2014 LSBC 03
Report issued: January 23, 2014
Citation issued: December 20, 2012

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

Ronald Wayne Perrick

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing dates: October 21, 22, 23, 24 and 25, 2013
Panel: David Renwick, QC, Chair, John (Woody) Hayes, Public representative, Bruce LeRose, QC, Lawyer

Counsel for the Law Society: Alison Kirby
Appearing on his own behalf: Ronald Perrick

Background

[1] The citation in this matter was authorized by the Discipline Committee on December 6, 2012 and issued on December 20, 2012. The Respondent admits that, on January 7, 2013, he was served with a copy of the citation in accordance with the requirements of Rule 4 15 of the Law Society Rules (the "Rules").

[2] The citation contains 11 allegations broken down into five categories, as follows:

(a) improper use of an expired power of attorney;

(b) backdating assignment of shares to a date prior to the death of the parents of a client;

(c) failure to respond to communications from another lawyer;

(d) three allegations of failure to provide quality of service; and

(e) five allegations of breach of Rules.

[3] These matters arose in 2006 and relate to the Respondent's conduct while acting for [number] British Columbia Ltd. (the "Company") respecting the sale of property on the south end of Seymour Street in Vancouver, BC, and the subsequent payment to the Respondent for fees and/or commission from monies paid into his Ron Perrick Law Corporation (RPLC), trust account.

[4] The substance of many of the allegations in the citation were the subject of judicial comment in two judicial proceedings:

(a) a Rule 18A Application before Mr. Justice Rice, decided January 23, 2007, between the Company and the Respondent and RPLC (the "First Action");

(b) a 22-day trial before Madam Justice Allan, decided May 1, 2009 (the "Allan Reasons"), between the Company and the Respondent and RPLC (the "Second Action").

[5] During the hearing we made a ruling that the Law Society was entitled to rely upon the Allan Reasons and that those findings established a prima facie case against the Respondent with respect to ten of the 11 allegations. We further ordered that the Respondent was not entitled to re-litigate those issues as it would result in an abuse of process.

ISSUES

[6] The primary issue before us is whether or not the Respondent's conduct amounted to professional misconduct and, secondly, if he breached any of the Rules, whether or not that amounted to professional misconduct.

ONUS AND STANDARD OF PROOF

[7] Since the Supreme Court of Canada decision *FH v. McDougall*, 2008 SCC 53, it is now well established that the standard of proof in civil proceedings applies to Law Society discipline proceedings. That is, the Law Society bears the onus of establishing professional misconduct or breach of the Rules on the balance of probabilities.

PROFESSIONAL MISCONDUCT

[8] Since the decision in *Law Society of BC v. Martin*, 2005 LSBC 16, it is well established that the test for professional misconduct is whether the facts disclose a "marked departure" in the conduct that the Law Society expects of lawyers.

[9] In *Martin*, the Panel commented:

> [154] … The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[10] The "marked departure" test has recently been reaffirmed by the review panel decision in *Re: Lawyer 12*, 2011 LSBC 35, when the Benchers adopted the reasons of the single Bencher in *Re: Lawyer 12*, 2011 LSBC 11:

> [14] In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

[11] Therefore, conduct falling within the ambit of the "marked departure" will display culpability that is grounded in a fundamental degree of fault; and although intentional malfeasance is not required, gross culpable neglect of one's duties as a lawyer may satisfy the test. (cf. *Law Society of BC v. Singh*, 2013 LSBC 17, paras. 11 12.)

DISTINCTION BETWEEN A BREACH OF THE RULES AND PROFESSIONAL MISCONDUCT

[12] In *Law Society of BC v. Lyons*, 2008 LSBC 9, the panel in considering the distinction between a breach of the Rules and professional misconduct, found:

[32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the Act or the Rules that constitutes a “Rules breach”, rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of the practice (*Law Society of BC v. Smith*, 2004 LSBC 29).

[35] 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.

