2017 LSBC 04
Decision issued: January 26, 2017
Citation issued: February 25, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 Review concerning

WILLIAM TERRENCE FAMINOFF

RESPONDENT

DECISION OF A REVIEW BOARD

Review dates:	March 8, 9 and May 31, 2016
Review Board:	Thomas Fellhauer, Chair Jeff Campbell, QC J.S. (Woody) Hayes Sharon Matthews, QC Steven McKoen Mark Rushton Sarah Westwood
Discipline Counsel:	Susan M. Coristine
Counsel for the Respondent:	Michael D. Shirreff, Emilie E.A. LeDuc

INTRODUCTION

[1] On May 9, 2014, a hearing panel concluded that the Respondent had committed professional misconduct by improper handling of clients' trust funds, failure to maintain proper accounting records, intentional misrepresentation to the Law Society by backdating statements of account, and breaches of undertakings.

[2] In brief overview, the citation in this case arose from the Respondent receiving funds from clients and depositing them directly into his general account in payment of fees for services when he had not issued or delivered statements of accounts. After receiving notice of a compliance audit, and prior to the audit, the Respondent and his bookkeeper created numerous "backdated" statements of account, which made it appear as if the statements of account had been issued at the time that the funds were received. The citation included a number of allegations related to this conduct, including improper handling of trust funds and failure to maintain accounting records. The citation also included unrelated conduct involving the Respondent breaching undertakings imposed by ICBC that required him to obtain his clients' signatures prior to disbursing settlement funds.

[3] The disciplinary action phase of the hearing took place on March 26, 2015. The Law Society submitted that the Respondent should be suspended in the range of five to six months and be ordered to complete a remedial program prior to recommencing his practice. Counsel for the Respondent accepted that a suspension was appropriate but submitted that it should be limited to one month.

THE HEARING PANEL'S DECISION ON DISCIPLINARY ACTION

[4] On April 28, 2015, the hearing panel released its decision on disciplinary action in which the hearing panel:

(a) suspended the respondent for two months;

(b) dismissed the request for an order that the Respondent complete a remedial program prior to recommencing practice; and

(c) ordered that the Respondent pay costs.

[5] Both the Law Society and the Respondent have sought a review pursuant to s. 47 of the *Legal Profession Act* of the hearing panel's determination with respect to the appropriate disciplinary action.

POSITION OF THE LAW SOCIETY ON REVIEW

[6] The Law Society submits that the hearing panel erred by making the following findings:

(a) that the Respondent's embarrassment and stress due to the disciplinary proceedings was a mitigating factor;

(b) that the lack of misappropriation by the Respondent was a mitigating factor;

(c) that there were no victims of the Respondent's misconduct, and that this should be considered a mitigating factor;

(d) that the fact that the Respondent did not gain a financial benefit was a mitigating factor; and

(e) that the Respondent immediately admitted misconduct and that the timing of that admission was a mitigating factor.

[7] The Law Society also argues that the hearing panel erred by placing insufficient weight on the Respondent misleading the Law Society and the need to protect the public interest. As well, the Law Society argues that the hearing panel erred by placing too much emphasis on the Respondent's attitude toward his misconduct as a mitigating factor.

[8] The Law Society seeks an order pursuant to paragraph 47(5)(b) of the *Legal Profession Act* that the decision of the hearing panel be set aside and an order be substituted that the Respondent be suspended for six months. The Law Society also seeks an order that the Respondent pay the costs of the review.

POSITION OF THE RESPONDENT

[9] The Respondent submits that fresh evidence should be admitted pursuant to subsection 47(4) of the *Legal Profession Act* regarding public communications made by the Law Society with respect to the Respondent's disciplinary matter and the effect of those communications on the Respondent and his reputation. In light of that fresh evidence, the Respondent argues that the decision of the hearing panel should be set aside and a lesser penalty of a one-month suspension be substituted.

FACTUAL BACKGROUND

[10] The factual background to the citation is set out in the decision of the hearing panel reported at *Law Society of BC v. Faminoff*, 2014 LSBC 22, and in the Agreed Statement of Facts (the "ASF") filed by the parties. It suffices here to provide a brief overview of the salient facts.

[11] At all relevant times, the Respondent practised in Vancouver as a sole practitioner, primarily in the areas of immigration law, plaintiff motor vehicle litigation, and other civil litigation.

[12] The Respondent was responsible for the financial management of his practice, including the issuance and delivery of statements of account to his clients.

