2013 LSBC 22
Report issued: August 26, 2013
Citation issued: December 18, 2012

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

RUDI GELLERT

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: July 18, 2013
Panel: David Renwick, QC, Chair, Dennis Day, Public Representative, David Layton, Lawyer

Counsel for the Law Society: Carolyn Gulabsingh
No on appearing for the Respondent

Background

[1] The citation in this matter was authorized by the Discipline Committee on December 6, 2012 and issued on December 18, 2012. It was served on the Respondent in accordance with Law Society Rule 4-15 on January 2, 2013. An amended citation was issued on May 2, 2013. As required by Rule 4-16.1, the Law Society gave the Respondent written notice of the amendment.

[2] The amended citation contains nine allegations.

[3] Allegations one to four assert the misappropriation of client trust funds. In each instance the misappropriation is said to constitute professional misconduct or a contravention of Law Society Rule 3-56(1), which restricts the withdrawal of trust funds to certain limited circumstances, and Rule 3-57, which governs the withdrawal of trust funds to pay fees.

[4] Allegations five to seven assert various accounting improprieties that are said to constitute professional misconduct or breaches of:

(a) Rule 3-56(2)(b), which prohibits the issuance of trust cheques to “cash” (Allegation 5);

(b) Rule 3-60(a)(ii), which requires a lawyer to identify the source of funds deposited to trust (Allegation 6); and

(c) Rule 3-60(b), which requires a lawyer to maintain separate client trust ledgers (Allegation 7).

[5] Allegation eight asserts that the Respondent breached Chapter 2, Rule 1 of the *Professional Conduct Handbook* (“*Handbook*”) and committed professional misconduct by making discourteous and threatening comments to a Law Society auditor.

[6] Allegation nine asserts that the Respondent breached Chapter 13, Rule 3 of the Handbook and committed professional misconduct by failing to respond to communications from the Law Society.

DECISION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

[7] The Respondent did not appear at the hearing of this matter, nor did he send anyone to appear on his behalf.

[8] Section 42(2) of the *Legal Profession Act* provides that, where a respondent fails to attend a hearing on a citation and the panel is satisfied that the respondent has been served with notice of the hearing, the panel may proceed with the hearing in the respondent's absence and make any order that could have been made were the respondent present.

[9] Section 42(2) does not require that a panel proceed in the absence of the respondent where he or she has not appeared despite having been served with notice of the hearing. Rather, the panel is afforded a discretion in deciding whether to do so.

[10] In applying s. 42(2) to the Respondent's case we considered the following factors:

> (a) The citation and amended citation provided to the Respondent on January 2 and May 2, 2013, respectively, both state: "**If you fail to appear at the hearing, the Hearing Panel may proceed with the hearing in your absence and make any order that it could have made had you been present**" (original emphasis).

(b) The hearing was originally set for July 15 to 19, 2013. Written notice of these dates was personally served on the Respondent on March 2, 2013.

(c) The hearing was subsequently shortened to a single day by reason of the Respondent's June 5, 2013 email to the Law Society in which he agreed to proceed on the basis of facts and documents set out in a Notice to Admit prepared by the Law Society. The new date was set for July 17, 2013. The Respondent confirmed that this date was satisfactory in an email sent to the Law Society on June 7, 2013.

(d) The hearing date was later changed to July 18, 2013, to accommodate the schedule of one of the Panel members. The Respondent confirmed that this date was satisfactory in an email sent to the Law Society on June 25, 2013.

(e) The Respondent has not practised law since November 2, 2010, and ceased being a member of the Law Society on January 1, 2011.

(f) In a series of emails exchanged June 5 to 7, 2013 the Respondent asked counsel for the Law Society whether a hearing was really necessary given his admissions and his intention not to practise law in the future. The strong tenor of these emails is that the Respondent did not intend to dispute any issues relating to the facts and determination phase of the proceeding.

(g) Counsel for the Law Society made several attempts to contact the Respondent subsequent to June 7, 2013 but received no response to her emails.

(h) Shortly after convening at 9:30 a.m. and learning that the Respondent had neither appeared nor left any message with counsel for the Law Society, we adjourned for ten minutes in case he was simply running late.

[11] After the adjournment, we concluded that the Respondent had been served with notice of the hearing and had chosen not to attend the hearing. The precondition for proceeding in the Respondent's absence as set out in s. 42(2) was thus met. The question became whether we would exercise our discretion in this regard.

[12] In *Law Society of BC v. Power*, 2009 LSBC 23, the respondent was issued a citation alleging that he had made a number of knowingly false statements to the Law Society. In the months leading up to the hearing, he wrote to the Law Society indicating that he was resigning as a member effective immediately. He also indicated that he would not be contesting the allegations and asked that the Law Society prepare an agreed statement of facts. An agreed statement of facts was prepared and sent to the respondent, but he provided no response and did not appear at the hearing. The panel decided to proceed in his absence.

[13] The facts in *Power* are very similar to those in our case. The Respondent received notice of the allegations against him and the date of the hearing. Indeed, the hearing date was set with his approval. The emails from the Respondent to the Law Society sent in the month or so prior to the hearing indicate that he admitted the truth of the facts and the authenticity of the documents contained in the Law Society's Notice to Admit. This correspondence also strongly suggests that he did not plan to dispute any issues at the facts and determination stage of the proceedings, and that he had little or no intention of resuming the practice of law in the future.

[14] Given these circumstances, we concluded that exercising our discretion under s. 42(2) would cause the Respondent no unfairness, and therefore proceeded with the hearing in his absence.

THE LAW SOCIETY'S REQUEST TO ADMIT FACTS

[15] On May 9, 2013, the Law Society delivered a 21-page document plus numerous tabbed attachments to the Respondent, pursuant to Law Society Rule 4-20.1, asking that he admit, for the purposes of the hearing only, the truth of the facts set out therein and the authenticity of the documents attached.