Facts

[13] A lengthy Notice to Admit (“NTA”) was filed as an exhibit, as was the Respondent’s Response. Collectively, these documents established the bulk of the facts; most of which were uncontroverted. From these exhibits, together with the testimony of the Respondent and the Allan Reasons, we are able to summarize the relevant facts as they relate to each of the allegations:

1. In the early 1990s, JW and MW purchased property at the foot of Seymour Street in Vancouver, BC. Later, adjoining lots were purchased (collectively the “Property”). JW operated a welding shop through his company M Ltd. The business expanded to the manufacturing of trampolines, and JW and MW’s son RW and daughter DK became involved in the business.

2. In January 1990, the Company was incorporated for the purposes of an estate freeze, and later the property was transferred to the Company. The effect of the estate freeze was that, if the Company sold the property, JW and MW would receive the first million dollars, and their children would receive the balance equally.

3. The shareholders of the Company were JW and MW, each of whom owned 50 per cent of the voting shares, together with their four children, RW, DK, RM and AW.

4. Sometime in 2002, the Company and JW and MW agreed to sell the property, and a number of offers were made in 2002 and 2003.

5. In April 2003, C Corp. offered to purchase the property for $2.6 million. Shortly thereafter, Ronald Perrick was retained by the Company, with respect to the sale of the Property.

6. At the time he was retained, Mr. Perrick knew that JW and MW were the sole officers, directors and voting shareholders of the Company, and that the Property represented all, or substantially all, of the assets of the Company.

7. At no time did Mr. Perrick enter into a written fee agreement, contingent or otherwise, with the Company, or any members of the family. Although there was no fee agreement, it was conceded that, if Mr. Perrick did not complete the sale of the Property, he would not charge them anything. Furthermore, if he was instrumental in selling the Property, there would be some form of a fee. One of the issues was whether this fee would be real estate commission, or a contingency fee, or a combination, which was not determined in advance.

8. On December 4, 2004, JW died.

9. On October 25, 2005, MW died.

10. Mr. Perrick was aware of each of the deaths shortly after they occurred.

11. The Property was ultimately sold to C Corp. for approximately $5.75 million, pursuant to an offer to purchase and purchase and sale agreement dated December 15, 2005, with a closing of February 9, 2006.

12. The sale proceeds were placed into RPLC's trust account. A dispute quickly arose as to when the money would be distributed and the amount of Mr. Perrick's fee.

13. Mr. Perrick did not render a statement of account until June 15, 2006. This account was backdated to February 9, 2006. Prior to issuing the fee account, Mr. Perrick had removed from RPLC's trust account the sum of $926,916 for fees and taxes.

14. In the First Action, Mr. Justice Rice determined that Mr. Perrick had removed the funds from trust without rendering a statement of account pursuant to the Rules. As he had not disclosed what he had done with the money, the Court ordered judgment against him and RPLC for the sum of $926,916, together with interest.

15. In the Second Action, the issue before Madam Justice Allan was whether or not Mr. Perrick and RPLC were entitled to fees in the amount of $926,916, including taxes, with respect to services rendered, or to any amount. She determined that Mr. Perrick's misconduct precluded him from claiming fees on the basis of quantum meruit. Accordingly, she concluded:

> [154] … that Mr. Perrick's misconduct in the course of his retainer disentitles the defendants [the Respondent and RPLC] to any fee in relation to real estate and legal services.

Allegation 1: Improper use of expired powers of attorney

[14] Allegation 1 of the citation relates to the Respondent's preparation, in 2006, of an assignment of shares dated October 21, 2004 (the "Assignment"), and witnessing of the signatures of RM and DK, as attorneys for JW and MW, when he knew that JW and MW were deceased, and that the powers of attorney were no longer valid.

[15] Sometime between January 20, 2006 and February 7, 2006, the Respondent prepared the Assignment and met with RM and DK to witness their signatures as attorneys for JW and MW.

