

2014 LSBC 22
Report issued: May 9, 2014
Citation issued: February 25, 2013

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

WILLIAM TERRANCE FAMINOFF

Respondent

Decision of the Hearing Panel

Hearing date: March 12, 2014
Panel: Nancy Merrill, Chair, William Everett, QC, Lawyer, Graeme Roberts, Public representative

Counsel for the Law Society: Susan Coristine
Counsel for the Respondent: Henry Wood, QC

Introduction

[1] On February 25 2013, a citation (Exhibit 1) was issued against William Terrance Faminoff (the “Respondent”) arising out of a Rule 4-43 investigation of the Respondent’s practice (the “Investigation”). The Investigation was ordered on February 22, 2010 and covered the period January 1, 2007 to July 20, 2011.

[2] The Investigation resulted in an Investigation Report being issued on April 2, 2012 (Exhibits 2A, 2B, 2C and 2D). The Respondent admits the authenticity of the Investigation Report, but does not admit the truth of its contents.

[3] The citation contains eight allegations concerning improper handling of clients’ trust funds, failure to maintain proper records, intentional misrepresentation to the Law Society by backdating statements of account, and breaches of undertakings. Particulars of the foregoing allegations are set out in the citation.

[4] The Respondent has admitted that, on February 25, 2013, he was served through his counsel with the citation and that he has waived the requirements of Rule 4-15 of the Law Society Rules (“Rules”).

[5] The parties filed an Agreed Statement of Facts (“ASF”) (Exhibit 2).

Background

[6] The following background facts are taken from the ASF.

[7] Mr. Faminoff was called and admitted as a member of the Law Society of British Columbia on August 1, 1985.

[8] During the relevant period, Mr. Faminoff practised in Vancouver as a sole practitioner, primarily in the areas of immigration law, plaintiff motor vehicle (ICBC) litigation, and other civil litigation.

[9] During the relevant period, Mr. Faminoff was responsible for the financial management of his practice, including the issuance and delivery of statements of accounts to clients.

[10] On December 2, 2008, Mr. Faminoff received notice that the Law Society intended to conduct an audit of his practice pursuant to Rule 3-79 (“the Compliance Audit”).

[11] The Compliance Audit proceeded on January 7 - 9, 13 and 22, 2009.

[12] The Compliance Audit identified certain irregularities in Mr. Faminoff’s accounting practices, including the deposit of trust funds directly into the general account instead of into his trust account.

[13] On or around March 9, 2009, the auditor referred her findings to the Investigations, Monitoring and Enforcement Department of the Law Society.

[14] On February 22, 2010, the Chair of the Discipline Committee issued an order for the investigation of Mr. Faminoff's books, records and reports pursuant to Rule 4-43.

[15] On June 15, 2010, Karen Keating, a forensic accountant at the Law Society, other Law Society staff, and Colin Cree of EFC e-forensic Services, attended Mr. Faminoff's office to commence the Investigation. The period under investigation was from January 1, 2007 to June 15, 2010.

[16] The forensic accountant reviewed client files and electronic records and took copies of client trust ledgers, trust and general bank statements, cancelled cheques, and other accounting and client documents. She also met with Mr. Faminoff with respect to his practice. Ms. Keating was eventually replaced by Andrea Chan, also a forensic accountant at the Law Society.

[17] There was no discussion between Mr. Faminoff and any representative of the Law Society concerning the backdating of accounts until Mr. Faminoff was interviewed by Ms. Keating on December 14, 2010.

[18] On September 14, 2010, the Law Society conducted an interview of Mr. Faminoff. A copy of the transcript of that interview (ASF Tab 12) is admitted at ASF paragraph 18 as proof that the statements attributed to Mr. Faminoff in the transcripts were made by him.

[19] On or around April 2, 2012, Ms. Chan issued the Investigation Report.

ORGANIZATION OF THIS DECISION

[20] Allegations 1 to 7 of the citation all allege breaches by the Respondent of various provisions in Part 3, Division 7 of the Rules. Part 3 of the Rules is entitled "Protection of the Public", and Division 7 is entitled "Trust Accounts and Other Client Property".

(a) Allegation 1 concerns the backdating of statements of account and the further allegation that, in doing so, the Respondent misrepresented to the Law Society that those statements of account had been issued and delivered to his clients on or about the dates set out on the statements of account, when he knew they had not been issued and delivered on those dates.

