

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Sabrina Ali

Respondent

**Decision of the Hearing Panel
on Facts and Verdict**

Hearing date: February 20 and 21, 2007

Panel: David M. Renwick, Q.C., Chair, Brian J. Wallace, Q.C., Robert D. Punnett

Counsel for the Law Society: Brian McKinley

No-one appearing on behalf of the Respondent

Corrected Decision : A corrigendum was issued on June 14, 2007. The text of the initial decision is reproduced here with corrections, and the corrigendum is appended at the end of this corrected decision.

Background

[1] A citation was issued against the Respondent on January 9, 2006. It was amended in June, 2006 to add three additional allegations. The citation directs that this Hearing Panel inquire into the Respondent's conduct as follows:

1. You misappropriated trust funds from your client S.W.C. when you transferred funds to which you were not entitled from your pooled trust account to your personal account on March 1, 2004, and then used those funds.
2. You misappropriated trust funds from your client B.C. when you transferred funds to which you were not entitled from your pooled trust account to your general account on or about January 16, 2003 and then used those funds, rather than forwarding those funds to your client's trustee in bankruptcy.
3. You misappropriated trust funds from your client E.N. when you transferred funds to which you were not entitled from your pooled trust account to your general account on February 23, 2004 and February 25, 2004 and then used those funds.
4. You misappropriated trust funds from your client C.K. when you transferred funds to which you were not entitled from your pooled trust account to your general account on March 4, 2003 and March 19, 2003, and then used those funds.

5. You misappropriated client trust funds between January 2002 and February 2003 when you withdrew funds from your pooled trust account for your personal use through the use of a personal float trust ledger account, when the personal float trust ledger account did not hold sufficient funds.
6. You misappropriated trust funds from your client R.R. by depositing trust funds to which you were not entitled into your general account on January 14, 2002, and then used those funds.
7. You failed to pay several practice debts in a timely fashion contrary to Chapter 2, Rule 2 of the *Professional Conduct Handbook*.
8. Having collected funds from clients for federal goods and services tax (GST), you failed to hold and remit those funds.
9. You failed to remit payroll withholding funds on behalf of your employee to the federal government.
10. You failed to maintain your books, records and accounts in accordance with Part 3, Division 7 of the Law Society Rules. In particular, you:
 - (a) Deposited funds which should have been deposited to your trust account to your general account, contrary to Rule 3-51(1);
 - (b) Failed to maintain sufficient trust funds on deposit in each pooled trust account to meet your obligations with respect to funds held in trust for clients, contrary to Rule 3-55;
 - (c) Withdrew trust funds when there were insufficient funds held to the credit of the client on whose behalf the funds were withdrawn, contrary to Rule 3-56(1.2);
 - (d) Withdrew trust funds for fees when you had not first prepared a bill for those fees, contrary to Rule 3-57(2);
 - (e) Failed to maintain trust account records as required by Rule 3-60, and in particular failed to maintain a trust ledger or other suitable system showing separately for each client all trust funds received and disbursed, and the unexpended balance;
 - (f) Failed to record general funds received and disbursed, and revenues and applicable PST and GST, contrary to Rule 3-59;
 - (g) Failed to maintain an adequate accounts receivable ledger or other suitable system, contrary to Rule 3-61(1)(b);
 - (h) Failed to record each general account transaction within 30 days, contrary to Rule 3-63 (1)(b); and
 - (i) Failed to immediately pay sufficient funds into your trust account to eliminate trust

shortages, contrary to Rule 3-66(1).

11. You failed to respond promptly or at all to the following communications from the Law Society: letters dated February 9, February 24, and March 7, 2006, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*.

12. When you became aware in January 2005 of a default judgment filed against you in September 2004 by Loren and Company, you failed to satisfy the judgment against you within seven days and then failed to immediately notify the Executive Director in writing of your proposal for satisfying the judgment, contrary to Rule 3-44 of the Law Society Rules.

13. You failed to meet your professional financial obligations when you failed to pay a practice debt owed to Julia Ding and Co. when called upon to do so, contrary to Chapter 2, Rule 2 of the *Professional Conduct Handbook*.

[2] The matter was set for hearing on September 12th to 14th, 2006. At a pre-hearing conference on August 31, 2006, the Respondent sought and was granted an adjournment to February 20th to 22nd, 2007. The Respondent's then counsel subsequently withdrew.

[3] The Respondent failed to appear on February 20, 2007. Service of the citation having been proven, the hearing proceeded in her absence.

