2014 LSBC 57
Report issued: November 27, 2014
Citations issued: May 26, 2011 and May 24, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

BRADLEY DARRYL TAK

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	September 11, 2014
Panel:	Lee Ongman, Chair Anna Fung, QC, Lawyer John Lane, Public representative
Counsel for the Law Society:	Carolyn Gulabsingh
No-one appearing on behalf of the Respondent	

BACKGROUND

[1] On June 16, 2014 the Panel issued its decision on the Facts and Determination hearing of the 2011 and 2012 citations in *Law Society of BC v. Tak*, 2014 LSBC 27 (the "Decision").

[2] The Panel found that the Respondent had committed professional misconduct in respect of four allegations in the 2011 citation and all 22 allegations in the 2012 citation.

[3] The Law Society submits that the appropriate disciplinary action in respect of the Respondent's misconduct is disbarment.

[4] The Law Society also seeks costs of $10,530.

[5] The findings of professional misconduct in the Decision can be grouped into the following categories:

(a) misappropriation of client funds: allegation 1, 2011 citation; and allegations 1 to 8, 2012 citation;

(b) misleading or attempting to mislead the Law Society: allegation 4, 2011 citation; and allegations 18 and 19, 2012 citation;

(c) failure to respond to the Law Society: allegation 5, 2011 citation; and allegations 10 to 17, 2012 citation;

(d) failure to respond to another lawyer: allegation 3, 2011 citation;

(e) failure to report charges under a federal statute to the Law Society: allegation 20, 2012 citation;

(f) failure to report a certificate of judgment to the Law Society: allegation 21, 2012 citation;

(g) failure to remit to the Canada Revenue Agency funds he collected for GST: allegation 22, 2012 citation; and

(h) failure to abide by the Law Society trust accounting rules – allegations 9(a) through (f) and (h) through (j), 2012 citation.

[6] The Respondent was called to the bar on February 15, 1991. He was employed by Fraser and Beatty after call, and then from July 1992 to August 1996, he was employed by the Criminal Justice Branch of the Ministry of the Attorney General. He became a sole practitioner in August 1996, and since then has practised as a sole practitioner in the Lower Mainland except for approximately two years when he practised with Dickey, Browning, Ray, Soga, Dunne, Tak.

[7] The Respondent was suspended from practice from July 16, 2010 to August 30, 2010. He was also suspended from December 7, 2010 to January 1, 2011 for failure to file a trust report. His membership in the Law Society ceased between January 1, 2011 and February 17, 2011 for non-payment of fees, and he was suspended from February 17, 2011 to June 16, 2011. His membership was not reinstated after January 1, 2011, and he has remained a former member since then.

[8] The Respondent did not appear at this hearing or send anyone to appear on his behalf.

DECISION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

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

[10] The Respondent also failed to appear at the hearing on Facts and Determination, and we exercised our discretion under s. 42(2) to proceed in his absence.

[11] At the disciplinary action hearing, on learning that the Respondent was absent, we adjourned the proceeding for 20 minutes in order to provide the Respondent with additional time to appear.

[12] On reconvening, we relied on the affidavit filed by the Law Society confirming that the Respondent had been served with notice of the hearing by email. In addition, Law Society counsel satisfied us that a copy of the Notice of Hearing and material in support had been delivered by courier to the Respondent's home address under cover of a letter notifying the Respondent of its intention to seek disbarment. Based on this, as well as our findings regarding the Respondent's failure to attend at the Facts and Determination hearing on March 12, 2014, we exercised our discretion under s. 42(2) to proceed with the Disciplinary Action hearing in his absence.

[13] The circumstances relating to the Respondent's professional misconduct and rule breaches are detailed in our earlier Decision on Facts and Determination.

[14] A summary of the findings of professional misconduct in the Decision can be grouped into the categories set out in paragraph [5] above.

DETERMINATION OF THE APPROPRIATE SANCTION

[15] Rule 4-35 permits a panel to take account of the respondent's professional conduct record (PCR) in determining the appropriate penalty.

[16] The Respondent has an extensive PCR that includes three prior citations and a conduct review, as summarized in the paragraphs below.

[17] After a citation hearing on July 21, 2009, the Respondent was found to have committed professional misconduct by failing to respond to the Law Society regarding its inquiries about unsatisfied judgments against the Respondent that he had failed to report. The hearing proceeded summarily, and the Respondent was fined $2,000 and ordered to provide a substantive response to the Law Society within 21 days of the hearing.