(b) Allegations 2 to 5 concern the Respondent's improper handling of clients' trust funds under the Rules.

(c) Allegation 6 concerns the Respondent withdrawing funds from a client's trust account when there were insufficient funds held to the client's credit in the account at the time.

(d) Allegation 7 concerns the Respondent's failure to maintain accounting records under the Rules.

(e) Allegation 8 of the citation concerns breaches of undertakings the Respondent made to the Insurance Corporation of British Columbia ("ICBC").

[21] The Panel will address the allegations in the following order:

(a) Allegations 2 to 5 and 6-7;

(b) Allegation 1; and

(c) Allegation 8.

In the Panel's view, addressing allegations 2 to 7 first will provide some context for its consideration of allegation 1.

ALLEGATIONS 2 – 7 BREACH OF LAW SOCIETY RULES

Allegation 2 – Breach of Rule 3-51(1)

[22] Paragraphs 22 and 23 of the ASF state that, on nine occasions between May 2007 and August 2008, Mr. Faminoff received funds from clients and deposited them directly into his general account, in payment of fees for services, when he had not yet completed all work on the file and had not issued or delivered statements of account. The Law Society did not allege that Mr. Faminoff took payment of fees for work he never completed.

[23] Particulars of the impugned transactions are set out in allegation 2 of the citation and Schedule 1

(Column B) thereof.

[24] Mr. Faminoff, at paragraph 24 of the ASF, admitted that the impugned conduct constituted a breach of Rule 3-51(1).

Allegation 3 – Breach of Rules 3-56(1) and 3-57(2)

[25] Paragraph 25 of the ASF states that, on one occasion, Mr. Faminoff withdrew funds from his trust account and deposited them into his general account when he had not yet completed all work on the file, or issued or delivered a statement of account. Particulars of the impugned transaction are set out in allegation 3 of the citation and Schedule 1 (Column C) thereof.

[26] Mr. Faminoff, at paragraph 26 of the ASF, admitted that the impugned conduct constituted a breach of Rules 3-56(1) and 3-57(2).

Allegation 4 – Breach of Rule 3-63(3)

[27] Paragraph 27 of the ASF states that, between approximately February 2007 and November 2008, Mr. Faminoff received funds from clients and deposited them directly into his general account for payment of fees for services, without issuing statements of account at the time. The Law Society did not allege that Mr. Faminoff had not completed sufficient work to justify billings in the amounts indicated on the dates of deposit. The particulars of the impugned transactions are set out in allegation 4 of the citation and Schedule 1 (Column D) thereof (Column D particularizes 33 such breaches of Rule 3-63(3)).

[28] Mr. Faminoff, at paragraph 28 of the ASF, admitted that the impugned conduct constituted breaches of Rule 3-63(3).

Allegation 5 – Breach of Rule 3-57(2)

[29] Paragraph 29 of the ASF states that, between approximately February 2007 and December 2008, Mr. Faminoff withdrew client funds from his trust account and deposited them into his general account in payment of fees for service without issuing or delivering a statement of account. The Law Society did not allege that insufficient work had been completed in each of the particular transactions to justify billing for the amounts transferred on the dates of the transfer. The particulars of the impugned transactions are set out in allegation 5 of the citation and Schedule 1 (Column E) thereof (Column E particularizes eight such breaches of Rule 3-57(2)).

[30] Mr. Faminoff, in paragraph 30 of the ASF, admitted that the impugned conduct constituted a breach of Rule 3-57(2).

Allegation 6 – Breach of Rule 3-56(1.2)(b)

[31] Paragraph 31 of the ASF provides that, on January 25, 2007, Mr. Faminoff withdrew \$1,695 from his trust account for payment of fees on behalf of his client MR when there were not sufficient funds held to the credit of that client.

[32] Mr. Faminoff, in paragraph 32 of the ASF, admitted that the impugned conduct constituted a breach of Rule 3-56(1.2)(b).

