2021 LSBC 53
Hearing No.: HE20200018
Decision Issued: December 16, 2021
Citation Issued: March 11, 2020

CORRECTED DECISION: PARAGRAPH [72] OF THE DECISION WAS AMENDED ON DECEMBER 17, 2021

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

DESMOND GREG FRIEDLAND

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	August 18, 2021
Panel:	Thomas L. Spraggs, Chair Linda Berg, Public representative John D. Waddell, QC, Lawyer
Discipline Counsel:	Kathleen M. Bradley
Appearing on his own behalf:	Desmond Greg Friedland

INTRODUCTION

[1] The Disciplinary Action phase of this hearing proceeded virtually through Zoom on August 18, 2021.

[2] In our Decision on Facts and Determination, *Law Society of BC v. Friedland*, 2021 LSBC 13 ("F&D"), we found that the Law Society had proven the citation that

related to three allegations dealing with failures to comply with the requirements of the trust accounting rules.

[3] The substance of the allegations are at paragraph three of F&D and reproduced below:

(a) Between approximately February 2015 and February 2018, you misappropriated or improperly withdrew some or all of $825 from your client, AN and DN, by withdrawing the funds from trust when you were not entitled to the funds, contrary to Rule 3-64 of the Law Society Rules [Rule 3-56 prior to July 1, 2015].

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

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

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

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

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

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

[4] At paragraph 81 of F&D, we found that:

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

THE POSITION OF THE PARTIES

The Law Society

[5] The Law Society asks the Panel to consider appropriate disciplinary action in the form of a suspension in the range of four to five months. The Law Society also seeks tariff costs in the amount of $9,809.84.

[6] In support of its position of a suspension in the range of four to five months, the Law Society provided detailed written submissions in addition to oral argument.

[7] The Law Society submits that the proposed sanction reflects an appropriate balancing of the principles and factors relevant to the global assessment of sanction in the circumstances of this case and this Respondent.

The Respondent

[8] The Respondent submits that the appropriate sanction is a fine in the amount of costs sought and has also volunteered to attend a trust accounting course as part of the sanction order.

[9] The Respondent appeared on his own behalf in these proceedings. In addition to tendering documentary evidence in support of his position, the Respondent called one witness. The Respondent testified and was cross-examined. The Respondent accepts full responsibility for the findings and accepts that his acts and omissions constitute professional misconduct but he articulates a distinction in the present case against a suspension as he submits there was no intention of dishonesty or deceit.

DISCIPLINARY ACTION

Object and purpose of the sanctioning process

[10] Helpful guidance relating to principles that inform a fair and consistent approach is found in several frequently cited decisions. The Panel relies on *Law Society of BC v. Lessing*, 2013 LSBC 29 as a concise summary of the applicable law.

[11] As referenced in *Lessing*, the starting point in determining the appropriate disciplinary action to be imposed under sections 38(4) and 38(7) of the *Legal Profession Act* (the "*Act*"), is a consideration of the Law Society's mandate under section 3 of the *Act.*

[12] Section 3 of the *Act* provides as follows:

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[13] *Lessing* sets out that the object and duties in section 3 of the *Act* are reflected in a helpful passage from *Law Society of BC v. Ogilvie*, 1999 LSBC 17:

> [9] Given that the primary focus of the Legal Profession Act is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct. Section 38 of the Act sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.
>
> [10] The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate

> in all cases, the following 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.
>
> [emphasis in original]

[14] The Law Society submits that the *Ogilvie* factors as set out above come into play in all cases and the weight to be given to these factors varies from case to case. The Panel accepts the proposition that the protection of the public and the rehabilitation of the lawyer are two factors that play an important role in most cases. Underpinning those factors is a consideration and awareness of upholding public confidence in the disciplinary process and the legal profession generally**.**

[15] The Law Society submits that the prominent factors to be given consideration in the assessment of appropriate disciplinary action are:

(a) the nature and gravity of the misconduct;

(b) the respondent's character, including his professional conduct record;

(c) the advantage gained and the impact on the victims;

(d) the respondent's acknowledgement of the misconduct;

(e) the need to ensure public confidence in the integrity of the legal profession; and

(f) the range of sanctions imposed in similar cases.

[16] The Panel accepts the Law Society's position that where there are multiple proven allegations, as is the case here, an assessment on a "global basis", taking into account the nature of all the misconduct, is considered the standard approach taken by hearing panels.

[17] The Panel also takes into consideration previous tribunal decisions that have referenced the following passage from MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Carswell, 1993) at 26-1:

> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

This extract was cited with approval in *Law Society of BC v. Hordal*, 2004 LSBC 36 at para. 51 and *Law Society of BC v. Pyper*, 2019 LSBC 01 at para. 12.