[18] On December 10, 2009, the Respondent underwent a conduct review regarding his failure to report four unsatisfied judgments to the Law Society, his financial situation and the Respondent's plan, if any, to satisfy the judgments. The Conduct Review Subcommittee concluded at page 3 of their Report:

> [The Respondent] has now heard the importance of reporting judgments to the Law Society of British Columbia. We are very concerned about his apathy concerning his responsibility to satisfy judgments. He needs to change this and needs the assistance of the Chartered Accountant to break this unfortunate cycle. We hope that will occur.

[19] In December 2009, the Respondent was cited again for failing to respond to the Law Society, this time in respect of the Law Society's inquiries regarding the KP retainer funds (allegation 1, 2011 citation). After making a finding of professional misconduct at the Facts and Determination hearing, in the Disciplinary Action decision the panel noted, at paragraph 11, that this second finding of professional misconduct in respect of failing to respond to the Law Society came "… quickly on the heels of his July 21, 2009 citation in respect of which he was found to have professionally misconducted himself …" and ordered that the Respondent be suspended from practice for 45 days.

[20] On December 7, 2010, the Respondent was administratively suspended from practice as he had not filed a completed trust report for the year ending December 31, 2009. This administrative suspension was lifted January 5, 2011.

[21] In November 2009, the Respondent was referred to the Practice Standards Committee in respect of his failure to report unsatisfied judgments to the Law Society, and a practice review was ordered. Following the practice review, in March 2010, the Practice Standards Committee made 14 recommendations to improve the Respondent's practice and office systems and procedures, and directed that a follow-up practice review be held December 1, 2010. The follow-up review took place on December 20, 2010. No new recommendations were made in the report to the Committee in January 2011, but the Respondent was encouraged to fully comply with recommendations 8, 11 and 12 that the Practice Standards Committee had made in March. The Committee also revised recommendation 2

from the March recommendations urging that, within 30 days of the Respondent returning to practice:

(a) the Respondent confirm he had enlisted the services of a therapist to assist the Respondent in maintaining focus, prioritizing matters and dealing with emotional stressors;

(b) the Respondent provide a copy of the January 11, 2010 follow-up practice review report to his therapist;

(c) the Respondent attend counselling for at least 12 months, with his therapist providing a monthly report to the Committee; and

(d) a follow-up practice review be conducted within 20 days of the Respondent's return to practice.

[22] The Practice Standards Committee file was closed in March 2012 with recommendations outstanding.

[23] Following a third citation issued in October 2010 for failing to respond to the Law Society (which was heard on December 6, 2010), the Respondent was again found to have committed professional misconduct by failing to comply with an order made under Rule 4-43(2)(b) of the Law Society Rules, and for failing to respond promptly or at all to communications from the Law Society. The failures to respond that were the subject of the October 2010 citation were virtually a continuation of the failures to respond that led to the Respondent's 45 day suspension from practice. The panel ordered a suspension of four months, but at the time the sanction order was made (February 17, 2011) the Respondent was already a former member of the Law Society, for non-payment of fees, as detailed in the Decision at paragraph 25. The panel ordered that the four-month suspension commence on February 17, 2011, the date the decision was issued.

[24] The Respondent ceased to be a member of the Law Society on January 1, 2011 when two of the four cheques he provided to satisfy the annual fees, outstanding fines and costs were returned due to non-sufficient funds. The funds that were provided by the Respondent were first applied to the fines and costs owed to the Law Society, pursuant to Rule 2-77. The shortfall owing was $4,035.76 in respect of annual fees, fines and costs.

GENERAL PRINCIPLES

[25] Although the Respondent has not been a member of the Law Society since January 1, 2011, the provisions in the Act and Rules relating to discipline also apply to a former member as defined in s. 1 of the Act with the necessary changes and so far as applicable.

[26] The primary purpose of disciplinary action is set out in the following decisions: *Law Society of BC v. Hordal*, 2004 LSBC 36 at paragraph 51; *Law Society of BC v. Gellert*, 2014 LSBC 05 paragraph 36; and *Law Society of BC v. Hill*, 2011 LSBC 16. In *Hill*, the hearing panel commented at paragraph 3 that:

> It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

GLOBAL ASSESSMENT OF SANCTION

[27] In *Law Society of BC v. Lessing*, 2013 LSBC 29 , a recent s. 47 review decision, the review panel considered the approach to sanction in circumstances of multiple findings of professional misconduct. In that case, the review panel was reviewing the sanctions imposed under more than one citation. The review panel considered whether separate sanctions should be ordered for each proven allegation or if a single sanction should be imposed in respect of all of the findings of professional misconduct. At paragraph 77, the review panel held that the determination of whether a suspension or fine should be imposed, and the length of the suspension, should be made on a global basis.

