

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DIEP THANH HOANG NGUYEN

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date: April 7, 2015

Panel: Dean Lawton, Chair
Patrick Kelly, Public representative
Richard Lindsay, QC, Lawyer

Discipline Counsel: Carolyn Gulabsingh
Appearing on her own behalf: Diep Thanh Hoang Nguyen

INTRODUCTION

- [1] This hearing concerns the practices of a lawyer relating to disbursements and fees she charged a client to avoid paying income tax on the full fees she earned; and making deliberately misleading and misrepresentative statements to the Law Society in the course of Law Society investigations following a Law Society audit.
- [2] The Citation sets out several allegations of misconduct as follows:
1. Between May 2012 and October 2012, in the course of representing PT on a contingency fee retainer, you engaged in conduct intended to conceal the full amount of fees you earned in order to avoid paying income tax on the full fee earned, contrary to Chapter 2, Rule 1 of the Professional Conduct Handbook then in force by doing one or more of the following:

- (a) issuing an account to the client dated September 1, 2012 that included a fictitious \$30,000 disbursement identified as “Diep Nguyen credit line Hong Kong agent”;
 - (b) falsely representing to the client that the \$30,000 disbursement was for an agent you hired in Hong Kong to assist with the client’s claim; and
 - (c) creating a fake cheque in the amount of \$30,000 payable to KT in respect of the fictitious disbursement.
2. Between July 2013 and February 2014, in the course of the Law Society’s investigation relating to an account you issued to your client, PT, dated September 1, 2012, you represented to the Law Society that the \$30,000 disbursement identified in the account related to a disbursement paid to a third party on behalf of your client when the you knew that representation was false.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[3] An Agreed Statement of Facts (“ASF”) was filed as an exhibit at the hearing. The ASF contained a single admission of misconduct by Ms. Nguyen. In particular, the admission found at paragraph 35 in the ASF states as follows:

35. The Respondent admits that between May 2012 and October 2012, in the course of representing PT on a contingency fee retainer, she engaged in conduct intended to conceal the full amount of fees she earned in order to avoid paying income tax on the full fee earned, contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force by doing one of more of the following:
- a) issuing an account to her client dated September 1, 2012 that included a fictitious \$30,000 disbursement identified as “Diep Nguyen credit line Hong Kong agent”;
 - b) falsely representing to her client that the \$30,000 disbursement was for an agent she hired in Hong Kong to assist with the client’s claim; and
 - c) creating a fake cheque in the amount of \$30,000 payable to KT in respect of the fictitious disbursement.

- [4] In the course of the hearing, discipline counsel and Ms. Nguyen acknowledged that the ASF should have included a second admission of misconduct on the part of Ms. Nguyen stemming from her communications with the Law Society. In particular, this admitted misconduct is set out in paragraph 2 of the citation and states as follows:

Between July 2013 and February 2014, in the course of the Law Society's investigation relating to an account you issued to your client PT dated September 1, 2012, you represented to the Law Society that the \$30,000 disbursement identified in the account related to a disbursement paid to a third party on behalf of the client when you knew that representation was false.

ISSUE

- [5] Should the Hearing Panel accept Ms. Nguyen's admission of professional misconduct and if so, what, in the circumstances, would be an appropriate disciplinary action? Specifically:
1. Does Ms. Nguyen's conduct as set out in the citation and admitted by her before this Panel constitute professional misconduct under section 38(4) of the *Legal Profession Act*; and
 2. If so, what is the appropriate disciplinary action within the range of fair and reasonable discipline in all the circumstances?

FACTS

- [6] The following facts are admitted through the Agreed Statement of Facts:
1. Ms. Nguyen was called to the bar and admitted as a lawyer on May 15, 1992.
 2. After her call to the bar Ms. Nguyen opened a personal law corporation operating under the name Diep T. H. Nguyen Law Corporation, practising mostly in the area of residential real estate and administrative law.
 3. In addition to her personal law corporation, Ms. Nguyen commenced employment with the Workers' Compensation Appeal Tribunal (WCAT) in September 2011 where she remained employed until January 19, 2015.