[16] As required by Rule 4-20.1, the Law Society's request to admit was made more than 45 days before the hearing of the citation, was set out in writing clearly marked "Notice to Admit," and was served on the Respondent in accordance with Rule 10-1.

[17] Rule 4-20.1(7) provides that, if a party does not respond to a Notice to Admit, the party is deemed, for the purposes of the hearing only, to admit the truth of the facts described in the request or the authenticity of the documents attached to the request.

[18] However, by email sent to the Law Society on June 5, 2013, the Respondent acknowledged receipt of the Notice to Admit and stated that he was "prepared to admit, for the purposes of the [sic] resolving the citation issued December 18, 2012 as subsequently amended, to all matters and the authenticity of the documents."

[19] Given the Respondent's June 5, 2013 email, we conclude that the parties have agreed to the truth of the facts set out in the Notice to Admit and the authenticity of the documents attached. Had the email not been sent, we would have come to the same conclusion based on the application of Rule 4-20.1(7).

[20] Having reviewed the Notice to Admit and attached documents, we accept as proven the facts recounted in the Notice and the authenticity of the documents.

FACTUAL FINDINGS

[21] The Respondent was admitted as a member of the Law Society on May 19, 1995.

[22] From May 2006 until he ceased practising law on November 2, 2010, the Respondent was employed by CGM lawyers (the "Firm"). He practised in the Firm's Surrey office, doing primarily residential real estate conveyances.

[23] On October 25, 2010, two Law Society auditors attended at the Firm's Surrey office to conduct a routine compliance audit. The compliance audit covered the period from September 1, 2009 to October 25, 2010.

[24] During the period covered by the compliance audit, the Respondent managed the daily affairs of the Surrey office, had administrator's access to the Firm's electronic accounting system and had signing authority on the Firm's trust accounts.

Facts Pertaining to Allegation 1 – Misappropriation of Client Trust Funds

[25] The Respondent's wife is the sole director and officer of A Inc. The Firm charged its clients for support services provided by A Inc. such as photocopying, courier, banking services and agency services.

[26] During the compliance audit, one of the auditors requested client files from the Respondent in which the firm issued trust cheques to A Inc. subsequent to a stale-dated trust cheque to the client being voided.

[27] On October 29, 2010, the Respondent admitted to this auditor that he had voided the trust cheques that had been initially issued to the clients, and had caused cheques to be issued to A Inc. in their place. He told the auditor that he took full responsibility for issuing the trust cheques to A Inc. He said that neither his wife nor a named law firm partner were aware of the transactions.

[28] The conduct in question involved ten transactions that occurred between May 2009 and May 2010. In each instance, the Respondent voided a stale-dated trust cheque originally issued to a client, then caused a trust cheque to be issued to A Inc. in the same amount. The Respondent knew that A Inc. was not entitled to the funds.

[29] The amounts involved ranged from $62.50 to $5,200, and totalled $13,714.60.

[30] With respect to each of these withdrawals, as well as the withdrawals described below regarding Allegations 2 to 4:

> (a) the effect was to reduce the trust fund balance for the client to zero; and
>
> (b) the withdrawal was made by a cheque signed by another lawyer at the Firm, but the Respondent was the person responsible for the withdrawal and the other lawyer had no knowledge of the Respondent's conduct until after the compliance audit took place.

[31] After the Respondent's October 29, 2010 admission to the auditor, the compliance audit was terminated and a referral was made to the Law Society's Professional Conduct Department.

[32] On November 2, 2010 the Respondent provided an undertaking to the Law Society not to practise law.

[33] On November 4, 2010, the Chair of the Discipline Committee ordered an investigation under Rule 4-43 of the Firm's books, records and accounts. This forensic audit covered the period from September 1, 2009 to November 9, 2010, and resulted in the preparation of an interim report.

Facts Pertaining to Allegation 2 – Misappropriation of Client Trust Funds

[34] Between October 2009 and September 2010, the Respondent voided 11 stale-dated trust cheques payable to clients and caused replacement cheques to be issued payable to the Firm in the same amounts, when he knew that the Firm was not entitled to these amounts.

[35] The amounts involved ranged from $9.97 to $96.70, and totalled $482.81.

Facts Pertaining to Allegation 3 – Misappropriation of Client Trust Funds

[36] In September 2010, the Respondent voided six stale-dated trust cheques payable to clients, and caused the funds to be paid from trust to the Firm by trust transfer and cheque. In each instance, the Respondent knew that the Firm was not entitled to the funds.

[37] The amounts involved ranged from $5 to $150, and totalled $279.15.

Facts Pertaining to Allegation 4 – Misappropriation of Client Trust Funds

[38] In March and April 2008 and August 2010, the Respondent caused trust funds held in the Firm's pooled trust account to be transferred from four client ledgers into a ledger in his name, and then on August 23, 2010 the Respondent transferred the funds to the Firm, when the Firm was not entitled to those funds.

[39] The amounts involved ranged from $0.01 to $10, and totalled $10.13.

Facts Pertaining to Allegation 5 – Issuing Trust Cheques Payable to "Cash"

[40] The Firm acted for a client IS regarding the distribution of her common-law partner's estate.

[41] On June 1, 2010, the Firm issued a cheque to IS for $109,518.15, which was the balance held in trust for the estate after payment of the Firm's fees and disbursements.

[42] On August 6, 2010, the Respondent voided the trust cheque dated June 1, 2010.

[43] Between August 6 and September 30, 2010, the Respondent issued seven cheques from IS's trust ledger. Six of the cheques were made out to "cash." The seventh cheque was made out to the Firm, but the Respondent altered the cheque by hand to make it payable to "cash" as well.

[44] Six of the cheques were negotiated at the bank by the Respondent's wife. The seventh was negotiated at the bank by the Respondent. IS has confirmed to the Law Society that she received all of the funds from these cheques.

Facts Pertaining to Allegation 6 – Failure to Identify Source of Deposits

[45] In 2009 and 2010 the Respondent failed to identify the source of funds deposited to trust in respect of 21 bank drafts totaling $760,000 recorded in the ledger for a client KB. The amounts of the bank drafts ranged from $15,000 to $150,000. The drafts were from the TD Bank, Royal Bank, Khalsa Credit Union, Vancouver City Savings Credit Union and Bestway Foreign Exchange Ltd.

