2015 LSBC 11
Report issued: March 31, 2015
Citation issued: July 18, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JOHN DAVID BRINER

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing date: December 9, 2014

Panel: Thomas Fellhauer, Chair
Dr. Gail Bellward, Public representative
Richard B. Lindsay, QC, P. Eng., Lawyer

Discipline Counsel: Alison Kirby
No one appearing on behalf of the Respondent

INTRODUCTION

[1] The Law Society has issued a citation against John David Briner (the "Respondent") in accordance with s. 38 of the *Legal Profession Act*. The Respondent was served with the citation on July 22, 2014 in accordance with Rule 4-15 of the Law Society Rules.

[2] The essence of the citation centres around three allegations summarized as follows:

(a) The Respondent misappropriated $50,439.44 received on behalf of his client, GK (the "Client's Funds");

(b) The Respondent failed to cooperate with the Law Society's investigation into the receipt and disbursement of the Client's Funds; and

(c) The Respondent failed to comply with his obligations under Part 3, Division 7 of the Law Society Rules with respect to recording the receipt and withdrawal of the Client's Funds.

[3] The Respondent is a former member of the Law Society. He ceased to be a member on October 16, 2013.

PRELIMINARY MATTER – PROCEEDING WITH THE HEARING IN THE ABSENCE OF THE RESPONDENT

[4] The Panel convened at 9:30 a.m. on December 9, 2014 as scheduled. At that time the Respondent was not present. In order to ensure that this was merely not a case of tardiness or unavoidable delay, the Panel adjourned for approximately 15 minutes. The Respondent did not appear and the proceeding commenced.

[5] Section 42(2) of the *Legal Profession Act* permits a hearing panel to proceed in the absence of a respondent if the panel is satisfied that the respondent has been served with the notice of hearing. See *Law Society of BC v. Tak*, 2014 LSBC 27; *Law Society of BC v. Gellert*, 2013 LSBC 22; *Law Society of BC v. Power*, 2009 LSBC 23; *Law Society of BC v. Basi*, 2005 LSBC 41.

[6] To prove service, counsel for the Law Society filed the affidavit of Katherine Shaben sworn on December 3, 2014. Ms. Shaben is a legal assistant in the Discipline Department of the Law Society.

[7] Based on the information contained in the affidavit of Ms. Shaben, we find the Respondent was properly served with the Notice of Hearing as required by Rule 10-1. The original Notice was for November 4, 2014. This was adjourned. As noted, the hearing was adjourned to December 9, 2014. The Respondent's knowledge of the rescheduled date is important. The Shaben affidavit sets out a considerable portion of dealings between the Law Society and the Respondent. In essence, starting in August of 2014, an attempt was made to draft and obtain an agreement on an Agreed Statement of Facts. A draft Agreed Statement of Facts was delivered to the Respondent on August 22, 2014.

[8] In September 2014, requests were made by the Law Society regarding the draft Agreed Statement of Facts. A formal agreement was not achieved.

[9] On September 9, 2014 the Respondent was served with the Notice of Hearing pursuant to Rule 4-24 of the Law Society Rules. That Notice of Hearing stated the hearing would be held November 4, 2014. The Respondent acknowledged receipt of the Hearing Administrator's email attaching the Notice of Hearing for the hearing to be held November 4, 2014. On September 10, 2014 Law Society counsel received an email from the Respondent in which he wrote as follows: "I have read through the statement – this looks accurate to me except I am certain I replied to the Law Society when a response was required. There was a letter from the Law Society stating that no response indicates that you agree. As a result I did not respond as I agreed with the letter's contents."

[10] The reference to "the statement" is a reference to the Agreed Statement of Facts.

[11] During mid to late September 2014, email exchanges continued between Law Society counsel and the Respondent regarding the whereabouts of the signed Agreed Statement of Facts.

[12] The correspondence shows the Respondent failed to return the signed Agreed Statement of Facts.