[16] The Respondent knew that JW and MW had both died before he prepared the Assignment, but nevertheless witnessed the signatures of RM and DK as attorneys under their parents' powers of attorney.

[17] The Respondent also knew at the time of preparing the Assignment that the powers of attorney were no longer valid because of the deaths of JW and MW.

[18] As well, the Respondent had been advised by an estate lawyer how the shares of the deceased could be properly transferred to RM and DK, as executors of their parents' estates, without the need for probate. The Respondent testified that he did not follow the advice of the estate lawyer, as he thought he needed consent of all the beneficiaries to such a transmittal, and he knew that AW would not consent.

[19] In the Assignment, which was dated prior to either of their deaths, JW and MW purportedly transferred the voting shares in the Company to RW.

[20] The Respondent admitted that there was no documentary evidence, or other evidence, to establish that prior to their deaths, JW or MW wanted the shares transferred to RW.

[21] Their wills directed that RW receive the voting shares so he could continue on with the business; but

that would only occur upon their deaths.

[22] The Respondent testified that he had seen both of the wills prior to preparing the Assignment.

[23] Madam Justice Allan found that, by backdating the Assignment and using the expired powers of attorney, the Respondent acted improperly.

[24] We also agree that his conduct was improper.

[25] The Respondent knew, at the time of preparing and witnessing the signatures on the Assignment, that the parents wanted their shares in the Company to transfer to RW only upon their deaths. Therefore, he knowingly facilitated the use of the powers of attorney in a manner contrary to the deceased donors' wishes, and contrary to the testators' expressed intentions.

[26] The Respondent acknowledged that he had a significant self-interest in ensuring that the real estate transaction completed, as his fees were contingent upon the closing.

[27] In *Law Society of BC v. Rutley*, 2013 LSBC 16, the panel found that the respondent's conduct in facilitating the improper use of a power of attorney was questionable conduct that reflected adversely on the integrity of the legal profession and constituted professional misconduct.

[28] Under Chapter 2, Rule 1 of the *Professional Conduct Handbook* (the "Handbook"):

> 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 professional or the administration of justice.

(Note: The *Professional Conduct Handbook* has been replaced by the new *Code of Professional Conduct* as of January 1, 2013, but these provisions were in effect at the time of the allegations.)

[29] Clearly, the evidence establishes that the Respondent's conduct is contrary to the provisions of the Handbook.

[30] Furthermore, his improper conduct amounts to dishonourable conduct as it falls "markedly" below the standard expected by the Law Society of lawyers, and we find it amounts to professional misconduct.

Allegation 2: Backdating assignment of shares

[31] The Respondent admitted backdating the Assignment to October 21, 2004; a date prior to JW's death.

[32] On or about February 6, 2006, the Respondent contacted the Company's corporate solicitor advising him that he needed the directors' resolution for the closing of the sale on February 9, 2006. The Respondent then instructed RM and DK to take the Assignment to the Company's corporate solicitor to prepare the necessary documentation.

[33] The Respondent knew that the Company's corporate solicitor would be preparing a directors' resolution approving the sale based on the Assignment, and he knew, or ought to have known, that the Assignment would be relied upon by the Company's corporate solicitor to prepare other corporate documentation to transfer the voting shares.

[34] On or about February 7, 2009, the Company's corporate solicitor, relying on the Assignment, prepared the directors' resolutions and forwarded the documents to the Respondent so that the resolutions would be signed by RW.

[35] The Respondent returned the duly executed resolutions to the Company's corporate solicitor. At no time did he inform the Company's corporate solicitor that the Assignment was backdated. As a result, the backdated Assignment was used by the Company's corporate solicitor to update the minute book to reflect the transfer of shares effective October 21, 2004.

[36] The Respondent witnessed the signature of RW, as an authorized signatory for the Company, on the closing documents.

[37] The Respondent tried to suggest that the end justified the means. That is, all the parties wanted the sale to complete, and they wouldn't be concerned how it happened.

