2015 LSBC 48
Decision issued: November 6, 2015
Oral reasons: October 8, 2015
Citation issued: April 15, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JASON BAWA MANN

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	October 8, 2015
Panel:	Sharon Matthews, QC, Chair Laura Nashman, Public representative John Waddell, QC, Lawyer
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	Henry Wood, QC

INTRODUCTION

[1] The hearing of this matter was conducted pursuant to Section 38 of the *Legal Profession Act*, SBC 1998, c. 9. The Law Society alleges a single count of professional misconduct pertaining to the Respondent's handling of trust funds. The Respondent admits the professional misconduct.

[2] Notwithstanding the admission, the hearing was necessary to determine whether the citation of professional misconduct has been made out. If the citation was made out, the Panel was also asked to accept the Law Society's proposal for the

appropriate disciplinary action to be imposed. The Respondent did not oppose the disciplinary action proposed by the Law Society.

[3] The Law Society also made an application, pursuant to Rule 5-8(2)(a), that certain parts of the record be redacted in the event a member of the public seeks a copy, to protect the confidentiality of the complainant and Mr. Mann's clients.

[4] The hearing took place in the premises of the Law Society of British Columbia on October 8, 2015. The complainant attended the hearing.

[5] At the conclusion of the phase of the hearing on facts and determination, the Panel made an oral ruling finding that the allegation of professional misconduct was made out as alleged in the citation with written reasons to follow.

[6] The hearing then proceeded to the disciplinary action phase. At the conclusion of that hearing, the Panel ordered a fine of $4,000 and costs of $4,672.50, both payable by October 31, 2015 with written reasons to follow.

[7] Finally, the Law Society made an application to redact certain portions in the event of public inquiry into the record, and we made the order as requested.

[8] These reasons are written reasons on all three matters we heard and for which we made orders.

PROFESSIONAL MISCONDUCT

Onus of proof

[9] The onus and burden of proof in Law Society hearings is well known and consistently applied. The onus is on the Law Society, and the standard of proof is a balance of probabilities. The onus is for the Law Society to prove on a balance of probabilities that the Respondent conducted himself in a way that amounted to professional misconduct.

Facts

[10] The parties provided an Agreed Statement of Facts. The following is the Panel's summary of these facts.

[11] In or around November 2010, the Respondent was retained by CC in respect of various legal matters. In December 2010, CC provided the Respondent with a

$4,000 retainer by cheque. The Respondent deposited the retainer into trust, and it was reflected in his trust ledger.

[12] After the $4,000 initial retainer was depleted, on October 26, 2011, CC provided the Respondent with a further $4,000 retainer in cash (the "Cash Retainer"). The Respondent provided CC with a cash receipt for these funds (the "Cash Receipt"), but did not keep a duplicate copy of the receipt for his records. The Respondent told the Law Society his copy of the Cash Receipt was likely attached to the Cash Retainer.

[13] The Respondent has no recollection of what he did with the Cash Retainer but when interviewed, he speculated to the Law Society the Cash Retainer got mixed in with his own cash. The Respondent told the Law Society it is not uncommon for him to have large amounts of cash in his possession as he plays poker in tournaments and, at the time CC provided the Cash Retainer, the Respondent was playing poker at local casinos a couple of days per week.

[14] As reflected in the client trust ledger, the Respondent did not deposit or record deposit of the Cash Retainer into trust on October 27, 2011 or at any time thereafter. The Respondent admitted this in his letter to the Law Society dated August 19, 2014 and when he was interviewed by the Law Society.

[15] In December 2013, the Respondent emailed CC and explained in response to her request for a statement of account that he had yet to bill $1,000 in fees and $3.70 in disbursements on her file. The Respondent confirmed he held $4,000 in trust on her behalf. The Respondent in fact only held $52.85 in trust for CC at that time, as he failed to deposit the Cash Retainer into trust.

[16] The Respondent's practice was subjected to a Law Society compliance audit in September 2013, before CC complained to the Law Society. Following the audit, the auditor wrote to the Respondent and asked him (among other questions) about the trust balance of $52.85 he held on behalf of CC. The Respondent replied that there was unbilled work on CC's file, but he did not note that the Cash Retainer was not reflected in the trust balance referred to by the auditor.

