.

[11] As stated by the review board in *Law Society of BC v. Nguyen*, 2016 LSBC 21 at para. 36:

> Still, the disciplinary action chosen, whether a single option from s. 38(5) or a combination of more than one of the options listed, must fulfill the two main purposes of the discipline process. The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. If there is conflict between these two purposes, the protection of the public and the maintenance of public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes.

[12] In *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 55, the review panel confirmed that "The … objects and duties set out in section 3 of the Act are reflected in the factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, at paras. 9 and 10 …" In *Ogilvie*, the panel set out 13 factors that while not exhaustive, might be said to be worthy of general consideration in disciplinary dispositions:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[13] Those factors have been considered in many discipline decisions. In *Law Society of BC v. Dent*, 2016 LSBC 05 at para. 16, the panel stated:

> It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.

[14] As stated, not all of the *Ogilvie* factors have the same weight (see *Law Society of BC v. Gellert*, 2014 LSBC 05 at para. 39). The Law Society stressed this last point in their submissions and relied on the following passage from *Gellert* to submit that the seriousness of the misconduct should be the prime determinant of the disciplinary action to be imposed:

> … the nature and gravity of the misconduct will usually be of special importance [citations omitted], not only because this factor in a sense encompasses several of the others, but also because it represents a principal benchmark against which to gauge how best to achieve the key objective of protecting the public and preserving confidence in the legal profession. Indeed, this key objective is the prism through which all of the *Ogilvie* factors must be applied …

[15] The Law Society further submits that our primary focus must be on the regulation of the profession and that it is not sufficient to merely consider the Respondent and the particulars of the matter before us.

[16] We agree with the Law Society that upholding and protecting the public interest in the administration of justice generally must form part of our decision-making and that it would be an error to focus solely on the individual respondent and the mitigating and aggravating factors that may be present. To that end, we are mindful of the Respondent's observation that the outcome of this decision will have an impact on other lawyers, currently in practice, who may be struggling with addiction, and the public's interest in increasing the likelihood that such lawyers receive treatment and thus reduce the negative impact of active addiction on the delivery of legal services in British Columbia.

[17] While this Panel must be mindful of public interest beyond the context of this particular matter, it does not mean that the particulars of the matter are not highly relevant. In *Lessing*, the review panel noted that, in particular, the professional conduct record of the respondent would rarely not be relevant to the decision being made by a panel, stating:

> [71] In this Review Panel's opinion, it would be a rare case for a hearing panel or a review panel not to consider the professional conduct record. These rare cases may be put into the categories of matters of the conduct record that relate to minor and distant events. In general, the conduct record should be considered. However, its weight in assessing the specific disciplinary action will vary.
>
> [72] Some of the non-exclusionary factors that a hearing panel may consider in assessing the weight given are as follows:
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> (a) the dates of the matters contained in the conduct record;
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> (b) the seriousness of the matters;
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> (c) the similarity of the matters to the matters before the panel; and
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> (d) any remedial actions taken by the Respondent.
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> [73] In regard to progressive discipline, this Review Panel does not consider that *Law Society of BC v. Batchelor*, 2013 LSBC 9 stands for the proposition that progressive discipline must be applied in all circumstances. At the same time, the Review Panel does not believe that progressive discipline can only be applied to similar matters.
>
> [74] Progressive discipline should not be applied in all cases. A lawyer may steal money from a client. In such a case, we generally skip a reprimand, a fine or even a suspension and go directly to disbarment. Equally, a lawyer may have in the past engaged in professional misconduct requiring a suspension. Subsequently that lawyer may be cited for a minor infraction of the rules. In such a situation, progressive discipline may not apply, and a small fine may be more appropriate.

[18] We agree with the review panel in *Lessing* that progressive discipline may not be required in all circumstances. Where there is a significant intervening event between discipline matters that goes to the nature of the conduct involved and demonstrates that a driver of the conduct may have been addressed, such as the residential addiction treatment and active substance use monitoring program that the Respondent undertook in the current matter, the evidence of the nature and impact of that intervening event should be considered when determining if progressive discipline is appropriate.