[38] Madam Justice Allan found the Respondent's conduct in backdating the Assignment was improper conduct.

[39] In *Law Society of BC v. Foo*, [1997] LSDD No. 197, the respondent dated an affidavit six weeks later than it was actually sworn. In a separate matter he also witnessed a client swearing two affidavits purporting to attach exhibits when the exhibits were not attached at the time. The respondent was found to have committed professional misconduct.

[40] In *Law Society of BC v. Addison*, 2007 LSBC 12, the respondent was found to have committed professional misconduct by misleading opposing counsel by including a witness, who he knew was dead, in his list of witnesses.

[41] Again, we are satisfied the improper conduct in backdating the Assignment is a "marked" departure from what the Law Society expects of lawyers, and amounts to professional misconduct.

Allegation 3: Failure to respond to communications from another lawyer

[42] Allegation 3 relates to the Respondent's failure to respond promptly to communications from opposing counsel, Robert Ward, regarding the handling and disbursement of the trust funds and, in particular, some or all of the letters dated March 29, 2006, April 3, 2006, May 18, 2006 and June 2, 2006, contrary to Chapter 6, Rule 6 of the *Professional Conduct Handbook*.

[43] Mr. Ward was retained on or about March 29, 2006 by the Company and three of the shareholders to obtain details from the Respondent relating to distribution of the balance of the sale proceeds, believed to be in excess of $1.6 million, and to have the Respondent account for his "fees". The Respondent had provided to the Company and the siblings two schedules dated March 2, 2006, which accounted for the $926,916, as either "fee all inclusive - $926,916" or "commission $866,277 plus GST $60,639 - $926,916."

[44] There is no evidence that the Respondent replied to Mr. Ward's repeated inquiries about the handling and disbursement of trust funds until June 2, 2006 when he simply forwarded the March 2 schedules, which he had already sent to the Company and the four shareholders, to Mr. Ward.

[45] On June 16, 2006, after Mr. Ward had commenced the First Action for an accounting, the Respondent delivered his legal bill in the amount of $926,916, but did not disclose whether the trust monies remained in trust.

[46] At the Hearing, the Respondent tried to justify his failure to respond to the four letters on the basis that:

(a) Until May 12, 2006 he had been instructed not to do so by the fourth sibling, AW.

(b) He had already provided the accounting to the Company, and therefore did not need to respond to Mr. Ward's communication.

(c) As he continued to act for the Company until the end of April 2006, regarding the filing of a certificate of pending litigation, he could not understand how Mr. Ward could also be acting for the Company.

(d) By directly responding to the Company, he felt that the Company would pass the information on to Mr. Ward.

[47] Regarding these submissions we note:

(a) In a letter dated March 7, 2006 addressed to the four shareholders and the Company, the Respondent indicated that he was prepared to meet with the shareholders to "discuss what has been done as well as to discuss my account." This did not occur.

(b) The Respondent did not reply to Mr. Ward's letter of March 29, 2006.

(c) In response to the April 3, 2006 letter, the Respondent, on April 4, sent a letter to Mr. Ward stating that he would respond "tomorrow". He did not respond on April 5.

(d) On April 7, 2006, the Respondent wrote to the four shareholders and the Company advising that he would provide them with a summary accounting by April 10, 2006, which he did not do.

(e) On May 12, 2006, the Respondent left a voice message with Mr. Ward and advised that he understood that the family wanted to have a meeting and that he would "be available on the 25th or probably better would be the 30th."

(f) On May 18, 2006, Mr. Ward sent a follow-up letter to the Respondent asking for his response by May 30, 2006.

(g) On May 30, 2006, the Respondent sent a letter to Mr. Ward advising that he would respond tomorrow.

(h) On May 31, 2006, the Respondent sent a letter to Mr. Ward, indicating that he would provide him with a particularized account by "tomorrow", which he did not do. He also attached a copy of his letter of April 7, 2006 to the Company, wherein he had sent a cheque for $773,964.41.