[13] On September 22, 2014, counsel for the Law Society emailed the Respondent stating, in part, as follows:

> In the interim, since I have not heard from you I have made arrangements to forward you a Notice to Admit. The Notice to Admit is largely the same as the Agreed Statement of Facts but in a different format. Under Rule 4-20.1 of the Law Society Rules, you have 21 days to respond to the Notice to Admit from the date of service or you will have been deemed to have admitted the facts and documents set out in the Notice.

[14] The Notice to Admit dated September 22, 2014 ("NTA") was forwarded to the Respondent's residential address. There was proof of delivery notice from the courier appended as an exhibit to the Shaben affidavit.

[15] The NTA was not delivered more than 45 days prior to commencement of the scheduled hearing on November 4, 2014 as required by Rule 4-20.1(1). Consequently, a request for rescheduling was forwarded to the Hearing Administrator on October 16, 2014. The Respondent was copied with this request. The request was for the citation hearing to be rescheduled to December 9, 2014.

[16] The Respondent was advised of the rescheduled date and responded in an email to the Hearing Administrator on October 27, 2014 saying "I'm sorry I won't be able to make it until January. I'm available any day in January."

[17] In response to that email, the Law Society wrote the Respondent on October 29, 2014. At that time the Law Society acknowledged the email of the Respondent but pointed out he had not given any reason for his inability to attend on December 9, 2014. In addition, Law Society counsel pointed out Rule 4-29 of the Law Society Rules which would allow the Respondent to apply for an adjournment of the December 9, 2014 hearing date.

[18] On November 28, 2014 Law Society counsel again emailed the Respondent, again pointing out that the hearing of the citation was scheduled for December 9, 2014 and she intended to forward the NTA to the Hearing Panel on December 2, 2014. On December 1, 2014, Law Society counsel wrote to the Respondent asking if he wished to apply for an adjournment indicating "if you wish to do so you should be prepared to produce evidence as to why you are not available on December 9."

[19] This was in response to an email from the Respondent stating "I am dealing with another court matter this month that is taking all of my resources both in time and in finances. I am available any time in January." Again, Law Society counsel pointed out the procedural availability of an adjournment application and asked "please let me know as soon as possible whether you will be requesting an adjournment or whether you will be attending the hearing as scheduled."

[20] On December 2, 2014, Law Society counsel advised the Hearing Administrator, by way of a memorandum dated September 22, 2014 copied to the Respondent, that the Respondent had not filed a response to the NTA. As the Respondent had provided no response within 21 days, he would be deemed to have admitted the documents and facts set out in the NTA as set out in Rule 4-20.1(7).

[21] That memorandum also indicated as follows: "Mr. Briner is a former member. He has indicated that he is not able to make the hearing on December 9, 2014. Mr. Briner has, however, not sought an adjournment of the hearing or provided evidence of his unavailability. The Law Society intends to proceed in his absence should he not appear at the hearing."

[22] In response, an email from the Respondent was sent to Law Society counsel on December 2, 2014 as follows: "Thank you for this. I will not be able to attend, but I do not object to the hearing proceeding in my absence. Thank you. John."

[23] In short, the Panel concluded the Respondent was properly served with the original Notice of Hearing, was apprised of the rescheduled date and was given every opportunity to appear. He declined to do so. In fact, the Respondent explicitly authorized the Panel to proceed in his absence. The hearing proceeded without the Respondent.

ISSUE

[24] The issue to be decided is whether or not the admitted facts indicate misconduct that amounts to professional misconduct. The oft-quoted case *Law Society of BC v. Martin*, 2005 LSBC 16 sets out the test as follows:

> ... 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.

[25] This test has become known as the "marked departure test." That test has been applied on many instances and most recently in *Law Society of BC v. Harding*, 2014 LSBC 52, where the panel stated at para. [76]:

> In our view, given all the cases and guiding principles from *Stevens v. Law Society (Upper Canada)* (1979), 55 OR (2d) 405 (Div. Ct.) and the marked departure test from *Martin*, there must be culpability in the sense that the lawyer must be responsible for the conduct that is the marked departure. The words "marked departure" are where one finds the requirement that the nature of the conduct must be aggravated or, to use the words of *Stevens*, outside the permissible bounds.