Allegation 7 – Failure to comply with Division 7, Part 3 of the Rules

[33] Paragraph 33 of the ASF provides that, between January 2007 and June 2010, Mr. Faminoff failed to maintain his records in accordance with Division 7 of Part 3 of the Rules by:

- (a) failing to record in a book of original entry for his general account the name of each recipient for each disbursement, contrary to Rule 3-61(1)(a);
- (b) failing to record in his accounts receivables ledgers for his general account the balance owed by each client, contrary to Rule 3-61(1)(b);
- (c) failing to complete trust reconciliations for the months January 2007 through June 2007, contrary to

Rule 3-65(2)(a);

(d) failing to reconcile, in his monthly trust reconciliations for the months July 2007 through December 2008, the total of all unexpended balances of funds held in trust for clients as they appeared in the trust ledger with the total of balances held in his trust bank account and did not provide an explanation for the difference, contrary to Rule 3-65(1); and

(e) failing to maintain a cash receipt book of duplicate receipts from approximately January 30 to October 9, 2008, contrary to Rule 3-61.1.

[34] Mr. Faminoff, in paragraph 34 of the ASF, admitted that the impugned conduct constituted a breach of Rules 3-61(1)(a), 3-61(1)(b), 3-65(2)(a), 3-65(1) and 3-61.1.

[35] Despite Mr. Faminoff's admissions that his conduct in respect of allegations 2 to 7 constituted breaches of the Rules, the Law Society is seeking a finding that such acts constitute professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

[36] The burden rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the necessary facts to support a finding of professional misconduct on a balance of probabilities. (*Law Society of BC v. Liggett*, 2009 LSBC 21, paras. 13-16.)

[37] The test for professional misconduct was set out in *Law Society of BC v. Martin*, 2005 LSBC 16, where the Panel cited *Re: Lawyer 12*, 2011 LSBC 35, as follows:

... 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.

ALLEGATIONS 2 – 5

[38] Allegations 2 – 5 arise out of Rules requiring a lawyer who receives trust funds (which includes funds received for services to be performed) immediately to place such funds in a pooled trust account and Rules specifying the proper manner in which such trust funds may be withdrawn.

[39] The Respondent does not dispute that his conduct breached the Rules referred to in allegations 2 to 5. He says that most of the clients' payments that were deposited directly to his general account related to files on which he had "fixed" (also known as "flat" or "set") fee arrangements. His rationale for taking the money at the time it was received from the clients was that the fixed fee arrangement had committed him to do all the work and that such a commitment would justify what is sometimes referred to as a "pre-taking" of fees for services not yet performed, but which, in fact, would ultimately be performed.

[40] However, "pre-taking" of fees in circumstances where there is a fixed fee arrangement with a client is not permitted under the Rules.

[41] The direct deposit of clients' funds by the Respondent into his general account and his improper withdrawal of such funds, on numerous occasions is a serious breach of the applicable Rules. Those Rules are found in Division 7 of Part 3 of the Rules. The Division is entitled "Protection of the Public". Enforcement of those Rules is critical in ensuring that the public has confidence that its interests are, in fact, being properly protected in connection with a lawyer's handling of trust funds.

[42] The Panel finds that the Respondent's admitted conduct in respect of allegations 2 to 5 were serious breaches of the Rules that occurred on numerous occasions over approximately one year. In the circumstances, the Panel finds that the Respondent's conduct in each case fell markedly below the standard expected of a lawyer and constitutes professional misconduct.

ALLEGATIONS 6 AND 7

[43] The Respondent admits that his conduct constituted a breach of the Rules referred to in allegations 6 and 7.

[44] The Rule involved in allegation 6 concerns the Respondent transferring funds from his trust account to his general account for payment of fees on behalf of a client when there were not sufficient funds held in trust to the credit of that client.

[45] The Rules involved in allegation 7 concern the Respondent's failure to properly maintain his accounting

records.

[46] The Respondent argues that his admitted breach of the Rule in allegation 6 only reflects a single instance of a lack of care on his part in coordinating the deposit of a payment by a client with a related withdrawal and should not constitute professional misconduct.

[47] In respect of allegation 7, the Respondent argues that the breaches occurred when he was generally busy and falling behind, and that, as it was the first time he had been criticized for his record-keeping, his breaches should not constitute professional misconduct.