[13] On December 2, 2008, the Respondent received notice that the Law Society intended to conduct an audit of his practice pursuant to Rule 3-79 (the "Compliance Audit").

[14] In the ASF, the Respondent admitted that he and his assistant created 44 statements of account between January 2 and January 4, 2009, which was after the Respondent had received notice of the Compliance Audit and prior to the commencement of the Compliance Audit. These statements were backdated with dates between February 2007 and November 2008. While the Respondent delivered some of the backdated statements of account to clients, he admitted in the ASF that he did not deliver all of them.

[15] The Compliance Audit proceeded from January 7 to 9, 13 and 22, 2009. During the Compliance Audit, certain irregularities were identified in the Respondent's accounting practices. The Respondent did not inform the compliance auditor of the backdating of accounts at this time.

[16] The compliance auditor referred her findings to the Investigations, Monitoring and Enforcement Department of the Law Society. On February 22, 2010, the Chair of the Discipline Committee issued an order for the investigation of the Respondent's books and financial records.

[17] On June 15, 2010, a forensic accountant for the Law Society attended at the Respondent's office to commence an investigation of the Respondent's records.

[18] The forensic accountant interviewed the Respondent on December 14, 2010, at which time the Respondent admitted to backdating statements of account.

[19] On February 25, 2013, the citation for this matter was issued. It contained eight allegations:

1. intentional misrepresentation to the Law Society by backdating statements of account;

2. receiving funds from clients in trust and depositing such funds into a general account prior to completion of work and issuance and delivery of statements of account;

3. withdrawing funds from a trust account prior to completion of work and issuance and delivery of a statement of account;

4. receiving payments for services and depositing such payments into a general account without issuing a statement of account or delivering a receipt;

5. withdrawing funds from a trust account for services performed without issuing or delivering statements of account;

6. withdrawing funds from a trust account when there were insufficient funds to the client's credit in the account;

7. failure to maintain proper accounting records; and

8. breaches of undertakings made to ICBC regarding disbursement of funds.

[20] A hearing panel heard submissions on the facts of this matter on March 12, 2014. At that hearing the ASF was filed, and in it the Respondent admitted that allegations (2) to (7) constituted breaches of the applicable rules and that allegations (1) and (8) constituted professional misconduct contrary to s. 38(4) of the *Legal Profession Act*.

[21] Accordingly, the Respondent made extensive admissions before the hearing panel with respect to the conduct itself, including that it amounted to professional misconduct. The hearing focused on the state of the mind of the Respondent in creating the backdated accounts.

[22] Of note, the Respondent did not admit that his failure to inform the compliance auditor and forensic accountant of the backdating of his statements of account until December 14, 2010 involved an intention to mislead the Law Society's investigators. Instead, he maintained that it was done to "catch up on overdue paperwork" and was intended to assist the Law Society with the Compliance Audit.

[23] The Law Society did not allege that the Respondent took payment of fees for work he never completed or that the Respondent did not complete sufficient work to justify his billings.

[24] In the hearing panel's decision on facts and determination, the hearing panel reviewed the evidence with respect to the Respondent's intentions and concluded

that he backdated the statements of account with the intent to mislead the Law Society by falsely representing that the statements of account had been issued and delivered to his clients on or about the dates set out in the statements of account when he knew that they had not been issued and delivered on those dates.

THE HEARING PANEL'S DECISION ON DISCIPLINARY ACTION

[25] The hearing panel released its decision regarding disciplinary action on April 28, 2015: *Law Society of BC v. Faminoff*, 2015 LSBC 20.

[26] After setting out the sanctions available to the hearing panel under section 38(5) of the *Legal Profession Act*, the hearing panel noted that it had discretion as to which sanction to impose: *Law Society of BC v. Lessing*, 2013 LSBC 29, paras. 50 and 51.

[27] The hearing panel also relied on *Lessing* in determining that, because this matter involved multiple allegations, the question of whether a suspension or fine should be imposed and the length of any suspension should be determined on a global consideration of all of the misconduct.

[28] The hearing panel then considered the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, for assessing the penalty to be imposed. The hearing panel observed that not all of these factors are necessarily relevant in every case. It also acknowledged that, in *Lessing* at para. 57, two factors were identified as particularly important in determining the appropriate disciplinary action: maintaining public confidence in the profession and the rehabilitation of the lawyer.