[19] The panel in *Dent* provided a useful consolidation of the *Ogilvie* factors and described them as follows:

(a) the nature, gravity and consequences of the conduct;

(b) the character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession including public confidence in the disciplinary process.

[20] The Law Society made submissions using the consolidated *Dent* factors. The Panel agrees that those factors provide an appropriate framework in this matter and we will address each of the four consolidated factors in turn.

Nature, gravity and consequences of conduct

[21] The nature of the conduct here is extremely grave. The Respondent took money from his clients on four separate occasions totalling $16,000, and used that money for his own ends. He also took those funds without creating the required records of the transactions. Lawyers are required to comply with extensive trust accounting rules because we recognize that trust funds belong to the client and we must account for how they are handled. Simply put, trust funds are not our money. Clients are often required to financially expose themselves to their lawyers in order to effectively address their legal needs. When a lawyer takes a client's money and spends it, that lawyer not only harms their client, but they undermine the trust all potential clients have in lawyers. An increased lack of trust in lawyers makes it much more difficult for the legal system to operate effectively and in the public interest.

[22] Further, the Respondent's failure to attend chambers on March 2, 2017 similarly exposed his client to risk of financial harm and undermined the trust the client and

the public have in lawyers and the legal profession. A lawyer, when they accept an engagement, is agreeing to protect the client's interests to the extent the lawyer is capable. When the lawyer fails to even show up, with no notice and no excuse, it is impossible for their client and all members of the public who are informed of the event to not have their faith in the profession generally diminished.

[23] The Respondent was in active addiction at the time he intentionally misappropriated his clients' money, failed to follow accounting and billing rules and failed to appear in chambers. Clearly, his judgment was distorted by his addiction that was characterized by the medical experts at the hearing on Facts and Determination as a brain disease and "not simply as a character flaw"[1] that "alters normal brain functioning" so as to create "distortions in thinking, feelings, perceptions, and judgments that push people to behave in ways that are not understandable to others around them."[2] Since the incidents that form the basis for the Citation, the Respondent has sought help, has completed a residential rehabilitation program and has made restitution to all of his victims. He voluntarily complies with addiction monitoring processes and submits himself to testing even more frequently than the schedule suggested by his therapist. He has become much more active in our community, both through mentoring others and through participating in programs meant to bring more focus on addiction issues and to lessen the stigma around the disease. These are significant mitigating factors.

[24] However, as noted in *Nguyen*, in our determination, we must balance the need for rehabilitation of the lawyer against the need to demonstrate to the public that they will be protected from acts of professional misconduct and that they can be confident in our legal system. From a purely rehabilitative perspective, most of the steps we would require the Respondent to take have been completed. However, when the public is confronted with a lawyer who intentionally misappropriates their clients' money and leaves their client exposed by failing to appear, rehabilitation of the lawyer and monetary restitution to clients does not wholly offset the damage done to both their clients' and others' trust and confidence in the legal system.

Character and professional conduct record

[25] The Respondent is 37 years old and was called and admitted as a member of the Law Society of British Columbia on April 15, 2012. He has a substantial professional conduct record which consists of the following:

[1] 2019 LSBC 31, at paras 15 and 16.
[2] See the decision on Facts and Determination 2019 LSBC 31, at paras. 126 to 129.

(a) **2009 application for admission**. Prior to commencing his career, the Respondent was the subject of a credentials hearing because of an incident during law school where he was found to have provided a false name to a police officer during a traffic stop while driving under suspension. His application for admission was approved, but he was required to a write a letter to the Credentials Committee addressing the importance of truthfulness and candour in being a lawyer, and was required to meet twice with a bencher during his articles.

(b) **May - June 2016 practice review**. On May 5, 2016, a practice review was ordered with respect to the Respondent and on June 14, 2016, a practice review report was submitted to the Practice Standards Committee. After reviewing the report, the Practice Standards Committee made various recommendations to the Respondent, including that he complete specific courses, use checklists to manage files and generally improve his file management, record keeping and client communication systems. The Respondent's practice standards file was closed on July 12, 2018 because the Respondent was being monitored by the Investigations, Monitoring and Enforcement group of the Law Society due to the events that gave rise to the Citation in this matter.