[48] Allegations 6 and 7, taken on their own, would not, in the Panel's view, likely constitute professional misconduct. However, when considered as part of the Respondent's broader course of impugned conduct regarding accounting Rules specifically designed to protect the public interest, the breaches are serious and part of a pattern of failure to follow the Rules for approximately one year. In the circumstance, the Panel finds the Respondent's admitted conduct fell markedly below the standard expected of a lawyer and constitutes professional misconduct.

ALLEGATION 1 – BACKDATING STATEMENTS OF ACCOUNT

[49] Paragraphs 19 and 20 of the ASF state:

19. During the course of the [Investigation], Ms. Keating, the 4-43 Auditor, noted that the date on the face of many Statements of Account matched the date payments were deposited into the Respondent's general account. As a result of these findings, she searched the electronic copies of the Statements of Account maintained on his office computer and determined the following:

(a) Fifty-two (52) of the Statements of Account were created after the dates on their face ("the backdated Statements of Account").

(b) Forty-four of the backdated Statements of Account had been created between 2 and 4 January 2009, after the Respondent had received notice of the Compliance Audit. These accounts are set out in Column A of Schedule 1 of the Citation and particularized below in paragraphs 22(a)-(g), 25, 27(a)-(ff), and 29(a)-(c).

(c) The file copy of the backdated Statements of Account were dated to correspond to the dates on which client funds were deposited into the Respondent's general account with the following exceptions:

(A) The dates on two of the backdated Statements of Account were later than [sic] the date on which the client funds were deposited into the Respondent's general account;

(B) The dates on five of the backdated Statements of Account were earlier than [sic] the dates on which the client funds were deposited into the Respondent's general account.

20. While the Respondent delivered some of the backdated Statements of Account to some clients, he did not deliver all of them.

[50] In paragraph 21 of the ASF, the Respondent admitted that the conduct set out in paragraph 19 quoted above constituted professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

[51] However, the Respondent has not admitted that, in backdating the statements of account, he misrepresented to the Law Society that the backdated statements of account were issued and delivered to the clients on or about the dates on the face of the statements of account, when he knew they had not been. The Law Society is asking this Panel to find, in its assessment of the relative gravity of the Respondent's admitted professional misconduct, that his state of mind, at the time of the backdating, was that he acted with intent to mislead the Law Society.

[52] In support of its position, the Law Society relies on statements the Respondent provided during an interview on September 14, 2012 (the "Interview") by counsel for the Law Society. Counsel for the Respondent was also present. The Interview was recorded and transcribed into a written record (the "Transcript"), which was reviewed and corrected by counsel for the Law Society (ASF Tab 12). At the outset of the interview, one of the interviewers reminded the Respondent as follows:

DM: ... First of all, I'd like to just remind you that this meeting is being recorded and you agree to its being recorded. We will send you a copy of the transcript when we receive it for your review. I'd

also just like to remind you that this recording and the transcript can be used in Law Society proceedings and that we will be using it as part of our investigation and it may be entered in evidence if there's a potential Hearing. And do you understand that?

WF: Yes.

[53] The Respondent did not give an oath or affirm that his answers were true at the time of the Interview.

[54] The Transcript is hearsay. A copy of the Transcript was admitted as proof that the statements attributed to the Respondent in the Transcript were made by him (ASF, paragraph 18). The Law Society argues that the portions of the Transcript it intends to rely upon are statements made by the Respondent that constitute admissions against his interest and are therefore admissible for proof of their truth as an exception to the hearsay rule. The Respondent disagrees and says the Transcript statements are only admissible as proof of the fact that the statements were made and not proof of the truth of the statements. The Respondent further says that, if the Transcript is determined to be admissible for the proof of the truth of the statements, then there are portions of the Transcript that, he submits, indicate that he did not apply his mind to the gravity of his acts at the time of the backdating and, therefore, that he did not intend to mislead the Law Society.

[55] The Respondent did not give evidence. The Panel, therefore, had no opportunity to hear his evidence as to his state of mind at the time of the backdating of the statements of account or to hear and observe him under cross-examination.

[56] The statements in the Transcript might be admissible as proof of the truth of the Respondent's statements provided they are admissions against his interest. However, the Panel is of the view that it is not necessary to determine whether that exception to the hearsay rule is applicable. In the Panel's view, the Respondent's statements in the Transcript, while hearsay, were provided in a setting with a high degree of formality. While the Respondent was not under oath or affirmation, he knew and understood the purpose of the Interview and, particularly, that his statements in the Transcript could be used by the Law Society in this hearing. He acknowledged his understanding of the purpose of the Interview and had his counsel present. In those circumstances, the Panel is of the view that the statements made by the Respondent and recorded in the Transcript can be considered as having a high degree of reliability.