[29] The hearing panel noted that the Respondent had acknowledged that the conduct proven against him constitutes serious misconduct and accepted that a suspension was appropriate in the circumstances. The hearing panel therefore considered the primary issues to be what length of suspension was appropriate and whether completion of a remedial program should be ordered.

[30] The hearing panel noted that the professional misconduct in this case included intentionally misleading the Law Society, a failure to comply with trust and accounting Rules, and breaches of undertakings.

[31] The hearing panel noted that it considered the nature and gravity of the conduct to be very serious. It also noted that the Respondent was a senior and experienced lawyer who should have been familiar with the applicable rules. Both of these were considered aggravating factors.

[32] The hearing panel reviewed the Respondent's professional conduct record, which disclosed a prior disciplinary matter. Despite the fact that 17 years had elapsed since the prior matter, the hearing panel found it to be an aggravating factor as it involved false representations made by the Respondent and a failure to disclose true facts when given an opportunity to do so.

[33] The hearing panel also considered the number of times the offending conduct occurred and the period over which it continued. The hearing panel noted that it considered the Respondent's global misconduct to have occurred numerous times over an extended period and that this was an aggravating factor.

[34] The hearing panel noted a number of factors that it considered to be mitigating, including that the Respondent had not misappropriated funds and had not received a direct financial benefit from his conduct.

[35] The hearing panel also discussed the Respondent's acknowledgement of his misconduct and the steps he had taken to disclose and redress his actions. The hearing panel acknowledged that the Respondent did not admit that he had intended to mislead the Law Society investigators, but nonetheless found that his other admissions and cooperation had saved considerable time and expense in the investigation and hearing. The hearing panel considered these to be mitigating factors.

[36] The hearing panel also noted that, while the Respondent did not formally acknowledge that he intended to mislead the Law Society, the Respondent demonstrated an understanding and acceptance of the hearing panel's findings and a sincere regret for his conduct. The hearing panel considered these to be mitigating factors.

[37] The hearing panel then reviewed the range of penalties in similar cases and, after considering the aggravating and mitigating factors, determined that a two-month suspension satisfied the twin objectives of ensuring public confidence in the disciplinary process and the Respondent's rehabilitation.

APPLICATION TO ADDUCE FRESH EVIDENCE

[38] At the commencement of this review hearing, the Respondent applied to adduce fresh evidence.

[39] The Law Society opposed the application and argued that it does not meet the fresh evidence test set out in *Palmer v. The Queen*, [1980] 1 SCR 759, as adopted in *Law*

Society of BC v. Kierans, 2001 LSBC 6, and *Law Society of BC* v. *Goldberg*, 2007 LSBC 55.

[40] After hearing submissions, we reserved judgment on this application.

THE FRESH EVIDENCE

[41] The Respondent seeks to introduce evidence pertaining to events that have occurred since the release of the hearing panel's decision. The Respondent seeks to admit new evidence in relation to four issues:

(a) The Law Society's press release following his disciplinary matter, which the Respondent says was unfair and damaging (the "Press Release"). The Press Release described the Respondent's conduct as "misuse of trust funds," which the Respondent says led readers to believe that he had misappropriated trust funds. The Press Release did not report the hearing panel's conclusion that the Respondent's clients had not suffered any harm from his actions (nor had he gained from them);

(b) An alleged breach of a publication ban by the Law Society with respect to a prior disciplinary matter involving the Respondent;

(c) The Law Society's online posting of incorrect information concerning the Respondent's practice status in July, 2015; and

(d) The general impact of the above on the Respondent's character, reputation and professional standing.

[42] The fresh evidence consists of two affidavits presented at the commencement of this Review on March 8, 2016 and at the continuation of the Review on May 31, 2016.

THE LAW

[43] *Law Society of BC* v. *Vlug*, 2015 LSBC 59, sets out the applicable law regarding the authority to admit fresh evidence:

> [15] The authority for the Benchers to admit evidence in addition to the evidence that forms part of the Record is set out in section 47(4) of the *Legal Profession Act* and Rule 5-17(2) of the Law Society Rules.
>
> [16] Section 47(4) states:

(4) If, in the opinion of the benchers, there are special circumstances, the benchers may hear evidence that is not part of the record.

[17] Rule 5-17(2) states:

(2) If, in the opinion of the benchers, there are special circumstances, the benchers may admit evidence that is not part of the record.

