2015 LSBC 14
Decision issued: April 2, 2015
Oral decision: February 4, 2015
Citation issued: July 11, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

CAMERON JOHN PHAM

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	February 4, 2015
Panel:	David Mossop, QC, Chair Jasmin Z. Ahmad, Lawyer Graeme Roberts, Public representative
Discipline Counsel:	Alison L. Kirby
Counsel for the Respondent:	Moses Kajoba

INTRODUCTION

[1] This hearing concerns the billing practices of a lawyer in respect of both fees and disbursements and, in one instance, the alleged creation of fictitious documents to support inaccurate trust accounting entries.

[2] The amended citation sets out eight allegations of such conduct. Those allegations are summarized as follows:

(a) Allegations 1 and 2: two allegations of issuing accounts to clients and withdrawing funds from trust to pay those accounts in order to "clean up the trust account."

(b) Allegation 3(a) to (e): similar allegations made in respect of five different clients of: (i) billing clients for disbursements not actually incurred or (ii) billing clients amounts that exceeded the actual amount of a disbursement, either by adding an administrative "mark-up" or by basing the amount billed for the disbursement on an estimate.

(c) Allegation 4: an allegation of improperly recording retainer funds on the wrong client ledger and preparing a fictitious letter and invoice in support of the withdrawal of funds from trust.

[3] It is alleged that the conduct set out in allegations 1 to 4 constitutes professional misconduct under section 38(4) of the *Legal Profession Act*, SBC 1998, c. 9 (the "*Act*").

[4] Pursuant to Rule 4-22 of the Law Society Rules, on January 20, 2015, the Respondent made a conditional admission of the discipline violations set out in the amended citation and as more fully set out in an Agreed Statement of Facts (the "ASF") jointly filed by the parties.

[5] He has also consented as follows:

(a) disciplinary action of a suspension of two months commencing on March 1, 2015 or such other date as the hearing panel may order; and

(b) to pay costs in the amount of $1,800 inclusive of disbursements by April 30, 2015 or such other date as the hearing panel may order.

[6] The Respondent expressly acknowledged that publication of the circumstances summarizing his admissions would be made pursuant to Rule 4-38 and that such publication would identify him.

[7] The Discipline Committee accepted the Respondent's conditional admission and the proposed disciplinary action. Pursuant to Rule 4-22(4), counsel for the Law Society recommended that the Hearing Panel accept the Respondent's conditional admission and proposed disciplinary action.

[8] At the conclusion of this hearing, the Hearing Panel accepted both the conditional admission of a discipline violation and the proposed disciplinary action and ordered as follows:

(a) The Respondent is suspended from the practice of law for a period of two months commencing on March 1, 2015 until and including April 30, 2015, pursuant to section 38(5)(d) of the *Act*; and

(b) The Respondent will pay costs in the amount of $1,800, inclusive of disbursements on or before April 30, 2015.

[9] These are our written reasons.

ISSUE

[10] Should the Hearing Panel accept the Respondent's conditional admission and the proposed disciplinary action? Specifically:

(a) Does the Respondent's conduct as set out in citation constitute professional misconduct under section 38(4) of the *Act*; and

(b) If so, is the proposed disciplinary action within the range of a fair and reasonable disciplinary action in all the circumstances.

FACTS

[11] The Respondent was called and admitted as a member of the Law Society of British Columbia on April 30, 2003. He practises as a sole practitioner in Vancouver, British Columbia primarily in the area of residential real estate law.

[12] Prior to the issuance of the original citation on July 11, 2014, the Law Society had conducted a compliance audit of the Respondent's practice pursuant to Rule 3-79 for the period October 1, 2011 to March 31, 2013.

[13] At the conclusion of that audit, by letter dated July 5, 2013 the Law Society advised the Respondent as follows:

> Due to the low compliance with Division 7 Trust Accounting Rules, your firm will be required to file an Accountant's Report for the 2013 reporting year.

[14] Counsel advised the Hearing Panel that, in fact, the Respondent has filed an Accountant's Report for each of the last two years since the audit was conducted, the first of which revealed some "minor exceptions" and the latest of which has yet to be reviewed.

[15] Counsel for the Law Society also advised the Hearing Panel that, given the issuance of the amended citation, the Respondent's trust accounting will be more "highly" and "carefully scrutinized" by the Law Society in the upcoming years.

[16] As noted, the parties jointly filed an ASF that included various documents relating to the agreed facts. The relevant portions of the ASF are summarized below (confidential information has been deleted):

Allegation 1: Excessive fees - Client A

1. In or about June 2011, the Respondent was retained by Client A in connection with the sale of a residential property.

2. On or about June 20, 2011, the Respondent forwarded a retainer letter to Client A. A copy of the unsigned retainer letter dated June 20, 2011 provided, in part, as follows:

> In the event that you sell a property, I may be required, with your consent, to holdback from you, certain funds on account of unbilled or uncleared payments to third parties, such as municipal governments and mortgage lenders. If such action is required by me, I shall release any holdback funds to you in a timely manner. My practice is to have you come and pickup a cheque and to not mail any funds to you in order for me to confirm that you have received my cheque. Upon receipt of any holdback cheques from me, I remind you that you [sic] 6 months from the date of the cheque to present it to your bank for deposit before my cheque becomes stale dated.
>
> Prior to any cheque issued by me to you becoming stale dated, I shall make four attempts to contact you at the telephone numbers you have given to me along with a final letter to that last known address I have on file for you to remind you to cash my cheque. If all my attempts to contact you should fail and my cheque for any holdback funds become stale dated, then it is my practice to bill against the holdback funds for my time expended in the matter.