[57] In addition, the Panel is of the view that it cannot properly determine the Respondent's state of mind at the time of the backdating without reference to the Transcript and that it is, therefore, necessary to refer to the Transcript for that purpose. In the result, the Panel finds that it will consider the Respondent's statements in the Transcript to be admissible for the proof of the truth of the statements on the basis that they are reliable and necessary. The weight to be given such evidence is for the Panel to determine.

[58] The Law Society relies upon the following evidence in support of its position that the Respondent intended to mislead it at the time he backdated the statements of account:

(a) On or around December 5, 2008, the Respondent received Notice of the Compliance Audit, which stated:

This audit is being conducted in accordance with Law Society Rule 3-79. It will examine your compliance with Division 7 Rules covering trust accounts and other Client Property.

ASF Tab 2

(b) On December 5, 2008, the Respondent sent a letter to the Law Society acknowledging that he had received the Notice of Compliance Audit.

ASF Tab 2

(c) In a letter dated July 18, 2012, the Respondent made the following admission:

The Statements of Account were backdated in preparation for the Rule 3-79 audit of which I had prior notice. I realized these Statements of Account should have been prepared previously, but in my mind, it was simply a case of trying to catch up on overdue paperwork.

ASF Tab 9

(d) The following statements were made by the Respondent during the Interview and recorded in the Transcript (ASF Tab 12):

SC: Now in your correspondence you've indicated that you back-dated these invoices in anticipation of the rule, in anticipation of the compliance audit.

WF: Yes.

Transcript p. 34

...

SC: So the, if I understand you, the account would be dated in accordance to when the payment was made?

WF: As one of the factors yeah.

SC: What would the other factor be? Just thinking about the date here, not the invoice.

WF: It's the date I think is primarily when the payment's made.

Transcript p. 35

...

SC: You were aware at the time of the trust accounting Rules 351 and 357 which stated that, which we've discussed before which provide that money should be put in trust for work to be done and that a lawyer should not be depositing, transferring the money from trust until an invoice had been issued. You were aware of that accounting rule?

WF: Yes.

SC: And you were aware of the fact that you had breached it.

WF: Well again...

SC: You were aware that you were behind in your invoices.

WF: Yes, yes.

SC: And you were aware that invoices were required under the Law Society rules.

WF: Well yes, invoices have to be issued, yes.

Transcript p. 44

...

SC: And did you instruct her as to, who did the typing and who, did she type and you...?

WF: Yes, KA.

SC: You dictated ...?

WF: Yes, KA typed and I would have dictated the accounts.

SC: Right, including the dates.

WF: Yes.

Transcript pp. 37 – 38

...

SC: Is it, are you aware of other circumstances in which it's routine to back date document, accounting documents?

WF: No.

SC: And had you ever, in your practice, understood that back dating accounting documents was a desirable or an acceptable practice?

WF: No, not desirable.

SC: Acceptable, under accounting rules?

WF: I don't know if I thought about acceptable with respect to this. I really didn't put my mind to it.

Transcript pp. 45 – 46

...

DM: If I could ask one question, it's quite a simple one. After you created the invoices to get your accounting records back up-to-date, did you send those invoices out to the clients?

WF: Some of them were sent out to clients. I think the ones that were resident in Canada got the ones. The ones that were out of the country, probably not, because some of my clients who come to Canada for six months, maybe a year, and then they would return back to their home countries. But some were, I cannot say all of them were.

DM: But you made the effort to complete the cycle and get the invoices out to the clients.

WF: Right.