[18] It should be noted that the aforementioned *Ogilvie* factors are non-exhaustive in nature; furthermore, logic and common sense assist in determining the appropriateness of the sanction, which ought to be firmly grounded in fairness.

The nature and gravity of the conduct proven

[19] The Law Society seeks a significant suspension as necessary to address the serious nature of the gravity of the misconduct that includes multiple failures to abide by the Law Society's trust accounting rules for a period of at least nine years.

[20] The Law Society submits that the nature and gravity of the trust accounting rules misconduct spanning a period of at least nine years is serious. This includes a failure to identify and record the identity of clients on whose behalf trust funds were received, proper maintenance of a trust ledger or other suitable system to

show for each client on whose behalf trust funds were received and disbursed and a failure to comply with a monthly trust reconciliation.

[21] In this decision, the Panel addresses the misappropriation found in relation to allegation 1 of F&D, as well as what can properly be described as a protracted failure to abide by Law Society trust accounting rules as set out in allegations 2 and 3.

[22] As set out above, we found in F&D that the misappropriation occurred because of unconventional trust accounting practices. The Panel does not find any dishonesty or intention to misappropriate on behalf of the Respondent. Misappropriation is a very serious matter and one of the most serious forms of misconduct a lawyer can commit.

[23] Misappropriation betrays the essential trust in lawyers to handle client affairs to expected standards that include honesty and loyalty. The Law Society cites *Law Society of BC v. Tak*, 2014 LSBC 57 for the proposition that a strong message of deterrence should be sent to other members of the Law Society relating to misappropriation and that for most cases involving misappropriation, the starting point is a revocation of the right to practise law.

[24] Disbarment is an extreme remedy and should only be ordered in those cases where it is the only means by which the public and the public interest can be protected. As noted in *Law Society of BC v Hammond*, 2004 LBSC 32, a panel may decline to disbar a lawyer where there are "exceptional circumstances" to suggest that a disbarment is not required to protect the public interest. Exceptional circumstances may include where lawyers were suffering from serious mental health issues when the misconduct occurred, where the misconduct was not done intentionally or where the misconduct was done for "administrative convenience" rather than personal gain.

[25] The Law Society concedes that the Respondent's misappropriation was not done with knowing dishonesty and is in the category of improper and grossly negligent accounting practices; therefore, the sanction of disbarment will not presumptively apply as it does in cases involving intentional misappropriation".

[26] In this matter there is some import as to how the plain meaning of the word "misappropriation" is considered by the jurisprudence relating to trust accounting obligations and how the plain and ordinary meaning of the word "misappropriation" communicates in the vernacular of the legal community compared to the public generally. To the public, misappropriation means theft. Law Society decisions have expanded this definition to include not only theft but

unauthorized use of client funds which occurred as a result of grossly negligent accounting practices.

[27] While there was technical misappropriation in this case, the misconduct is a result of long-standing failures to observe important but often complicated trust accounting rules and procedures. These rules and procedures exist for an important purpose but do not necessarily always cause the same harm when breached. The Respondent did not misappropriate any trust funds in the sense of intentional taking of clients' funds, which is the context in which misappropriation most squarely and seriously implies.

[28] The misappropriation in this case was not theft but a function of significant accounting deficiencies, which the Respondent has accepted full responsibility for. The misappropriation does not have any direct victims and once the accounting was remedied, the affected client proffered a letter of support for the Respondent as was considered in F&D.

[29] While misappropriation will attract a serious sanction for administrative convenience as set out in *Law Society of BC v. Sas*, 2016 LSBC 03, the conduct here is not of the same degree when considering the range of meanings attributable to the hard-edged term "misappropriation".

[30] The Panel also found that the Respondent created non-compliant alternative processes in an honest but misguided belief about how his accounting procedures must align to his practice. An example of the level of noncompliance is demonstrated through the maintaining of more than $300 of funds in trust and withdrawing money from trust when it was needed. Withdrawals from trust were deferred for periods of four months to five years and as of February 1, 2018, the Respondent's unclaimed fees in trust totalled $9,442.03.

[31] The Respondent's protracted failure to comply with his trust accounting obligations over the course of nine years is serious misconduct justifying the imposition of a suspension. The Law Society's trust accounting rules have been implemented to protect the public. Business processes and creative workflows must comply with the rules as a minimum standard.

Progressive discipline and other factors

[32] The Respondent is a senior member of the bar, having been called in December 1997. There is a relevant prior conduct review. The conduct review subcommittee met with the Respondent in March 2017 to address noncompliance with the trust accounting requirements relating to a failure to promptly correct trust shortages and

report anything over $2,500, in addition to failing to prepare monthly trust reconciliations and an accurate trust report for 2011.