(c) **First 2016 citation.** The Respondent was found to have committed professional misconduct and was suspended for one month following a citation issued on November 9, 2016. The decision is reported at *Law Society of BC v. Ahuja*, 2017 LSBC 26 and finds that the Respondent, after attending a firm event and consuming alcohol the night prior, missed a flight to Kelowna for a court hearing and then told the court that he missed his flight due to it being overbooked. He attended the hearing by telephone. He later, after becoming concerned that a transcript of the hearing may not reflect what he told the court and others was the reason for his absence because he could not remember what he had said at the hearing, self-reported that he had mislead the court. He was found to have engaged in professional misconduct and a one month suspension was ordered.

(d) **Second 2016 citation.** The Respondent was found to have committed professional misconduct in a decision reported at *Law Society of BC v. Ahuja*, 2017 LSBC 39. The Respondent was found to have failed to advise his client that he would not attend a summary trial application on November 18, 2014, failed to follow instructions, failed to inform his

client of his failure to attend and mislead his client with respect to her prospects on appeal. The Respondent was ordered suspended for a one-month period and that suspension was ordered to be served consecutively to the suspension ordered due to the first 2016 citation.

(e) **2017 voluntary undertaking.** On May 19, 2017, the Respondent signed an Interim Practice Undertaking and Consent and voluntarily undertook not to practise law. That undertaking was extended and expired on September 29, 2017.

(f) **March 2018 conduct review.** A conduct review was held in March 2018 with respect to the Respondent's conduct in 2016 where he represented a client in both criminal and family proceedings and attempted to influence the conduct of the criminal proceeding through settlement negotiations in the family proceeding without the consent of crown counsel. The Respondent admitted his misconduct, which arose as result of his being unaware of the requirement to receive advance consent from the crown to such discussions.

[26] In our decision on Facts and Determination, we noted that the conduct that gave rise to most of the professional conduct record occurred during a period during which Dr. Farnan, the expert called by the Law Society, opined that there was "no doubt" that the Respondent met the diagnostic criteria for addiction in the past and probably would have met the diagnostic criteria for alcohol dependence in or about 2011/2012 and for cocaine dependence in or about 2014. These were his best estimates, but he readily admitted that it was difficult to be sure of exact dates where misuse or abuse of a drug has transitioned to addiction.

[27] Having said that, the Respondent's professional conduct record is an aggravating factor when assessing the appropriate penalty.

[28] The Respondent submitted 28 letters with character references from his family, his clients, his former supervising lawyer, senior members of the bar, articled students and three of the clients from whom he misappropriated funds. It is clear from reviewing these letters that the Respondent has, on numerous occasions, provided valuable service to members of our community through his practice and his community activities. As well, his many activities to promote rehabilitation and awareness of addiction are noted, including:

(a) forming the Live BIG Society, which has assisted over 60 people living with addiction through sponsored rehabilitation and after-care;

(b) speaking on addiction issues in many fora, including a national CBA meeting;

(c) contributing to the BC Centre for Substance Abuse 2018 report "Strategies to Strengthen Recovery in British Columbia: The Path Forward"; and

(d) acting as sponsor for persons seeking treatment for addiction.

[29] Most of the letters acknowledge that they are aware of the Respondent's actions that lead to the Citation and with that knowledge, they continue to vouch for him as being of good character and a passionate and effective advocate for his clients' interests. His clients speak forcefully of their desire to have his actions after leaving his residential rehabilitation program be the measure of the Respondent, not his actions prior to seeking rehabilitation. Many express the opinion that no further sanction should be levied against the Respondent given his rehabilitation and community service. While we acknowledge the letters, we are mindful that many of the authors state that they are writing with the Respondent's best interests in mind and with their own interests in not wanting to be deprived of the Respondent as their counsel. This Panel, by contrast, must be informed by the public interest in the administration of justice generally, not solely with the Respondent's interests or his clients' interests (see *Law Society of BC v. McGuire*, 2006 LSBC 20 at para. 24). Letters of reference are only one factor that we must consider (*Law Society of BC v. Johnson*, 2016 LSBC 20).