[4] The Respondent was called to the Bar in September, 1997. In 2003, the Respondent was practising as a sole practitioner out of her home on Victoria Drive in Vancouver, and from a shared office on Nelson Street. As a result of concerns raised by her Form 47 Audit Report for the period ending December 31, 2002, an audit was ordered under Rule 3-79 on October 30, 2003. Adrienne Fairburn, CGA (Certified General Accountant) and CFE (Certified Fraud Examiner) conducted the audit. Her first interim audit report dated January 28, 2004 determined that she was unable to conduct an audit of the Respondent's trust records as they were incomplete and inaccurate and her general account records were unreliable. The books and records required updating in order to complete the audit.

[5] Ms. Fairburn also found that the Respondent had failed to report and remit PST, GST and payroll deductions.

[6] On March 18, 2004 an investigation order pursuant to Rule 4-43 was issued, and Ms. Fairburn continued with her investigation.

[7] On March 23, 2004, the Respondent provided an undertaking to the Law Society in which she agreed to:

- (a) only engage in practice under the direct supervision of Kerry-Lynne Findlay, Q.C.;
- (b) dispose of any client monies held in trust by returning those funds to clients;
- (c) not open new trust accounts or general accounts;
- (d) provide weekly statements on the general account to her Practice Supervisor and the Law Society upon request;
- (e) not accept retainers or new files;

- (f) cooperate with the Law Society in the reconstruction of accounting records;
- (g) cooperate with the Law Society in their conduct of the Rule 4-43 audit;
- (h) enter into a Practice Supervision Agreement acceptable to the Law Society upon the request of the Law Society; and
- (i) provide an executed copy of the undertaking to her Practice Supervisor.

[8] On March 24, 2004, the Respondent provided a further undertaking by deleting item (f) and replacing it with the following:

I undertake to bring my books, records and accounts up to date by April 26, 2004.

[9] Ms. Fairburn provided a second interim Audit Report on May 14, 2004. After reviewing the state of the Respondent's books, records and accounts, Ms. Fairburn concluded that she could still not complete the audit due to the incompleteness and inaccuracy of the records. She reconstructed the 2003 and 2004 trust cashbooks to allow her to analyze the trust accounts and to confirm and quantify previously identified trust shortages. Her second interim Audit Report described and documented client trust shortages that had occurred in 2003 and 2004, as well as trust shortages that had been allocated to the Respondent's personal trust ledger from January 2002 to February 2003.

[10] Ms. Fairburn continued to review the existing books and records and performed a reconstruction of the 2002 trust cashbook and reviewed account information pertaining to the Respondent's general and personal bank accounts. She provided a final Audit Report on January 17, 2005, which provided details of her findings regarding trust shortages that occurred in 2002, and some further findings related to the 2003 and 2004 trust shortages she had identified in the second interim Audit Report. She also provided an analysis of trust shortages and balances in the general bank account and in the Respondent's personal bank account.

Facts

[11] Our findings with respect to the facts related to each count are as follows.

Count 1

[12] The Respondent had an ongoing retainer with this client. On January 12, 2004, she issued an account to the client that allowed her to remove some funds from trust, leaving an outstanding amount owing of \$115.86. She sent the statement of account with a letter requesting payment of that amount, plus a further retainer of \$200.

[13] The client sent a cheque for \$315.86 to the Respondent. The Respondent deposited the cheque into her trust account on March 1, 2004. The client, S.W.C., testified that it was understood that the trust funds would only be used if a bill was rendered.

[14] On March 1, 2004, the Respondent wrote a trust cheque for \$315.86 and deposited the cheque into her personal account. The sum of \$115.86 related to the outstanding account. No account was rendered for the \$200 taken in addition to the balance due.

[15] The Respondent's personal bank account was in a slightly (\$0.21) negative balance on March 1,

2004, and account records show that, by March 4, 2004, the account was down to a balance of \$8.71, indicating that the Respondent used the funds for other purposes. The Respondent subsequently informed the client that she would no longer act and, on March 22, 2004, wrote a trust cheque in the amount of \$200 to the client and thereby returned the retainer to the client and terminated the relationship. On March 24, 2004, she deposited \$200 to the trust account to cover the trust cheque.

[16] The explanation provided by the Respondent through her counsel, in a letter dated June 15, 2005, was that " Since she previously billed the client from time to time, when the cheque for \$315.86 was received, she assumed that it was payment of an account and therefore, placed the monies in trust and then took all as payment for fees and disbursements." Then realizing that \$200 was to be paid as a retainer, the Respondent placed these funds herself in trust. She subsequently closed the trust account and returned the retainer to the client.

Count 2

[17] The Respondent collected \$5,000 in settlement funds for her client. Those funds were deposited into her trust account to the credit of the client on January 13, 2003. She issued a statement of account on January 16, 2003, for \$2,500 in fees plus disbursements totaling \$3,212.83. As the client was bankrupt, the balance of the funds should have been paid directly from trust to the client's trustee in bankruptcy, BDO Dunwoody. The Respondent transferred the entire \$5,000 from trust to her general account with a trust cheque on January 16, 2003. The Respondent issued a cheque for the balance owing from her general account to BDO Dunwoody in January and again in February of 2003, but neither cheque cleared due to insufficient funds.