3. On or about June 24, 2011, the Respondent prepared a Direction to Pay with respect to the sale of the property. The Direction to Pay included a holdback of the sum of $1,508.10 with respect to a one month mortgage payment.

4. On or about August 9, 2011, the mortgage holdback was released and the Respondent issued a cheque in the amount of $1,508.10 to Client A.

5. On or about February 2, 2012, the Respondent sent a letter to Client A at her former address informing her that, if his cheque in the amount of $1,508.10 was not cashed, he would "be at liberty to bill for my time against funds which I hold in trust."

6. On or about April 23, 2012, the Respondent sent a letter to Client A enclosing a statement of account in the amount of $1,508.10. The statement of account described the "Professional Services Rendered" as follows:

> ... communications with you regarding the holdback funds and the unnegotiated cheque; to communications with your mother … regarding the cheque; to advising both of you that [sic] cheque will become stale; and to all other matter necessary and incidental hereto and not specifically set out herein …

7. He subsequently withdrew that sum of $1,508.10 from trust in payment of his fees.

8. The fee for legal services set out in the Respondent's account was based on the amount of funds held in trust and not on the time spent on the file. The Respondent states "the entire thrust of it is to clean up the trust account, to finally get the funds out of trust."

9. On or about June 28, 2013, in response to a suggestion from the compliance auditor, the Respondent paid $1,508.10 back into trust to the credit of the client.

10. On or about September 21, 2013, the Respondent forwarded a cheque in the amount of $1,508.10 to the client.

Allegation 2: Excessive fees - Client B

11. In or about June 2011, the Respondent was retained by Client B in connection with the sale of a residential property.

12. On or about June 16, 2011, the Respondent forwarded a retainer letter to the client. The unsigned copy of the retainer letter expressly provided, among other things, that:

> Prior to any cheque issued by me to you becoming stale dated, I shall make four attempts to contact you at the telephone numbers you have given me along with a final letter to the last known

> address I have on file for you to remind you to cash my cheque. If all my attempts to contact you should fail and my cheque for any holdback funds become stale dated, then it is my practice to bill against the holdback funds for my time expended in the matter. My practice of billing against your holdback funds shall only apply to the first $2,000. All sums in excess of this shall be remitted to the Law Foundation as unclaimed trust funds.

13. On or about June 24, 2011, the Respondent prepared a Direction to Pay with respect to the sale of the property. The Direction to Pay included a holdback of the sum of $923.77 with respect to a one-month mortgage payment.

14. On or about July 13, 2011, the mortgage holdback was released, and the Respondent issued a cheque in the amount of $923.77 to his client. The Respondent has no record of how the cheque was delivered to his client.

15. On or about December 9, 2011, the Respondent sent a letter to Client B informing the client that, if his cheque in the amount of $923.77 was not cashed, he would "be at liberty to bill for my time against funds which I hold in trust."

16. On or about April 25, 2012, the Respondent sent a letter to the client enclosing a statement of account in the amount of $923.77. The description of the "Professional Services Rendered" entirely related to the Respondent's efforts to have the client cash his cheque.

17. The fee for legal services set out in the Respondent's account was based on the amount of funds held in trust and not on the time spent on the file, and the account was issued to clean up the balance remaining in the trust account to the credit of these clients.

18. On or about May 17, 2012, the Respondent withdrew the sum of $923.77 from trust in payment of his fees.

19. On or about June 5, 2012, Client B contacted the Respondent with respect to the April 25, 2012 statement of account. In reply, the Respondent sent a letter to the client purporting to discount his bill and enclosing a cheque in the amount of $913.77

Allegation 3: Improper billing of disbursements

20. The Respondent states that it was his usual practice to obtain title insurance on real estate matters involving the purchase of property or mortgage refinancing. The Respondent states that he relied on his support staff to obtain the title insurance.

21. The Respondent did not adequately supervise his support staff or review his real estate files to ensure that they carried out his instructions and did not bill for services not provided or disbursements not incurred.

22. The Respondent acknowledges that he is responsible for the work performed on his behalf by his support staff.

Allegation 3(a): Improper billing of disbursements – Client C

23. In or about January 2012, the Respondent was retained by Client C in connection with the purchase of a residential property.

24. On or about February 1, 2012, the Respondent prepared the Purchaser's Statement of Adjustments with respect to the property, which included the sum of $495 for "Stewart Title Guaranty Company re title insurance."

25. On February 20, 2012, the Respondent prepared a statement of account that included a disbursement in the amount of $495 with respect to "Stewart Title Insurance Policy."

26. The Respondent did not issue a cheque to Stewart Title in payment of an insurance policy, nor is there any evidence that an insurance policy was ever purchased from Stewart Title on behalf of Client C.

27. On or about December 12, 2013, the Respondent sent a letter to Client C acknowledging the overbilling of $495 and enclosing a cheque in the amount of $495.