The panel further stated at para. [79]:

> Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstance as a whole, may be part of an

assessment that the impugned conduct did not cross the permissible bounds.

Did the respondent misappropriate client money?

[26] As noted earlier, the facts relied upon by the Panel are facts deemed admitted by the Respondent. On the question of the receipt and disbursement of the Client's Funds, the following facts are deemed admitted (paras. 7 to 37 of the NTA):

7. In or about September 2011, the Respondent was retained by GK to act in relation to a $50,000 loan GK was to make to EC.

8. GK advanced the loan to EC in or about September 2011 through the Respondent's trust account, with the funds coming from GK's self-directed retirement savings plan at his financial institution (the "Trust Company").

9. On or about December 16, 2012, GK emailed a payout statement to EC. GK copied the Respondent on the email. The email provides in part:

> Please make payment of $53,164.44 shown below, before 12 pm on December 21st to John Briner at MetroWest Law Corporation who will in turn pay out the Trust Company, and take care of discharge of mortgage. [NTA Tab 2]

10. On or about December 18, 2012, the lawyer who represented EC couriered to the Respondent a letter of that date enclosing a Scotiabank Canadian dollar bank draft [number] for $50,439.44 payable to "MetroWest Law Corp in Trust." [NTA Tab 3]

11. On December 20, 2012 at 11:21 am, the Respondent forwarded GK's email dated December 16, 2012 to his assistant AV. [NTA Tab 2]

12. Also on December 20, 2012, the Respondent deposited the Client's Funds to his Canadian dollar pooled trust account. [NTA Tabs 4 and 5]

13. Immediately prior to the deposit of the Client's Funds, the Respondent's trust account had a balance of only $2,886.60. [NTA Tab 5]

14. Therefore, of the new account balance of $53,326.04 following the deposit, all but $2,886.60 belonged to GK.

15. The Respondent did not allocate the $50,439.44 deposit to the client trust ledger for GK. [NTA Tab 6]

16. Instead, the $50,439.44 deposit was allocated to the client trust ledger for a different client matter, namely the RD matter. [NTA Tab 7]

17. The RD client trust ledger shows an overdraft position of $11,500.47 prior to the deposit in question. [NTA Tab 7]

18. The allocation of the deposit of the Client's Funds to the RD client trust ledger took that ledger out of the overdraft position. [NTA Tab 7]

19. In addition to the client trust ledger record that shows the allocation of the Client's Funds to the RD ledger, the Respondent's accounting records also contain two versions of a document called "MetroWest Law Corporation Receipt Voucher" that identify the RD ledger as the "A/C to be credited" with the Client's Funds. [NTA Tab 8]

20. The Respondent was not authorized by GK to allocate the Client's Funds to the RD client trust ledger.

21. The Respondent was not authorized by GK to make withdrawals of the Client's Funds from the trust account for the benefit of the Respondent, RD or anyone else.

22. The Respondent admits that GK instructed him to keep the Client's Funds received from or on behalf of EC in his trust account until he had received some additional funds which GK believed were owed by EC. The Respondent was then to return the Client's Funds, plus any additional amounts received, to GK's self-directed retirement savings plan at the Trust Company.

23. As noted earlier, the Client's Funds were deposited to the Respondent's trust account on December 20, 2012. Within four days of the Client's Funds being deposited, all or virtually all of the Client's funds had been withdrawn by the Respondent from the trust account:

Date	**Respondent's Trust Account Canadian Dollar Pooled Trust Account Statement**		**Trust Ledger Allocations**	**Comments**
	(Withdrawal) /Deposit	**Balance**		
12/20/2012		$2,886.60		Amount in account prior to deposit of Client's Funds.