[33] The conduct review subcommittee determined that, while the Respondent's conduct was not deliberate, the deficiencies were caused by a lack of understanding of his obligations regarding accurate record keeping. The Respondent accepted responsibility and resolved to correct these breaches and was cooperative with the investigation.

[34] The Respondent's accounting deficiencies also prevented him from acting as a principal for more than one articled student at a time unless he received approval from the credentials committee to do so.

[35] The Law Society submits that it is an aggravating factor that the Respondent indicated to the conduct review subcommittee that he would take steps to ensure that appropriate accounting systems were put in place but that he failed to do so.

[36] As outlined in F&D, it is hard to understand why these accounting deficiencies were not better addressed in the time following the conduct review by the Respondent. Had the Respondent improved his accounting and bookkeeping practices to conform with the Rules at that time, he would not likely be dealing with these present proceedings.

[37] The Respondent's failure to comply with the Rules after having been cautioned to do so by the conduct review subcommittee, is an aggravating factor.

Mitigating circumstances

[38] The Respondent immigrated from South Africa in 1993 where he practised law with his father. The Panel accepts that the Respondent demonstrates care in being supportive of individuals in need. He employs three staff in his office.

[39] Rabbi Solomon Estrin appeared as a witness at the hearing and testified about his interactions with the Respondent. Rabbi Estrin works at the Hebrew Academy and receives financial support from the Respondent. Rabbi Estrin is aware that the Respondent has provided financial assistance to as many as six families.

[40] Rabbi Estrin described the Respondent's financial assistance over the last 12 years as a "huge help." The Respondent supports Rabbi Estrin through a consistent financial contribution of $400 per month.

[41] On cross-examination, Rabbi Estrin was firm in his view of the Respondent's good character.

[42] The Respondent testified on his own behalf and outlined his contributions to his clients, colleagues and his faith community. The Respondent considers himself an honest and hardworking individual. There is no reason or evidence to dispute that assertion.

[43] The Respondent has served as a principal to over nine articled students in the last 24 years of legal practice. The Respondent discounts his fees by 50 per cent to any member of the clergy, whether it be Christian, Jewish or Muslim. In the Jewish community in which he actively participates, the Respondent does not charge any fees.

[44] The Respondent testified that the COVID-19 pandemic has had a serious and negative impact on his cash flow. While most of his practice is immigration, the pandemic has caused significant delays with application processing. The other portion of the Respondent's practice is motor vehicle injury claims which are expected to end due to changes to the governing law relating to injury victim compensation.

[45] The Respondent admits his wrongdoing in this case and is deeply embarrassed by it. Misappropriation, as it applies in this case, carries with it the unfortunate potential to be conflated with an incorrect finding of dishonesty. In this instance, the Respondent has a demonstrated flagrant and long-standing disregard for the rules required of lawyers relating to accounting. That is a character flaw even if it was done unintentionally.

[46] The Respondent tendered documentary evidence relating to online reviews and ratings for the proposition that his clients are highly satisfied. However, the online reviews do not meet any standard of admissibility and the comments relied upon had no direct application to the Respondent's trust accounting practices.

[47] It is a mitigating factor that the Respondent cooperated with this process, including appropriate admissions consistent with the position taken throughout these proceedings. These proceedings have been efficient and the Respondent has been respectful throughout.

[48] The Law Society encourages lawyers to offer pro bono services to their community. In this case, the Respondent's community service and the desirability for his being able to continue to offer those services was a mitigating factor taken into account in assessing the appropriate length of suspension.

Remediation and rehabilitation of the concerns

[49] As set out above, the Respondent could have likely avoided these proceedings entirely if the assurances provided to the conduct review subcommittee had been followed. It is not clear to this Panel as to why the Respondent did not abide by those assurances.

[50] The process which the Respondent has been through has taken a significant toll on him, as is evident in his presentation. The Panel finds his remorse genuine and sincere.

[51] The Law Society relies upon *Law Society of BC v. Mann*, 2015 LSBC 48 for the proposition that handling trust funds is one of the most serious responsibilities a lawyer owes a client.

[52] The Respondent failed to remedy accounting procedures after they were brought to his attention which is concerning for the Panel.

The impact of the proposed penalty on the Respondent

[53] A suspension in the range sought by the Law Society would be devastating to the Respondent. A four or five-month suspension is a heavy time away from a solo practice. The Respondent has a staff that will likely suffer with him during the suspension, in addition to the obvious ability to support community well-being as articulated by Rabbi Estrin and the accepted representations of the Respondent.

[54] On the one hand, making an order for a lengthy suspension sends a strong message of deterrence. That message is an important one. On the other hand, the Respondent has submitted that he would accept payment of the full costs and take an accounting course as an appropriate sanction. The Panel finds that the appropriate remedy in this case is somewhere between these two positions as the multitude of factors are unique for each individual matter.

