

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

SEBASTIAN NEJAT

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date: August 26, 2014

Panel: A. Cameron Ward, Chair
Patrick Kelly, Public representative
David Layton, Lawyer

Counsel for the Law Society: Carolyn S. Gulabsingh
Appearing on his own behalf: Sebastian Nejat

INTRODUCTION

[1] The Respondent is the subject of a citation alleging that he committed professional misconduct by failing to disclose material information to the court and the opposing party or counsel, contrary to Chapter 1, Rule 2(1) or 2(3), or Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force by:

- (a) failing to disclose that he no longer held any funds in trust on behalf of his client during a court appearance on June 28, 2011, when the court ordered that the funds held in his trust account be frozen pending final determination of the issues between the parties; and
- (b) failing to subsequently correct the record, or continuing to leave the impression that he held the funds in trust, on some or all of the following occasions:

- i. when he wrote to opposing counsel on July 13, 2011 enclosing the draft order he had signed;
 - ii. when he wrote to the opposing party on August 23, 2011 and August 30, 2011 seeking her agreement to allow him to release to his client funds held in trust; and
 - iii. a court appearance on April 12, 2012.
- [2] The citation was authorized by the Discipline Committee on December 5, 2013 and issued December 16, 2013. The Respondent has admitted that he was served with the citation on December 17, 2013.
- [3] The Respondent made a proposed conditional admission under Rule 4-22 that his conduct constituted professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*. The Discipline Committee accepted the conditional admission at its meeting on July 10, 2014, and instructed the Law Society's counsel to recommend its acceptance to the hearing panel.
- [4] Pursuant to Rule 4-22(5), the sole issue for determination is whether we accept or reject the proposed disciplinary action. In making this determination, we must be satisfied that the admission on the alleged infraction is appropriate and that the proposed disciplinary action is within the range of a fair and reasonable disciplinary action in all of the circumstances (*Law Society of BC v. Dhindsa*, 2014 LSBC 18, para. 7).

FACTUAL OVERVIEW

- [5] The parties provided us with an agreed statement of facts, the relevant portions of which are set out below.
- [6] Sebastian Nejat, now 33 years of age, was called to the Bar on June 1, 2010 and has practised law in Vancouver in areas including administrative law, family law, civil litigation, residential real estate and motor vehicle law.
- [7] AJ and FG separated and retained lawyer CS to assist them with the sale of their family residence, which sold in January 2011 producing net sale proceeds of \$255,999.25 owing to them collectively.
- [8] On January 14, 2011, AJ and FG signed a Direction to Pay with CS, which provided that:

Balance Payable to be held in CS and associated Trust in an interest bearing account. To be realized upon mutual agreement of AJ and FG and their respective council [sic].

- [9] On March 4, 2011, FG appeared before Mr. Justice Groves and obtained an order that:
- The sum of \$175,000 from the balance of proceeds of sale of the matrimonial home, currently held in trust by CS and Associates Law Corporation be paid out, together with any accrued interest, to the Claimant, FG forthwith.
- [10] The March 4, 2011 order reflected that AJ had been served with FG's application but did not appear to defend the application.
- [11] On March 4, 2011 FG attended at CS's office with a copy of the court order she obtained that day, and CS paid out the funds as the order stipulated.
- [12] On or about March 16, 2011, AJ retained Mr. Nejat to act for him. Mr. Nejat emailed CS on March 16, 2011, and arranged for the balance of the net sale proceeds held by CS in trust to be transferred to Mr. Nejat in trust.
- [13] On March 17, 2011, Mr. Nejat brought an application without notice seeking an order restraining FG from disposing of the funds that were paid out to her pursuant to the March 4, 2011 order. Master Taylor made the requested order.
- [14] On March 23, 2011, CS provided Mr. Nejat with a cheque for the balance of the net sale proceeds, which amounted to \$80,952.70. Mr. Nejat deposited the cheque into his trust account.
- [15] On March 29, 2011, Mr. Nejat brought an application without notice before Master Taylor, seeking an order compelling FG to pay \$175,000 into court. Mr. Nejat advised the court that he had not been able to serve FG with the March 17, 2011 order and had been unable to contact her, as his only way to communicate with her was through a mailbox at the UPS Store in West Vancouver. Master Taylor granted the requested order.
- [16] On May 5, 2011, at the request of AJ, Mr. Nejat provided him with a trust cheque for \$78,952.70, which was the balance of the net sale proceeds he held in trust, less legal fees along with a cover letter in which he advised AJ of "the potential ramifications of requesting this sum from us and disposing of it."
- [17] On June 28, 2011, DB appeared before Mr. Justice Groves on FG's behalf to set aside the orders made by Master Taylor on March 17, 2011 and March 29, 2011.