[30] We take into account the character references and the evidence of the Respondent's service to the community and find that his efforts at rehabilitation demonstrate that a driver of his conduct, his addiction, has been the subject of residential addiction treatment and is continuing to be addressed through an active substance use monitoring program that the Respondent continues to comply with to a level that far exceeds the minimums set by the Law Society in the current Medical Supervision Agreement. We find his efforts at rehabilitation and community activities reflect positively on his character and are a mitigating factor.

Acknowledgement of the misconduct and remedial action

[31] Through the proceeding, the Respondent has unconditionally acknowledged his actions were professional misconduct, apologized for his actions and has not argued against the penalties recommended by the Law Society, except with respect to the length of the suspension to be imposed. We find that the Respondent's unreserved acknowledgement and agreement to the recommended penalties is a mitigating factor.

[32] As outlined above, the Respondent has engaged in numerous remedial actions and, as acknowledged by the Law Society in their submissions before this Panel, has in many respects been a "model" respondent. He cooperated with the Law Society throughout their investigation, made restitution to the clients he misappropriated funds from and has been complying with his recovery program for approximately four years.

[33] The Respondent has practised since December 2017 under the supervision of a senior lawyer and has had no complaints made against him, nor has any evidence been provided to indicate that his practice has given rise to any incident worthy of complaint.

Public confidence in the legal profession

[34] When considering the effect of the Respondent's actions on public confidence in the legal profession, we must look at both the nature of the actions and their effect on public confidence in the disciplinary process. In *Dent*, the panel found that the specific item at issue with respect to public confidence is whether the public will have confidence in the proposed disciplinary action when comparing it to similar cases (*Dent*, para. 23).

[35] In this case, one of the fundamental issues is ensuring that the outcome will provide the public with confidence that this matter is dealt with appropriately. In this matter, the Respondent misappropriated his clients' funds and left a client without representation in court. Without the context of his active addiction and his subsequent efforts at rehabilitation, the normal outcome of this matter would be disbarment. The administration of justice and the public confidence in the legal profession would suffer immensely if the Law Society was seen to not treat multiple acts of misappropriation as a complete betrayal of those clients' trust deserving of the highest sanction. As stated by the hearing panel in *Law Society of BC v. Tak*, 2014 LSBC 57 at para. 35:

> In the absence of multiple, significant mitigating factors, public confidence in the profession and its ability to regulate itself would be severely compromised if anything short of disbarment is ordered for misappropriation of client funds.

[36] The Law Society submits that, in this case, significant mitigating factors do exist such that disbarment would not be appropriate. Of the range of available outcomes under s. 38 of the *Act*, the Law Society submits that we should impose an eight-month suspension, and impose practice restrictions upon the recommencement of practice by the Respondent. In support of this position, the Law Society cited five

cases that dealt with misappropriation in the context of substance use disorders and other mental health issues.

[37] *Law Society of Ontario v. Yantha*, 2018 ONLSTH 94 dealt with a case of overbilling approximately $29,000 to Legal Aid Ontario by a lawyer who suffered from depression and was self-medicating with alcohol. In that matter, the lawyer argued for a long suspension and practice conditions, but the panel ordered that the lawyer surrender his license due to concerns that the lawyer continued to minimize his wrongdoing and was avoiding treatment for his mental health issues. In that context, the panel did not believe that the public could be assured of the lawyer's future integrity.

[38] The Law Society acknowledged in its submissions that the matter before us does not give rise to the same concerns as in *Yantha*. The Respondent has acknowledged his illness, has sought treatment and is complying with his treatment plan.

[39] In *Law Society of BC v. Ranspot*, 1997 LSDD No. 52, the hearing panel found that where a lawyer defrauded the Legal Services Society of $4,000, that behaviour was brought on by the pressures of his marital breakdown, concern for his children, depression and excessive drinking. The panel ordered an 18-month suspension and imposed various conditions on the lawyer's practice, including psychiatric examination and satisfying a board of his fitness to return to practice.