4. On or about September 26, 2009, PT retained Ms. Nguyen to act for her regarding a claim arising from a motor vehicle accident on September 11, 2009.
5. PT and Ms. Nguyen signed a contingency fee retainer agreement dated September 26, 2009. The retainer agreement allowed Ms. Nguyen to charge PT a contingency fee of 30 per cent of any amounts recovered.
6. PT resides in Vancouver and in Hong Kong.
7. PT's adult children, CT and FT, assisted her with her claim, including communicating with Ms. Nguyen.
8. Ms. Nguyen wrote a personal cheque dated May 18, 2012 to KT for \$30,000. In her memo section of the cheque Ms. Nguyen made the notation, "*PT care & assistance.*"
9. Ms. Nguyen settled PT's claim for \$302,013.09. On August 27, 2012 Ms. Nguyen deposited into her trust account a settlement cheque in the amount of \$302,013.09 she received from ICBC on PT's behalf.
10. On September 1, 2012 Ms. Nguyen issued a bill to PT. The bill included, as an item in the disbursements, a \$30,000 disbursement with the notation, "*Diep Nguyen credit line cheque Hong Kong agent.*"
11. At no time did Ms. Nguyen hire a Hong Kong agent to assist with PT's claim.
12. Ms. Nguyen prepared PT's bill with the \$30,000 disbursement of a Hong Kong agent purposely to avoid paying income tax on the \$30,000 sum by disguising it as a fictitious and manufactured disbursement, rather than properly allocating the \$30,000 as her fees.
13. From July 23 to July 26, 2013, the Law Society subjected Ms. Nguyen's practice to a compliance audit. The compliance audit examined the period January 1, 2012 to June 30, 2013.
14. During the course of the compliance audit the Law Society's auditor reviewed the PT claim. After the audit was concluded the auditor prepared a memorandum dated October 25, 2013 referring concerns to the Law Society's Professional Conduct Department for investigation.
15. During the audit, the auditor questioned Ms. Nguyen about to whom she had paid the \$30,000 disbursement and why. Initially Ms. Nguyen told the auditor

the payment was for in-house care for PT. When the auditor pressed for more details about the type of care and who had provided it, and why Ms. Nguyen paid for it with personal funds, Ms. Nguyen told the auditor the payment was made to an agent and that PT was aware of the payment.

16. During the audit Ms. Nguyen also told the auditor she was contacted by the Hong Kong agent after PT was in Hong Kong. Ms. Nguyen further told the auditor that she understood that if she did not pay \$30,000 to the Hong Kong agent, she would lose the file, because the Hong Kong agent led her to believe that the file would be “shopped around” to another lawyer.
17. Ms. Nguyen told the auditor that she did not know who ultimately ended up with the \$30,000 but she believed it was a relative of PT, and that PT’s children were aware of the claim. When specifically questioned by the auditor, Ms. Nguyen denied she was being extorted.
18. In a letter dated October 5, 2013, Ms. Nguyen confirmed the information she gave the auditor orally as outlined in paragraphs 15 to 17 above.
19. On January 8, 2014, Ms. Hoglund, a lawyer employed by the Law Society in the Professional Conduct Department, wrote to Ms. Nguyen asking for more information and detail regarding the \$30,000 disbursement to the Hong Kong agent.
20. Ms. Nguyen replied to Ms. Hoglund by letter dated January 29, 2014. Ms. Nguyen did not respond substantively to the questions posed in Ms. Hoglund’s January 8, 2014 letter; instead, her reply focused on interpretation of the bill to PT stating that her fee did not exceed the 30 per cent contingency as provided in the retainer agreement.
21. On February 13, 2014, Ms. Nguyen contacted Ms. Hoglund by telephone and told her:
 - (a) She lied to the Law Society auditor about the \$30,000 disbursement;
 - (b) She did not pay \$30,000 to a Hong Kong agent or anyone else;
 - (c) She represented \$30,000 of her fees as a disbursement to the Hong Kong agent, rather than as fees, so that she could avoid paying income tax on the \$30,000; and
 - (d) She intended to use the money she saved on paying income tax to pay down personal debt.