[18] The Respondent issued another general cheque for \$1,787.17 to BDO Dunwoody on February 27, 2004, but did not mail it until the last week of April, 2004. BDO Dunwoody was not able to cash that cheque in May 2004 due to insufficient funds in the Respondent's account. They finally obtained a certified cheque from the Respondent for the full amount on October 4, 2004. The explanation from the Respondent's counsel respecting the long delay from February, 2003 to October 4, 2004 is that the Respondent thought her second cheque of February, 2003 had cleared and the trustee explained that they had archived the file without realizing that the second cheque had not cleared. The fact that the second cheque did not clear only became apparent at the time of Ms. Fairburn's review in 2004.

[19] From a review of the general account statements, it is clear that the Respondent did not retain sufficient funds on deposit in her general account to replace the funds that should have been sent directly to BDO Dunwoody from her trust account.

[20] In the response from the Respondent provided by her counsel, she has admitted the facts surrounding the transactions, but has not admitted any intention to misappropriate the funds. She did not provide any explanation for why she transferred all of the funds to her general account in the first place. In response to further inquiries about what authority the Respondent considered she had to transfer those funds from trust, her counsel replied in a letter dated August 8, 2005, " ... in case I have not made it clear, there was no authority for the transfers and these were a mistake on Ms. Ali's part."

Count 3

[21] The Respondent received a \$500 retainer from her client E. N. and deposited those funds into her trust account in March 2003. She did not do any work for the client. The client requested the return of the retainer in February of 2004.

[22] The Respondent first paid out \$300 of the retainer from trust. A trust cheque was deposited into her general account on February 18, 2004, but the deposit was reversed on February 20, 2004, and the \$300 was then transferred from trust to general on February 23, 2004.

[23] The Respondent made a second payment from trust to general with a trust cheque she deposited on February 25, 2004. The Respondent then wrote a cheque to the client from her general account dated March 12, 2004, and provided it to the client on that day. It was negotiated by the client, and it cleared the Respondent's general account on March 26, 2004.

[24] The retainer should have been returned directly from trust to the client. It was not. It was placed in the general account without authority, and the Respondent had the use of those funds for one month. During that month, the general account balance was in a constant state of overdraft. The Respondent did not always have the funds available during that month to provide the client with the funds on demand.

[25] The Respondent responded to a query from the auditor about why she deposited the funds into trust in an e-mail dated May 4, 2004: " This was a mistake on my part. I would have transferred the amount back to trust, but by the time I realized it, I was not to operate a trust account."

[26] It should be noted that the Respondent provided her undertaking to the Law Society to return client trust funds and not to open new trust accounts on March 23, 2004.

[27] The Respondent, through her counsel, provided a further comment: " She transferred the funds from trust to general in order to issue a general cheque. She acknowledges it would have been simpler to simply issue a cheque from trust marked 'retainer returned' but denies any intent to make use of the funds personally."

[28] When questioned by Law Society staff as to what authority the Respondent considered she was acting on when she transferred the funds from trust on this file, her counsel replied with respect to this file as noted above with respect to Count 3 in a letter dated August 8, 2005, " ...in case I have not made it clear, there was no authority for the transfers and these were a mistake on Ms. Ali's part."

Count 4

[29] The Respondent was retained to assist this client with family support issues. She requested a retainer of \$2,000. On February 28, 2003, the client provided the Respondent with \$1,216.82, which was deposited into trust to the benefit of this client.

[30] On March 3, 2003, the Respondent issued a statement of account for \$745.19 for fees and disbursements, and, on the same day, a trust cheque in that amount was issued and then deposited into the general account.

[31] Without issuing a statement of account, on March 4, 2003, the Respondent removed the balance of funds held in trust for this client with a trust cheque in the amount of \$471.63. The trust cheque was deposited into the general account.

[32] On March 11, 2003, the client provided a further \$783.18, which was deposited into trust to the benefit of this client. On March 14, 2003, the Respondent issued a statement of account for \$571.92 and, on the same day, issued a trust cheque in that amount and deposited it into her general account.

[33] Without issuing a statement of account, on March 19, 2003, the Respondent removed the balance of funds held in trust for this client with a trust cheque in the amount of \$211.26 and deposited those funds into her general account.

[34] The general account was in an overdraft position at the time of both transactions, and the funds were used by the Respondent after they were transferred into that account.