(i) On June 2, 2006, the Respondent sent a note to Mr. Ward advising that his typist was away until June 5, 2006. He also attached a copy of the two schedules.

(j) On June 2, 2006, Mr. Ward sent a letter to the Respondent requesting a breakdown of how he arrived at fees in the amount of $926,916.

[48] Throughout the period of time from March 29 to June 2, 2006, the Respondent continued to remove monies from his trust account knowing that there were issues regarding his accounting for the monies.

[49] Madam Justice Allan, in her Reasons, stated:

> [92] In April 2006, Mr. Perrick indicated that he would respond to Mr. Ward, although he did not do so in any timely way. …
>
> [93] By June 2006, Mr. Ward was continuing to inquire as to whether the balance of the plaintiff's money was still in trust, whether there was any fee agreement, and how Mr. Perrick's account was quantified.
>
> [149] On a number of occasions, [the Company] requested a legal account, distribution of the balance of the sale proceeds, and confirmation that the funds remained in trust. Mr. Perrick

ignored all of those requests. …

[50] Chapter 11, Rule 6 of the Handbook requires a lawyer to reply reasonably promptly to any communications from another lawyer that requires a response.

[51] Counsel for the Law Society provided us with a number of cases that were not helpful. They were unique to their facts, and provided illustrations where five months to two years in which there was no response, were found to be professional misconduct.

[52] In this case, given the significant amount of money involved, as well as the concerns of the Company and three of its four shareholders as to what had happened to the proceeds from the sale, a more full and adequate response was required rather than the pathetic efforts made by the Respondent.

[53] Furthermore, the Respondent's explanations and/or excuses were untenable. His suggestion that responding to the Company and the shareholders was a sufficient response to a lawyer's communication is totally unacceptable.

[54] In these circumstances, the Respondent needed to provide a comprehensive, timely response to Mr. Ward's correspondence. His approach fell far below the standards required by the Law Society, and was a "marked departure" from the norm, which we find amounts to professional misconduct.

Allegation 4: Failure to provide quality of service

Allegation 4(a) Failure to take reasonable steps to determine who was authorized to give instructions for the Company.

[55] The Law Society alleges that the Respondent did not take reasonable steps to determine who was authorized to give instructions on behalf of the Company between October 2005 and June 2006.

[56] The evidence suggests that there were significant negotiations in mid-December 2005 regarding the sale of the Property. During the negotiations, the Respondent was receiving his instructions from AW. However, each of the siblings was aware of the final selling price of approximately $5.75 million.

[57] To facilitate the completion of the sale on February 9, 2006, the Respondent prepared the backdated Assignment allowing RW to become the directing shareholder for the Company. Until then, the Respondent was taking his directions on behalf of the company from AW.

[58] After the closing, the Respondent again received instructions from AW, as he filed a Certificate of Pending Litigation on the Property to advance further claims for the Company. The Respondent mistakenly believed that, by having the voting shares transferred to RW for the purposes of allowing the sale to complete, RW's authority to speak for the Company was restricted to that transaction only. He resolutely, however mistakenly, maintained that he could continue to receive instructions from AW without considering who the proper directing force behind the Company was.

[59] Madam Justice Allan found that position untenable and preposterous. In the Allan Reasons she stated:

> [94] At trial, Mr. Perrick took the untenable position that RW was not authorized to retain Mr. Ward. He stated that RW had only been designated the sole officer and director of the [Company] for the purpose of signing the closing documents when the sale with C Corp. completed. He testified that he was properly instructed by AW, who told him not to respond to Mr. Ward's entreaties regarding the disposition of trust funds and the proposed fee. However, when he placed and later removed the CPL against the Property when C Corp. sold its lots to O Corp., he was careful to note that his

instructions were received “from RW through AW”.