Allegations 3(b): Improper billing of disbursements - Client D

28. In or about February 2012, the Respondent was retained by Client D in connection with a construction loan.

29. On or about February 23, 2012, the Respondent prepared a Direction to Pay with respect to the property. The Direction to Pay included the sum of $1,658 payable to "Stewart Title re title insurance" and the sum of $50 payable to "Harris Insurance re binder."

30. On March 23, 2012, the Respondent prepared a statement of account that included a disbursement in the amount of $1,658 with respect to "Stewart Title Insurance Policy" and a disbursement in the amount of $150 for an "Insurance Binder."

31. However:

    a. The Respondent did not issue a cheque to Stewart Title in payment of an insurance policy nor is there any evidence that an insurance policy was ever purchased from Stewart Title on behalf of this client.

    b. The Respondent did not incur disbursements of $150 with respect to an insurance binder. Instead, he paid $35 for an insurance binder.

32. The Respondent states that the disbursement claimed on his statement of account for the insurance binder was inaccurate because he included in the amount charged a "mark-up" or administrative fee for the work involved in obtaining the insurance binder. He acknowledges that the statement of account does not clearly distinguish between charges by his firm versus disbursements paid to third parties.

33. On or about December 12, 2013, the Respondent sent a letter to his client acknowledging the overbilling of $1,658 with respect to this property and an overbilling of $812 with respect to the property referred to in allegation 3(c) of the citation and enclosing a cheque payable to Client D in the total amount of $2,470.

Allegations 3(c): Improper billing of disbursements – Client E

34. In or about February 2012, the Respondent was retained by Client E in connection with a refinancing of a property.

35. On or about February 23, 2012, the Respondent prepared a revised Direction to Pay that included the sum of $1,262 payable to "Stewart Title re title insurance," the sum of $100 payable for an insurance binder but now showed the sum of $280 payable to "Pham & Co re form F & B."

36. On March 23, 2012, the Respondent prepared a statement of account in the amount of $3,399, including a disbursement in the amount of $1,262 with respect to "Stewart Title Insurance Policy," a disbursement of $100 for the

insurance binder and a disbursement in the amount of $250 with respect to "Form F&B Fees."

37. However:

    a. The Respondent did not issue a cheque to Stewart Title in payment of an insurance policy, nor is there any evidence that an insurance policy was ever purchased from Stewart Title on behalf of this client. The Respondent purchased an insurance policy from First Canadian Title for $450;

    b. The Respondent did not pay $100 for an insurance binder. Instead, he paid CMW Insurance the sum of $40 for an insurance binder; and

    c. The Respondent did not pay Form F&B fees to the strata property manager in the amount of $250. Instead, he paid Warrington PCI Management $151.20 for the Form F.

38. The Respondent states that, at the time of signing the statement of account, he knew or ought to have known that the amount claimed for disbursements for Form F&B fees was inaccurate. He acknowledges that the difference between the disbursements billed and the actual disbursements should have been returned to the client or disclosed to the client as an administration fee charged by his firm.

39. On or about December 12, 2013, the Respondent sent a letter to his client acknowledging overbilling of $812 for title insurance and an overbilling of $1,658 and enclosed a cheque payable to Client E for $2,470.

40. The Respondent did not reimburse the client for the $129.80 overcharged for the Form F.

Allegations 3(d): Improper billing of disbursements - Client F

41. In or about April 2012, the Respondent was retained by Client F in connection with a purchase of property.

42. On or about April 25, 2012, the Respondent prepared a Purchaser's Statement of Adjustments with respect to the property. The Purchaser's Statement of Adjustments included the sum of $1,684.50 payable to "Stewart Title Guaranty Company re title insurance for Lender (x2)" and an amount of $150 for an "insurance binder for lender."

43. On April 30, 2012, the Respondent prepared a statement of account in the amount of $7,133. The statement of account included a disbursement in the amount of $1,684.50 with respect to "Title Insurance (x2)" and a disbursement in the amount of $150 for an insurance binder.

44. However:

    a. The Respondent did not pay $1,684.50 for the purchase of title insurance from Stewart Title or otherwise; and

    b. The Respondent did not pay $150 for an insurance binder. Instead, the Respondent paid $90 for three insurance binders on behalf of the client with respect to three properties other than the property for which he was retained.

45. The Respondent states that the disbursements claimed on his statement of account for the insurance binders were inaccurate because he included in the amount charged a "mark-up" or administrative fee for the work involved in obtaining the insurance binders. He acknowledges that the statement of account does not clearly distinguish between charges by his firm versus disbursements paid to third parties.

46. On or about December 12, 2013, the Respondent sent a letter to his client acknowledging the overbilling and enclosing a cheque payable to Client F in the amount of $1,744.50.

Allegations 3(e): Improper billing of disbursements - Client G

47. In or about October 2012, the Respondent was retained by Client G in connection with a refinancing of property.

48. On or about October 2, 2012, the Respondent prepared a Direction to Pay with respect to the property. The Direction to pay included the sum of $797.85 payable to "Stewart Title Guaranty re title insurance."

49. On October 10, 2012, the Respondent prepared a statement of account that included a disbursement in the amount of $797.85 for title insurance.