[17] In April 2014, CC complained to the Law Society about the quality of service the Respondent provided to her. As part of the investigation the Respondent was asked to provide various documents, including the client trust ledger for CC, but the Respondent failed to do so when initially asked to in the Spring of 2014.

[18] When CC met with the Law Society staff in June 2014 to discuss her complaint, she expressed concern that the Respondent had mishandled her trust funds.

[19] On July 29, 2014, the Respondent provided a copy of his client trust ledger to the Law Society and he wrote that, when he prepared the ledger, he discovered there was only $52.85 in trust on behalf of CC, but he said that he recalled CC providing him with the Cash Retainer. He wrote that he was certain there should have been $4,052.85 in trust for her, but he checked his bank records and found the Cash Retainer was not deposited.

[20] On August 18, 2014, $4,000 was deposited into trust to eliminate the trust shortage arising from the Respondent's failure to deposit the Cash Retainer, and the following month, the Respondent returned the balance of the funds in trust ($4,052.85) to CC.

[21] The Respondent practised criminal law, and stated to the Law Society that he received cash retainers on occasion, and he advised that, if he did not deposit the cash into the bank right away, he kept it with him and would take it home with him, having placed it in his suit pocket.

[22] By letter dated August 19, 2014, the Respondent told the Law Society he was unaware of the trust shortage until July 2014. He said that in December 2013 when he emailed CC and confirmed he held $4,000 in trust for her, he had not checked his records to confirm the money was deposited, but at that time he had a distinct memory of CC providing him with the Cash Retainer. When interviewed, the Respondent told the Law Society he clearly remembered receiving the Cash Retainer because it was unusual for that to occur in respect of a non-criminal matter.

[23] The Respondent has admitted the conduct alleged in the citation, and admitted that it constitutes professional misconduct.

Application of law to the facts

[24] The citation alleged the Respondent contravened the Law Society Rules in his handling of the Cash Retainer in five specific ways. The Rules that the citation alleges were breached are detailed below, along with a summary of the evidence that demonstrates the manner in which they were breached.

[25] Allegation 1(a) of the citation alleges a breach of Rule 3-58 (previously Rule 3-51), which requires lawyers who receive trust funds to deposit the funds into a pooled trust account as soon as possible. The Respondent did not deposit the Cash Retainer into a trust account after he received it or at any later date.

[26] Allegation 1(b) of the citation alleges Rule 3-70 (previously Rule 3.61.1) was breached. It provides:

> (1) A lawyer who receives any amount of cash for a client that is not the lawyer's employer must maintain a cash receipt book of duplicate receipts and make a receipt in the cash book for any amount of cash received.

The Respondent did not keep a duplicate copy of the Cash Receipt into trust as required.

[27] Allegation 1(c) of the citation alleges the Respondent breached Rule 3-72 (previously Rule 3-63), which provides:

> (1) A lawyer must record each trust or general transaction promptly, and in any event, not more than
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> (a) 7 days after a trust transaction, or
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> (b) 30 days after a general transaction.

Additionally, Rule 3-68(a) (previously Rule 3-60(a)) requires lawyers to maintain a book of entry documenting the date and amount of any trust funds received, the source and form of funds received, and the identity of each client on whose behalf the trust funds were received. Rule 3-68(b) (previously Rule 3-60(b)) requires lawyers to maintain a trust ledger reflecting all trust funds received, and pursuant to Rule 3-72 (previously Rule 3-63) lawyers are required to record each trust or general transaction promptly, or in any event within seven days.

The Respondent did not record receipt of the Cash Retainer in his accounting records within seven days of October 26, 2011 or at any time.

[28] The citation alleges at paragraph 1(d) the Respondent breached Rule 3-74(1) (previously Rule 3-66(1)), which requires that when lawyers discover a trust shortage, they must *immediately* pay enough funds into the account to eliminate the shortage. The Law Society questioned the Respondent about CC's trust funds when corresponding with him following the Law Society's compliance audit in the autumn of 2013. However, the Respondent says he did not examine CC's client ledger when corresponding with the Law Society following the compliance audit and therefore did not realize at that time a trust shortage existed. When interviewed by the Law Society, the Respondent stated he was not sure when he realized a trust shortage existed, but he was aware of it by July 29, 2014. The trust shortage was not eliminated until August 18, 2014.