Date	**Respondent's Trust Account Canadian Dollar Pooled Trust Account Statement**		**Trust Ledger Allocations**	**Comments**
	(Withdrawal) /Deposit	**Balance**		
12/20/2012	$50,439.44 Bank draft from EC's lawyer for GK	$53,326.04	Credit to RD (which was in overdraft position of $11,500.47 prior to the credit)	Should have been credited to GK's client ledger but was not.
12/20/2012	($2,533.25) wire transfer neither to nor for GK	$50,792.79	Debit to RD	Withdrawn without GK's authorization.
12/20/2012	($10,000) transfer to Respondent's general account	$40,792.79	Debit to RD (with a memo reference to "CM" on the ledger) misdated 12/24/2012 on ledger (according to account statement, there was no withdrawal of $10,000 from account on December 24)	Respondent's accounting records for December 2012 contain an unsigned copy of a Statement of Account dated December 20, 2012 is referenced at **NTA, Tab 9**, which lacks an account or file number, for exactly $10,000 to "CMG, Attention: RD". Withdrawal was not by cheque, which was required method of payment was in fact for fees.
12/21/2012	($4,988) transfer neither to nor for GK	$35,804.79	Debit to RD	Withdrawn without GK's authorization.

Date	Respondent's Trust Account Canadian Dollar Pooled Trust Account Statement		Trust Ledger Allocations	Comments
	(Withdrawal) /Deposit	Balance		
12/21/2012	($2,500) cheque #511 dated Dec. 20, 2012 to "AD"	$33,304.79	Debit to RD	Withdrawn without GK's authorization.
12/24/2012	$75,218.20 deposit	$108,522.99	Credit to RD	
12/24/2012	$19,369 transfer from US dollar trust account	$127,891.99	Credit to RD	
12/24/2012	($2,500) cheque #510 dated Dec. 20, 2012 to "HOAT"	$125,391.99	Debit to RD	Withdrawn without GK's authorization.
12/24/2012	($125,000) cheque #512 dated Dec. 20, 2012 to "JD"	$391.99	Debit to RD	Withdrawn without GK's authorization.

24. The Respondent admits that the table set out in para. 23 above, accurately reflects the deposit and withdrawal of the Client's Funds from his trust account.

25. With respect to the December 20, 2012 electronic transfer of $10,000 to the Respondent's general account, the Respondent states that, immediately prior to the $10,000 transfer from the trust account, the Respondent's general account held only $1,396.33. [NTA Tab 10]

26. On the same day as the transfer was made from the trust account to the general account, the Respondent made the following withdrawals from his general account:

Amount	Method	Payee	Comments
$2,200	"Cash Withdrawal"		
$25.76	Cheque #633 dated December 17, 2012	Dye & Durham	
$1,670	Cheque #629 dated December 14, 2012	Briner	Cheque memo: "Dec 15/12 – Draw"
$2,458.78	Cheque #628 dated December 14, 2012	Briner	Cheque memo: "Dec 15/12 – Wages"
$1,500	Cheque #638 dated December 20, 2012	M Society	According to the society's website the Respondent is (or was) its Executive Director.

27. The Respondent admits that the table set out in para. 26 above, accurately reflects the withdrawals from his general account on December 20, 2012. [NTA Tab 10]

28. By the end of the day on December 24, 2012, four days after the deposit of the Client's Funds to the trust account, the Client's Funds had been withdrawn (or almost entirely withdrawn) from the trust account, as the remaining balance in the trust account was only $391.99. [NTA Tab 10]

29. Although there were numerous subsequent transactions in the Respondent's trust account after December 24, 2012, the Respondent's client trust ledger for GK does not show any credits to the ledger, whether by deposit or ledger transfer, or indeed any transactions whatsoever on the ledger after September 2011. [NTA Tab 6]

30. In addition, no funds remained in the trust account when the custodian took custody of the Respondent's practice in October 2013.