[28] The assessment of sanction on a global basis discussed in *Lessing* echoes the approach taken in the decisions of *Law Society of BC v. Gellert*, 2005 LSBC 15, and the 2014 *Gellert* decision cited above. In the 2005 *Gellert* case, the respondent was found to have committed a wide range of professional misconduct in respect of 12 allegations contained in four citations. The Law Society and the respondent agreed that the appropriate approach in determining sanction was to deal with all of

the proven instances of misconduct with one sanction. The single Bencher panel accepted this approach. In the 2014 *Gellert* case, where there were multiple findings of professional misconduct in a single citation, the hearing panel held at paragraph 37:

> In cases involving multiple allegations of professional misconduct and/or rule breaches, the usual approach is to arrive at a disciplinary action that is suitable for all of the incidents viewed globally (*Gellert*, (supra), para. 22; *Law Society of BC v. Basi*, 2005 LSBC 1, para. 2; *Law Society of BC v. Markovitz*, 2012 LSBC 25, para. 13; *Law Society of BC v. Lessing*, 2013 LSBC 29, paras. 75-78). A global approach tends to carry with it the benefit of simplicity and will, in most cases, be particularly well-suited to arriving at a result that furthers the objective of protecting the public. After all, the extent to which the public needs protection, and the manner by which such protection is best provided, must ultimately relate to the entire scope of the misconduct in issue and not to each particular wrongdoing viewed piecemeal.

[29] These general principles provide guidance to hearing panels, but are not binding, and the ultimate determination of sanction is contingent on the unique facts and circumstances of each case.

PRINCIPLES OF PROGRESSIVE DISCIPLINE

[30] The principle of progressive discipline suggests that a lawyer who has had prior discipline, whether for the same or different conduct and whether that conduct has been joined in one proceeding or dealt with by way of successive proceedings, may have a more significant disciplinary sanction imposed in a subsequent proceeding than someone who has had no prior discipline.

[31] This principle has been followed in recent Law Society decisions such as *Law Society of BC v. Niemela*, 2012 LSBC 09, and *Law Society of BC v. Batchelor*, 2013 LSBC 09. In *Lessing*, the review panel stated at paragraph 73:

> In regard to progressive discipline, this Review Panel does not consider that *Law Society of BC v. Batchelor*, 2013 LSBC 9 stands for the proposition that progressive discipline must be applied in all circumstances. At the same time, the Review Panel does not believe that progressive discipline can only be applied to similar matters.

OGILVIE FACTORS

[32] In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the panel set out a non-exhaustive list of factors to be considered in determining the appropriate disciplinary action. This case is often cited and utilized in disciplinary cases in the consideration of the factors and weight to be given to those that are applicable in the circumstances. The following factors listed are found in paragraph 10 of the *Ogilvie* decision:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public s confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[33] In this case the Panel places the most weight on the following factors, namely: a) nature and gravity of the misconduct; k) deterrence, and l) the need to ensure the public's confidence in the integrity of the profession, which means confidence in knowing that the Law Society can properly govern the profession by delivering the

most serious discipline to those whose conduct is completely unacceptable. The public needs to have confidence that a lawyer who has been found guilty of multiple instances of professional misconduct in his responsibilities to his clients, his colleagues, and the Law Society will be disciplined severely.

[34] The Panel also weighed the facts in light of the other *Ogilvie* factors and drew the following conclusions in relation to the *Ogilvie* factors:

d) victim impact and e) advantage gained: the victims (the Respondent's clients) were often facing criminal court proceedings and suffered anxiety and worry, which was shared by their families. Monies were taken by the Respondent from clients and clients' families as a retainer and then misappropriated by the Respondent for his own personal use while leaving the victims in the lurch. He failed to communicate with the victims on many occasions and did not attend fixed court dates on their behalf that he contracted to attend, leaving them to suffer the consequences;

g) redress the wrong or mitigate: the Respondent made little effort to compensate the clients for his misconduct and his failure to communicate with or provide any assistance to transfer their files to other counsel made the transition of his clients' files to other lawyers difficult;

h) possibility of remediation or rehabilitation: the Respondent having elected not to appear at this hearing, there was no evidence of any mitigating factor that we ought to take into account in this regard; and

m) range of penalties: the Panel considered the various categories of misconduct and although each typically attracts a particular range of penalties based on previous disciplinary decisions, disbarment for misappropriation of client funds was the most common sanction.