[29] Allegation 1(e) of the citation alleges the Respondent breached Rule 3-74(2) (previously Rule 3-66(2)), which requires lawyers to *immediately* make a written report to the Executive Director upon discovering a trust shortage. The Respondent had discovered the trust shortage by July 29, 2014 but did not report it to the Executive Director until August 18, 2014, approximately three weeks later.

[30] The Respondent should have realized the existence of the trust shortage earlier. The Respondent should have realized the existence of the trust shortage several times before he did, in particular on the following occasions:

(a) in the autumn of 2013, when the Respondent was questioned by the Law Society about the funds he held in trust on behalf of CC, he did not examine the client trust ledger or other accounting records when he responded to the Law Society;

(b) in November/December 2013 when the Respondent replied to CC's email requesting a statement of account, he confirmed to CC he held $4,000 in trust on her behalf but did not examine the client trust ledger; and

(c) in May of 2014, the Law Society requested the Respondent provide CC's trust ledger, but he did not produce it to the Law Society until July 2014.

[31] Application of the factors set out in *Law Society of BC v. Lyons*, 2008 LSBC 09, supports that the Respondent's breach of the Law Society Rules rises to professional misconduct, as discussed below.

(a) Gravity of the misconduct – mishandling trust funds is very serious conduct, and it is perhaps one of the most serious forms of lawyer professional misconduct as it goes to the heart of the integrity of the lawyer and the fiduciary duties owed to clients;

(b) Duration of the misconduct – the misconduct in this case endured from October 2011 (when the Respondent received the Cash Retainer) to August 2014, when the trust shortage was eliminated. The breach of the accounting rules could have, and should have been detected earlier by the Respondent when he replied to inquires arising from the Law Society's compliance audit in autumn 2013 or when he replied to the client's inquiries in December 2013;

(c) The number of breaches – the misconduct occurred in respect of one client transaction on one occasion only;

(d) Presence or absence of *mala fides* – there does not appear to be any *mala fides* present: the Respondent has readily admitted receipt of the Cash Retainer, and issued the Cash Receipt in respect of it; and

(e) Harm or potential harm resulting – CC could have been $4,000 out of pocket by the conduct. There was potential, but not actual financial loss resulting from the misconduct.

[32] The adverse determination of professional misconduct is available to the Hearing Panel, even if the Panel finds the Respondent's conduct was inadvertent or unintentional. The Respondent maintains that he was unaware of the trust shortage created by his failure to deposit the Cash Retainer into trust, but by later July 2014, when he responded to CC's Law Society complaint, he knew of it.

[33] The Respondent says that he did not deliberately fail to deposit the funds. However, the marked departure from the conduct expected of a member of the Law Society test for the finding of professional misconduct set out in *Law Society of BC* v. *Martin*, 2005 LSBC 16, does not require a finding of intentional misconduct (*Law Society of BC* v. *Gellert*, 2013 LSBC 22). Other, earlier case authorities support that a determination of professional misconduct may be made even in cases where a respondent's actions were not intentional. For example, in *Law Society of BC* v. *Singh*, 2013 LSBC 17, (where the respondent suffered from alcohol addiction at the time of the misconduct) the panel commented at paragraphs 12-14:

> [12] While a finding of professional misconduct requires a degree of fault or culpability, that may be the result of negligence as well as intentional. …
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> [13] The Panel agrees with this Respondent that his admitted misconduct constitutes professional misconduct because it clearly discloses a marked departure from the standard expected of members of the legal profession.
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> [14] The behavior exhibited by the Respondent during the relevant period of time described in the citation occurred when the Respondent was unable to control his addiction to severe extended bouts of alcohol consumption. The Respondent's irresponsible attention to matters of financial accountability showed a complete disregard for the rules and standards expected from members of the Law Society. Financial responsibility is the cornerstone at the heart of the integrity of a lawyer without which the legal profession suffers immeasurable harm.