Mr. Nejat appeared on behalf of AJ. While hearing the application, Mr. Justice Groves attempted to clarify the status of the net sale proceeds from the family residence. DB advised the court that the funds that remained in CS's trust account had been transferred to Mr. Nejat, subsequent to which, the following exchange occurred:

Mr. NEJAT: CS & Associates issued a cheque for the balance to my account because they didn't want to keep it there. So they paid out 175 to FG and then they issued a cheque in trust to my – to my client.

THE COURT: How much?

MR. NEJAT: For 80 - I have -\$80,952.70.

[18] Mr. Justice Groves set aside both orders of Master Taylor and directed that the funds in Mr. Nejat's trust account be frozen pending final determination of the matter, except for \$15,000, which would be made available to AJ. Mr. Justice Groves also ordered that \$36,476.35 of the funds paid into court by FG be paid to DB in trust. The court commented:

The effect of this order is to basically give FG one-half of this family asset, this home. The rest is held in trust in some capacity or another.

[19] Mr. Nejat did not advise the court at any time during the June 28, 2011 proceedings that he no longer had any money in trust account on behalf of AJ or FG.

[20] On July 13, 2011, Mr. Nejat returned to DB the signed draft of Mr. Justice Groves' June 28, 2011 order, along with a covering letter. Mr. Nejat did not advise DB that he no longer held any funds in trust on behalf of AJ and FG.

[21] In or about early August 2011, DB withdrew as FG's counsel and FG began representing herself.

[22] On August 23, 2011, Mr. Nejat wrote to FG in an attempt to secure her consent for him to release trust funds to AJ. Mr. Nejat wrote:

In view of the above, please advise by September 9, 2011 whether you consent to the release of the sum of \$65,952.70 to my client. Please note that this is independent of the \$47,000 that would still remain in court.

[23] Mr. Nejat did not advise FG that he had already released all of the funds in his trust account to AJ in May 2011.

[24] On August 30, 2011, Mr. Nejat wrote to FG again, and stated:

Lastly, since you are withholding your consent to the release of trust funds to my client, I have instructions to bring an application for an order for same and to also compel you to produce all your banking records. I will provide you with my client's filed Notice of Application in due course.

[25] Once again, Mr. Nejat did not advise FG that he had already released all of the funds in this trust account to AJ in May 2011.

[26] In or about March 2012, FG retained KS, who arranged for a Trial Management Conference on April 12, 2012 before Madam Justice Gerow. The following are excerpts from the transcripts where Madam Justice Gerow questioned Mr. Nejat about the status of the funds in his trust account:

THE COURT: Did you release \$65,000 out of your trust account?

MR. NEJAT: I have to check with – with your – with our accountant. If any money was released to AJ, which I don't know, it – it was definitely before that court order was made, right? I – I certainly did not release – I have not had any dealing with AJ after – after the chambers proceedings. He was away for a long time. I have not been in constant communication with him. I certainly haven't given any instructions to my office to release any money to him. So there was certainly no activity done on his file after that court order was made, so I don't know what letter my friend is referring to.

...

THE COURT: And are you saying you don't know whether this money's in trust?

MR. NEJAT: I haven't authorized any release to my client since that date. If any money was released to him at his request, it was – it may have been before that date. I have not authorized any. A lot has transpired after that court order and – and there were no orders before that – before that order was made, so I –

THE COURT: Well, presumably there was –

MR. NEJAT: I need to have –

THE COURT: – this money was in existence at the time the court order ...

MR. NEJAT: Yes.

THE COURT: ... was made.

MR. NEJAT: I –

THE COURT: You appeared –

MR. NEJAT: Yes

THE COURT: at this order.

MR. NEJAT: I don't know how much there was in trust at the time. There was no court order dealing with the money in trust before that date. The money was released to us ...

THE COURT: I thought there was section – there was [sic] orders in place not allowing either party to dispose of the assets.

MR. NEJAT: Only – only FG.

...

THE COURT: ... And, I don't understand why you can't tell me what the funds are in your trust account at this point. That should be fairly easy determination. So I'm just telling you this could be problematic for you, sir.

MR. NEJAT: My Lady, at the time I was – the matters that were discussed at the hearing were not matters that were supposed to be discussed at the hearing, so I did not come to court prepared to answer all the questions.