SEVERITY OF THE PROFESSIONAL MISCONDUCT

[35] Misappropriation of client trust funds is perhaps the most egregious misconduct a lawyer can commit. Wrongly taking clients' money is the plainest form of betrayal of a client's trust and is a complete erosion of the trust required for a functional solicitor-client relationship. The public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. In the absence of multiple, significant mitigating factors, public confidence in the profession and its ability to

regulate itself would be severely compromised if anything short of disbarment is ordered for misappropriation of client funds.

[36] In *Law Society of BC v. McGuire*, 2006 LSBC 20, the hearing panel found that the respondent had misappropriated clients' funds. In our Decision on Facts and Determination, we found the Respondent misappropriated funds totalling $53,200 from nine different clients over the course of two years. The conclusion in *McGuire* that disbarment is the only remedy for deliberate misappropriation of trust funds except in highly unusual circumstances was upheld by the Court of Appeal when Mr. McGuire appealed the Benchers decision (*McGuire v. Law Society of BC*, 2007 BCCA 442).

[37] The Respondent's misappropriation had an obvious impact on his client victims: they (and their families) were out the retainer funds advanced. Many, if not all, were vulnerable at the time, facing criminal charges of various degrees of seriousness, and they all needed legal representation.

[38] There should be no doubt that a strong message of general deterrence should be sent to other members of the Law Society in respect of misappropriating funds, and it should be unequivocal that such misconduct will almost certainly result in the revocation of the right to practise law.

MISLEADING THE COURT OR THE LAW SOCIETY

[39] In addition to misappropriating client funds, the Respondent was found to have committed multiple other instances, and types of, professional misconduct, including misleading the Law Society. Misleading the court or the Law Society is a serious matter. The case law distinguishes circumstances where respondents have been found to have intentionally misled the court or the Law Society from cases where the misrepresentation or misleading was not intentional. In cases where the misleading was found to be intentional, a suspension has typically followed. Accordingly, the Panel's findings that the Respondent's misrepresentations were intentional elevate the seriousness of this element of the Respondent's misconduct. Misconduct that includes dishonesty is a factor weighing in favour of a suspension.

[40] This Panel found the Respondent misled or attempted to mislead the Law Society in respect of three allegations, in five instances. This misconduct is aggravated because of the subjects about which the Respondent was misleading the Law Society: the status of client retainer funds (allegation 4, 2011 citation), that he retained GST Funds collected (allegation 18, 2012 citation) and that he had paid all GST remittances when due for the years ending 2005, 2006 and 2007 (allegation

19, 2012 citation). The Respondent's misrepresentations, it appears, helped conceal from the Law Society the Respondent's financial difficulties and misappropriation. This misconduct spanned from May 2006 (allegation 19, 2012 citation) to February 2010 (allegation 4, 2011 citation). In the absence of evidence of a finding of misappropriation, a finding of intentionally misleading the Law Society would justify a suspension, as set out in *Law Society of BC v. Martin*, 2007 LSBC 20.

OTHER PROFESSIONAL MISCONDUCT

[41] The other types of professional misconduct found by the Panel, failing to respond to the Law Society, failing to respond to another lawyer, failing to report charges to the Law Society, failing to report judgments to the Law Society, failing to remit collected GST and failure to follow accounting rules,(collectively referred to as "Other Professional Misconduct") while serious, are not usually treated at the same level of disciplinary action as misappropriating client funds or misleading the Law Society, except where a lawyer's repetitive instances of Other Professional Misconduct make him or her ungovernable.

[42] In this case, the Other Professional Misconduct can fairly be described as instances of the Respondent failing to honour his obligations to the Law Society, thereby interfering with the Law Society's regulatory functioning. The Society's ability to carry out its regulatory responsibilities is significantly compromised if lawyers are permitted to ignore Law Society accounting rules and requirements of communicating with clients, colleagues and the Law Society, and the requirement to report judgments and charges to the Law Society.

[43] The Respondent's PCR aggravates this last category of misconduct because his PCR details a significant history of the Respondent failing to fulfill his regulatory obligations to the Law Society. Upon close examination, many of the matters in which the Respondent misled or failed to respond to the Law Society or another lawyer, failed to report judgments and charges, and otherwise breached rules were related to the Respondent's financial difficulty and misappropriation of client funds. If the Respondent had been forthright with the Law Society, the Law Society would have been in a better position to seek immediate measures to protect the public and may have been able to detect and prevent some of the misappropriation.