[35] In response to questions about these transactions, the Respondent's counsel stated in her letter of June 15, 2005, " Ms. Ali cannot locate the accounts in support of these transactions. ... She simply cannot say how it was that she came to remove the funds from trust."

Count 5

[36] The Respondent maintained a trust float within her pooled trust account that she titled " Personal" on her monthly trust reconciliation list. The personal float was overdrawn on five occasions between January 2002 and February 2003.

[37] Bank fees were charged to this account, and the Respondent took personal draws from it. On November 1, 2002, when the balance in the personal float ledger account was \$43.19, the Respondent issued a trust cheque, payable to herself, for \$319.81 and deposited those funds into her general account, thereby overdrawing her personal float account by \$276.62. The resultant trust shortage continued until March 31, 2003, when a general cheque for \$500.94 was deposited into trust and used to repay overdrafts in the personal float ledger and in two other individual client trust accounts.

[38] The Respondent did not provide a substantive response to the issues raised regarding the personal float account.

Count 6

[39] This client retained the Respondent in January 2002. He provided her with a requested \$1,000 retainer by cheque dated January 14, 2002. The Respondent issued a receipt marked " For: Retainer" on that date. On January 15, 2002, the Respondent deposited the cheque into her general account and then used those funds.

[40] In March and April 2002, the Respondent issued three statements of account totalling \$1,064.88 and from April 1 to 16, 2002, she issued four trust cheques that totalled \$1,000 and deposited those funds into her general account, thereby creating a trust shortage of \$1,000 on April 16, 2002.

[41] The Respondent's counsel responded to this allegation by letter of June 15, 2006, as follows:

On this file, Ms. Ali mistakenly deposited the \$1,000 retainer into her general account instead of her trust account. ... Since Ms. Ali did not prepare ledgers and keep them up to date properly, she did not realize that the funds had been put into her general account. Accordingly, she then rendered statements of account and moved money from trust to general in order to pay those accounts, thereby creating the trust shortage.

Count 7

[42] In the course of the audit, the Respondent revealed that she had several practice debts that had not been paid for some time. As of December 31, 2004, most of the debts were several months in arrears. The total practice debts as of December 31, 2004 totalled \$9,790.86. Seven of the unpaid practice debts had been outstanding since December 31, 2003.

Count 8

[43] A reminder note from CRA dated July 15, 2004 indicated that the Respondent's GST return for 2003 had not yet been filed. The Respondent's accounting records indicated GST collected in 2003 was \$2,432.82, with input tax credits of \$1,392.05, with a net GST owing before penalties and interest of \$1,042.77. However, that amount may have been understated, as it appears that the Respondent had not recorded all statements of account in her records.

[44] The Statement of Arrears dated July 14, 2004 states that the Respondent's GST account was in arrears \$3,320.24, which included unremitted GST of \$2,649.97 for the years 2000, 2001 and 2002.

[45] The Respondent's then counsel advised on August 8, 2005 that the Respondent still owed \$4,174.99 for unpaid GST remittances, and still needed to file two years of returns. Her counsel indicated at that time that the Respondent was unable to satisfy her GST indebtedness.

Count 9

[46] The Respondent failed to remit payroll withholding tax for a part-time employee from January and February 2003, in the amount of \$502.65, until January 2004.

[47] The auditor reported that, in her first meeting with the Respondent on December 23, 2003, the Respondent advised that she had remitted all payroll withholdings for 2003. On January 12, 2004, the Respondent wrote to CRA to advise that she had not forwarded the 2003 payroll withholdings and forwarded two post-dated cheques to cover the amount owing.

Count 10

[48] There were several examples where the Respondent deposited trust funds to her general account rather than to her trust account. With respect to client R.R., (Count 6) the failure to deposit the funds into trust led to the personal use of client trust funds by the Respondent and to a trust shortage for a number of months.

[49] There were also numerous examples of trust shortages with respect to client trust accounts that continued for months. The most egregious examples are described in the Audit Report and relate to clients J.M. (A1034), R.R. (A1078), detailed under Count 6, and F.P. (A1086).

[50] There were several examples of withdrawing fees when a bill had not been prepared. One was respecting the client S.W.C., detailed in Count 1, another was respecting client E.N., detailed in Count 3, and another was respecting client C.K., detailed in Count 4.

[51] The state of the Respondent's records resulted in the auditor concluding in January 2004 that she was unable to commence an audit because the Respondent did not maintain adequate trust account records. One of the results of the inadequate trust records was the obvious inability of the Respondent to keep accurate track of what funds were held to the credit of each client, and in some cases led to trust shortages and other accounting rule breaches. Counsel for the Respondent has suggested in response to the audit that all of the trust shortages were due to the numerous errors in the Respondent's accounting and that none of them were due to any intentional misdealing with respect to trust funds.