[40] In *Law Society of BC v. Gayman*, 2012 LSBC 12, affirmed 2012 LSBC 30, the panel considered an application for reinstatement by a lawyer who had been disbarred 13 years earlier due to becoming embroiled in a fraudulent scheme that resulted in a breach of trust exceeding $1 million. The lawyer led evidence that he had been sober for nine years and he was readmitted with conditions. In considering the case, the panel noted that while alcoholism alone is not and cannot be a defense to a disciplinary matter, alcoholism followed by real rehabilitation is an important consideration. However, they also noted that the evidence of rehabilitation should be sufficient to convince the panel that the lawyer's character has changed and that there is little or no chance of a repetition of the lawyer's past actions. We agree with the panel in *Gayman* that the bar is high for lawyers to demonstrate that they have met this standard. In *Gayman*, nine years of sobriety preceded the order for reinstatement. We contrast that with the Respondent's four years of sobriety. The evidence before us does not indicate that there is a "magic" number of years of sobriety that will indicate that substantial risk to the public of recurrence of the past bad acts has passed. When the number of years of sobriety is shorter, there is a greater need to protect the public through measures such as the

imposition of conditions. In this case, the Law Society proposes, and the Respondent agrees, to a set of robust conditions that are meant to protect the public from any risk of recurrence of the Respondent's past behaviour. That evidence of a rehabilitation program that has been successful to date, and evidence that the Respondent is willing to continue to comply with that program, support a finding that disbarment in this case, despite the multiple misappropriations, is not appropriate.

[41] In *Nova Scotia Barristers' Society v. Van Feggelen*, 2010 NSBS 2, a hearing panel split on the disposition of a case where a lawyer misappropriated $29,158 while suffering from clinical depression and anxiety. Prior to the hearing, the lawyer had been suspended for nine months but had been readmitted to practise under supervision. The majority of the hearing panel concluded that the prior nine-month suspension satisfied the need to demonstrate to the public that the conduct was dealt with seriously and allowed the lawyer to return to practice with conditions. The minority would have disbarred the lawyer.

[42] In *Law Society of Upper Canada v. Harvey*, 2007 ONLSHP 99, in circumstances similar to those before us, the lawyer admitted to being addicted to alcohol and cocaine and, while in active addiction, misappropriated $14,311 from seven clients. Unlike the Respondent, that lawyer had no prior discipline history. The panel in *Harvey* quoted the following with approval from another Ontario case, *Re Douglas Robert Wilson*:

> The Rule quite clearly is that misappropriation will normally result in termination of a solicitor's right to practise, barring mitigating circumstances. Mitigating circumstances will quite often be circumstances of substance abuse where it is clear that a number of conditions have been met by the solicitor. These include an acknowledgement by the solicitor of his professional misconduct. That is present here. They include a genuine, sincere effort to get help, to rehabilitate himself or herself from the disease that they are battling. That is present here.

[43] That lawyer undertook not to practise until he was medically fit in 2004 and had not practised for three years prior to the hearing. The hearing panel imposed a six-month suspension and placed a number of conditions on the lawyer's ability to practise, similar to those proposed by the Law Society in this case.

[44] The Law Society also provided citations to other Ontario cases that resulted in suspensions from two to 21 months: see two months (*Law Society of Upper Canada v. Lachappelle*, 1999 LSDD No. 90); four months (*Law Society of Upper*

Canada v. Elston, 2010 LSDD No. 100); 15 months (*Law Society of Upper Canada v. Falla*, 2004 LSDD No. 32); and 21 months (*Law Society of Upper Canada v. Wilson*, 1996 LSDD No. 187).

[45] The Respondent directed us to two cases where relatively short suspensions were ordered in cases of intentional misappropriation. In *Law Society of BC v. Schauble*, 2009 LSBC 32, a lawyer kept $90,000 in fees for himself when he should have split them with his firm and kept only $45,000. A suspension of three months was ordered. The *Schauble* case is materially different from the matter before us, however, because there the fees for services had been earned but were not shared appropriately within the firm. Here, the Respondent misappropriated funds from clients without providing the corresponding services. As such, we find the behaviour here should result in a more severe sanction than in *Schauble*.