RANGE OF DISCIPLINARY ACTIONS IN SIMILAR CASES

Misappropriation

[44] In *Ogilvie*, the respondent misappropriated $7,000 from clients by rendering accounts that misstated the services he had provided and then transferring trust funds in satisfaction of the fraudulent accounts. He also failed to account for trust funds in relation to five other files that totalled $96,000. He failed to respond to the Law Society's investigation arising from an audit of his practice that was conducted after the Law Society received complaints about the respondent's conduct. Mr. Ogilvie did not participate in the hearing as he had a stroke approximately four years before the hearing and was no longer practising law. Despite the fact that the respondent was not practising, the hearing panel considered the need for public protection in the face of the serious misconduct, particularly the misappropriation.

[45] In *Law Society of BC v. Harder*, 2006 LSBC 48 at paragraph 9, the hearing panel quoted from MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline* at p. 26-1:

> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of recurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.

[46] In *Harder*, the respondent had misappropriated client trust funds, failed to provide an acceptable quality of service, failed to remit collected PST and GST, and breached various Law Society accounting rules, which included failure to account to clients, to maintain sufficient trust funds, to report trust shortages, and to prepare and deliver accounts to clients. He also failed to supervise employees adequately and practised while uninsured. The respondent provided evidence that he suffered from depression. In ordering disbarment of the respondent, the panel commented at paragraphs 57 and 58:

> In circumstances such as these, it is our opinion that the protection of the public demands that this Respondent be disbarred and this decision is necessary not just because we must ensure that this Respondent is no longer able to practise and that we provide a safeguard to the public by

> this action, but also we must generally deter any other member of the Law Society who might think that deteriorating health will offer a defence to a misappropriation scheme such that disbarment will not necessarily follow in the result.
>
> … It is the view of this Panel that there will almost never be an "explanation" for misappropriation that will save a Respondent from the most severe penalty available to the Law Society. …

[47] The respondent in *Law Society of BC v. Goulding*, 2007 LSBC 39, had failed to respond to communications from the Law Society regarding a client complaint and the scheduling of a conduct review, failed to answer inquiries regarding a Practice Review and misappropriated client trust funds. Before the panel quoted from the passage from the MacKenzie text cited above, and adopted that logic, it said at paragraph 4:

> In cases of misappropriation, the general principle is that disbarment is the appropriate penalty to protect the public, even if the possibility of recurrence is remote. This is required to protect the public's trust in the profession.

[48] In *Law Society of BC v. Oldroyd*, 2007 LSBC 26, the respondent was found to have misappropriated client trust funds, misled another lawyer regarding the misappropriated funds, breached an undertaking to another lawyer in respect of the trust funds and breached a Law Society accounting rule by failing to produce his books, records and accounts to the Law Society for its investigation. The respondent did not attend either the Facts and Determination or the Disciplinary Action phase of the hearing. The panel quoted from the *Ogilvie* case the passage that is cited above in paragraph 46 of this decision, and commented at paragraph 10 that the respondent's conduct clearly justified the penalty of disbarment.

Misleading or attempting to mislead the law society

[49] In the following cases, respondents were found to have committed professional misconduct in respect of misrepresentations to or misleading the Law Society in the course of investigations of complaints or fulfilling their regulatory obligations. The lowest sanction ordered in this group of cases is a one-month suspension.

[50] In *Law Society of BC v. Liggett*, 2012 LSBC 07, the respondent told the Law Society that he was unable to attend a citation hearing because he had a trial. The respondent sought an adjournment. The panel found the respondent had committed professional misconduct when he sent a Notice of Trial to the Law Society and,

either knowingly or recklessly, misrepresented that he continued to be unavailable for a discipline hearing. The respondent was suspended for one month.

[51] In *Law Society of BC v. Strandberg*, 2001 LSBC 26, the respondent admitted to the conduct cited in several allegations, including attempting to mislead the Law Society by making misrepresentations to the Law Society in the course of its investigation of a complaint. The misrepresentations included forging documents. The respondent was suspended for one month and fined $15,000.

[52] In *Law Society of BC v. Botting*, [2001] LSDD No. 21, the respondent misrepresented to the court in a family law matter that opposing counsel had consented to access and subsequently misrepresented to the Law Society that he did not make the representation to the court. The hearing panel determined that the respondent's conduct constituted professional misconduct and ordered a suspension of 90 days. He had a PCR consisting of two conduct reviews.

[53] In *Law Society of BC v. Geronazzo*, 2006 LSBC 50, the respondent was found to have committed professional misconduct in several instances of attempting to mislead other lawyers and one allegation of attempting to mislead the Law Society in the course of its investigation of a complaint. The panel ordered a suspension of six months.

[54] In *Law Society of BC v. Luk*, 2007 LSBC 13, the respondent provided a false document to the Law Society during the course of its investigation. The matter proceeded by way of Rule 4-22, and the panel accepted the respondent's admission of professional misconduct and imposed an 18-month suspension and practice conditions.