[52] The failure of the Respondent to keep adequate trust records led to other trust shortages, and it created a situation in which it was not possible for the Law Society to quickly audit her books and records to determine the cause of each trust shortage. A complete reconstruction of the Respondent's trust records was necessary to determine what had occurred.

[53] The Respondent made some effort to correct her accounting deficiencies, starting in March 2004, but by the time of the final Audit Report in January 2005, the accounting records were still a long way from being complete or accurate.

[54] On at least three occasions, the Respondent did not immediately pay sufficient funds into trust to eliminate trust shortages. It appears from the trust reconciliations that the Respondent prepared herself, that she was aware of trust shortages relating to client J.M.'s account, and relating to client F.P.'s account. Those trust shortages were eventually cleared up after a number of months.

[55] It is noteworthy that, during the period that the trust shortages continued on those two files, the Respondent received payments from the clients toward outstanding accounts and deposited those funds into her general account rather than into trust to eliminate the shortages.

Count 11

[56] The Respondent became a non-practising member in 2006. There were still open complaints that required her response. One of those complaints was a complaint that she had failed to pay a default judgment against her that was obtained by the accounting firm that did her 2002 bookkeeping and prepared her Form 47 Accountant's Report for 2002. Letters mailed to her from the Professional Conduct Department of the Law Society were not answered. At that time, she was not represented by counsel with respect to that complaint.

Count 12

[57] Loren and Company did the Respondent's bookkeeping in 2002 and prepared her Form 47 Accountant's Report for 2002. They sent her an invoice in June 2003 for \$3,190.88. After several weeks, they started sending her regular reminders, left telephone messages that were not returned and eventually turned the matter over to collections. They filed a Notice of Claim in Small Claims Court and served it on the Respondent by leaving a copy at her office address with a receptionist, and moved to obtain Default Judgment in September, 2004. After obtaining the judgment, they sent a letter in January, 2005 requesting payment and enclosing the Default Order.

[58] During the course of the audit, Ms. Fairburn advised the Respondent about the Default Order. The Respondent claimed in January 2005 that she was not aware of it and was not aware that she had been served with anything.

[59] The Respondent's counsel advised the Law Society in her response of June 15 that the Respondent learned of the claim from Ms. Fairburn, and that the Respondent was "unable to pay the amount owed and hopes to be able to make arrangements to do so" and again on August 8, 2005 that the Respondent was "unable to satisfy the judgment, at present, owing to her financial circumstances."

[60] Loren and Company complained to the Law Society on August 16, 2005, that they had not received any contact from the Respondent about the Default Order or their request for payment.

[61] Ms. Ross of Loren and Company advised the Law Society on October 31, 2005, and in this hearing that the Respondent had contacted her by telephone that day and advised that she would be providing them with post-dated cheques to satisfy the judgment.

[62] On December 2, 2005, Ms. Ross advised that they had not received any cheques from the Respondent. On January 6, 2006, Loren and Company received five post-dated cheques in the amount of

\$200 each from the Respondent. The first three cheques cleared but the cheques dated May 15 and June 15, 2006 were returned for insufficient funds.

[63] Loren and Company have not had any further contact from the Respondent. The mail they sent to her office address was returned in July 2006, and they did not have a forwarding address.

[64] The letters sent from the Law Society to the Respondent in February and March 2006 requested that she provide a proposal for satisfying the judgment, as it was clear that the five post-dated cheques would not completely pay the debt.

Count 13

[65] Ms. Ding is a C.G.A. who prepared the Respondent's Form 47 Accountant's Report for the years 2003 and 2004. She was paid for the 2003 report, but had trouble collecting for the 2004 report. She sent an invoice to the Respondent for \$802.50 on May 6, 2005.

[66] On September 26, 2005, the Respondent provided two cheques to pay the invoice. The second cheque for \$400 dated October 14, 2005, was returned due to insufficient funds. The Respondent sent a letter to Ms. Ding on December 13, 2005, with an enclosed cheque for \$420 dated December 28, 2005.

[67] Ms. Ding asked the Respondent in an e-mail on December 29, 2005, if she could deposit the cheque. The Respondent replied by e-mail asking her to wait two weeks. On January 17, 2006, Ms. Ding advised the Respondent by e-mail that she was going to deposit the cheque. The Respondent did not respond to the e-mail and Ms. Ding deposited the cheque. It was returned due to insufficient funds.

[68] Ms. Ding sent a message to the Respondent via e-mail on January 30, 2006, advising her that the cheque bounced and e-mailed her again on February 2, 2006, demanding a certified cheque. When she did not receive payment, she reported the Respondent to the Law Society.