50. The Respondent did not purchase title insurance with respect to this property for $797.85 or at all.

51. On or about December 12, 2013 the Respondent sent a letter to the client acknowledging the overbilling of $797.85 and enclosing a cheque in the amount of $797.85.

Allegation 4: Creation of fictitious documents in support of withdrawal from trust account - Clients H and I

52. In or about September 2011, the Respondent was retained in connection with an application for subdivision of property in Burnaby (the "Subdivision"). The Subdivision was part of a business venture in which Client H was a silent partner.

53. On or about September 16, 2011, the Respondent received the sum of $3,000 from Client H as a retainer for legal services to be rendered in connection with the Subdivision. The Respondent deposited the $3,000 into his trust account but did not record the receipt of the retainer on any client trust ledger opened with respect to the Subdivision.

54. Instead, the Respondent recorded the receipt of the $3,000 on the client ledger of Client I relating to the sale of a different property located in Burnaby (the "Property") and for which Client H was also a silent partner.

55. At the time of the depositing the $3,000 in retainer funds, the Respondent was already holding $4,000 in trust for Client I and Client H (as silent partner) as a retainer for legal services rendered in connection with the removal of a builders lien claim from the Property.

56. The Respondent issued statements of account and withdrew the total sum of $7,000 from funds held in respect of the Property for services rendered in connection with the discharge of the builders lien claim from the Property as follows:

    (a) On or about September 21, 2011, $3,360; and

    (b) On or about April 30, 2012, $3,640.

57. The April 30, 2012 statement of account contained the following description of the "Professional Fees Rendered":

> Taking instructions to act on your behalf in respect of the above claim of builders lien; attending to search title; to consultation with Moses Kajoba, litigation counsel for [Client H] and [his company] re strategy to clear the builders lien; to preparation of 21 days notice of commence[sic] an action; to arranging an agent to serve the 21 day notice; to receiving an affidavit of service; to attending to discharge of the builders lien at the Land Title Office; to reporting to you …

58. The April 30, 2012 statement of account was accompanied by a letter from the Respondent addressed to Client I, the re line of which read "Release of Builders Lien … for [the Property]…and stated as follows:

> I enclose my account for fees and disbursements incurred in the sums of $3,640 in regards to the negotiations to services provided for releasing Builders Lien against the Property. …

59. The Respondent admits that the letter and statement of account dated April 30, 2012 are fictitious in that he did not render the services described in the statement of account to Client I. In his response to questions raised by the Law Society in its investigation of the complaint, the Respondent wrote as follows:

> The real work relating to the April 30, 2012 account did not involve any further builders lien matters and was completely on account of the Subdivision … By the date of this bill, I had realized that I should have credited the retainer of $3,000 to the … account [relating to the Subdivision] but was trying to save [Client I] trust administration fees. In retrospect, it seems a small amount to save a client and was an error in judgment on my part …
>
> In respect to my April 30, 2012 invoice, the factors in determining my fees related to the time spent corresponding with the City of Burnaby in regards to the … Subdivision …

FACTS AND DETERMINATION

[17] Rule 4-22 permits a respondent to make admissions of disciplinary violations on the condition of a specified disciplinary outcome. If the Discipline Committee accepts the proposal, discipline counsel is instructed to recommend to the hearing panel that it be accepted.

[18] Together, Rules 4-22(5) and 4-23(3) allow a hearing panel to either accept or reject a proposal. There is no provision in the Rules that would allow a hearing panel to substitute a different adverse determination or a different disciplinary action.

[19] In considering whether to accept the proposal, this Hearing Panel must be satisfied that:

(a) the proposed admissions on the substantive matters are appropriate, and

(b) the proposed disciplinary action is within the range of a fair and reasonable disciplinary action in all the circumstances.

ADMISSION OF PROFESSIONAL MISCONDUCT

[20] The well-settled test for "professional misconduct" is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members … ." That test, set out in *Law Society of BC* v. *Martin*, 2005 LSBC 16, has been consistently applied in disciplinary hearings in this Province.

Allegations 1 and 2 – Excessive Fees

[21] The *Professional Conduct Handbook* (then in force at the time of the conduct set out in the amended citation) provides a general guide to lawyers' conduct in the Province and sets out the standards of that conduct. Its provisions are instructive in considering whether the Respondent's conduct is a marked departure from that conduct the Law Society expects of lawyers in BC.

[22] The *Handbook* provides direction with respect to a lawyer's fees. Specifically:

(a) Chapter 9, Rule 1 provides that "a lawyer must not charge an excessive fee";

(b) Canon 3(9) provides that a lawyer is entitled to reasonable compensation for services rendered but "should avoid charges that are unreasonably high or low" and that a client's ability to pay cannot justify a charge in excess of the value of the services; and

(c) Canon 3(10) provides that a "lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business."

[23] The Hearing Panel was advised that there was only one other decision in British Columbia that expressly considered a similar allegation of charging excessive fees.

[24] In that case, *Law Society of BC v. Pierce*, 2001 LSBC 4, the lawyer's retainer agreement provided that he would bill for fees on an hourly basis. However, in addition to his hourly fee, the respondent also billed his client a fee of $2,838.93, being one per cent per year of the amounts held in trust for the client. The latter fee was billed to account for his neglect in recording time, which would have otherwise left him unremunerated for all of the hours actually spent on the file. He was cited for rendering an account that was unreasonable and excessive.