[46] The Respondent also directed us to the decision of the hearing panel on disciplinary action and costs in *Law Society of BC v. Sas*, 2016 LSBC 03. In that case, the lawyer misappropriated an aggregate of $1,947.39 from 22 clients for disbursements that had not been incurred. The panel found, in part, that the " … Applicant knew, or was wilfully blind to the fact, that those clients had been improperly billed for disbursements that were not incurred or, alternatively, was reckless as to whether those billings for disbursements were proper." Her motivation appeared to be that it was administratively simpler to simply take the funds, rather than go through the process of returning the funds to her various clients, or paying the funds over to the Law Society if the clients could no longer be found. She was suspended for four months. We find that *Sas* is distinguishable from the case before us because in *Sas*, all of the affected clients were no longer seeking services. The services that the lawyer had been retained for were complete, and the funds that remained in the lawyer's trust accounts were no longer needed to fund services that were yet to be delivered. While the fact that services were complete, in no way excuses misappropriation. In the matter before us, the misappropriation was of money needed to pay for ongoing legal services and risked substantial additional harm to the clients in need of services by reducing their ability to pay for legal advice. We find the behaviour here should result in a more severe sanction than in *Sas*.

[47] When comparing the cases cited by the Law Society and the Respondent to the one before us, the range of sanctions is quite broad. However, it is clear that if a suspension is ordered in a case involving mental health issues, its length is tied to a number of factors:

(a) the length of any prior suspension;

(b) the time elapsed from the incidents that gave rise to the citation to the time of the hearing;

(c) the acknowledgement and acceptance by the lawyer of the nature of their mental health issues;

(d) the nature of the rehabilitation that the lawyer has undergone and, in cases of addiction, whether and for how long the lawyer had maintained sobriety and compliance with terms of any ongoing treatment program; and

(e) the lawyer's compliance with the terms of any practice conditions.

[48] In the matter before us:

(a) the Respondent has served two months of suspension prior to this Hearing. While that suspension was not directly tied to this case, we find that the circumstances of the two 2016 citations, when considered in light of the evidence before us of the nature and extent of the Respondent's addiction, indicate that those citations are part of a nexus of behaviour that should be considered when considering the disposition of the matter before us. The Respondent also voluntarily withdrew from practice for approximately four months from May to September 2017;

(b) approximately five years has elapsed since the first of the four misappropriations in this matter;

(c) the Respondent has fully and unreservedly acknowledged and accepted his addiction and has gone to great lengths to assist others who are suffering from addiction;

(d) the Respondent has undergone a residential treatment program for his addiction and has maintained stable abstinent remission and compliance with an ongoing sobriety monitoring program for approximately four years; and

(e) the Respondent has complied with the conditions on his practice.

ANALYSIS

[49] After taking into account that this matter involves misappropriation, one of the gravest misconducts a lawyer can engage in, the public interest in preserving confidence in the profession's ability to self-govern, considering the Respondent's professional conduct record and evidence of his character, the range of sanctions imposed in similar cases and comparing and contrasting the facts in this case with the facts in cases where suspensions, rather than disbarment, were ordered, we accept that disbarment is not appropriate in this matter. We find that the Respondent's conduct since March 2017 has indicated that the risk of engaging in professional misconduct is low so long as he continues with his recovery program and, as such, we find that it is appropriate to order conditions on the Respondent's practice that seek to ensure compliance with his recovery program. As such, the Respondent shall continue to comply with the existing conditions on his practice, including a continuation of his Medical Supervision Agreement as ordered below. However, we agree with the Law Society's submission that there should be an opportunity for an end point to such supervision and have included in our order an opportunity, after he has been subject to the agreement for five years, for a medical professional to conclude that such supervision should continue or is no longer necessary.