[148] … Mr. Perrick, who created the improperly backdated Assignments for the purpose of giving RW the voting shares so that he could become the sole director and officer of the [Company], then took the position that RW was only authorized in that capacity for the sole purpose of signing the closing documents and could not give instructions on behalf of the [Company]. Such a proposition is preposterous.

[60] Although the Company retained Mr. Ward to obtain an accounting of the monies received and details of the Respondent’s fee account, the Respondent ignored Mr. Ward’s inquiries and corresponded directly with the siblings.

[61] The Respondent failed to recognize that there were competing interests among the siblings. He should have withdrawn from his retainer with the Company.

[62] Notwithstanding his belief that he could continue to accept instructions from AW, we are satisfied that his actions in doing so amounted to gross culpable neglect, or a “marked departure” from the norm expected of lawyers, and therefore his conduct amounted to professional misconduct.

Allegation 4(b): Failure to keep client reasonably informed of handling of disbursement of trust funds between October 2005 and June 2006

[63] Chapter 3, Rule 3 of the Handbook requires a lawyer to provide a quality of service to his clients that would be expected of a competent lawyer in a similar situation. The factors to be considered in determining the quality of service includes whether:

(a) the client has been kept reasonably informed;

(b) he has answered reasonable requests from the client for information;

(c) the work has been done promptly;

(d) legal tasks have been performed accurately;

(e) he has disclosed all relevant information to the client and whether he has made a prompt and complete report once the work has been finalized.

[64] Shortly after the closing on February 9, 2006, a dispute arose as to when the money would be distributed and the amount of the Respondent’s fees.

[65] On February 17, 2006, DK sent a letter to the Respondent asking him to provide the Company with an estimate of how the balance of the proceeds from the sale of the Property would be disbursed.

[66] The Respondent agreed in cross-examination that his March 2 schedules were the only documents he provided to the siblings or the Company until his 34-page statement of account attached to his letter of June 16, 2006.

[67] On March 2, 2006, the Respondent faxed a letter addressed to the Company and the four shareholders setting out a proposed distribution of the sale proceeds, including a spread sheet/schedule that included a commission payable to the Respondent of $866,277 plus GST of $60,639, for a total of $926,916.

[68] On March 2, 2006, the Respondent also forwarded a revised spreadsheet/schedule showing an all-inclusive fee of $926,916.

[69] By March 2, 2006, he had already withdrawn from RPLC’s trust account the sum of $741,000 for fees

and taxes, including $342,000 that was withdrawn the day after he received the February 17 letter.

[70] The Respondent testified that he calculated his fee at 27.5 per cent on the difference between the original offer on the Property of $2.6 million and the final selling price of $5.75 million.

[71] On June 8, 2006, the Company instructed Mr. Ward to commence the First Action for an accounting.

[72] The Respondent did not render his statement of account until June 15, 2006.

[73] The Respondent's failure to communicate to his clients with respect to his legal account was a breach of his fiduciary obligations to act in good faith towards his client (cf. *Ladner Downs v. Crowley*, (1987) CanLII 161).

[74] This fiduciary obligation creates a relationship of trust and confidence from which flows obligations of loyalty and transparency requiring a lawyer to be candid with his client in all matters, including his retainer, and requires a lawyer to be candid and fully inform and properly advise the client with respect to all matters, including his retainer (cf. *Nathanson, Schachter & Thompson v. Inmet Mining Corporation*, 2009 BCCA 385).

[75] In spite of the First Action having been filed, and the numerous requests by Mr. Ward for an accounting, it was not until November 28, 2006 that the Respondent disclosed that the funds had been withdrawn from trust.

[76] We find that the Respondent failed to provide the quality of service to his client that would be expected of a competent lawyer in similar circumstances.

[77] In these circumstances, the Respondent's actions amounted to professional misconduct in failing to respond to his client in regards to his retainer.

Allegation 4(c): Failure to advise client of the basis of his fees

[78] The Respondent was retained in 2003, and at no time did he have a written fee agreement.