[69] After a number of requests from Law Society staff for a response went unanswered, the Respondent finally responded on March 20, 2006, with a letter sent via e-mail, advising that " ... I acknowledge that I owe Ms. Ding \$440 for the balance payable for her services, however, I am still unable to satisfy this bill right now due to my very restricted financial situation. I expect to be able to satisfy this amount when I have obtained employment."

[70] In 2005, the Respondent was still practising under supervision, but in January 2006 she changed to non-practising status.

EVIDENTIARY BURDEN AND STANDARD OF PROOF

[71] During the one and one-half days of hearing the Law Society led evidence from a number of witnesses. As noted, the Respondent did not appear and was not represented by counsel at the hearing.

[72] The Law Society bears the burden of proving the allegations contained in the amended Schedule to citation. The standard required is higher than the balance of probabilities but lower than the criminal law standard (see *Ewachniuk v. Law Society of British Columbia*, [2003] B.C.J. No. 823 (C.A.)).

[73] In *Jory v. College of Physicians and Surgeons of British Columbia*, [1985] B.C.J. No. 320, Madam Justice McLachlin (as she then was) stated:

The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities. The

authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence . . . The evidence must be sufficiently cogent to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community . . .

[74] The allegations against the Respondent are serious. As a result, the standard of proof must be closer to the criminal law standard but does not have to be beyond a reasonable doubt. That is, a finding of professional misconduct can be made, even if there is a reasonable doubt. As set out in *Law Society of BC v. Martin*, 2005 LSBC 16 at par 137(b);

The standard of proof is higher than the balance of probabilities but less than reasonable doubt. The standard is a civil standard but rises in direct proportion to the gravity of the allegation and the seriousness of the consequences.

[75] As a result of the Respondent choosing not to appear at the hearing, the only explanations before the Panel were those provided either directly by the Respondent, whether in writing or in statements made to Law Society staff, or through her counsel. Notwithstanding the lack of an opportunity for the Respondent to be cross-examined, the Panel has scrutinized her explanations carefully and considered what weight to give them, particularly where they are not supported by or are contradicted by the other evidence that is available.

[76] The test for a finding of professional misconduct was considered in *Martin* (supra) where the Panel provided a thorough analysis of the issue of what constitutes professional misconduct and concluded as follows:

[150] " Professional Misconduct" is not defined in the *Legal Profession Act*. The leading case concerning the test to be met to support such a finding is found in *Re: Hops*, a decision of the Benchers on review, where it was held:

" From the legislated development, the definitions set out above from Oxford and the decisions of the Benchers, it can only be concluded that the Benchers have recently determined it to be appropriate to broaden the scope of professional misconduct in order to more closely regulate the activities of its members. These developments also allow less draconian punishments from those which were available when the standard of disgraceful or dishonourable conduct was required for a finding of professional misconduct. If the standard for professional misconduct still requires " disgraceful" or " dishonourable" conduct, the Benchers have lowered the level of impropriety to attract the descriptions."

And later:

" It is clear that conduct matching these descriptive adjectives is no longer required for a finding of misconduct" .

[170] The Panel finds that the real issue is not whether the behaviour complained of can be described as a single act, or a series of acts, and whether it is labelled as gross negligence or not.

[171] The test that this Panel finds is appropriate is whether the facts as made out disclose a

marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[77] We accept this test.

Verdict

[78] The Schedule to the citation alleges in counts 1 through 6 that the Respondent misappropriated trust funds from her clients.

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

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

[80] In *Law Society of BC v. Andres-Auger*, Hearing Report: Findings of Fact dated January 14, 1994, misappropriation was explained as follows:

Webster's definition of " appropriate" includes " often without permission or legal right" indicating that " misappropriation" must involve something more than mere " lack of right" . A finding of " misappropriation" is a factual finding only and it is only after submissions are received on verdict that it can be determined that any found " misappropriation" leads or does not lead to a finding of " professional misconduct" , " conduct unbecoming a Member" or a finding of " incompetence" . A factual finding of misappropriation will not always lead to all or any such verdicts in every case.

" Misappropriation" or " wrongfully converting money" at least requires proof of the appropriation being wrongful, and means more than merely receiving money to which you are not entitled. There must be some mental element amounting to wrong doing. This need not be the equivalent of criminal conduct such as dishonesty or fraud. Incompetence or some degree of carelessness may be all that is necessary. It will in every case depend upon the circumstances.

[81] In assessing Counts 1 to 6 we take into account the overall series of transactions on the various files and examine each count in light of the pattern shown by them.