Events following receipt and disbursement of the Client's Funds

31. The Respondent responded to the December 18, 2012 letter from EC's lawyer by a letter dated December 31, 2012. [NTA Tab 11]

32. The Respondent sent a further letter dated January 20, 2013 in which he advised that litigation would ensue if the balance demanded was not paid to his firm in trust by January 25, 2013. [NTA Tab 12]

33. On January 23, 2013, the Respondent emailed GK a draft caveat, apparently for intended filing at the Land Title and Survey Authority. The draft caveat included the following statement:

    6. On December 18, 2012, EC purchased and delivered to my solicitors a bank draft in the amount of $50,439.44, which represented the outstanding principal and per diem interest, leaving a balance payable of $2,725 … [NTA Tab 13]

34. On February 15, 2013, the Respondent filed a Notice of Claim against EC on behalf of GK in Small Claims Court (Vancouver Registry). The Notice of Claim repeated the statement that:

    6. On December 18, 2012, EC purchased and delivered to my solicitors a bank draft in the amount of $50,439.44, which represented the outstanding principal and per diem interest, leaving a balance payable of $2,725.

35. The Notice of Claim was filed to collect those additional funds which GK claimed were owed by EC under the loan agreement.

36. On March 6, 2013, GK sent an email to the Respondent asking whether the Respondent was still holding the payout amount in his trust account. [NTA Tab 14]

37. The Respondent did not reply to GK's inquiry about the status of the Client's Funds.

[27] On the basis of this evidence, the Panel concludes that these facts constitute misappropriation of the Client's Funds by the Respondent.

[28] As noted in *Law Society of BC v. Ali*, 2007 LSBC 18 at 104 and 105, the panel stated:

> [104] A fundamental principle that governs the conduct of lawyers is that trust funds are sacrosanct. The Respondent has breached that principle repeatedly and over a significant period of time. The fact that the amounts involved were relatively small is irrelevant.
>
> [105] The Respondent's conduct, whether deliberate or a matter of incompetence or negligence, is so gross as to prove a sufficient mental element of wrongdoing. The Respondent has shown a remarkable disregard and lack of attention to her obligations.

[29] These remarks apply equally to the Respondent. There has been no rational explanation for the transgressions relating to misappropriation of the Client's Funds. The Respondent has had ample opportunity to provide an explanation to the Law Society but has declined to do so. As well, the Respondent would have, had he elected to attend, been given full opportunity to offer any such explanation to the Panel. But again, the Respondent chose not to attend and chose not to avail himself of the opportunity to adjourn the hearing so he could attend and provide an explanation.

[30] GK has stated what the purpose of the trust funds was:

> The funds were in partial repayment of Ms. [C]'s loan. Mr. Briner was to keep the funds until I received some interest owed to me by Ms. [C] and then deposit the funds, plus interest, into my self-directed registered savings plan (RSP) at [the Trust Company].
>
> [NTA Tab 20, Exhibit "A", page 3, para. 20)]

[31] The funds in question were never paid to GK or his RSP.

[32] On April 16, 2014, the Lawyers Insurance Fund ("LIF") paid GK $51,097.44 in settlement of his claim. LIF has obtained default judgment in that amount against the Respondent.

[33] Pursuant to the NTA, the Respondent is deemed to admit that the statements made by GK in his statutory declaration with respect to the Client's Funds are true and accurate [NTA para. 4]. The Respondent is also deemed to admit that, between December 20, 2012 and October 16, 2013, he misappropriated some or all of the $50,439.44 received on behalf of his client GK on or about December 18, 2012 as set out in allegation 1 of the citation [NTA para. 52].

[34] At para. 53 of the NTA the Respondent is also deemed to admit that this misappropriation constitutes professional misconduct. Although a finding that conduct constitutes professional misconduct is a finding for this Panel to make, we do believe that the Respondent understood that his failure to respond to the Law Society to disagree with this point and his failure to attend this hearing or to take the opportunity to adjourn the hearing so he could attend, could result in a finding of professional misconduct by this Panel.