[25] The hearing panel in *Piece* found that "the amount of the fees billed which was based upon the application of a percentage to the funds held in trust over time was far in excess of the value of the services provided when calculated according to the hourly rate to which the Member was entitled by the retainer agreement." The respondent was found to have committed professional misconduct.

[26] As was the case in *Piece*, the amount billed by the Respondent in this case had no direct correlation to the services provided in relation to the retainer. Rather, by the Respondent's own admission, the fees were billed solely to "clean up" the trust account and presumably allow him to close his file.

[27] In both cases, the clients had fully paid their lawyers for all of the legal services performed in relation to their retainers.

[28] It warrants mention that the Respondent did not attempt to conceal from his clients the fact that he charged the fees that gave rise to allegations 1 and 2 or the basis on which he charged them. To the contrary, the documentary evidence before the Hearing Panel indicates that he explained his process for doing so on more than one occasion, both prior to and at the time of charging the fee. Notably:

(a) the Respondent's fee agreements expressly contemplated charging clients if they did not cash his holdback cheques;

(b) when the cheques were not cashed the Respondent communicated his intention to "bill for [his] time" against funds he held in trust if the cheques weren't cashed; and

(c) the Respondent delivered invoices to his clients accurately describing the "services" rendered (i.e., his attempts to have the client cash the cheques) and amounts charged.

[29] Furthermore, although it cannot be disputed that the Respondent did benefit financially from the fee charged, there is no indication that he had any nefarious or sinister intention in doing so. He did so for administrative convenience.

[30] However, in this Panel's view, while the candid disclosure to the clients and the lack of any sinister intent may be relevant to the determination of the appropriate disciplinary action, neither detract from the fact that the Respondent knowingly charged his clients a fee that could not be justified for the "services" provided.

[31] Indeed, it could easily be argued that no services were provided, certainty in respect of the matters for which the Respondent was retained.

[32] Section 3 of the *Act* provides that "it is the object and duty of the society to uphold and protect the public interest in the administration of justice." Without doubt, it is in the public interest that members of the public be able to confidently rely on the fact that the fees that they are billed fairly and accurately reflect the services that have been provided. Without that confidence, it would be difficult, if not impossible, to maintain the public's confidence in the legal profession generally or in lawyers as individuals.

[33] By his admission, the Respondent undermined the ability of his clients to be confident that they would be fairly billed relative to the services provided. His conduct in billing the fees he did, regardless of his candour in doing so, cannot be sanctioned.

[34] In the circumstances, we accept the Respondent's admission of the facts set out in allegations 1 and 2 of the amended citation and as further set out in the ASF. The Panel concludes that that conduct contravenes Chapter 9, Rule 1 and Canon 3(9) of the *Handbook* and "disclose[s] a marked departure from that conduct the Law Society expects of its members … ."

[35] We accept the Respondent's admission of professional misconduct and, accordingly, under section 38(4) of the *Act*, we determine that the Respondent has committed professional misconduct with respect to allegations 1 and 2.

Allegations 3(a) – (e): Improper billing of disbursements

[36] The fiduciary nature of the relationship between a lawyer and a client requires, among other things, a solicitor to be candid with his or her client on all matters including the retainer and ensuring that the client has been fully informed and properly advised of any transaction from which the solicitor receives a benefit. See *Nathanson, Schachter & Thompson v. Inmet Mining Corporation*, 2009 BCCA 385 at paragraphs 48-49.

[37] That duty of candour to the client with respect to billing is codified in the *Act* and the *Handbook*. Specifically:

(a) Section 69(4) of the *Act* provides that a lawyer's bill must contain "a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursement"; and

(b) Chapter 9, Rule 7 of the *Handbook* prohibits a lawyer from charging a hidden fee. It provides that a lawyer must fully disclose to the client "any fee that is being charged or accepted."

[38] The importance of the personal accountability owed by lawyers to their clients is highlighted by Chapter 12, Rule 3(o) of the *Handbook*. That Rule prohibits a lawyer from permitting a non-lawyer to issue statements of account. Issuing accounts is the responsibility of the lawyer alone.

[39] In this case, by admittedly:

(a) charging clients for disbursement that were not incurred;

(b) charging an undisclosed "mark-up" or administrative fee for the work involved in obtaining the insurance binders;

(c) billing for disbursements on the basis of estimates, not the actual costs incurred; and

(d) failing to supervise his support staff and allowing staff to prepare and issue statements of account,

the Respondent is in clear violation of those provisions of the *Act* and the *Handbook* under which he has been cited.

[40] Not only is the conduct a clear violation of the *Act* and the *Handbook,* it involved dishonesty (particular in respect of the billings for disbursements not actually incurred and in billing for disbursements on the basis of estimates) and a breach of the basic duty of candour owed to the client (particularly in respect of the undisclosed "mark-ups" billed).

[41] While the *Handbook* requires lawyers, not support staff, to issue statements of account, we note that there is nothing to suggest any sinister or nefarious intention in allowing his support staff to prepare and failing to supervise his staff's preparation of the bills. On the evidence, it appears that the Respondent was, at best, sloppy and lazy in his billing practice.