[55] *Law Society of BC v. Strandberg*, 2007 LSBC 19, dealt with two citations with 13 allegations of misleading the Law Society, as well as allegations of misleading another lawyer, inadequate quality of service to three clients, and breach of undertaking. At the disciplinary action phase of the hearing, the panel accepted a joint submission from the Law Society and the respondent for the respondent's resignation from the profession coupled with an undertaking that he not apply for reinstatement for at least seven years, rather than disbarring him.

Failing to respond to the Law Society or another lawyer

[56] In the absence of other findings of misconduct, when a respondent has been found to have failed to respond to the Law Society for the first time, and there is no professional conduct record, a sanction at the low end of the spectrum is ordered, usually a fine. Suspensions for failing to respond (to the Law Society or another

lawyer) are ordered in cases where the respondent has a significant and related disciplinary history, or other aggravating factors are present.

[57] In *Law Society of BC v. Hall*, 2003 LSBC 11, [2003] LSDD No. 55, the respondent lawyer was found to have committed professional misconduct by failing to respond to Law Society communications. The panel commented at paragraph 2:

> [I]t is essential for lawyers to respond to Law Society communications. Otherwise the Society cannot effectively discharge its responsibility of protecting the public interest in the administration of justice. It is simple: lawyers neither have the freedom not to respond nor the freedom to respond according to a schedule that suits them. They certainly cannot put their heads in the sand, as the Respondent said he did.

[58] In *Hall*, the hearing panel found a suspension of one week was warranted to achieve both specific and general deterrence, as the lawyer failed to respond when required, despite an assurance that he would respond at a specific time and because the respondent was the subject of a disciplinary proceeding for which the Facts and Verdict decision was published 17 days before the respondent was first asked to respond to the Law Society. (The respondent was fined $6,500 in respect of the previous disciplinary violation.)

[59] The same lawyer was again the subject of *Law Society of BC v. Hall*, 2004 LSBC 01. In this case, the lawyer was found to have failed to respond substantively to requests from the Law Society and provided his response after the panel made an adverse determination of professional misconduct but before the disciplinary action phase of the hearing. The panel escalated the disciplinary response from the respondent's prior case, and he was suspended for one month and ordered to provide a substantive response within two weeks of the panel's order.

[60] In *Law Society of BC v. Braker*, 2007 LSBC 42, the panel found the respondent had failed to respond substantively to communications from both the Law Society and another lawyer. The respondent had a professional conduct record that included three prior conduct reviews concerning failure to respond and a previous citation for failing to respond to the Law Society, which resulted in a fine. The failure to respond that was before the hearing panel occurred within days of the respondent's last conduct review where the respondent confirmed to the Subcommittee that his conduct would not reoccur. Noting the lack of success of the previous disciplinary responses, the panel ordered a suspension of one month, along with conditions requiring him to respond to the Law Society's communications.

[61] In *Law Society of BC v. Welder*, 2010 LSBC 05, the respondent had not responded to Law Society requests for documents and information relating to his general and trust accounts. The hearing proceeded summarily and the respondent was suspended for one month.

[62] In *Law Society of BC v. Ashton*, 2004 LSBC 11, the respondent did not respond to communications from another lawyer. The panel noted the respondent's PCR revealed he suffered from a chronic procrastination-avoidance ailment, but further references to his PCR lacked detail other than to note that at the time of the hearing, he was not practising law. He was not practising because he had not met conditions imposed by a previous hearing panel to allow for his return to practice following a suspension imposed by that hearing panel. The hearing panel took into account the respondent's financial position and ordered a three-month suspension from practice, with the suspension taking effect the date the panel's decision was issued.

[63] The respondent in *Law Society of BC v. Williamson*, 2005 LSBC 04, was found to have failed to provide quality service to a client, failed to respond to the Law Society, failed to provide the Law Society with an accountant's report, and delayed in responding to another lawyer regarding the delivery of client files and fee issues. The respondent provided the panel with evidence regarding depressive episodes and other personal matters to explain this misconduct. The respondent was suspended for 45 days.

[64] In *Law Society of BC v. Geronazzo*, 2005 LSBC 40, the lawyer was found to have committed professional misconduct by failing to respond to the Law Society in respect of four separate complaints. At the time of the hearing, the lawyer had been suspended for an indeterminate amount of time and was no longer a member of the Law Society as her membership had lapsed due to non-payment of fees. A suspension of two months was ordered.

Failing to report charges to the Law Society/failing to report a judgment certificate to the Law Society/failing to remit funds collected for GST to Canada Revenue Agency/breach of Law Society Accounting Rules

[65] When an adverse determination is made by a panel that falls into one of these categories, a fine is usually ordered where there is no accompanying more serious misconduct or when the respondent lawyer's PCR is relatively modest.