THE COURT: Sir –

MR. NEJAT: ... not spent any money.

THE COURT: Sir, that's not the issue, and that should not be the issue that you're concerned with. That is not the issue here.

- [27] When Mr. Nejat stated, "If any money was released to him at his request, it was – it may have been before that date," he was referring to June 28, 2011, the first date he appeared before Mr. Justice Groves on behalf of AJ.
- [28] At the Trial Management Conference on April 12, 2012, Madam Justice Gerow ordered Mr. Nejat to advise KS by the end of the day of the amount he held in trust on behalf of the parties.
- [29] On April 12, 2012, at 6:50 pm, Mr. Nejat wrote to KS to advise that he may not be able to provide the information regarding the trust accounting activity as ordered by Madam Justice Gerow until April 16, 2012, depending on the availability of his bookkeeper.
- [30] On April 13, 2012, KS wrote to Mr. Nejat and advised that she did not need a summary of his trust account, but wished to know whether or not funds had been released to AJ and how much, if any, funds Mr. Nejat held in trust on behalf of the parties.
- [31] On April 13, 2012, Mr. Nejat wrote to KS and advised that he no longer held any funds in trust on behalf of the parties, as \$78,952.70 had been released to AJ on

May 5, 2011. Mr. Nejat also stated in this letter that he was going to withdraw as AJ's lawyer.

- [32] On August 24, 2012, at approximately 11:00 am, Mr. Nejat obtained an order from Master Taylor removing him from the record as AJ's lawyer. KS did not appear on the application because Mr. Nejat did not provide her with his materials until 10:00 am the same morning.
- [33] On August 27, 2012, KS appeared before Mr. Justice Groves for the summary trial. AJ was represented by AS, who appeared for the sole purpose of applying for an adjournment of the trial. Mr. Justice Groves adjourned the summary trial and directed Mr. Nejat to appear for the summary trial application before him and to provide the court with all the financial records of his trust account pertaining to the parties and obtain and produce CS's trust records as well.
- [34] On September 28, 2012, Mr. Justice Groves heard the summary trial application. Mr. Nejat appeared and was questioned by the court about the trust funds and how he had obtained an order removing himself from the record without proper notice to KS. In his reasons for judgment, Mr. Justice Groves was highly critical of Mr. Nejat's lack of candour in his earlier dealings with the court, opposing counsel and FG, and directed that the reasons be transcribed and forwarded to the Law Society.
- [35] As Mr. Nejat explained to Mr. Justice Groves on September 28, 2012, augmented by his subsequent response to queries posed by the Law Society's investigators and his submissions to us at the hearing of this matter:
- (a) on June 28, 2012, when Mr. Justice Groves made the order requiring him to keep the funds in trust, he truly did not know whether the funds had been paid out to his client, not having expected the issue to be raised in court that day, and therefore made an inadvertent error in stating that the funds were still in his trust account;
 - (b) he should have, but did not, inform the court and opposing counsel on subsequently realizing that the funds were not in his trust account;
 - (c) instead, his client provided Mr. Nejat with a cheque to "replace" the funds that had been released from trust prior to the June 28, 2011 order, and instructed Mr. Nejat to hold off cashing the cheque until sufficient funds were in the client's chequing account;
 - (d) it being uncertain whether his client would be able to honour the cheque, Mr. Nejat wrote to FG in August 2011 asking her to consent to his client

obtaining the funds from trust, the aim being to bring his client into compliance with the June 28, 2012 order;

- (e) when Mr. Nejat appeared before Madam Justice Gerow in April 2012, he was unsure of the status of this cheque and whether it was cashable; and
- (f) his uncertainty regarding the status of the trust monies at certain points was partly the result of his inexperience, he being a one-year call, combined with the fact that he had no control over the trust account used in the office where he practised.

[36] The Law Society has essentially asked us to accept the Respondent's explanation for his conduct. Given the parties' joint position in this regard, we are prepared to do so.

ADMISSION ON THE ALLEGED INFRACTION IS APPROPRIATE

[37] As officers of the court, lawyers have an overriding duty to ensure that they provide accurate information to the court, opposing counsel and self-represented litigants. When lawyers fail in this duty, the integrity of the profession and the administration of justice are compromised. It is no excuse that a lack of candour may inure to a client's benefit. A legal system in which the courts and other actors cannot trust a lawyer to be accurate in his or her representations cannot hope to achieve justice or maintain the respect of the public.