Transcript p. 49

[59] The Respondent's position is that, in backdating the statements of account, he did not intend to mislead the Law Society. In support of his position, the Respondent relies upon the following evidence:

(a) With respect to his state of mind at the time of the backdating, he refers to the following comment taken from his letter to the Law Society of July 18, 2012:

The Statements of Account were backdated in preparation for the Rule 3-79 audit of which I had prior notice. I realized that these Statements of Account should have been prepared previously, but in my mind, it was simply a case of trying to catch up on overdue paperwork. It is important for you to know that these were mostly fixed fee arrangements in visa cases, so that the costs to the client were in accordance with the clients' [sic] expectations. Although it will sound naïve, I believed that it would actually be helpful for the Auditor to have the billing records in order to reflect what specific services had been provided to and paid by the clients. *I appreciate now that it might also appear that I was trying to deceive the auditor, but that truly was not my intent.*

The dates were chosen based on payments having been received from the clients for the services that were being provided for them on the files. I do not believe I had any discussions with my clients about the actual Statements of Account (as opposed to discussions we had about what I would bill for my services, and at what stages).

[emphasis added]

ASF, Tab 9

(b) The following statements were made by the Respondent during the Interview and recorded in the Transcript (ASF, Tab 12):

SC: Could you sort of tell me what was going through your mind with respect to that in terms of non-compliance with the rules?

WF: Well I felt at the time that I was giving the clients a substantial fee break and that the work was being done, all the work would be done, and I would speak with the client about the fee arrangement as far as the tranches and agreed amounts would be. I should have obviously paid more attention to the rule.

SC: Did you turn your mind to the rule with respect to your practice?

WF: I, honestly I, at the time, I probably was a little overwhelmed to just stop and pay closer attention to it. I mean if you rationalize what was going on, I think for me it was I'm doing the work, I'm making sure everybody gets their result, I'm providing the service by the strict compliance to the rules. On some files obviously it wasn't happening and yeah, I would say I should have been much more careful with how this, how these rules were applying to my practice.

Transcript p. 18

...

SC: How about the billing practices? Was that, did the, and by that I mean the practice of depositing money in general account prior to doing the work and prior to issuing the invoice? Had that always been part of your practice in terms of...?

WF: No.

SC: When did that arise or begin?

WF: I'm not certain. I'd have to check.

SC: Can you recall why you made that switch?

WF: I think primarily trying to get the foreign worker and build up that practice got me off the course and I was not paying close enough attention to my accounting at that time. I needed extra help, I should have just had an outside accountant available, coming in all the time.

SC: Right.

WF: But I always knew in my mind that the work I was doing I was a little bit overwhelmed as a sole practitioner so it was trying to keep up, it's you know I know it's not an excuse, I mean I'm admitting the rules weren't followed by strict definition.

Transcript p. 19

...

SC: Has it been your practice ... prior to this period, to deposit part of the funds in trust or had you always deposited the money directly into general?

WF: No, I think that started towards the time of this project that we dealt with. But again I don't know how to clarify better than simply indicating that for me, in my mind at the time, I knew I was doing all the work in agreement with the client, that the amount of work that was required. I just wasn't careful enough by splitting up the fees what should have been in trust, what should have been billed. I fell behind in my billing practice and you know I wish I'd done it differently now but ...

SC: But, splitting it up is something that you did prior to this period?

WF: No, 2007?

SC: Yeah. What I'm trying to determine is had it always been your practice when you got money and it was partly for work that had been done and partly for work to be done, to deposit that directly into your general account?

WF: I'm not sure. I'd have to check going beyond 2007.

SC: Okay, so you don't recall?

WF: I'm not sure, I'm sorry, I don't recall but yeah, I'd have to check. I was never required to handle a trust account in any other prior areas that I worked. I'm not offering that as an excuse, I'm just saying I never was responsible for handling the trust at the other firms that I worked with.

SC: Yes, tell me a bit about that, how it would work in other firms?

WF: Just there's in-house accountants. They would handle all of, any cheques come in automatically goes to the in-house bookkeeper and you just do the work. And then every month your work in progress would be printed out and you would be advised by one of the managing partners get billing. So ...

SC: And you did not have that process when you started working as a general practitioner, is that correct?

WF: No, no.

SC: So would it be fair to say that you followed this practice that we've been discussing of depositing into the general account since you've been a sole practitioner?

WF: Probably yeah.

Transcript pp. 20 – 21

...

SC: And you dated the invoices in accordance with when the cheque is received. Why was that as opposed to dating it when you wrote the account? Why did you back date them as opposed to just issuing them late?

WF: I just, I didn't really put my mind to those statements of account except to do them and try to get the records up to speed a little bit and that was it. I didn't even make, I didn't realize it was even going to be an important part of the audit except that I thought the records were behind so I should start getting these records available in the files.