[66] However, this Respondent has been found to have committed professional misconduct for failing to respond to the Law Society on three prior occasions and

previously faced a conduct review when he failed to report unsatisfied judgments to the Law Society.

[67] The disciplinary penalties imposed for these previous infractions included a fine of $2,000 on the first finding, suspension for 45 days on the second finding, and suspension for four months on the third finding. While a suspension in other circumstances might have been warranted for this category of professional misconduct, given the Respondent's extensive PCR, his misappropriation of client funds in this case makes such sanction insufficient.

[68] As discussed below, it is not necessary to assess the length of a suspension that would be warranted for the Respondent's misleading the Law Society, failure to respond to the Law Society, and the other professional misconduct found by this Panel in the Decision, when this Panel finds that the sanction should be assessed on a global basis and when, considering all of the misconduct in the Decision as a whole, determines that disbarment is the only appropriate disciplinary response.

ASSESSMENT OF APPROPRIATE SANCTION

[69] In the 2014 *Gellert* case, after confirming at paragraph 37 that the assessment of appropriate sanction should be done on a global basis, the hearing panel considered the *Ogilvie* factors and commented that not all of the factors warrant the same weight in every case. The *Gellert* panel found that the nature and gravity of the misconduct will almost always be an important factor as it stands for a benchmark against which to assess how to best protect the public and preserve its confidence in the profession, and this objective of public protection is the prism through which all of the *Ogilvie* factors should be applied.

[70] The *Gellert* panel went on at paragraph 42 to find:

> Finally, where a lawyer has deliberately misappropriated client funds, the application of principles and factors mentioned above will usually result in disbarment (*Law Society of BC v. Ali*, 2007 BCSC 57, paras. 7-12 and the authorities cited therein; *Law Society of BC v. Kierans*, 2001 LSBC 6, paras.56-61; *Law Society of BC v. Hall*, 2007 BSCS 26, para. 26; *Law Society of BC v. Dennison*, 2007 BCSC 51, para. 4; *Law Society of BC v. King*, 2007 BCSC 52, para. 4; *Law Society of BC v. Blinkhorn*, 2010 BSCS 36 para. 7).

[71] Yet this sanction is usually imposed for deliberate misappropriation from a client – almost always where the amount is substantial (*Harder*, para. 9; MacKenzie, p. 26-

1) because in such cases disbarment is usually the only means of fulfilling the goal of the protecting the public and preserving public confidence in the legal profession. Deliberate misappropriation of funds is among the very most serious betrayals of a client's trust and constitutes gross dishonesty. Disbarment absolutely ensures no further recurrence of such conduct on the part of the lawyer. It also promotes general deterrence (*McGuire v. Law Society of BC*, 2007 BCCA 442, para. 15; *Goulding*, para. 17; *Harder*, para. 57). And disbarring a lawyer who has deliberately misappropriated client funds is usually the only way to maintain public confidence in the legal profession.

[72] The Respondent did not appear at the hearing and did not reply to the Notice to Admit. There are no rare and extraordinary mitigating factors in evidence that could possibly lead the Panel to any other conclusion but disbarment. The Panel finds that disbarment is the only disciplinary action that could unquestionably protect the public from future acts of serious professional misconduct by this Respondent.

[73] Although the result is that the Other Professional Misconduct could be perceived by the public and the profession to be gratuitous misconduct, we find that the concept of global discipline is entirely appropriate in this case because the ultimate penalty of disbarment ensures that the public will be protected in future from other misconduct from the Respondent. Were it not for disbarment, the Panel would give greater weight to considering the possible discipline measures for all of the acts of professional misconduct on a cumulative basis.

SEALING ORDER

[74] At the conclusion of the hearing in this matter, counsel for the Law Society made an oral application for a non-disclosure and sealing Order pursuant to the Law Society Rules for the purpose of preventing third party access to solicitor-client confidential information. The application is to have certain exhibits redacted or anonymized before disclosure to members of the public. These exhibits consist of:

(a) Exhibit 1: the Notice to Admit;

(b) Exhibit 2: the citation issued May 26, 2011;

(c) Exhibit 3: the affidavit of Chrysta Gejdos sworn November 13, 2013 and Exhibit "A" to that affidavit; and

(d) Exhibit 4: the amended citation issued July 18, 2012.