[38] The leading case defining what constitutes professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16, wherein the hearing panel concluded that the test is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct." *Martin* was applied recently in *Re: Lawyer 12*, 2011 LSBC 35 and in *Law Society of BC v. Gellert*, 2013 LSBC 22.

[39] As noted in *Gellert*, at paragraph 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.

[40] The Respondent's admission that his failure to disclose material information as detailed in the citation constituted professional misconduct is appropriate. While he did not intend to mislead the court or opposing counsel, his failure to disclose constitutes gross culpable neglect.

**PROPOSAL IS WITHIN THE RANGE OF FAIR AND REASONABLE
DISCIPLINARY ACTION**

- [41] The parties have proposed that the Respondent pay a fine of \$5,000 and costs of \$1,000, both payable by October 31, 2014, and the Discipline Committee has recommended that we accept this proposed disciplinary action.
- [42] In determining whether to accept the proposed disciplinary action, we must ascertain whether it is within the range of a “fair and reasonable disciplinary action in all of the circumstances”: see *Law Society of BC v. Rai*, 2011 LSBC 02.
- [43] We have considered the factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, including the nature and gravity of the misconduct, the Respondent’s lack of disciplinary history and the range of disciplinary sanctions imposed in prior similar cases.
- [44] In respect of the latter factor, we were referred to *Law Society of BC v. Boles*, [1999] LSBC 14, *Law Society of BC v. Antle*, 2005 LSBC 45, *Law Society of BC v. Galambos*, 2007 LSBC 31 and *Law Society of BC v. Cranston*, 2011 LSBC 24.
- [45] In *Boles*, the respondent was reprimanded for misinforming the court that a custody and access report was in the process of being prepared, when that was untrue. The panel found that the respondent did not intend to mislead the court, but had failed to exercise proper care in reviewing her file. The respondent had had a prior conduct review for failing to pay practice debts.
- [46] In *Antle*, the respondent, a senior lawyer with over 15 years of experience, was fined \$10,000 and ordered to pay costs after he was found to have unintentionally misled the court in four material respects on a without notice application for a garnishing order in a complex securities litigation matter.
- [47] In *Galambos*, the respondent was suspended for one month after he inaccurately advised the court on a without notice short leave application that all the pleadings had been served. When he returned to his office immediately after the application, he was advised that service of some of the documents had not been effected, but he failed to return to court to attempt to correct the misrepresentation.
- [48] In *Cranston*, the respondent was fined \$10,000 and ordered to pay costs of \$10,000 after a hearing panel found that the respondent’s conduct, which included five separate misrepresentations to the court, constituted incompetent performance of his duties as a lawyer.

- [49] In this case, there were five occasions, over a span of ten months, on which the Respondent failed to disclose material information or failed to correct the record. The benefit accruing to the Respondent was not significant, but he was able to pay his modest account sooner than if he had kept the funds in his trust account as required. These are aggravating factors, and there is a need to send a message of deterrence to the profession in order to preserve the integrity of the judicial system.
- [50] On the other hand, the Respondent has no relevant professional conduct record, he did not intend to mislead the court or opposing counsel, and at the time in question he was a fairly new call to the bar. In addition, he admitted his misconduct to the Law Society from the outset of disciplinary proceedings and conveyed to the hearing panel his deep contrition and indicated that he had taken steps to ensure that he would never commit such errors again. These are mitigating considerations.
- [51] Based on the foregoing, and according deference to the recommendation of the Discipline Committee, we conclude that a fine of \$5,000 and costs of \$1,000, payable by November 30, 2014, falls within the range of a fair and reasonable disciplinary action in all of the circumstances.

ORDER

- [52] We conclude that the Respondent committed professional misconduct as alleged in the citation, and order that he pay a fine of \$5,000 and costs of \$1,000, for a total of \$6,000, payable on or before November 30, 2014.
- [53] The Executive Director is instructed to record the Respondent's admission on his professional conduct record.

SEALING ORDER

- [54] Counsel for the Law Society applied for an order pursuant to Rule 5-6(2) that information identifying AJ and FG not be disclosed to the public. Accordingly, at the conclusion of the hearing we ordered that:
- (a) Exhibit 1, the Agreed Statement of Facts, be sealed and excluded from the public;
 - (b) If a member of the public requests a copy of Exhibit 1, that Exhibit 1 be redacted to preserve the anonymity of AJ and FG; and

- (c) If a member of the public requests a copy of the transcript of the hearing, that the transcript be redacted to preserve the anonymity of AJ and FG.

[55] We made the order sought to preserve the privacy and anonymity of AJ and FG in these family law proceedings.