[55] Here, a suspension would have the unfortunate reality of likely causing harm and interruption to the individuals and families that the Respondent supports and provides *pro bono* services to. The Panel seeks to consider disciplinary action that best fits the various competing and sometimes irreconcilable choices available to serve the principles of the *Act*.

[56] While a four to five-month suspension and costs payable, as sought by the Law Society, could be considered appropriate, it is also fair to give further consideration to the mitigating factors as outlined in these reasons.

[57] This analysis is predicated on difficulty with the previously referenced suboptimal scope of the term "misappropriation". Another way of framing the Respondent's misconduct relating to misappropriation is a complete lack of appreciation for necessary legal bookkeeping resulting in a return of $825 to a repeat client whom the Respondent had an ongoing solicitor-client relationship.

[58] Trust accounting rules must be followed and some period of suspension is warranted. As outlined in F&D, minor or occasional good faith accounting mistakes will occur and those should not attract any disciplinary consequences. What occurred here was preventable given the regulatory warning arising from the conduct review process.

[59] Section 38 of the *Act* states that where a hearing panel finds, as this Panel did, that a lawyer'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.

[60] The question then becomes - are there additional orders the panel could make that would substitute a period of the suspension having regard to all the factors?

[61] In this matter, the Panel finds the answer is yes. As set out below, the Respondent should not handle trust funds until he completes some accounting courses and only then with the assistance of a qualified accountant.

[62] Eliminating the potential for any harm in this manner serves to send a message of deterrence while also addressing the problem to be solved, that is, the Respondent's demonstrated avoidance of compliance with trust accounting rules.

[63] The need to ensure public confidence in the integrity of the legal profession is a paramount consideration. Consistency with other similar cases helps to guide that analysis.

[64] In *Sas*, the lawyer was found to have misappropriated trust funds by zero balancing out her trust account. The amount involved was $1,947.39. The lawyer was suspended for four months.

[65] A distinction in the present case is that *Sas* involves a more serious breach of the Rules compared to this case. The Respondent was grossly negligent in his accounting. The non-compliant accounting caused confusion about the entitlement of the misappropriated funds as opposed to the pure administrative convenience with gain in *Sas*.

[66] Similarly, in *Law Society of BC v. Lowe*, 2019 LSBC 37, a suspension of five months was ordered. The Law Society in that case sought a suspension of six to eight-months.

[67] *Lowe* is distinguished against the present facts in that at paragraph 33 of *Lowe*, the panel found as an aggravating factor that the lawyer profited from his position while in a position of trust.

[68] Both *Sas* and *Lowe* consider more serious fact patterns than what was involved here.

CONCLUSION

[69] In our view, the public interest requires that misconduct remain a prime determinant of the sanction imposed in order to maintain public confidence in the integrity of the profession.

[70] Considering all of the circumstances and the submissions of both the Law Society and the Respondent, this Panel finds that the appropriate, fair and proportionate sanction is a two-month suspension.

[71] The Panel accordingly orders that the Respondent is suspended from the practice of law for two months commencing on January 15, 2022 or such other date as may be agreed to between the Law Society and the Respondent.

[72] Pursuant to the jurisdiction in section 38 of the *Act*, it is further ordered that

a. the Respondent immediately cease operating his trust account or handling trust funds until such time as he has satisfactorily completed the Law

Society's Trust Accounting Basics and Trust Accounting Regulatory Requirements courses;

b. commencing January 1, 2022 and for a period of three years thereafter, the Respondent retain a Chartered Professional Accountant to assist in maintaining his accounting records;

c. the Respondent file an Accountant's Report with his Annual Trust Report for a period of 3 years and then thereafter until relieved by the Trust Regulation Department.

COSTS

[73] The Law Society requests an order for costs in the amount of $9,809.84 which has been calculated in accordance with Schedule 4 - Tariff for Hearing and Review Costs.

[74] Hearing panels derive their authority to order costs from section 46 of the *Act* and Rule 5-11 of the Rules. Under Rule 5-11, a panel must have regard to the tariff when calculating costs. The costs under the tariff are to be awarded unless, under Rule 5-11(4), the panel determines it is reasonable and appropriate to award no costs or costs in an amount other than that permitted by the tariff.

[75] In this case, there is no reason to deviate from the tariff. The Respondent has not provided any direct evidence with respect to his current financial circumstances, including any information about his assets, net worth or ability to pay costs. The total effect of the order for costs and a suspension is not inordinate or out of proportion to the misconduct.

[76] The Respondent asks for a reasonable time to pay in light of the financial consequences of a suspension. The Respondent shall pay the costs within 6 months of the publication of these reasons. If there are circumstances that require further consideration, an application may be made pursuant to Rule 5-12.