SC: Right. When you were drafting the invoice for example for JH, the date of the deposit was February 15th, 2008, and then the statement of account was dated the 15th of February, 2008, but written on January 2nd, 2009. Why didn't you date it January 2nd, 2009, which is when the invoice was being issued?

WF: Yeah, I should have done that but again I did not put my mind to that except to say it's something we need to get our records from the previous time to update it. But I didn't even spend that much time thinking about it except as a way of getting the records up-to-date a bit. I didn't even think it through that much.

SC: What, you obviously made a decision though to date the, to back date them to the date at the time that the money was received.

WF: Right.

Transcript p. 36

...

SC: So I'm going to suggest that by back dating the invoices, it wasn't helpful, it actually made it harder for the auditor to do her job because it made it harder for her to identify the fact that you had not complied with the trust accounting rules.

WF: I'm not sure if it was more difficult or not. I thought when I got the accounts together, I thought I was assisting her. In my mind that's what I believed at the time, that I would be helping her out and that I didn't even think this was going to be a central part of what her job was. In fact, I didn't know what her job was really except that you know she was going to look at some files and see how they were being administered but I, I didn't really put much focus on the fact that these bills were back-dated. I didn't think anything really was major about that. I do now, based on what's transpired. But at the time, I didn't see it as a focal point of the audit.

Transcript p. 43

...

SC: Yes. And by back dating the invoices, you must have been aware that you were creating the appearance that invoices had in fact been issued.

WF: I mean again, at the time, all I knew was my records were behind and I thought that this would be helpful so I asked to my assistant [sic] if we could get these records up-to-date. But I didn't put my mind as to what appearances or any attempt to deceive, I was putting my mind to the fact that I was behind in recordkeeping and I thought I'd be doing some helpful things for the audit.

SC: Leaving aside any attempt to deceive, you must have been aware that it would, that someone looking at the account would think that the account had been issued on the date it was dated.

WF: I didn't really even think about that at the time. I, now, I of course can think about that, but at the time I didn't put my mind to that. I thought this would be helpful, it would help her position and I didn't put my mind to anything like that. After you know the questions you've raised, I can understand that you know you have a concern. But it wasn't an intent to deceive, it was an attempt

to get my records up to speed because I was behind and I thought that would helpful [sic] for whatever process the auditor had to go through.

SC: So why did you not tell her that you'd done that?

WF: Just never really had an opportunity or anything else. I was extremely busy as a sole practitioner and I didn't even stop to discuss it. There were other things I think that were just occupying my mind at the time.

Transcript pp. 44 – 45

(c) The Respondent called one witness, KA, his primary assistant during the relevant time period, to give evidence at the hearing. To some extent, her evidence was in respect of the Respondent's character. The Panel gave no weight to that evidence. KA was recruited from a previous job with a bank and had no prior training in legal or accounting work. She entered into a personal relationship with the Respondent while she was employed by him. That relationship ended approximately a year and a half prior to this hearing. KA understood that the focus of this hearing was the backdating of several statements of account. She recalled that most of the backdated statements of account were prepared over a period of three days. The Respondent prepared the drafts in handwritten note form and KA typed up the statements of account. It was her understanding that the statements of account were required for the Law Society auditors so that they could follow the trail. It was also her understanding that the Respondent was embarrassed by the Audit and was afraid of the Law Society. She understood that he wanted to clean things up in his practice and do things well going forward.

[60] It is for this Panel to determine, on the basis of the foregoing evidence, whether the Respondent intended to mislead the Law Society by backdating the statements of account.

[61] The Respondent received and acknowledged notice of the Compliance Audit. He was aware of the applicable Rules regarding trust funds and knew that the Compliance Audit was being conducted to examine his compliance with those Rules. KA said he was embarrassed and afraid of the Law Society. He was understandably concerned about the Audit and wanted to clean up his practice and record keeping. He did this by backdating 44 statements of account over a three-day period to accord with the dates he received funds from his clients. He did this in anticipation of the Compliance Audit. He did not tell the auditor that he had backdated the statements of account and only acknowledged the backdating when confronted by the auditor. He could not think of any circumstance in which it was routine to backdate accounts. Nor did he understand that backdating was a desirable practice.