22. On June 25, 2014 Ms. Hoglund interviewed Ms. Nguyen in the presence of her lawyer. During the course of the interview Ms. Nguyen admitted she had a business relationship with KT as they were in a joint venture to bring technology to Vietnam and Hong Kong. Ms. Nguyen advised that she had previously provided KT with \$30,000 to establish offices in Vietnam and in Hong Kong where KT had residences.
23. Ms. Nguyen explained she had a receipt for the provision of the \$30,000 to KT. Ms. Nguyen stated that, since PT had a residence in Hong Kong, she thought she could use this connection to disguise the \$30,000 receipt from the business venture as a disbursement in the PT matter to avoid paying income tax to the Receiver General for Canada via the Canada Revenue Agency (“CRA”). Ms. Nguyen also admitted that the \$30,000 personal cheque dated May 18, 2012 that she wrote to KT was a fake. She wrote it and put it in the file to create a paper trail in case she was audited by the CRA. This cheque was never distributed to anyone and never cashed. Instead, Ms. Nguyen wrote a \$30,000 trust cheque to herself and deposited it into her personal account.

ADMISSION OF PROFESSIONAL MISCONDUCT

- [7] Although Ms. Nguyen had previously engaged counsel in the course of this disciplinary matter, she appeared before the Hearing Panel on her own behalf. During the course of the hearing Ms. Nguyen confirmed the history of events in the ASF and consented to the ASF being made in exhibit in the hearing. Further, during the course of the hearing Ms. Nguyen admitted orally that her conduct set forth in the citation constituted professional misconduct pursuant to section 38(4) of the *Legal Profession Act*.
- [8] Despite Ms. Nguyen’s admissions, the Law Society bears the burden of proving the allegations of professional misconduct. The standard of proof is the balance of probabilities. See: *Law Society of BC v. Liggett*, 2009 LSBC 21. The test for professional misconduct is whether Ms. Nguyen’s conduct constitutes a marked departure from the standard of conduct the Law Society expects of lawyers. See: *Law Society of BC v. Martin*, 2005 LSBC 16. During the course of the hearing the Panel accepted the admission of professional misconduct on the part of Ms. Nguyen, both in terms of the ASF and her oral admission during the course of the hearing before the Panel.

DISCIPLINARY ACTION

- [9] Following the admissions being made and accepted, the Panel heard submissions and was referred to other Law Society determinations on disciplinary action in respect of Ms. Nguyen's professional misconduct. Ms. Gulabsingh submitted that an appropriate sanction in the circumstances would be a suspension of 30 days and payment of costs in the amount of \$2,925. Ms. Nguyen stated she was not opposed to the suggested disciplinary action.
- [10] Ms. Gulabsingh made a number of submissions with respect to the factors to be concerned in determining disciplinary action in this case. These submissions included a confirmation that the primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate as set out in section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice. Ms. Gulabsingh submitted that the purpose of the Law Society disciplinary hearings is not to punish offenders and exact retribution but rather to protect the public interest, maintain high professional standards, and preserve public confidence in the legal profession.
- [11] Ms. Gulabsingh invited the Panel to consider factors to be contemplated in assessing penalty as set out in the 1999 decision in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, as follows:
- (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 on the respondent of criminal or other sanctions or penalties;
- (j) the impact of the proposed penalty on the respondent;
- (k) the need for a 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.

- [12] The Panel observes that the considerations set forth in *Ogilvie* are not exhaustive. They are designed to set and reflect the objects and duties of the Law Society under the *Legal Profession Act*.
- [13] In particular, the Panel recognizes that all of the *Ogilvie* factors are not necessarily relevant for consideration in each case. Every proceeding is to be considered on its own facts and circumstances.
- [14] Nevertheless, two factors are pivotal in considering penalty in discipline proceedings, namely maintaining public confidence in the profession generally and rehabilitation of the lawyer. Comments concerning this approach can be found in *Law Society of BC v. Lessing*, 2013 LSBC 29.
- [15] One of the helpful cases referred to the Panel by Ms. Gulabsingh was *Law Society of BC v. Martin*, 2007 LSBC 20. In that case, when considering the penalty, the review panel noted that hearing panels should consider the following factors:
1. Whether or not the misconduct included elements of dishonesty;
 2. Whether or not the misconduct involved repetitive acts of deceit or negligence; and
 3. Significant personal or professional conduct issues.
- [16] We reflected upon the factors in *Martin* in the context of the facts of the citation and admissions in this case.
- [17] The Panel recognizes that Ms. Nguyen engaged in the misconduct solely for her own personal benefit in order to avoid paying tax to the CRA. The objective of that conduct was her personal financial gain, and is an aggravating factor.