[46] On February 2, 2010 the Respondent failed to identify the source of funds deposited to trust in respect of $400,000 recorded in a ledger called "Rudi Gellert Miscellaneous – 15000-010."

Facts Pertaining to Allegation 7 – Failure to Maintain Separate Client Ledgers

[47] The Respondent maintained a "Rudi Gellert Miscellaneous" file and trust ledger for each year, in which he processed "one off" client matters such as notarizations and statutory declarations.

[48] During 2009 and 2010, the Respondent recorded transactions for eight clients in the "Rudi Gellert Miscellaneous" trust ledger instead of recording the transactions in separate client trust ledgers.

Facts Pertaining to Allegation 8 – Discourteous or Threatening Comments to Law Society Auditor

[49] As noted in paragraph [23] above, on October 25, 2010 two auditors attended at the Firm's Surrey office to conduct a routine compliance audit.

[50] Shortly after the audit started, the Respondent attended the room where the auditors were working. He told one of the auditors that he was not happy with her, and claimed that the last time she had been at his office she spent two and a half years conducting the audit and the audit cost him $80,000. The Respondent then left the room.

[51] About ten minutes later the Respondent returned and spoke with the other auditor outside the door to the room. He told this auditor that if he had a gun he would shoot someone. Referring to the first auditor, with respect to whom he had earlier expressed displeasure, he said "she is not going to look in any of my files" and "I will not have her in my office."

[52] The first auditor left the premises shortly after the Respondent made these comments, and was replaced by a new auditor.

Facts Pertaining to Allegation 9 – Failure to Respond to Law Society

[53] During the compliance audit, one of the auditors asked the Respondent to provide an explanation for the trust cheques payable to "cash" involving the client IS (i.e. the trust cheques that are the subject of Allegation 5). The Respondent refused to provide a full explanation, citing solicitor-client privilege.

[54] On October 12, 2011, the Law Society wrote to the Respondent and asked for information regarding a number of issues identified as possible professional misconduct or breaches of the Law Society Rules. Among other things, the Respondent was asked to provide information in response to a number of specific questions regarding:

(a) the trust cheques issued to A Inc. (see Allegation 1);

(b) the cheques issued to "cash" (see Allegation 5);

(c) the bank drafts recorded in the client account held for KB (see Allegation 6);

(d) the February 2, 2010 receipt of $400,000 (see Allegation 6);

(e) the recording of client trust transactions in "Rudi Gellert Miscellaneous" files (see Allegation 7); and

(f) the comments regarding a gun made to one of the auditors (see Allegation 8).

[55] The Respondent did not respond to the Law Society's October 12, 2011 letter.

[56] On November 8, 2011, the Law Society wrote to the Respondent and asked for his response to the October 12, 2011 letter.

[57] The Respondent did not respond to the Law Society's November 8, 2011 letter.

[58] On July 17, 2012, the Law Society wrote to the Respondent and provided him with a copy of the interim forensic audit report referred to in paragraph [33] above.

[59] On October 11, 2012, the Law Society wrote to the Respondent indicating that the investigation to date suggested that he had breached a number of specified Law Society requirements and asking for his written response to the questions set out in the Law Society's earlier letter dated October 12, 2011.

[60] The Respondent did not respond to the Law Society's October 11, 2012 letter.

ISSUES

[61] The issues to be decided are whether the Respondent has breached the Law Society Rules and/or committed professional misconduct in relation to the nine allegations set out in the amended citation.

DISCUSSION

[62] Before addressing each of the allegations separately, it is helpful to set out the basic law regarding the onus and standard of proof and the test for determining whether a member's actions constitute professional misconduct.

Onus and Standard of Proof

[63] The Law Society bears the onus of establishing professional misconduct or a breach of the Law Society Rules on a balance of probabilities. This is so even where an adverse finding may have serious consequences for the Respondent, such as disbarment. The Panel's task at the facts and determination stage is thus to determine whether the Law Society has established that it is more likely than not that the alleged misconduct or breach has occurred. The evidence must be scrutinized with care, and must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. See *FH v. McDougall*, [2008] 3 SCR 41, paras. 26-44; *Law Society of BC v. McRoberts*, 2010 LSBC 17, para. 11; *Law Society of BC v. Seifert*, 2009 LSBC 17, paras. 10-13; *Law Society of BC v. Schauble*, 2009 LSBC 11, para. 43.

Test for Determining Whether Member's Actions Amount to Professional Misconduct

[64] Section 38(4) of the *Legal Profession Act* provides that after a hearing the Panel must either dismiss the citation or determine that the Respondent has committed one or more of the following:

> (a) professional misconduct;
>
> (b) conduct unbecoming a lawyer;
>
> (c) a breach of this Act or the rules;
>
> (d) incompetent performance of duties undertaken in the capacity of a lawyer;
>
> (e) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules.

[65] The citation as amended alleges that the Respondent's conduct in respect of the nine allegations amounts to either professional misconduct or a breach of the Law Society Rules.

[66] Though not defined in the *Legal Profession Act*, professional misconduct will be found to have occurred where a lawyer's actions constitute a marked departure from the conduct the Law Society expects of its members (*Law Society of BC v. Martin*, 2005 LSBC 16 ("*Martin*"), para. 171; *Re: Lawyer 12*, 2011 LSBC 35, paras. 8-9, 44-51; *Law Society of BC v. Niemela*, 2013 LSBC 15, para. 14).

[67] Conduct falling within the ambit of the "marked departure" test will display culpability that is grounded in a fundamental degree of fault, but intentional malfeasance is not required – gross culpable neglect of a member's duties as a lawyer also satisfies the test (*Martin*, para. 154; *Law Society of BC v. Singh*, 2013 LSBC 76, paras. 11-12).