[82] On Count 1 we find that the Respondent rendered an account for \$315.86 to S.W.S., \$200 of which was paid from trust. She requested payment of the balance of \$115.86 plus a further retainer of \$200. Her action in taking the cheque for \$315.86 when received, depositing it to trust and then writing a trust cheque for the full amount to her personal account (when her personal account was in a slightly negative balance (\$0.21) on March 1, 2004) and then using these funds, reducing the personal account to \$8.71 leads us to the conclusion that she used trust funds for her personal purposes. The writing of the cheque for \$315.86 reduced the trust account to a zero balance. On March 22, 2004, she wrote a cheque from trust to the client refunding the \$200 retainer and on March 24, 2004, deposited \$200 to trust to cover that cheque.

[83] The only explanation given is in a letter dated June 15, 2006 from her counsel that she assumed the payment of \$315.86 was in payment of the account, not realizing that she had already been paid \$200 of it.

[84] Given the Respondent prepared the account, paid it in part from trust, requested payment of the balance, requested a further retainer and required funds in her personal account, we find that her explanation is not credible, and we further find that the taking of the funds was deliberate.

[85] On Count 2 we find that the settlement funds of \$5000 for client B.C. were placed in trust and the Respondent rendered an account for \$3,212.83 for fees and disbursements. The balance should have been paid to the client's trustee in bankruptcy. Instead, the whole \$5,000 was transferred to the Respondent's general account.

[86] The Respondent subsequently attempted to pay the trustee in bankruptcy with three different cheques, each of which was drawn on her general account, and each of which was dishonoured due to lack of funds in the general account. A review of the general account statements clearly shows the Respondent did not retain sufficient funds in her general account to cover what was owed to the trustee in bankruptcy and which should have been paid from trust.

[87] We are satisfied that the Respondent used those trust funds for personal purposes. In light of the pattern of use of her trust account, we do not accept that this was simply a mistake on her part.

[88] With respect to Count 3, we find that client E.N provided a retainer to the Respondent in the sum of \$500 in March 2003. The money remained in trust until February 20, 2004, when the Respondent transferred \$300 into her general account. The Respondent did no work for the client and the client at some point in February or March 2004, asked for the return of the funds. The Respondent wrote a general cheque to the client on March 12, 2004, and provided it to the client that day.

[89] We find that the Respondent removed the funds from trust without authority and had the use of those funds for several weeks. The general account during that time was in a constant state of overdraft and the Respondent did not always have the funds available to provide them to the client, had the client requested them.

[90] The Respondent acknowledges that the funds were removed from trust without authority but states that it was a mistake. However, as the Respondent had done no work for the client and given her pattern of the use of trust funds generally, we find that the Respondent deliberately used the trust funds to which she was not entitled for her own purposes.

[91] With respect to Count 4 the Respondent requested a retainer of \$2,000 from her client C.K. On February 28, 2003 she received a retainer of \$1,216.82, which was deposited to trust. On March 3, 2003, the Respondent issued an account for \$745.19 for fees and disbursements and on the same day issued a trust cheque for that amount and deposited it to her general account. The account was dated March 4, 2003 and shows \$471.63 remaining in trust, which was not true given that on March 4, 2003 the Respondent wrote another trust cheque in the sum of \$471.63, being the balance of the funds in trust, and deposited the funds into her general account. No statement of account was issued for the remainder of those funds.

[92] On March 11, 2003 the Respondent received a further \$783.18 retainer from the client. On March 14, 2003 she issued a statement of account for \$571.92, issued a trust cheque and deposited the funds to her general account. On March 19, 2003, without issuing a statement of account, she removed the balance of funds in trust (\$211.26) by a trust cheque and deposited the funds to her general account.

[93] A review of the general account statements for March, 2003 reveal that it was in overdraft position at the time of the two above transactions (March 4 and 19, 2003) and that the funds were used by the Respondent after they were transferred into the account.

[94] The Respondent's counsel advised that " Ms. Ali cannot locate the accounts in support of those transactions. ... She simply cannot say how it was that she came to remove the funds from trust."

[95] The bill of March 14, 2003 clearly stated that \$471.63 remained in trust, yet on March 4, 2003 the Respondent had transferred those funds to her general account.

[96] We find that the pattern of taking the funds on the two occasions without rendering an account, given the short time period involved and the lack of funds in the general account, along with the lack of an explanation, indicate the deliberate misappropriation of those funds.

[97] Count 5 relates to a trust float maintained by the Respondent within her pooled trust account. This personal float was overdrawn on five occasions between January 2002 and February 2003. This occurred as a result of the Respondent issuing a trust cheque payable to herself on November 1, 2002, causing a trust shortage, which remained until March 31, 2003. The Respondent provided no substantive response to the issue raised concerning the personal float account.

[98] We find that the Respondent misappropriated trust funds from the pooled trust account for her personal purposes.