[79] In the Second Action, the Respondent gave differing testimony as to what his fee would be. In one instance he said would receive 25 to 30 per cent on the difference between $2.6 and $5.75 million. In another, he discussed a fee range of between 20 and 30 per cent. RM testified that the Respondent indicated that the fee might be between 15 and 30 per cent, and possibly 25 per cent.

[80] It was not until March 2, 2006 when the Respondent delivered his schedule setting out a fee of $926,916 that the Company finally learned that he was claiming 27.5 per cent on the difference between $2.6 and $5.75 million. By this time he had already withdrawn $741,000 from RPLC's trust account.

[81] Again, these facts clearly indicate that the Respondent failed to meet the standard required of a lawyer in respect of disclosing and fully informing his client of his fee arrangement, and these non-disclosures amounted to professional misconduct.

Allegation 5: Breach of Law Society Rules

Allegation 5(a): Failure to account to client contrary to Rule 3-48

[82] Rule 3-48 requires that a lawyer is to account to the client in writing for funds and valuables received.

[83] The general public requires that the Law Society ensure that lawyers adequately and completely

account for monies entrusted to them, which is necessary to maintain the confidence in the profession at large.

[84] Once we have determined that a Rule breach has been established, we must then look to see if that breach amounts to professional misconduct.

[85] However, we find that this allegation is duplicative of allegation 4(b) in respect of which we have already found that professional misconduct is established. Therefore, this allegation is dismissed.

Allegation 5(b): Failure to enter into a written contingent fee agreement

[86] Rule 8-3 of the Rules requires that a contingent fee agreement be in writing and that it contain a statement advising the client of his/her right to have the agreement examined. Rule 8-4 requires that a contingent fee agreement limits the amount of the contingent fee that may be charged without court approval in personal injury claims arising for a motor vehicle accident. These Rules, together with Rule 8-1 and Sections 65 to 74 of the *Legal Profession Act*, (which permit a review of the written contingent fee agreement to ensure it is "fair and reasonable"), ensure that contingent fee agreements are fully transparent and partially mitigate the inherent conflict of interest that a lawyer has in both negotiating a contingent fee agreement and in subsequently conducting the client's case.

[87] The purpose requiring a contingent fee agreement to be in writing, and to have the provisions of the Rules 8-3 and 8-4 set out, is to protect the client from allowing a lawyer to set fees at levels that bear little or no relationship to the time and monies he may risk spent on the transaction.

[88] The Respondent admits there was no written fee agreement, either contingent or otherwise.

[89] The Respondent purportedly billed the company on March 2, 2006 the sum of $926,916 calculated on the basis of 27.5 per cent of the difference between $2.6 million and $5.75 million.

[90] The Respondent testified that, if the sale did not go ahead, he would receive nothing; no fees and no disbursements. He stated that all parties wanted the sale to complete and his actions were to facilitate the sale to complete. What is at issue is whether or not his actions were acceptable practice.

[91] Under Section 64 of the Act, the contingent fee agreement is defined as "an agreement that provides that payment to the lawyer for services provided depends, at least in part, on the happening of an event." The Respondent reluctantly acknowledged that, in these circumstances, his fee calculation amounted to a contingent fee arrangement and that he did not have a written fee agreement.

[92] In *Law Society of BC v. Cruickshank*, 2012 LSBC 27, the respondent admitted that he had committed professional misconduct in failing to enter into a written contingent fee agreement for five clients.

[93] In this case, it was more than mere failure to document the agreement upon a fee arrangement that is in issue. The Respondent failed to gain the proper instructions from his client with respect to the fee calculation, he arbitrarily and unilaterally fixed that calculation, he took the monies from trust, and then later on he tried to justify his actions by preparing a fee account.

[94] We find that, in these circumstances, the Respondent's conduct was egregious and did not meet the standard expected of a lawyer practising in this area. His conduct was a "marked departure" from the norm and amounted to professional misconduct.