[35] The Panel agrees that misappropriation of trust funds is among the clearest of marked departures from conduct the Law Society expects of lawyers.

[36] After considering all of the facts set out above, we find that the misappropriation of the Client's Funds by the Respondent constitutes professional misconduct.

Did the Respondent fail to cooperate with the Law Society investigation into the receipt and disbursement of the client's funds?

[37] As noted at tab 15 of the NTA, in an undertaking and consent dated October 8, 2013 (the "Undertaking"), the Respondent voluntarily undertook to the Law Society "to cooperate with all Law Society investigations, present or future, relating to my conduct, including, without limitation, not altering, deleting, destroying, secreting, or withholding evidence." We note that the Respondent was still a member of the Law Society when he gave this Undertaking to the Law Society.

[38] On January 24, 2014, the Custodianship Department made a referral (the "Complaint") to the Investigations, Monitoring and Enforcement Group of the Law Society. On or about March 4, 2014, the Respondent was notified by LIF of a claim against him under Part B of the LSBC Captive Insurance Company Ltd. Policy [NTA para. 47]. On April 16, 2014, LIF paid GK $51,097.44 in settlement of his claim [NTA para. 48].

[39] The following facts were deemed admitted [NTA paras. 41 to 46]:

41. On or about March 6, 2014, the Law Society sent a letter [signed by Kurt Wedel, Staff Lawyer] to the Respondent with respect to GK's matter and requested his answer by March 17, 2014. [NTA Tab 17]

42. The Respondent did not reply by March 17, 2014.

43. On or about March 18, 2014, the Law Society sent a follow up letter to the Respondent asking for a response to the March 6, 2014 letter by April 1, 2014. [NTA Tab 18]

44. On April 1, 2014, the Respondent contacted the Law Society requesting that they let Mr. Wedel know that he will respond to his letters by Friday, April 4, 2014.

45. By return email that same day, Mr. Wedel confirmed that he was waiting for the Respondent's response to his letter of March 6, 2014 in GK's matter. [NTA Tab 19]

46. The Respondent did not reply to the Law Society's letter of March 6, 2014 by April 4, 2014 or at all.

[40] It is apparent the Respondent did not respond to the inquiries made by the Law Society.

[41] We find that the requests made by the Law Society were reasonable and straightforward. The Respondent has provided no explanation or reasons for his failure to respond to the Law Society.

[42] As cited by Law Society counsel, *Law Society of BC v. Dobbin*, [1999] LSBC 27 at para. 20, states:

> [T]he duty to reply … is a cornerstone of our independent, self-governing profession. If the Law Society cannot count on prompt, candid and complete replies by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interest of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.

[43] This decision has been followed in several cases, including *Law Society of BC v. Cunningham*, 2007 LSBC 17; *Law Society of BC v. Decore*, 2012 LSBC 17; *Law Society of BC v. Malcolm*, 2012 LSBC 04; *Law Society of BC v. Marcotte*, 2010 LSBC 18; *Law Society of BC v. Niemela*, 2012 LSBC 9; and *Law Society of BC v. Welder*, 2012 LSBC 18.

[44] We note that the requests from the Law Society with respect to their investigation all followed the resignation by the Respondent as a member of the Law Society.

[45] Section 38(4) of the *Legal Profession Act* applies to a hearing that has been authorized through the issuance of a citation concerning the conduct or competence of a lawyer or articled student. A lawyer under the *Legal Profession Act* includes a former member for the purposes of Part 4, Discipline.

[46] Section 26 of the *Legal Profession Act* permits the benchers to make rules authorizing the investigation of the conduct of a former lawyer. Rule 3-5(6) requires a lawyer to cooperate fully in an investigation by responding fully and

substantively to the complaint. This includes a former lawyer according to Rule 3-1.