[68] A breach of the *Legal Profession Act* or Law Society Rules does not without more constitute professional misconduct. Only those breaches that meet the "marked departure" test will amount to professional misconduct.

[69] In *Law Society of BC v. Lyons*, 2008 LSBC 9 ("*Lyons*"), at para. 35, the panel provided the following guidance for determining whether a breach of the Act or Rules rises to the level of professional misconduct:

> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the Act or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of mala fides, and the harm caused by the respondent's conduct.

See also *Law Society of BC v. Boles*, 2012 LSBC 21, para. 36; *Law Society of BC v. Lester*, 2011 LSBC 28, para. 31; *Law Society of BC v. Van Twest*, 2011 LSBC 9, para. 34; *Law Society of BC v. Liggett*, 2009 LSBC 21, para. 25; *Law Society of BC v. Chan*, 2008 LSBC 30, para. 16.

Misappropriation: Allegations 1 to 4

[70] Each of Allegations 1 to 4 of the amended citation contends that the Respondent misappropriated client trust funds or improperly withdrew them contrary to Law Society Rules 3-56(1) and 3-57, which amounts to professional misconduct or a breach of the Rules.

[71] Misappropriation of a client's trust funds occurs where the lawyer takes those funds for a purpose unauthorized by the client, whether knowingly or through negligence or incompetence so gross as to prove a sufficient element of wrongdoing. As this definition indicates, there must be a mental element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in the criminal law. See *Law Society of BC v. Ali*, 2007 LSBC 18 ("*Ali*"), paras. 79-80, 105; *Law Society of BC v. Harder*, 2005 LSBC 48 ("*Harder*"), para. 56.

[72] In determining whether a lawyer has misappropriated trust funds, it matters not whether the lawyer received any personal benefit from taking the funds. Nor does it matter that the lawyer intended to or did return the funds in short order, that he or she was acting in response to severe personal financial pressures, or that the amount of money taken was relatively small. See *Ali*, para. 104; *Harder*, para. 56.

[73] The definition of misappropriation, and in particular its mental fault element, is driven by a recognition that the proper handling of trust funds is one of the core parts of the lawyer's fiduciary duty to the client. An unauthorized use of trust funds harms or risks harming the client, undermines the client's confidence in counsel, and has a seriously deleterious impact on the legal profession's reputation in the eyes of the public. Because of the sacrosanct nature of trust funds, removing a client's trust funds is and should always be a memorable, conscious and deliberate act that a lawyer carefully considers before carrying out (*Ali*, para. 104, 106).

[74] Allegations 1 to 4 contend not only that the Respondent misappropriated trust funds so as to constitute professional misconduct, but also assert that he breached Law Society Rules 3-56(1) and 3-57. Rule 3-57 pertains to the withdrawal of trust funds to pay fees, covering matters such as the need to issue a bill and the proper procedure to follow where fees are disputed. The Law Society has not indicated how Rule 3-57 might apply on the facts before us, and so we will address it no further in these reasons.

[75] However, Rule 3-56(1) does appear to be relevant, and states:

> 3-56 (1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are

(a) properly required for payment to or on behalf of a client or to satisfy a court order,

(b) the property of the lawyer,

(c) in the account as the result of a mistake,

(d) paid to the lawyer to pay a debt of that client to the lawyer,

(e) transferred between trust accounts,

(f) due to the Foundation under section 62(2)(b) of the Act, or

(g) unclaimed trust funds remitted to the Society under Division 8.

Allegation 1

[76] As reviewed in paragraphs [25] to [30] above, we have found that on ten occasions the Respondent voided stale-dated trust cheques payable to clients and issued new cheques in the same amount to his wife's company, A Inc. He did so without authorization from the clients and knowing that A Inc. was not entitled to the funds. The total amount of money taken was $13,714.60.

[77] We conclude that the Respondent breached Rule 3-56(1) by authorizing the withdrawal of the client trust funds in question where none of the justifications in clauses (a) to (g) was applicable.

[78] We further conclude that the Respondent misappropriated the trust funds of these ten clients by causing the monies to be paid to A Inc. without authorization from the clients and knowing that A Inc. was not entitled to the funds.

[79] Finally, we conclude that these breaches of Rule 3-56(1) and misappropriations constitute professional misconduct. The unauthorized taking of $13,714.60 in trust monies from ten clients for payment to an entity that the lawyer knows has no entitlement to the monies is a marked departure from the conduct the Law Society expects of its members.

Allegation 2

[80] As reviewed in paragraphs 34 to 35 above, we have found that, on eleven occasions between October 2009 and September 2010, the Respondent voided stale-dated trust cheques payable to clients and caused replacement cheques to be issued payable to the Firm in the same amounts, when he knew that the Firm was not entitled to these amounts. The total amount of money taken was $482.81.

[81] For the same reasons given with respect to Allegation 1, we find that the Respondent's conduct breached Rule 3-56(1), constituted a misappropriation of client trust monies, and amounts to professional misconduct.

[82] The fact that the money was paid to the Respondent's Firm rather than his wife's company makes no difference to the analysis – what is pertinent is that the Firm was not entitled to the clients' monies, and the Respondent knew it.

[83] Nor does it matter that the amount in question is substantially less for Allegation 2 ($482.81) than for Allegation 1 ($13,714.60). As already noted, the unauthorized taking of a relatively small amount of trust money can still amount to misappropriation. Given the paramount importance of lawyers maintaining the integrity of client trust funds, the amount taken is not a relevant consideration provided the requirements for misappropriation and professional misconduct are otherwise established.

Allegation 3

[84] As reviewed in paragraphs [36] to [37] above, we have found that in September 2010 the Respondent voided six stale-dated trust cheques payable to the Firm's clients, and caused the funds to be paid from trust to the Firm by trust transfer and cheque. In each instance, the Respondent knew that the Firm was not entitled to the funds. The total amount of money taken was $279.15.

[85] For the same reasons given with respect to Allegation 2, we find that the Respondent's conduct breached Rule 3-56(1), constituted a misappropriation of client trust monies, and amounts to professional misconduct.