[99] With respect to Count 6 we find that the client R.R. provided a retainer of \$1,000. The Respondent issued a receipt marked " retainer" but deposited the cheque to her general account. She then issued three statements of account totalling \$1,064.88 and she issued four trust cheques totalling \$1,000 and deposited those funds into her general account, thereby creating a trust shortage of \$1,000.

[100] The Respondent's explanation was that, since she did not prepare ledgers and keep them up to date, she did not realize that the funds were in her general account, not her trust account. Of note is that at the time the \$1,000 was placed in the general account it was overdrawn by \$1,126.05 and a number of transactions occurred that day which depleted the funds.

[101] This Panel finds that the Respondent misappropriated trust funds for her personal purposes.

[102] With respect to Counts 7 to 13, based on the findings of fact set out earlier we are satisfied that the rule breaches set out in each Count are proven.

[103] The Respondent, through her counsel's letter of June 15, 2005, stated that " her practice was so small that she thought it was possible to keep the records straight even in her memory," and in her letter of August 8, 2005 her counsel stated that " Ms. Ali felt that her financial dealings with clients were simple enough that she could keep track of them by memory, and without written records. She recognizes that she ought to have maintained a ledger card. This process has brought home to Ms. Ali the need to pay scrupulous attention to accounting matters. It has also demonstrated to her that her record keeping system was entirely inadequate, a fact that she did not appreciate at the relevant time."

Analysis

[104] A fundamental principle that governs the conduct of lawyers is that trust funds are sacrosanct. The Respondent has breached that principle repeatedly and over a significant period of time. The fact that the amounts involved were relatively small is irrelevant.

[105] The Respondent's conduct, whether deliberate or a matter of incompetence or negligence, is so gross as to prove a sufficient mental element of wrongdoing. The Respondent has shown a remarkable disregard and lack of attention to her obligations.

[106] The Panel in *Andres-Auger* (supra) stated:

The taking of a client's money by a lawyer and placing it into that lawyer's own account is always and must be a conscious, considered and memorable event which that lawyer puts her mind to carefully before doing. This Member's overall conduct revealed, as it is, in a large percentage of her few active files at that time, demonstrates an unacceptable degree of inattention, even wilful neglect of her trust obligations.

[107] The Respondent had a very small practice. There is no reasonable explanation for her failures to properly deal with her trust account and trust funds. We find that the Respondent has, by the conduct described in each of Counts 1 to 6, misappropriated client trust funds and professionally misconduct herself. We also find that her failure to pay practice debts, as set out in Counts 7 and 13 and her personal use of funds held for payment of GST, PST and employee income tax, as set out in Counts 8 and 9 exhibited a disregard for her professional obligations, amounting, in all the circumstances, to professional misconduct. We find as well, that the pattern of conduct reflected in the failure of the Respondent to keep adequate trust records as described in Count 10, her failure to respond to the Law Society as described in Count 11 and her conduct relating to a monetary judgment described in Count 12 was professional misconduct, as well as being a breach of the Law Society Rules. Her failure to keep adequate records led to other trust shortages and created a situation in which it was not possible for the Law Society to quickly audit her books and records to determine the cause of each trust shortage. A complete reconstruction of the Respondent's trust records was necessary to determine what had occurred.

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Corrigendum issued: June 14, 2007

Decision issued: April 11, 2007

Citation issued: January 9, 2006

The Law Society of British Columbia

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

and a hearing concerning

SABRINA ALI

Respondent

CORRIGENDUM

Panel: David M. Renwick, Q.C., Chair, Brian J. Wallace, Q.C., Robert D. Punnett

Counsel for the Law Society: Brian McKinley

No-one appearing on behalf of the Respondent

[1] The Panel makes the following correction to the report on Facts and Verdict, issued April 11, 2007, by revising paragraph [107] as follows:

[107] The Respondent had a very small practice. There is no reasonable explanation for her failures to properly deal with her trust account and trust funds. We find that the Respondent has, by the conduct described in each of Counts 1 to 6, misappropriated client trust funds and professionally misconduct herself. We also find that her failure to pay practice debts, as set out in Counts 7 and 13 and her personal use of funds held for payment of GST, PST and employee income tax, as set out in Counts 8 and 9 exhibited a disregard for her professional obligations, amounting, in all the circumstances, to professional misconduct. We find as well, that the pattern of conduct reflected in the failure of the Respondent to keep adequate trust records as described in Count 10, her failure to respond to the Law Society as described in Count 11 and her conduct relating to a monetary judgment described in Count 12 was professional misconduct, as well as being a breach of the Law Society Rules. Her failure to keep adequate records led to other trust shortages and created a situation in which it was not possible for the Law Society to quickly audit her books and records to determine the cause of each trust shortage. A complete reconstruction of the Respondent's trust records was necessary to determine what had occurred.