[42] However, clients deserve more. They deserve thoughtful and honest billing practices by their lawyers. They deserve to know that they have the full attention of their lawyers in all matters relating to their retainers, including billing matters. They deserve to know that the amounts they are billed for disbursements actually reflect the costs incurred by the lawyer issuing the bill.

[43] In our view, the dishonesty and lack of candour evidenced by the manner in which the Respondent billed for disbursements does nothing to instill his clients with confidence that his accounts for disbursements accurately reflect the costs he actually incurred. Rather, they are left to guess what portion of the bill for

disbursement reflects the lawyer's actual costs and what portion is a money-making exercise at their expense. That, in turn, does not reflect well on the profession.

[44] In the circumstances, we accept the Respondent's admission of the facts set out in allegations 3(a) to (e) of the amended citation and as further set out in the ASF. The Panel concludes that that conduct contravenes Section 69(4) of the *Act* and Chapter 9, Rule 7 and Chapter 12, Rule 3(o) of the *Handbook* and "disclose[s] a marked departure from that conduct the Law Society expects of its members … ."

[45] We accept the Respondent's admission of professional misconduct and, accordingly, under section 38(4) of the *Act*, we determine that the Respondent has committed professional misconduct with respect to allegations 3 (a) to (e).

Allegation 4: Creation of fictitious documents in support of withdrawal from trust account

[46] It is perhaps trite to state that, in order to satisfy the objective of section 3 of the *Act* to "uphold and protect the public interest," the Law Society must ensure that lawyers act honestly and with integrity in their dealings with the public.

[47] The deliberate creation of the fictitious description of service set out in both a letter and invoice casts doubt on the Respondent's honesty and integrity and reflects adversely on the integrity of the legal profession, regardless of his intention in doing so (to avoid the client having to pay a $10 trust administration fee (TAF)).

[48] Such dishonesty cannot be sanctioned. That is particularly true given the deliberateness of the action.

[49] We accept the Respondent's admission of the facts set out in allegation 4 of the amended citation and as further set out in the ASF. The Panel concludes that that conduct contravenes Section 69 of the *Act* and "disclose[s] a marked departure from that conduct the Law Society expects of its members … ."

[50] We accept the Respondent's admission of professional misconduct and, accordingly, under section 38(4) of the *Act*, we determine that the Respondent has committed professional misconduct with respect to allegation 4.

PROPOSED DISCIPLINARY ACTION

[51] Together with the admission of professional conduct, the Respondent has proposed as disciplinary action a suspension of two months commencing on March 1, 2015

or such other date as the Hearing Panel may order. As noted, the Discipline Committee has consented to that proposal.

[52] Having accepted the Respondent's admission of professional misconduct, this Hearing Panel must determine whether to accept that proposed disciplinary action.

[53] As noted by the hearing panel in *Law Society of BC v. Rai*, 2011 LSBC 2, a hearing panel should give deference to the recommendation to accept a proposed disciplinary action. As noted at paragraph 7:

> 7. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"

[54] The guiding principle in considering appropriate disciplinary action is section 3 of the *Act*. That section provides that "it is the object and duty of the society to uphold and protect the public interest in the administration of justice … ."

[55] The review panel in *Law Society of BC v. Lessing*, 2013 LSBC 29, noted that the object and duty set out in section 3 are reflected in the non-exhaustive list of factors to consider in discipline proceeding as set out in *Law Society of BC* v. *Ogilvie*, [1999] LSBC 17.

[56] As also noted by the review panel in *Lessing*, not all of the *Ogilvie* factors come into play in all cases, and the weight given to the factors vary from case to case.

[57] In this case, the Hearing Panel has given greatest significance to the following "*Ogilvie* factors" in determining whether the proposed disciplinary action falls "within the range of a fair and reasonable disciplinary action":

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

(b) the need to ensure the public's confidence in the integrity of the profession;

(c) the need for specific and general deterrence;

(d) prior disciplinary history;

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

(f) the range of penalties imposed in similar cases; and

(g) whether the respondent has acknowledged the misconduct.

[58] We will discuss the factors relevant to this proceeding below.

Nature and Gravity of Misconduct

[59] The Respondent has committed professional misconduct in relation to eight separate client matters. The conduct set out in allegations 3(a) to (e) and in allegation 4 all involve elements of dishonesty and deceit.

[60] Specifically, by billing the clients for fees and disbursements in the amounts that he did, the Respondent falsely represented to his clients the actual services provided and disbursements incurred on their behalf. The creation of false documents (allegation 4) was deliberately intended to mislead the Law Society and its auditors in respect of the payment of the $10 TAF.

[61] His conduct in respect of all of those matters evidence questionable integrity and lack of candour, both in respect of his clients and the Law Society.

[62] In *Law Society of BC v. Martin,* 2007 LSBC 20 at para. 41, the review panel noted that the salient features to consider when considering a suspension include elements of dishonesty, repetitive acts of deceit or negligence and significant personal and professional conduct issues.

[63] In our view, the repeated instances of lack of integrity, dishonesty and deceit (to varying degrees) and negligence (in failing to properly supervise and allowing his staff to issue statements of account) warrant a consideration of a suspension in this case.