Allegation 4

[86] As reviewed in paragraphs [38] to [39] above, we have found that in March and April 2008 and August 2010, the Respondent caused trust funds held in the Firm's pooled trust account to be transferred from four client ledgers into a ledger in his own name, and then on August 23, 2010 the Respondent transferred the funds to the Firm, when the Firm was not entitled to those funds. The total amount of money taken was $10.13.

[87] There are two distinctions between this Allegation and Allegations 2 and 3, which also involved relatively modest amounts of funds. First, the amount of the funds taken in relation to Allegation 4 is particularly small. Second, the facts set out in the paragraphs of the Notice to Admit devoted specifically to Allegation 4, and admitted by the Respondent, state that the Firm was not entitled to the transferred funds, but do not say that the Respondent knew that the Firm was not entitled to the transferred funds. This second distinction is particularly important because it means that the Respondent has not admitted to the knowing unauthorized taking of the funds in question, in contrast to his admissions regarding Allegations 1 to 3.

[88] At the hearing of this matter, counsel for the Law Society expressly stated that she was not seeking to prove professional misconduct with respect to any one allegation by relying on evidence regarding the Respondent's conduct with respect to one or more of the other allegations. That is, she did not apply for a ruling permitting the allegation-to-allegation use of any of the evidence for a similar fact purpose, as was done for example in *Law Society of Upper Canada v. JWCB*, [2003] LSDD No. 42 (QL). As noted in J. Sopinka, S. Lederman, &?A. Bryant, *The Law of Evidence in Canada*, 3rd ed., LexisNexis, at §11.220, the general principles applicable to similar fact evidence in criminal cases apply in civil cases as well, making such evidence presumptively inadmissible absent a successful application by the proffering party.

[89] As no such application was made, we have not engaged in the allegation-to-allegation use of evidence for a similar fact purpose in deciding any of the allegations. More specifically, in determining whether the mental element necessary to prove misappropriation and professional misconduct has been established with respect to Allegation 4, we have not considered the fact that, with respect to Allegations 2 and 3, the Respondent has admitted to knowing that he was causing the unauthorized transfer of funds to the Firm in circumstances arguably very similar to those in Allegation 4, and during overlapping periods of time.

[90] Nonetheless, two of the paragraphs in the Notice to Admit that deal with Allegations 1 to 4 by way of general overview state that the client trust withdrawals for all of the transactions were "improper." The Respondent has thus admitted that the withdrawals referable to Allegation 4 were improper.

[91] It is also clear that the trust account withdrawals listed in Allegation 4 were made in breach of Law Society Rule 3-56(1), for they were authorized by the Respondent even though none of the justifications in clauses (a) to (g) of the Rule was applicable. The number of breaches of Rule 3-56(1) detailed in Allegation

4 is not insubstantial – four in total.

[92] Furthermore, and of particular significance, during the period in question the Respondent was a 15-year call and was responsible for running the Firm's Surrey office. As the Notice to Admit and attached documents reveal, the Firm's practice involved frequent trust transactions for numerous clients. Given the nature of the practice, the Respondent's level of experience, and his administrative responsibilities, we conclude that at the very least the unauthorized transfer of the client trust funds dealt with in Allegation 4 represents a gross culpable neglect of the Respondent's duties as a lawyer, and so satisfies the element of moral fault necessary to prove both misappropriation and professional misconduct.

[93] Our finding in this regard is informed and supported by the sacrosanct nature of client trust funds and the need for lawyers always to treat client trust withdrawals as deliberate, conscious and memorable acts. Where a lawyer in the Respondent's circumstances causes client trust funds to be paid to a person or entity not entitled to those funds, without authorization from the client, the degree of moral fault necessary to establish misappropriation and professional misconduct will usually if not always be established absent any satisfactory explanation from the lawyer.

[94] We draw no adverse inference from the Respondent's failure to provide an explanation for taking the money without authorization. We were not asked to do so by the Law Society, and the propriety of drawing such an inference, which would be precluded in law in a criminal prosecution (*R. v. Turcotte*, [2005] 2 SCR 519, paras. 38-48), appears to be an open question (but see *Law Society of BC v. Lawyer 11*, 2007 LSBC 49, paras. 37-42, rejecting the applicability of the constitutional right to silence in an arguably related context).

[95] Rather, our holding is simply that, based on the evidence before us, the Law Society has met its onus regarding Allegation 4. While we can envision hypothetical scenarios where a lawyer in the Respondent's position might have available to him or her evidence to rebut the Law Society's case, on the evidence available to us, it is more likely than not that none of these hypotheticals apply. To hold otherwise would be to engage in sheer and baseless speculation. We therefore conclude that the trust withdrawals itemized in Allegation 4 constitute both misappropriation of funds and a marked departure from the conduct the Law Society expects of its members.

Other Payments from Trust Contrary to Law Society Rules: Allegations 5 to 7

[96] Allegations 5 to 7 of the amended citation contend that the Respondent breached Law Society Rules that require a lawyer to identify the source of funds deposited to trust (Allegation 6), prohibit the issuance of trust cheques payable to "cash" (Allegation 5), and require a lawyer to maintain separate client trust ledgers (Allegation 7).

Allegation 6 – Failure to Identify Source of Funds Deposited to Trust

[97] As reviewed in paragraphs [45] to [46] above, we have found that, in 2009 and 2010, the Respondent failed to identify the source of funds deposited to trust in respect of: (a) 21 bank drafts totaling $760,000 recorded in the ledger for the client KB; and (b) $400,000 recorded in a client ledger identified as "Rudi Gellert Miscellaneous – 15000-010."

[98] Allegation 6 of the amended citation alleges that the Respondent's conduct constitutes professional misconduct or a breach of Law Society Rule 3-60(a)(ii).

[99] Rule 3-60(a)(ii) states:

A lawyer must maintain at least the following trust account records:

(a) a book of entry or data source showing all trust transactions, including the following: [...]