[62] The Respondent has clearly and candidly admitted that he did not follow the applicable trust account Rules when he deposited clients' funds directly into his general account or withdrew clients' funds from his trust account without issuing and delivering statements of account at the time. He admits that such conduct constituted professional misconduct. He rationalized that he was doing all the work and making sure his clients got their results. He knew his records were behind, and he tried to get them up to date for the Compliance Audit. He thought that would be helpful to the auditor and, in the Transcript, stated that he did not put his mind to any attempt to deceive the Law Society. He also notes that the Law Society does not allege misappropriation of clients' funds. Nor does it suggest that the work was not completed by the Respondent before the backdated statements of account were issued or that the Respondent was not entitled to the fees. Finally, he points out that there was no evidence that any of the clients ever made complaints in relation to the files which are the subject of allegation 1.

[63] Having considered the evidence and submissions of counsel, this Panel finds that it is neither consistent with the surrounding events at the time, nor with common sense, to find that the Respondent did not turn his mind to the fact that backdating the statements of account would make it look like they had been issued at the time that clients' funds were deposited directly into his general account or trust account. The only reasonable inference is that the Respondent intended the consequences of his actions; namely, to make it appear to the Law Society that the statements of account had been issued and delivered to his clients on the dates on their face, when he knew they had not.

[64] In the circumstances, the Panel finds the Respondent's admitted conduct of backdating statements of account as particularized in allegation 1 constitutes professional misconduct. The Panel also finds that, at the time he backdated the statements of account as set out in allegation 1, he intended to mislead the Law Society by falsely representing that the statements of account had been issued and delivered to his clients on or about the dates set out in the statements of account when he knew that they had not been issued and delivered on those dates.

ALLEGATION 8 – BREACH OF UNDERTAKING

[65] Paragraph 35 of the ASF states that, between January 2007 and April 10, 2010, the Respondent was bound by undertakings imposed by ICBC requiring him to obtain his clients' signatures on Releases provided by ICBC and to return the Releases to ICBC before he disbursed settlement funds. In breach of those undertakings, the Respondent:

- (a) on three occasions, as particularized in paragraph 36 of the ASF, disbursed settlement funds to himself in payment of his fees and disbursements before he had obtained signed Releases and, on one occasion, when he had the signed Release, but had not returned it to ICBC; and
- (b) on seven occasions, as particularized in paragraph 36 of the ASF, disbursed settlement funds to himself in payment of his fees and disbursements and to his clients after the Releases had been signed, but before they were returned to ICBC.

[66] At paragraph 37 of the ASF, the Respondent admitted that the impugned conduct breached Chapter 11, Rule 7, of the *Professional Conduct Handbook*, then in force, and that such acts constituted professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

[67] Undertakings play a fundamentally important role in the day to day practice of law. Strict compliance with undertakings is therefore equally important in order to ensure that they can continue to be given and relied upon by members of the Law Society and the public.

[68] In this matter, ICBC settlement funds were delivered to the Respondent on his undertaking not to distribute such funds until he had signed Releases and had returned them to ICBC. He breached those undertakings on 11 separate occasions.

[69] The Respondent argues that he was merely sloppy in the circumstances, but that all the signed Releases were eventually returned to ICBC and no settlement funds were paid to any client before he had signed Releases.

[70] In the Panel's view, that is no answer to the Respondent's admitted breaches of the undertakings given to ICBC, nor to his admission that such breaches constituted professional misconduct.

[71] The Panel finds the Respondent's admitted breaches of undertakings as set out in allegation 8 fell markedly below the standard expected of a lawyer and constitute professional misconduct.

Determination

[72] In respect of allegation 1 of the citation, the Panel finds that the Respondent's conduct constitutes professional misconduct and further finds that, at the time the Respondent backdated the statements of account as set out in allegation 1, he intended to mislead the Law Society by representing that the statements of account had been issued and delivered to his clients on or about the dates set out in the statements of account, when he knew that they had not been issued and delivered on those dates.

[73] In respect of allegations 2 to 8 of the citation, the Panel finds that the Respondent's conduct constitutes professional misconduct.

[74] This matter will now be set down for a hearing on the appropriate disciplinary action under section 38(5) of the *Legal Profession Act*.