The Need to Ensure the Public's Confidence in the Integrity of the Profession

[64] The importance of the need to ensure the public's confidence cannot be overstated when determining an appropriate disciplinary action.

[65] As noted by the review panel in *Lessing*, protection of the public, together with the rehabilitation of the respondent, "will, in most cases, play an important role" in determining the sanction to be imposed against a lawyer who commits professional misconduct.

[66] Many, if not most, members of the public do not require legal services on a regular basis. They are unlikely to be able to determine on their own whether the amount of fees or disbursements billed is fair or reasonable. Many have no choice but to

rely on their lawyer not only to act in their best interest and to provide legal services in a competent manner, but to bill them fairly and accurately for the services provided and the disbursements incurred.

[67] Especially given that vulnerability, clients should have confidence that the fees that they are charged are reasonable relative to the legal services provided and that charges for disbursements accurately reflect those costs incurred, without hidden fees.

[68] Simply put, members of the public must be able to trust their lawyer in all aspects of their retainer.

[69] In this case, the Respondent's dishonesty in: (a) billing clients excessive fees for services provided, if at all; (b) billing clients for disbursements in excess of the costs actually incurred, if at all; and (c) deliberately creating fictitious documents, undermines the ability of the public to have trust in lawyers' billing practices and the profession in general.

[70] In our view, the disciplinary action imposed must be sufficient so as not to further undermine that trust.

Need for specific and general deterrence

[71] As noted, the Respondent's candour with his clients regarding the services provided and the amount of fees that gave rise to allegations 1 and 2 did not preclude a finding of professional misconduct.

[72] In our view, there is great value in reminding the profession that, even with a client's "consent" to do otherwise, lawyers must always act fairly and with integrity in respect of all matters relating to their relationship with their clients. A lawyer cannot contract out of his or her obligation to do so.

[73] There is a need to generally deter other members of the profession from excessively billing clients on the basis that they have fully disclosed their intention to do so. That will be an aggravating factor in determining the appropriate range in disciplinary action.

Prior disciplinary history

[74] The Respondent's professional conduct record consists of a prior conduct review ordered in 2010 to discuss the importance of the "no-cash" rule (Rule 3-51.1) and to discuss a lawyer's obligations when acting or considering to act for more than one client in a real estate transaction.

[75] While the Respondent does have a prior disciplinary history, it is not of such significance that it would justify an increase in the disciplinary action that may otherwise be ordered.

Possibility of remediation or rehabilitation

[76] In this case, of the three types of allegations set out in the amended citation, two involved repeated occurrences.

[77] Ensuring that the Respondent does not repeat the conduct that gave rise to the citation will be an aggravating factor in the determination of an appropriate disciplinary action.

Range of Sanction Imposed in Similar Cases

[78] The penalties imposed in similar cases will factor into a panel's determination on discipline.

[79] Of course, as is most often the case, there were no cases before the Hearing Panel in which the facts exactly mirrored the facts in this proceeding. We considered the following cases, among others:

Allegations 1 and 2

[80] As noted above, the Hearing Panel was advised that the decision in *Pierce* was the only other decision in British Columbia in which a hearing panel considered a finding that a lawyer billed "excessive fees."

[81] In *Pierce,* in addition to fees billed on an hourly basis, the respondent also billed his clients a fee of one per cent per year of the amount held in trust for the client. The respondent justified the latter fee on the basis that his neglect in recording time meant that he would otherwise not be remunerated for time actually spent on the matter.

[82] The respondent was fined $12,000.

[83] Unlike the Respondent's fee agreement in this case, the lawyer's fee agreement in *Pierce* did not expressly refer to or contemplate the one per cent fee charged. The fee agreement in that case only contemplated the payment for legal services on an hourly basis.

[84] It is also of note that the respondent's previous discipline record in *Pierce* included five other discipline hearings in which adverse findings were made and seven conduct reviews, several of which arose from complaints about his fees or billings for fees. The conduct record, among other things, was factor in the disciplinary action taken.

Allegation 3(a) to (e)

[85] Counsel for the Law Society referred the Hearing Panel to a number of decisions in which a panel considered the charging of marked up disbursements or the charging of disbursements that were not incurred.

[86] A distinction was drawn between those cases involving sloppiness in administrative and billing procedures (with sanctions ranging from a fine to a suspension) and those involving dishonesty (sanctions ranging from a lengthy suspension to disbarment). They are:

(a) In *Law Society of BC v. Harris,* 2004 LSBC 38, the lawyer billed clients for disbursements on the basis of what he estimated he had paid. When the respondent's accounts were brought up to date, it was found that he had erred in his calculations and overbilled the client by approximately $25. The respondent was fined $1,000.

(b) In *Re Whyte*, 1993 CanLII 664 (ONLST), the respondent charged disbursements to real estate files in matters where he had not actually incurred any expenses or where the disbursement charged was an estimate. The respondent was suspended for four months.

(c) In *Re Altimas,* 1992 CanLII 719 (ONLST), the lawyer billed disbursements for costs of surveys that were never ordered and disbursements that had not been incurred. The respondent also created false documents to disguise the misconduct. The lawyer was suspended for one month. The sanction would have been more severe but for the delay of the Law Society of Upper Canada in prosecution of the misconduct.