Allegation 5(c): Failure to record trust transaction within seven days

[95] The Respondent testified that he was familiar with the Law Society trust accounting Rules and knew

that he was required to record trust transactions promptly and, in any event, within seven days of the transaction.

[96] A review of the Respondent's client trust ledger shows that the entries in the trust account were made haphazardly, out of time and out of sequence to the events having transpired. For instance, there is an entry dated February 27, 2006. The next entry is dated February 9, 2006. The following entry is dated February 27, 2006. Then the next entry is dated February 10, 2006.

[97] The Respondent's only explanation was that he had a different bookkeeper working at the relevant times, and she may or may not have been aware of the requirements to record the transactions within seven days of the transaction.

[98] Counsel for the Law Society suggests that we find only a Rule breach.

[99] We are satisfied that, in these circumstances, the Respondent's inaction is clearly a Rule breach. He was careless and failed to properly instruct his staff. However, we find that, in these circumstances, his conduct did not amount to professional misconduct.

Allegation 5(d): Withdrew funds from trust when in dispute

[100] The Respondent was aware that Robert Ward was retained by the Company on March 27, 2006 with respect to the Respondent's fees.

[101] Madam Justine Allen found that, by April 7, 2006, the Respondent was aware that the $185,000 remaining in trust was the subject of a fee dispute.

[102] Although the Respondent denies that he was aware by April 7, 2006 that there was a dispute regarding his fee, we are satisfied that he knew, or ought to have known, that this was in issue. Nevertheless, and in spite of this knowledge, on April 18, 2006, he issued a trust cheque in the amount of $185,000 payable to RPLC for his fees.

[103] We find that his actions in withdrawing these funds amounted to professional misconduct.

Allegation 5(e): Withdrawal of fees prior to the delivery of a bill

[104] The Respondent admitted that the March 2, 2006 schedule was not a legal bill.

[105] He also admitted that he had withdrawn his fees prior to rendering an account, as follows:

> (a) on February 9, 2006, the Respondent issued a trust cheque in the amount of $350,000 payable to RPLC for his fees;
>
> (b) on February 10, 2006, the Respondent issued a trust cheque for $49,000 payable to RPLC for his fees;
>
> (c) on February 27, 2006, the Respondent issued a trust cheque in the amount of $342,000 payable to RPLC for his fees; and
>
> (d) on April 18, 2006, the Respondent issued a trust cheque in the amount of $185,000 payable to RPLC for his fees.

[106] The Respondent did not render a statement of account to the Company until June 15, 2006.

[107] Madam Justice Allan stated in her Reasons, quoting from the decision of Mr. Justice Rice in the First Action:

> [117] … Mr. Perrick removed the funds without permission before rendering a statement of account according to the Rules of the Law Society. Mr. Perrick knew that he was not authorized to take out funds. He knew or ought to have known that taking them was contrary to the Rules and constituted a breach of trust. Further, he concealed his actions. Despite many numerous and urgent requests between February and October 2006, Mr. Perrick never revealed that he had taken the money. To this day he has not revealed what he has done with the money. By virtue of those wrongful acts, his breaches of the Law Society Rules and his breaches of duty as trustee of the funds, the [Company] has been unlawfully deprived of $926,916. The defendants should not be allowed to retain that sum which was placed in trust for the [Company]. Pursuant to s. 84 of the *Legal Professions Act* [sic] and at law, Mr. Perrick is personally liable for a breach of trust by the Perrick Corporation.

[108] We are satisfied that, in these circumstances, the actions taken by the Respondent amounted to professional misconduct.

SUMMARY

[109] Accordingly, we find that the Respondent's actions as set out in allegations 1, 2, 3, 4(a), 4(b), 4(c), 5(b), 5(d) and 5(e) amount to the professional misconduct.

[110] As well, the Respondent was in breach of the Rules, as set out in allegation 5(c).

[111] The allegations set out in 5(a) are dismissed.