(ii) the source and form of the funds received;

[100] We find that the Respondent committed a breach of Rule 3-60(a)(ii) by failing to identify the sources of funds with respect to the trust account deposits itemized in Allegation 6.

[101] At the hearing, counsel for the Law Society submitted, and we agree, that the purpose of Rule 3-60(a)(ii) is to ensure accountability to each client for their funds and also to limit the risk of a lawyer being used as a dupe by an unscrupulous client to commit fraudulent or unlawful acts such as mortgage fraud or money laundering.

[102] Applying the factors in *Lyons*, (supra), counsel for the Law Society also submitted that the Respondent's breaches of Rule 3-60(a)(ii) did not rise to the level of professional misconduct because, while there was a significant number of breaches over an extended period of time and involving considerable amounts of money, there is no evidence of any resulting harm or any mala fides on the Respondent's part.

[103] While we are not bound by the Law Society's submissions on this issue, its position is not unreasonable, and we agree with it.

[104] Given the evidence before us and the position of the Law Society on the issue, we conclude that the Respondent's breaches of Rule 3-60(a)(ii) do not constitute a marked departure from the conduct expected of a member by the Law Society and thus do not amount to professional misconduct.

Allegation 5 – Issuance of Trust Cheques Payable to "Cash"

[105] As reviewed in paragraphs [40] to [44] above, we have found that between August 6 and September 30, 2010 the Respondent issued seven cheques from his client IS's trust ledger. Six of the cheques were made out to cash. The seventh was amended by hand to the same effect by the Respondent. The cheques totalled $35,000 and each was negotiated at the bank by the Respondent or his wife.

[106] Allegation 5 of the amended citation alleges that the Respondent's conduct constitutes professional misconduct or a breach of Law Society Rule 3-56(2)(b).

[107] Rule 3-56(2)(b) states:

A lawyer who makes or authorizes the withdrawal of funds from a pooled or separate trust account by cheque must ...

(b) not make the cheque payable to "Cash" or "Bearer,"

[108] By issuing or amending trust cheques so that they would be payable to "cash," the Respondent clearly breached Rule 3-56(2)(b), which expressly prohibits such conduct.

[109] The Law Society submits that, applying the factors in *Lyons*, (supra), the Respondent's breach of Rule 3-56(2)(b) also amounts to professional misconduct.

[110] We have found a single panel decision dealing with a breach of Rule 3-56(2)(b): *Law Society of BC v. Bridal*, 2002 LSBC 22 ("*Bridal*"). *Bridal* is of no real assistance, however, because in that matter the panel made a global finding of professional misconduct based on an assessment of a number of accounting rule breaches and a failure to cooperate with the Law Society's investigation, and the decision reveals little about

the underlying facts.

[111] Of somewhat more relevance is *Law Society of BC v. Uzelac*, 2003 LSBC 35 ("*Uzelac*"). There, the respondent received a multi-million dollar funds transfer in his trust account on behalf of a client. On instructions from the client, the respondent wrote a trust cheque for $71,500 payable to a cheque cashing business called Check Station, cashed the cheque at Check Station, then gave the cash to the client. As it turned out, the initial funds transfer was fraudulent, and the client had duped the respondent, who was now out the money he had obtained from Check Station.

[112] The conduct of the respondent in *Uzelac* was the subject of several citation allegations, one of which was that he had removed funds from his trust account in such a way that the recipient could not be ascertained, and he did not properly record the transaction by which the person or persons received the money withdrawn from trust. In addressing this particular allegation, the panel noted that Rule 3-56(2) did not apply on the facts, yet recognized that the Rule deals with a closely comparable situation, and made the following astute comments regarding its justification:

> [35] ... Rule 3-56(2) provides a lawyer who makes or authorizes the withdrawal of funds from a pooled or separate trust account must withdraw the funds with a cheque marked trust, not make the cheque payable to cash or bearer, and insure that the cheque is signed by a practising lawyer. The effect of those Rules is twofold; one, to create a paper trail that would reduce the opportunities for a lawyer to commit theft, and two, to protect a lawyer from a client who might falsely accuse the lawyer of not delivering the cash.

[113] The panel in *Uzelac* concluded that the respondent's actions were not dishonourable or disgraceful – the test then applicable for determining whether a member had committed professional misconduct – but added that the practice engaged in by the respondent was nonetheless risky and to be discouraged, and may in other circumstances amount to professional misconduct.

[114] Having addressed the two decisions from this jurisdiction that discuss a breach of the rule prohibiting making a cheque out to "cash," it remains to apply the *Lyons* factors to the facts to determine whether the Respondent's violations of this rule constitute professional misconduct.

[115] Beginning with the gravity of the breach, writing a trust cheque to cash can be a serious contravention of the Law Society Rules because the rule in question advances two very important goals: first, minimizing the risk of a lawyer misappropriating client trust funds; and second, guarding against a lawyer being used, whether unwittingly or not, as a conduit for laundering the proceeds of crime or otherwise unlawfully hiding assets.

[116] The seriousness of the breach in the Respondent's case is further supported by the amount of money involved – $38,000.

[117] There were seven breaches of Rule 3-56(2)(b) in total, which occurred over a period of seven weeks. This is a significant number of breaches, and shows that the Respondent's improper conduct was not a "one off" incident. On the other hand, the breaches only occurred with respect to a single client matter.

[118] Moreover, the breaches of Rule 3-56(2)(b) caused no harm to the client IS, who has confirmed to the Law Society that she received all of the funds in question. Nor is there any evidence of harm to anyone else. Counsel for the Law Society has not suggested otherwise.

[119] Finally, there is no evidence that the Respondent possessed mala fides in issuing the trust cheques payable to cash.

[120] Overall, an application of the *Lyons* factors brings us to a similar place as did the application of the

same factors in respect of Allegation 6. This observation is salient because, while the Rules involved in Allegations 5 and 6 are different, the policy concerns underlying each rule are roughly comparable.