- [18] Ms. Nguyen has acknowledged and admitted her misconduct; this is a mitigating factor.
- [19] Ms. Nguyen told us that, as a result of the admitted misconduct, she was terminated from her employment with the WCAT on January 19, 2015.
- [20] The Panel acknowledges that Ms. Nguyen understands the gravity of her misconduct and expresses remorse for it.

FACTORS RELATING TO THE MISCONDUCT

- [21] The Panel is very concerned that Ms. Nguyen exploited the relationship with her client, not only through dishonesty in channelling a fake disbursement through her trust account, but also by using her client as a device to advance that dishonesty.
- [22] Further, Ms. Nguyen lied to Law Society auditors several times, both orally and in writing, in the course of the audit concerning the transactions ultimately leading to the citation. This behaviour is an aggravating factor in considering the seriousness of her professional misconduct.
- [23] The Panel is concerned about what motivated Ms. Nguyen to engage in this professional misconduct. During the course of the hearing, Ms. Nguyen told us she had experienced some financial difficulties as a result of a marital breakup and needed money to pay for her children's private school education and other expenses. Although this is perhaps an explanation for Ms. Nguyen's misconduct, it is an unacceptable basis for it.
- [24] The Law Society has an obligation to see that, in circumstances such as those involved in this case, the public is protected and similar conduct dissuaded.
- [25] In considering the *Ogilvie* factors, we are satisfied that Ms. Nguyen's misconduct was motivated by her desire to maintain standards and privileges for her family members when she could not afford them financially. Instead of making adjustments in her spending to conform to her income, she chose to design a deceitful scheme to evade paying tax to the CRA.
- [26] Although the Panel recognizes Ms. Nguyen has no prior disciplinary record, we have concluded that Ms. Nguyen's professional misconduct warrants both a suspension and a fine.

CONCLUSION

- [27] The Panel recognizes that a degree of deference is appropriately granted to the submissions of the Law Society on proposed disciplinary action. In considering those submissions, the Panel is alive to the remarks found in *Law Society of BC v. Rai*, 2011 LSBC 02. There, the panel observed that, in respect of submissions on proposed disciplinary action, one should ask the question, “is the submission ‘fair and reasonable’?” Having considered the submissions, legal principles and evidence before us, the Panel has concluded that the Law Society’s proposed disciplinary action of a one-month suspension and costs is not acceptable in the circumstances, given our obligation to protect the public interest.
- [28] The Panel accepts that a suspension is appropriate in circumstances where a lawyer does not tell the truth. As noted in *Law Society of BC v Cooper*, [1999] LSBC 39 at para. 38, “With respect to a suspension, we agree that where a lawyer has lied, except in the most exceptional circumstances, a suspension should follow.” This Panel concurs. The question then becomes the length of the suspension and the amount of fine that should be imposed.
- [29] Our paramount duty in determining disciplinary action in these circumstances is to ensure the public is protected. To do that, we must send a clear message to the members of the Law Society and the public that lying by lawyers will not be tolerated and will attract significant sanctions. That must be tempered by the *Ogilvie* factors and the facts of each case.
- [30] As noted in *Ogilvie*, we are guided by past authorities where other panels have considered the same issue. The cases cited by the Law Society support a range of penalties of a suspension between one and three months. Each is fact-dependent. No two situations are the same. Some cases point to mental health issues, avoidance issues, abuse issues, character issues and other sundry reasons for deception. However, none condone or excuse lying, regardless of the reason for the lie.
- [31] The fundamental reason for the existence of the Law Society is set out in section 3 of the *Legal Profession Act*:
3. It is the object and the *duty of the society to uphold and protect the public interest* in the administration of justice by
 - (a) preserving and protecting the rights and freedoms of all persons,

- (b) ensuring the independence, integrity, honour and competence of lawyers,
- (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
- (d) regulating the practice of law, and
- (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[emphasis added]

[32] In short, the interest of the public is protected by regulating the integrity of lawyers.