[50] We also find that it would be insufficient in this matter to merely order conditions. In *Van Feggelen*, an order of conditions alone was imposed, but the majority took into account the nine-month interim suspension that had already been served. The Law Society seeks an eight-month suspension. The cases generally support a suspension in this matter of between six (*Harvey*) and nine (*Van Feggelen*) months. We find that it is appropriate in this matter to take into account the two-month aggregate suspension that was already ordered in the two 2016 citations. We note that not every prior suspension should be taken into account in all cases, but here, where the evidence indicates that the Respondent was very likely in active addiction during those incidents, and the behaviour (failure to attend and making misleading and untrue statements to cover up his behaviour) is so similar to the facts before us, we find that the three citations should be considered on a holistic basis. As indicated in *Lessing*, prior citations and their outcomes often give rise to progressive discipline, but will not necessarily do so. If the Respondent had not undergone rehabilitation, acknowledged his addiction and been a model case, a holistic, progressive discipline approach would likely result in a more lengthy suspension or disbarment. Here, we find that the Respondent's significant rehabilitative efforts and other factors we have discussed make it appropriate to take into account the prior suspensions when setting the length of the suspension in this matter.

[51] We do not find that the period of voluntary withdrawal, however, should similarly be taken into account. The Respondent cited two cases in support of giving credit for the period of voluntary withdrawal: *Law Society of BC v. Kaminski*, 2018 LSBC 14 and *Law Society of BC v. Uzelac*, 2003 LSBC 35.

[52] In *Kaminski*, the lawyer deposited $33,426 into his personal law corporation's account and failed to disclose or account for those funds to the firm he worked for. The lawyer conditionally admitted to all of the allegations and proposed disciplinary action of a three-month suspension, which came at the end of a 45-month period that the lawyer had been out of practice. The majority in that case approved the proposed disciplinary action. We do not find this case to be particularly helpful as the decision before that panel was whether or not to accept the proposed disciplinary action in the context of a 45-month withdrawal from practice. Here, the Respondent voluntarily withdrew for four months which we do not find to be comparable.

[53] In *Uzelac*, the lawyer was duped by a fraudulent client into engaging in cash transactions that resulted in him losing approximately $52,000 in cash and judgments of $170,000 against him. He voluntarily withdrew from practice for the nine months prior to the hearing on penalty. The panel found that the economic effect of the fraud, when combined with the nine months not practising, had dealt such a severe economic blow to the lawyer, that the public interest would not be served by an additional fine or suspension with respect to his poor bookkeeping. While the panel in *Uzelac* did say that whether voluntary or not, the effect on the lawyer of his withdrawal from practice was the same, namely, it resulted in a loss of income. We do not find this case to be sufficiently similar to the matter before us to draw meaningful guidance from it, however. The lawyer in *Uzelac* was the victim of a financial fraud and was liable to make-whole others who had also been defrauded. The panel's decision to not impose a suspension in those circumstances is a very different decision than the one before us.

[54] As such, we find that a seven-month suspension, along with the practice conditions noted below, is appropriate in this matter and will preserve public confidence in the Law Society's disciplinary process to regulate the conduct of lawyers.

COSTS

[55] The Law Society requests an order for costs in the amount of $21,046.25. That amount is the result of applying the tariff in Schedule 4 to the Law Society Rules, less a $4,000 reduction for the Law Society's expert. Rule 5-11 directs us to have regard to that tariff when considering an order for costs, though Rule 5-11(4)

permits us to order that a lesser amount or no costs be payable if it is reasonable and appropriate to so order.

[56] The Respondent submits that severe hardship has resulted for the Respondent from his addiction, including his loss of employment in 2017, his loss of income during his voluntary removal from practice, his repayment of all amounts misappropriated from his clients and the costs that will accrue due to the suspension we are ordering. He also points out that he has been cooperative with the Law Society throughout. He also urges us to consider the approach of the *Law Society of Upper Canada v. McLellan,* 2011 ONLSAP 35 and to take into account the role that mental health has played in bringing the Respondent before the Law Society on this Citation. He submits that another factor that supports a reduction in costs is as follows:

> [t]he approach taken by the parties in this matter has resulted in an informed focus upon the effects of addiction that should be of benefit to other parties and hearing panels in the consideration of similar cases in the future. That has complemented the efforts not only of the Law Society's Task Force on Mental Health but also an emerging societal attention to addiction and other mental health issues as matters of general importance. As indicated in the opening comment of the extract from the *McLellan* case above … the important nature of the issues raised and the coordinated manner in which they have been explored are additional considerations that support a reduction in costs from what would otherwise be payable.