[75] Openness and transparency are necessary to build confidence in the disciplinary proceedings. Rule 5-6(1) provides that every hearing is open to the public, while Rule 5-7(2) permits any person to obtain a copy of an exhibit entered during a public portion of a hearing. However Rule 5-6(2), read in conjunction with Rule 5-7(2), permits a panel to make an order that all or part of an exhibit filed at a public hearing not be made available to third parties to protect the interests of any person.

[76] It is important that clients not lose the protection of solicitor-client confidentiality simply because the Law Society has relied on documents containing confidential information for the legitimate purpose of bringing disciplinary proceedings against a lawyer or former lawyer. A panel can therefore rely on Rules 5-6(2) and 5-7(2) to seal materials filed at a hearing in order to prevent client confidences from being accessible.

[77] The Law Society submits that Exhibit 9 in these proceedings is a redacted and anonymized version of Exhibit 1, the Notice to Admit, and that Exhibit 9 could be disclosed on request instead of Exhibit 1 as Exhibit 9 does not contain client identifying information.

[78] The Panel finds that the submissions of counsel appropriately address the issues set out above, and therefore we order that all copies of the citation issued May 26 2011, (Exhibit 2), the affidavit and exhibit A of Chrysta Gejdos sworn November 12, 2013 (Exhibit3), the amended citation dated July 18 2012 (Exhibit 4) and the citation issued May 24,2012 be redacted and client names be initialized for anonymity before release to the public because these documents contain the names of numerous clients, which generally constitute confidential information [*Code of Professional Conduct for British Columbia*, Rule 3.3-1(5(a)].

[79] In addition, all copies of the Notice to Admit filed as Exhibit 1 should be sealed because this document makes extensive reference to client identities. However, the redacted and anonymized version of the Notice to Admit marked as Exhibit 9 in these proceedings should be available to the public instead of Exhibit 1.

[80] In ordering that all copies of the citation, amended citation and affidavit be redacted, anonymized, and the Notice to Admit sealed, we note that a version of the citations from which the client names have been redacted is available on the Law Society's website, as is our Facts and Determination Decision.

COSTS

[81] The Law Society seeks costs of $10,530 inclusive of disbursements and counsel fees. The Law Society submits these costs are also reasonable under the tariff of

costs in the Law Society Rules and in light of the factors set out in *Law Society of British Columbia v. Racette*, 2006 LSBC 29.

[82] The Benchers' authority to order costs is derived from section 46 of the *Legal Profession Act* and Rule 5-9 of the Law Society Rules. The relevant parts of the applicable rule are as follows:

> (1.1) Subject to subrule (1.2), the panel … must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by … a respondent or the Society in respect of a hearing on … a citation … .
>
> (1.2) If, in the judgment of the panel … , it is reasonable and appropriate for the Society … or a respondent to recover no costs or costs in an amount other than that permitted by the tariff in Schedule 4, the panel … may so order.
>
> (1.3) The cost of disbursements that are reasonably incurred may be added to costs payable under this Rule.
>
> (1.4) In the tariff in Schedule 4,
>
> (a) one day of hearing includes a day in which the hearing or proceeding takes 2 and one-half hours or more, and
>
> (b) for a day that includes less than 2 and one-half hours of hearing, one-half the number of units applies.

[83] *Racette* sets out, at paragraphs 13 and 14, factors relevant in determining the reasonableness of orders for costs. Those applicable in this case are:

> (a) the seriousness of the offence;
>
> (b) the financial circumstances of the Respondent;
>
> (c) the total effect of the penalty, including possible fines and/or suspension;
>
> (d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[84] While the conduct leading to disbarment is clearly very serious, we have received no evidence about the Respondent's financial circumstances, the effect of the penalty on him or how either party may have affected the accumulation of costs. In short, we are aware of no reason why the panel should exercise its discretion under

Rule 5-9(1.2) to deviate from an order of costs determined under the tariff in Schedule 4 to the Law Society Rules.

[85] Costs are therefore ordered in the amount of $10,530, payable by the Respondent by January 31, 2015.

ORDERS

[86] The Panel orders as follows:

(a) The Respondent be disbarred effective as of the date of this Order;

(b) Exhibit 1, the Notice to Admit filed by the Law Society during the hearing before us be sealed;

(c) The following materials filed by the Law Society in these proceedings be redacted to protect client confidentiality by expunging clients' names and anonymizing their identities:

i) Exhibit 2 – citation issued May 26, 2011;

ii) Exhibit 3 – affidavit and Exhibit "A" sworn by Chrysta Gejdos November 13, 2013;

iii) Exhibit 4 – amended citation dated July 18, 2012, and the second citation issued May 24, 2014; and

(d) Costs in the amount of $10,350, payable to the Law Society by January 31, 2015.