[121] It may well be, as submitted by counsel for the Law Society, that a breach of the Rule prohibiting issuing a cheque payable to "cash" is, all things being equal, more serious than a breach of the Rule requiring a lawyer to identify the source of all funds received in trust. For instance, it could be argued that the former Rule plays a greater role in protecting against a lawyer misappropriating funds from a client.

[122] However, we need not decide this point because, even if true, in a number of respects the Respondent's breaches in relation to Allegation 6 are more serious than those relating to Allegation 5. In particular, the conduct referred to in Allegation 6 involved more contraventions of the Rule, much larger sums of money, and the breaches occurred over a longer period of time and were related to two different matters.

[123] These differences are pertinent because, as already noted, the Law Society has submitted that the conduct referred to in Allegation 6 does not constitute professional misconduct, a submission with which we have agreed.

[124] Given our conclusion on Allegation 6, we similarly conclude, with respect to Allegation 5, that the Respondent committed breaches of Rule 3-60(a)(ii), but the breaches do not constitute a marked departure from the conduct expected of a member by the Law Society and so do not amount to professional misconduct.

Allegation 7 – Failure to Maintain Separate Client Trust Ledgers

[125] As reviewed in paragraphs [47] to [48] above, we have found that during 2009 and 2010 the Respondent recorded transactions for eight different clients in a trust ledger named "Rudi Gellert Miscellaneous," instead of recording the transactions in separate client trust ledgers.

[126] Allegation 7 of the amended citation asserts that the Respondent's conduct constitutes professional misconduct or a breach of Law Society Rule 3-60(b).

[127] Rule 3-60(b) states:

> A lawyer must maintain at least the following trust account records: ...
>
> > (b) 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;

[128] We find that, when the Respondent failed to establish a separate trust ledger for each of the eight clients, he committed breaches of Rule 3-60(b).

[129] In accordance with the submissions of counsel for the Law Society at the hearing of this matter, we find that this breach does not constitute professional misconduct.

Conduct During Compliance Audit and Subsequent Investigation: Allegations 8 and 9

[130] Allegations 8 and 9 relate to the Respondent's conduct during the compliance audit and the ensuing Law Society investigation. Specifically, it is alleged that the Respondent made discourteous and threatening comments to a Law Society auditor and failed to respond to communications from the Law Society.

Allegation 8 – Discourteous and Threatening Comments to Law Society Auditor

[131] As reviewed in paragraphs [49] to [52] above, during the compliance audit the Respondent told one of the auditors that he was not happy with her and claimed that an audit she had previously performed had cost him $80,000. Shortly thereafter, he told the other auditor that if he had a gun he would shoot someone and, referring to the first auditor, said “she is not going to look in any of my files,” and “I will not have her in my office.”

[132] The Respondent has admitted that his comments were discourteous and threatening.

[133] Allegation 8 of the amended citation alleges that the Respondent’s comments were discourteous and threatening and contrary to Chapter 2, Rule 1 of the *Handbook*, and constitute professional misconduct.

Chapter 2, Rule 1 of the *Handbook* states:

> Dishonourable conduct
>
> 1. A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

[134] Not every breach of the *Handbook* will constitute professional misconduct. As with breaches of the Law Society Rules, a contravention only amounts to professional misconduct where it constitutes a marked departure from the conduct expected of lawyers by the Law Society.

[135] Previous panel decisions have found abusive and discourteous language directed by a member at a non-litigant to constitute professional misconduct, for instance a probation officer in *Law Society of BC v. MacAdam*, [1997] LSDD No. 55.

[136] In the more recent case of *Law Society of BC v. Lawyer 13*, 2011 LSBC 30, at para. 24, the panel observed that decisions in which a lawyer’s communications have been held to constitute professional misconduct tend to involve comments that are “foul and abusive,” “intemperate and contemptuous,” or “insulting and degrading.” The panel went on to observe, in the same paragraph, that:

> In each case the lawyer’s use of the impugned language was entirely gratuitous, serving no relevant purpose, and in each case, the manifest intention and purpose of the lawyer in using those words was to abuse, show contempt, insult and degrade.

[137] As noted in *Law Society of BC v. Lanning*, 2008 LSBC 31, at para. 66, the determination as to whether a lawyer’s communications with another person constitute professional misconduct must be made objectively. This does not mean that the views of the lawyer will be ignored, nor for that matter will be the views of the recipient of the lawyer’s communications. It simply means that the assessment as to whether the communications amount to a marked departure from the conduct expected of members by the Law Society is made from the perspective of an informed, reasonable and independent person who is aware of all the relevant circumstances.

[138] Turning to the facts before us, the comments made to the second auditor by the Respondent on the occasion where he said that if he had a gun he would shoot someone, were not only threatening, but frightening as well. They were made to and about auditors attending the Respondent’s office for the wholly legitimate purpose of carrying out an important Law Society function. The comments represented an attempt by the Respondent to obstruct that function, or at least one of the individuals tasked with carrying it out. Indeed, the auditor who was the focus of the Respondent’s threat left the Firm’s office shortly thereafter – not surprisingly given the nature of the comments – and had to be replaced by another auditor.

[139] We acknowledge that audits, even routine compliance audits, can sometimes be an intimidating and nerve-wracking experience for lawyers. But this is no cause for making threatening comments of the sort uttered by the Respondent in this case. Lawyers have an obligation to cooperate with compliance audits, and should do so in a professional and courteous manner. The Respondent's conduct in issuing a threat, and pronouncing that one of the auditors would not be permitted to stay in his office or to look at the Firm's files, fell far short of this standard.

[140] We therefore conclude that the Respondent's comments breached Chapter 2, Rule 1 of the *Handbook* and departed markedly from the conduct expected by the Law Society of its members. As a result, the Respondent committed professional misconduct.

Allegation 9 – Failure to Respond to Communications from the Law Society

[141] As reviewed in paragraphs [53] to [60] above, we have found that the Respondent refused to provide a full response to questions asked of him by one of the compliance auditors regarding the cheques payable to "cash" in the IS matter, and failed to respond to three letters from the Law Society asking for information regarding a number of issues identified as possible or likely professional misconduct or Law Society Rules breaches.