[33] That regulatory function is carried out, in part, by the Law Society performing “compliance audits.” This was done with Ms. Nguyen’s practice for the period of January 1, 2012 to June 30, 2013. The irregularity of the \$30,000 disbursement led to questioning by the auditor. Ms. Nguyen repeatedly lied to the auditor about the \$30,000 “disbursement” during oral questioning. The information Ms. Nguyen provided was reduced to writing by the auditor and confirmed as correct by Ms. Nguyen. The auditor then referred the matter to the Law Society’s Professional Conduct Department, which wrote to Ms. Nguyen with specific questions. She did answer the questions in a direct and forthright way, maintaining in part that the \$30,000 was a “disbursement” included in her fee.

[34] It was not until a follow-up by the Law Society in requesting answers to the earlier request that Ms. Nguyen admitted she had lied to the auditor. She further admitted the purpose of the deception of listing the \$30,000 as a disbursement was to avoid paying income tax. She subsequently paid the tax.

[35] Ms. Nguyen is to be credited with finally “coming clean” through her admission. Nevertheless the course of conduct here is highly disconcerting for a number of reasons:

- (a) The whole purpose of the false disbursement was to avoid paying taxes that were due and payable;
- (b) The cheque on file for the disbursement of \$30,000 was described as being for “care and assistance” for the client. This was false;

- (c) The bill sent to the client was deceptive in describing the alleged disbursement as a payment to a “Hong Kong agent”;
- (d) Without the audit by the Law Society, the taxes would not have been paid and the client left believing that \$30,000 had been disbursed appropriately during the course of the litigation;
- (e) When questioned by the auditor for details of the disbursement she lied to the auditor by firstly saying the disbursement was for care for her client and then as a payment to someone in Hong Kong so she would not lose the file. She was also misleading regarding who had knowledge of the disbursement. In short she tried to cover up her attempt to avoid paying taxes she owed;
- (f) She perpetuated the deceptive information she gave the auditor in writing to the Law Society on October 5, 2013;
- (g) When the Professional Conduct Department became involved as a result of the concerns expressed by the auditor, Ms. Nguyen was evasive in first responding to questions about the \$30,000 disbursement. She attempted to avoid the specific questions by changing the subject and asserting the overall validity of her fee;
- (h) Only upon a follow up by the Law Society asking for answers to the specific questions posed did Ms. Nguyen admit lying to the auditor. She admitted she classified \$30,000 as a disbursement to avoid paying income tax and intended to use the money to pay down personal debt.

[36] Ms. Nguyen has used her position as a lawyer to attempt to defraud the CRA and Minister of Finance of personal income tax reflecting income of \$30,000. To do so she misled her client by deliberately describing a portion of her fee as a fictitious disbursement and misrepresenting how the funds she received in settlement were disbursed. When caught by the Law Society she attempted to avoid the consequences by lying.

[37] In all the circumstances we are of the view that a one-month suspension is not sufficiently appropriate in this case. Some members of the public may view a one-month suspension as something akin to a vacation regardless of the fact that the Respondent would be without income.

[38] In considering the sanction we recognize that Ms. Nguyen’s forced absence from practice may cause inconvenience to her client base within the Vietnamese

community. We also are aware she has lost her employment with the WCAT as a direct result of these proceedings. Furthermore, she faces financial responsibilities as a single mother of three children and a suspension will impact that situation.

[39] The Panel orders a suspension of 60 days and a fine of \$10,000.

COSTS

[40] 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.

[41] During the course of the hearing Ms. Gulabsingh submitted a proposed summary of costs and disbursements including costs in the amount of \$2,700 and court reporting fees of \$225 for a total of \$2,925.

[42] Given Ms. Nguyen's ultimate willingness to make admissions, costs were incurred at a lower level of complexity.

[43] The Panel agrees that costs in the amount of \$2,925 are appropriate in the circumstances.

ORDER

[44] The Panel orders that Ms. Nguyen:

1. be suspended from practice for a period of 60 days, such suspension to commence on the first day of the month following the release of the written decision in this matter;
2. pay a fine in the amount of \$10,000 on or before October 1, 2015; and
3. pay costs in the amount of \$2,925 on or before September 1, 2015.