[34] The Respondent's failure to deposit the Cash Retainer into trust, and his subsequent failure to realize the trust shortage, report and eliminate it are a marked departure from the conduct expected of members of the Law Society displaying gross culpable neglect of the Respondent's professional duties.

Conclusion on the Respondent's conduct

[35] This Hearing Panel accepts the Respondent's admission that his mishandling of the trust funds on these facts amounts to professional misconduct as alleged in the citation.

DISCIPLINARY ACTION

[36] The Law Society submits that the appropriate disciplinary action is a fine of $4,000 and payment by the Respondent of costs in the amount of $4,672.50. The Law Society proposed payment by April 30, 2016 or a reasonable date to be proposed by the Respondent.

[37] The Respondent did not oppose the fine or costs but proposed to pay both by October 31, 2015 in an effort to put this disciplinary proceeding behind him.

[38] A non-exhaustive list of factors to be considered in assessing penalty is set out in the 1999 decision *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 of absence or other mitigating circumstances;

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

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

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

(k) the need for specific and general deterrence;

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

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

[39] In *Law Society of BC* v. *Lessing*, 2013 LSBC 29, a Law Society review panel reaffirmed the *Ogilvie* factors, and noted they reflect the objects and duties of the Society set out in section 3 of the *Legal Profession Act*. The review panel placed particular emphasis on public protection, including public confidence in the profession generally:

> [56] All the *Ogilvie* factors do not come into play in all cases. In addition, the weight given to the factors may vary from case to case. Some factors may play a more important role in one case, and the same factor may play little or no role in another case.
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> [57] However, two factors will, in most cases, play an important role. The first is protection of the public, including public confidence in the disciplinary process and public confidence in the profession generally. The second factor is the rehabilitation of the member. Why is this so?
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> [58] These two factors are mentioned up front in *Ogilvie* (supra). That decisions indicates there is a balance between protecting the public, including confidence in the disciplinary process, and allowing the member to practise. This is set out in *Ogilvie* at paragraph 9:
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> > In determining the appropriate penalty, the panel must consider what steps might be necessary to ensure the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.
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> [59] Further, at paragraph 10(l) the following is stated:
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> (l) the need to ensure public's confidence in the integrity of the profession.

> [60] ... It is important to realize the protection of the public is not limited to protecting the public from lawyers who might, for instance, steal money from clients. It has a much broader meaning. It also includes public confidence in lawyers generally.
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> [61] People retain lawyers for a number of reasons. Lawyers become a depository of large sums of money, family secrets and wishful commercial aspirations in connection with the matters on which they have been retained. In providing legal services to the public, lawyers dispense large sums of money, give undertakings and making representations to the Court. They must be persons in whom the public have confidence. This public confidence relates to the legal profession generally.

Professional conduct record

[40] The Respondent's Professional Conduct Record ("PCR") consists of an administrative suspension from practice between June 3, 2014 and September 16, 2014 for the Respondent's failure to produce records during a compliance audit, pursuant to Rule 3-86 (previously Rule 3-79.1). This was resolved satisfactorily.

[41] In addition, under Rule 4-6(2) (previously Rule 4-4.2(4)), as he was under investigation under Part 3, Division 1, the Respondent became a member not in good standing by declaration of the Executive Director, effective January 20, 2015, and he was not permitted to practise law.

On February 19, 2015, by declaration of the Executive Director, the Respondent became a former member of the Law Society. The investigation behind the declarations was the investigation that led to this citation, so it is not a prior unrelated incident on his professional conduct record that needs to be taken into account in determining the proper discipline.

[42] Accordingly, the Respondent's PCR is a neutral factor.

Factors related to the misconduct

[43] The misconduct is serious. As submitted by the Law Society at the Facts and Determination hearing, mishandling trust funds is perhaps one of the most serious forms of professional misconduct, because being entrusted to deal honestly with a client's funds goes to the heart of a lawyer's integrity and the fiduciary duties lawyers owe to clients.

[44] Because the misconduct is serious, a message of general deterrence must be sent that lawyers handling trust funds must be meticulously scrupulous. Sending such a message will also help instill and maintain public confidence in the profession and its ability to effectively self-regulate. This message tells the public that they can, with ease, surrender trust funds to lawyers for retainers and transactions with assurance that any mishandling of trust funds will not be tolerated by the profession.