[142] Allegation 9 of the amended citation alleges that the Respondent failed to respond to some or all of the communications from the Law Society during the compliance audit and Law Society's investigation arising out of the audit, which was contrary to Chapter 13, Rule 3 of the *Handbook* and constituted professional misconduct.

[143] Chapter 13, Rule 3 of the Handbook states:

> A lawyer must
>
> (a) reply promptly to any communication from the Law Society;
>
> (b) provide documents as required to the Law Society;
>
> (c) not improperly obstruct or delay Law Society investigations, audits and inquiries;
>
> (d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;
>
> (e) comply with orders made under the Legal Profession Act or Law Society Rules; and
>
> (f) otherwise comply with the Law Society's regulation of the lawyer's practice.

[144] Parenthetically, we note that, though not mentioned in Allegation 9 of the amended citation, Law Society Rule 3-5(6) obliges lawyers to cooperate fully in an investigation by the Law Society.

[145] A breach of the Chapter 13, Rule 3 of the *Handbook* is generally a serious matter. This is so because compliance with the duties set out therein is an important and necessary part of an effective system of professional governance. If lawyers were free to ignore these duties, including the duty to reply promptly to a communication from the Law Society, the governing body's investigations would be unduly hampered, and in some cases completely stymied, which would in turn cause serious harm to the public interest in regulating the profession, the integrity of the bar and the administration of justice. See *Law Society of BC v. Dobbin*, 1999 LSBC 27 ("*Dobbin*"), paras. 20-25; *Law Society of BC v. Marcotte*, 2012 LSBC 18 ("*Marcotte*"), paras. 45, 48; *Law Society of BC v. Buchan*, 2013 LSBC 8 ("*Buchan*"), para. 10.

[146] It is for this reason that in *Dobbin*, ibid., at para. 25, a majority on Bencher Review held that an

unexplained and persistent failure to respond to Law Society communications is prima facie evidence of professional misconduct, shifting the evidentiary burden on the respondent to excuse his or her failure to respond. Recent cases adopting the same view include *Buchan*, para. 10; *Marcotte*, paras. 43-44; *Law Society of BC v. Niemela*, 2012 LSBC 9, para. 10; *Law Society of BC v. Malcolm*, 2012 LSBC 4, paras. 33.

[147] The majority in *Dobbin* further suggested, at para. 28, that one letter and a reminder from the Law Society should be sufficient to obtain a response in the absence of an explanation from the member. If the member requires additional time to respond, the onus is on him or her to ask the Law Society and provide a satisfactory reason for the request.

[148] We find that the failure of the Respondent to respond fully to the requests of the compliance auditor, and at all to the Law Society's three letters asking for information regarding numerous aspects of the Law Society's investigation, breached Chapter 13, Rule 3 of the *Handbook*, and also constitutes a marked departure from the conduct expected of lawyers by the governing body in this province so as to amount to professional misconduct.

[149] In so holding, we find that the Respondent's proffered reason for refusing to answer the compliance auditor's request for an explanation regarding the cheques issued payable to "cash" – namely, that the requested information was covered by solicitor-client privilege – was manifestly unsatisfactory.

[150] Solicitor-client privilege does not provide a justification or excuse for failing to cooperate fully with and provide information to the Law Society during an investigation, as expressly stated in Law Society Rule 3-5(10)(a).

[151] The reason why lawyers cannot properly invoke privilege as a basis for refusing to cooperate with a Law Society investigation is two-fold. First, the client's privilege is not lost by virtue of such disclosure, but rather remains in place against the rest of the world, pursuant to s. 88 of the *Legal Profession Act*. Second, the disclosure of client-lawyer privileged communications is necessary to ensure that the Law Society is able to properly investigate complaints and so protect the integrity of the profession and the interests of the public (*Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270, para. 195, affirmed without addressing this point, 2013 BCCA 147, (leave filed, [2013] SCCA No. 235 (QL)).

[152] We should also add that the protection afforded solicitor-client privilege by s. 88 of the *Legal Profession Act* was expressly pointed out to the Respondent in the first of the letters sent to him by the Law Society, in the course of repeating the request for information made by the compliance auditor regarding the issuance of trust cheques payable to "cash." It thus cannot be said that the Respondent was unaware of the protection afforded the privilege by the Act.

[153] Moreover, prior to refusing to answer the compliance auditor's question regarding the trust cheques payable to "cash," the Respondent made available to the auditors an extensive amount of solicitor-client privileged information by virtue of allowing them access to the Firm's client files and accounting records. The subsequent reliance on solicitor-client privilege with respect to the auditor's question regarding a specific client matter thus reveals a fundamental inconsistency in approach, suggesting that the Respondent's professed reason for refusing to provide a complete answer was either disingenuous or at least rash and ill-considered.

CONCLUSION

[154] Pursuant to s. 38(4) of the *Legal Profession Act*, we have determined that the Respondent has committed the following:

(a) breach of Rule 3-56(1) and professional misconduct with respect to the matters set out in Allegations 1 to 4, by misappropriating client trust funds;

(b) breach of Rule 3-56(2)(b) with respect to the matters set out in Allegation 5, by issuing trust cheques payable to “cash”;

(c) breach of Rule 3-60(a)(ii) with respect to the matters set out in Allegation 6, by failing to identify the source of funds deposited to trust;

(d) breach of Rule 3-60(b) with respect to the matters set out in Allegation 7, by failing to maintain separate client ledgers to record trust transactions;

(e) professional misconduct with respect to the matters set out in Allegation 8, by making discourteous and threatening comments regarding a Law Society auditor; and

(f) professional misconduct with respect to the matters set out in Allegation 9, by failing to respond to communications from the Law Society.

[155] This matter will now be set down for a further hearing to determine the disciplinary action to be taken under section 38(5) of the *Legal Profession Act*.