[57] In *Law Society of BC v. Straith*, 2020 LSBC 11, the panel cited *Law Society of BC v. Racette*, 2006 LSBC 29 for the following factors to be used when assessing whether it is reasonable to make an order for costs deviating from the Schedule 4 tariff:

(a) the seriousness of the offence;

(b) the financial circumstances of the respondent;

(c) the total effect of the penalty, including possible fines and/or suspensions; and

(d) the extent to which the conduct of the parties has resulted in costs accumulating or, conversely, being saved.

[58] Applying these factors to the matter before us, while it is clear the offence is very serious, it was in the context of active addiction which is now in stable abstinent

remission, that addiction has resulted in severe economic hardship for the Respondent and, finally, the manner in which the Law Society and the Respondent conducted this Hearing, has resulted in a focus on the effects of addiction which may be a positive contribution to a consideration of the emerging professional and societal attention to addiction and other mental health. Given these factors and the Respondent's cooperation, his behaviour as a model lawyer in his response to his addiction and the economic effect of the suspension we are ordering, we find that it is reasonable and appropriate to deviate from the Schedule 4 tariff and order costs of a total of $10,000, payable on or before August 31, 2022.

ORDER

[59] This Hearing Panel orders that:

(a) pursuant to s. 38(5)(d) of the *Act*, the Respondent is suspended from the practice of law for a period of seven months, commencing on the first day of December, 2021;

(b) pursuant to s. 38(5)(c) and (f) of the *Act*:

(i) the Medical Supervision Agreement, currently in place, continue during the period of suspension and thereafter until the Respondent has been on such an agreement for a period of five years total;

(ii) at the conclusion of that five year period, the Respondent be reassessed by Dr. Melamed, or an equivalent specialist in addiction medicine, to determine whether medical monitoring is required on a longer term basis or whether it can cease at that point;

(iii) for a period of one year following his return to practice post-suspension, the Respondent:

1. practise only as an employee or independent contractor of a law firm approved by the Executive Director of the Law Society;

2. not receive or otherwise handle any trust funds, not open or operate a trust account (whether in the name of a law corporation or not) including not making or authorizing

trust withdrawals, and not accept cash or other consideration for legal services;

3. use the office systems and staff of the firm to prepare and issue bills for legal fees and disbursements to clients; and

4. only practise in the areas of family law and immigration law, unless express written permission is provided by the Executive Director on a case-by-case basis to practise outside of these areas; and

(c) pursuant to Rule 5-11 of the Rules, the Respondent pay costs of $10,000 on or before August 31, 2022.

NON-DISCLOSURE ORDER

[60] Rule 5-9(3), recently amended, provides that while under Rule 5-9(2) the public has access to hearing transcripts and exhibits, the rule does not extend to permit access to "any information, files or records that are confidential or subject to a solicitor client privilege." To avoid any doubt as to the confidentiality of the names of the Respondent's children, the Respondent has applied for a sealing order in these proceedings to protect the names of the Respondent's children from being disclosed. The Law Society consented to this application.

[61] Rule 5-8(2) of the Law Society Rules provides that, upon application or on its own motion, a panel may order that specific information not be disclosed to protect the interests of any person. Rule 5-8(5) requires that, if the panel makes such an order, it must give its written reasons for doing so.

[62] We find that it is in the public interest that the privacy of the children of the Respondent be protected and that any reference to the names of the children of the Respondent in any documents filed in this Hearing, as well as any transcript of the Hearing, should not be disclosed and should be treated as confidential within the meaning of Rule 5-9(3). We therefore make the following order:

(a) if any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, the names of the children of the Respondent shall be redacted from the exhibit before it is disclosed to that person; and

(b) if any person, other than a party, applies for a copy of the transcript of these proceedings, the names of the children of the Respondent shall be redacted from the transcript before it is disclosed to that person.