Allegation 4

[87] Counsel for the Law Society referred the Hearing Panel to a number of disciplinary decisions involving the creation of false documents, including the following:

(a) In *Law Society of BC v. Perrick*, 2014 LSBC 25, the respondent, among other things, was found to have prepared an assignment of shares that he back-dated and then permitted his clients to sign as attorneys under a power of attorney that he knew had expired. There was no finding that the respondent acted deceitfully or dishonestly or that he was intentionally misleading (the assignment of shares could have been effected properly in another manner) or that he was primarily motivated by his own self-interest. The lawyer was fined $15,000.

(b) In *Law Society of BC v. Strandberg*, [2001] LSBC 26, the respondent failed to take steps on the client's behalf in a Small Claims Court action for 11 months and then backdated documents to mislead the client and the Law Society that he had commenced an action on the client's behalf. He was suspended for one month and fined $15,000.

(c) In *Law Society of BC v. Addison*, 2007 LSBC 12, the respondent was found to have committed professional misconduct by misleading opposing counsel when he advised her that a certain defence witness should be added to a list of witnesses although he knew at that time that the witness had died. Counsel for the respondent argued that he had done so out of a misguided sense of loyalty to the client. Although the respondent had no disciplinary record and there was no personal gain, the respondent was suspended for 30 days.

(d) In *Law Society of BC v. Jamieson*, 1999 LSBC 11, the respondent lied to the Law Society about corresponding with the client and then fabricated three letters, which he sent to the Law Society to induce it to discontinue its investigation into the complaint. The panel found the conduct to be "extremely serious and worthy of significant punishment." The respondent did not have a prior disciplinary record. The respondent was suspended for eight months.

(e) In *Law Society of BC v. Luk*, 2007 LSBC 13, the respondent attempted to mislead the Law Society in its investigation of a client complaint by providing a false document (copy of front and back of two different cheques while claiming that the copy was the front and back of the same cheque) and failed to provide another client with an adequate quality of service. She was suspended for 18 months with conditions on her practice upon her return.

Acknowledgment of the misconduct

[88] The Respondent co-operated with the Law Society during both the compliance audit which led to the citation and the investigation and prosecution of this complaint.

[89] Furthermore, not only has the Respondent agreed to the ASF and admitted the facts giving rise to the amended citation, he has also made a conditional admission of the discipline violations and has consented to disciplinary action and to pay costs.

[90] The Respondent's conduct in doing so is a mitigating factor.

Summary of *Ogilvie* factors

[91] Having considered all of the law and evidence before us and, in particular, having regard to the "*Ogilvie* factors," we have concluded that the proposed disciplinary action of a suspension of two months is appropriate.

[92] Of the *Ogilvie* factors, we are particularly mindful of the need to ensure the public's confidence in the integrity of the profession. For that reason, the elements of dishonesty and lack of integrity displayed by the Respondent's conduct militate in favour of the proposed suspension. That is true both in respect of the Respondent's dishonesty in the excess of the fees billed and the improper billing of disbursements, as well as the fictitious letter and invoice created to avoid the payment of the TAF.

[93] That conduct, however, is somewhat mitigated by the Respondent's co-operation with the Law Society, both in respect of the compliance audit that gave rise to the citation as well as admission and proposed disciplinary action in this proceeding. In our view, together, that co-operation and admission indicate that the Respondent has learned from these proceedings and is not likely to repeat the conduct in the future.

[94] While the dishonesty and lack of integrity may have otherwise warranted a suspension of more than two months, we take note that the effect of a two month suspension on a sole practitioner will not be inconsequential. Not only will the suspension likely have a financial impact on the Respondent, he will also have to notify his clients and incur costs to have someone maintain his practice during the period of the suspension.

[95] We are confident that, together with the ongoing obligation to produce the Accountant's Report to the Law Society, the imposition of the two-month

suspension will serve the important function of rehabilitation and ensuring public confidence in the disciplinary process.

COSTS

[96] Rule 5-9 of the Law Society Rules provides, in part, as follows:

> (1.1) Subject to subrule (1.2), the panel or review board must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by an applicant, a respondent or the Society in respect of a hearing on an application or a citation or a review of a decision in a hearing on an application or a citation.

[97] The Respondent has agreed to pay the Law Society costs in the amount of $1,800 by April 30, 2015.

[98] The range under item 23 of the tariff for hearings under Rule 4-22 is between $1,000 and $3,500. The $1,800 proposed for costs is within the range set out under that tariff item.

[99] In our view, an award of costs at the low end of that tariff range appropriately reflects the Respondent's admissions and co-operation with the disciplinary process.

[100] We agree that costs of $1,800 are appropriate.

CONCLUSION

[101] On the basis of the above, the Hearing Panel accepts the Respondent's admission of professional misconduct with respect to the allegations made in the amended citation as well as the proposed disciplinary action.

ORDER

[102] The Hearing Panel orders:

(a) The Respondent is suspended from the practice of law for a period of two months commencing on March 1, 2015 until and including April 30, 2015, pursuant to section 38(5)(d) of the *Legal Profession Act*; and

(b) The Respondent must pay costs in the amount of $1,800, inclusive of disbursements, on or before April 30, 2015.

[103] The Executive Director is instructed to record the admission on the Respondent's professional conduct record.