[45] The seriousness of the misconduct should be balanced, to a certain degree, by the fact that the misconduct occurred once, in respect of one client and only in respect of a single transaction.

[46] The impact of the misconduct on CC is not clear. Certainly, there was potential harm to her of the Respondent's mishandling of her funds. However, no actual harm was suffered, as the trust funds were replaced, and the shortage eliminated. The Respondent returned all of the trust funds he held on behalf of CC to her, without billing her for any work in progress on her file. At the end of the day, she suffered no financial loss.

Range of sanctions imposed in other similar cases

[47] Counsel for the Law Society referred to a number of decisions relevant to the sanction to be imposed upon the Respondent. Those similar cases were:

Law Society of BC v. Murray, 2006 LSBC 47

Law Society of BC v. Ebrahim, 2010 LSBC 14

Law Society of BC v. Lail, 2012 LSBC 32

Singh

Law Society of Manitoba v. *Brock*, [1996] LSDD No. 252

Law Society of Upper Canada v. *Lewarne*, 2006 OBLSHP 105

[48] These decisions had variable fact patterns and a range of sanctions appropriate to the circumstances of each case. The cases were helpful to the Panel in determining the appropriate sanction in this matter.

SUMMARY AND CONCLUSION

[49] The $4,000 fine sought by the Law Society is not opposed by the Respondent. This Panel accepts that it is the appropriate sanction in this case, primarily based on the following considerations:

(a) while the misconduct is serious, it appears to be inadvertent and due to carelessness, and the trust shortage was corrected by the Respondent within three weeks of when he says he gained awareness of it;

(b) the fine will demonstrate to the public and the profession that breach of the Law Society accounting rules, particularly those guiding handling of trust funds, is a marked departure from the expected standard and will not be tolerated;

(c) the breach only occurred once, in respect of a single transaction;

(d) the Respondent never denied receipt of the trust funds, issued a receipt to the client for them, and replenished the funds, and the client was not out of pocket for the funds; and

(e) this is the Respondent's first citation, and his PCR does not suggest a more significant sanction is appropriate.

[50] This Panel orders that a fine in the amount of $4,000, and costs in the amount of $4,672.50 be paid by the Respondent to the Law Society, on or before October 31, 2015.

RULE 5-8(2)(a) APPLICATION

[51] The Law Society made an application that certain parts of the record of this hearing be produced in a redacted form in the event that a public request is made for the record or part of it. Particulars of the redactions sought are:

(a) if any person applies to obtain a copy of the Exhibit 1 (the Agreed Statement of Facts) they will be provided a copy of Exhibit 3, which is a redacted version of the Agreed Statement of Facts, in which privileged, personal and identifying information about the Complainant and other clients has been removed;

(b) if any person applies to obtain a copy of Exhibit 2 (Citation), they will be provided an anonymized copy of Exhibit 2 wherein the Complainant is referred to by her initials only; and

(c) if any member of the public applies for a copy of the transcript of proceedings of this hearing, that the transcript be redacted to eliminate personal or identifying information of [the Complainant] (and any other client names mentioned) before the transcript being provided to the public.

[52] Rule 5-8 stipulates that hearings are public except if the panel or review board orders otherwise. Rule 5-8(1) and (2) reads as follows:

Public hearing

5-8 (1) Every hearing is open to the public, but the panel or review board may exclude some or all members of the public in any circumstances it considers appropriate.

(2) On application by anyone, or on its own motion, the panel or review board may make the following orders to protect the interests of any person:

(a) an order that specific information not be disclosed;

(b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).

[53] Clearly the rules promote public proceedings balanced by the reality that such proceedings may require review of sensitive, confidential or privileged matters. That is especially true when the complaint arises out of the conduct of a client matter as in this case. For this reason, the decisions of hearing panels routinely use initials instead of full client names. In our view the information requested to be redacted is appropriate and appropriately narrow, in that it seeks to limit only the public knowing the name of the Respondent's clients or personal identifying information pertaining to them.

[54] Accordingly, we made the order in the form requested.