[47] We find that the Respondent failed to cooperate with the Law Society by failing to respond substantively to the Law Society's letters dated March 6, 2014 and March 18, 2014 and an email dated April 1, 2014. We find that the Respondent breached subrules (6) and (10) of Rule 3-5. We also find that the Respondent breached his undertaking to the Law Society to cooperate.

[48] We find that the Respondent was aware of the request for an explanation from the Law Society, the request was reasonable and straightforward, and we find that the Respondent did not respond and has provided no substantive reason for not responding. We find that, in the context of this case, a failure to respond is clearly a marked departure from conduct the Law Society expects of lawyers. We find that the Respondent's conduct constitutes professional misconduct.

ACCOUNTING RULE BREACHES

[49] The citation alleges various breaches of trust accounting rules. The following facts were deemed to be admitted by the Respondent pursuant to NTA, para. 56:

With respect to the funds received from GK, the Respondent:

(a) failed to record on a trust ledger for GK the receipt of $50,439.44 and its subsequent disbursement as required by Rules 3-60(a)(iii) and (b) of the Law Society Rules;

(b) improperly recorded the receipt and disbursement of the funds in the trust ledger of his client RD, contrary to Rules 3-60(a)(iii) and (b) of the Law Society Rules;

(c) withdrew or authorized the withdrawal of some or all of the funds from his trust account between December 20, 2012 and October 16, 2013 when his trust accounting records were not current, or there were not sufficient funds held to the credit of the client (RD) on whose behalf the funds were paid, or both, contrary to Rule 3-56(1.2) of the Law Society Rules;

(d) withdrew or authorized the withdrawal of some or all of the funds in purported payment of his fees by way of an electronic transfer on December 20, 2012, contrary to Rule 3-56(3) of the Law Society Rules; and

(e) failed to maintain sufficient funds on deposit in his trust account to meet his obligations with respect to funds held in trust for clients as required by Rule 3-55 of the Law Society Rules.

[50] Based on the accounting documents and records, emails and other communications, which were attached as tabs to the NTA, we are satisfied that the evidence shows that the Respondent breached the Law Society accounting rules set out above.

[51] The Respondent has provided no explanation for the breaches nor has he disagreed with these allegations. We have also noted that, in addition to the Respondent incorrectly applying the funds for GK to another client and for his own use, the Respondent's internal accounting records showed other irregularities such as two different versions of the same receipt [NTA Tab 8].

[52] Not every breach of the Law Society Rules constitutes professional misconduct. However, in the context of a misappropriation of over $50,000 of a client's trust funds, we find that these breaches of the Rules are a marked departure from the conduct the Law Society expect of a lawyer and therefore constitute professional misconduct by the Respondent.

SUMMARY AND CONCLUSION

[53] From the evidence submitted, in particular the Notice to Admit and the accounting documents and records, emails and other communications which were attached as tabs to the Notice to Admit, we find that the Respondent:

(a) misappropriated trust funds of $50,439.44;

(b) failed to cooperate with the Law Society into this investigation; and

(c) breached the trust accounting rules set out in the citation.

The Panel finds that, in each case, the Respondent has committed professional misconduct.

SEALING ORDER

[54] Openness and transparency are necessary to build confidence in 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.

[55] On its own motion, the Panel makes the following order for the purpose of preventing third party access to confidential information that may identify third parties. The order is to have the transcript of these proceedings and the exhibits redacted or anonymized before disclosure to members of the public. These exhibits consist of:

(a) Exhibit 1: citation issued July 18, 2014;

(b) Exhibit 2: affidavit of Michelle Robertson sworn July 23, 2014;

(c) Exhibit 3: affidavit of Michelle Robertson sworn October 9, 2014;

(d) Exhibit 4: affidavit of Katherine Shaben sworn December 3, 2014;

(e) Exhibit 5: Notice to Admit dated September 22, 2014; and

(f) Exhibit 6: letter dated December 18, 2012 from the lawyer for EC.