[18] The Benchers considered the test for the admissibility of fresh evidence in *Law Society of BC v. Kierans*, [2001] LSBC 6. At paras. 13 and 14, the Benchers considered the tests for admissibility in the criminal and civil context:

13. The leading authority on the exercise of an appellate court of its discretion under the provisions of the *Criminal Code* to admit fresh evidence is *Palmer v. The Queen*, [1980] 1 SCR 759, in which the Supreme Court of Canada established the following tests:

The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;

The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

The evidence must be credible in the sense that it is reasonably capable of belief, and

It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

14. In a civil context, the test is established by the Court of Appeal decisions in *Cory v. Marsh* (1993), 77 BCLR (2d) 248 and *Appel (Public Trustee of) v. Dominion of Canada General Insurance Co.*, [1997] BCJ No. 1794 as being:

That the evidence was not discoverable by reasonable diligence before the end of the trial;

> That the evidence is wholly credible;
>
> That the evidence will be practically conclusive of an issue before the court.

> [19] The Benchers in *Kierans* adopted the test set out in *Palmer* and held that, if the proffered evidence fails to meet any of the *Palmer* tests, it cannot be admitted.

THE NATURE OF THE FRESH EVIDENCE

[44] The nature of the fresh evidence sought to be admitted is set out in the Respondent's affidavits. The Respondent has set out the effect that the disciplinary action has had upon his practice and attaches to the affidavits various exhibits, including copies of letters of support, information from the internet, and other similar documents.

THE ALLEGED BREACH OF THE PUBLICATION BAN

[45] The Respondent submits that there was a "publication ban" covering the Respondent's 1995 disciplinary matter (the "Prior Record"), which he argues was breached by the hearing panel describing the Prior Record in its Decision on Disciplinary Action.

[46] The Respondent points out that the reasons in the Prior Record were not published at the time that the decision was issued. No reason was provided for this oversight. In 2000, it appears that the Law Society realized the error in not publishing the reasons, and contacted the Respondent's counsel indicating an intention to publish a summary of the reasons at that time (some five years later). Counsel for the Respondent made submissions to the Benchers requesting that it not be published, asking them to exercise their discretion pursuant to Rule 4-38 of the Law Society Rules "not to publish a summary of the case." Counsel for the Law Society agreed that the delay in publication was "egregious and has prejudiced the process," and on October 6, 2000, the Benchers determined to exercise their discretion not to publish a summary of the reasons in the Prior Record. The Respondent characterizes this as a "publication ban." However, the words "publication ban" were never mentioned in the Respondent's counsel's submissions, the Law Society's response, or the Benchers' decision.

[47] In the hearing panel's decision on disciplinary action, the hearing panel referred to the Respondent's professional conduct record, which included the Prior Record.

Although it was dated, the Prior Record was described in some detail as it involved similar misleading conduct. The hearing panel considered it to be relevant to the determination of penalty.

[48] The Respondent suggests that fresh evidence describing how the Prior Record was not previously publicized should be admitted at this hearing. The Respondent says that the hearing panel's discussion of the Prior Record in its decision amounts to a breach of a "publication ban," which this Review Board should consider in determining what is an appropriate penalty.

[49] It is our view that the Benchers' 2000 decision not to publish a summary of the Prior Record cannot be considered a publication ban. Generally, a publication ban is a court order that prohibits the public or media from disseminating certain details of an otherwise public judicial procedure. Such orders, however, do not prevent the court or other tribunals from subsequently reviewing and referring to the record. Publication bans are most commonly issued in criminal matters when the safety or reputation of a victim or witness may be hindered by having their identity openly broadcast in the press. They are also commonly issued when the crime involves minors or is sexual in nature. Publication bans are typical regarding issues surrounding the identity of victims or witnesses, the identity of a child or youth, the fairness or integrity of a hearing, the accused's right to a fair trial, the right to freedom of expression, and the administration of justice. However, a decision not to publish a summary of the Prior Record in this case does not amount to a sealing or purging of a record such that its consideration by the hearing panel was improper.

[50] The Benchers' decision in 2000 was that a summary of the Prior Record should not be published at that time, based primarily on the unexplained delay in the Law Society publishing a summary of the case after it was decided in 1995. Some five years had passed before the Law Society proposed to publish the results, which was found to have caused prejudice to the Respondent. However, this decision cannot be taken as a decision that the record may never be referred to in subsequent proceedings.

[51] Further, we find that the evidence regarding the alleged publication ban does not meet the first part of the *Palmer* test. All of the material sought to be introduced by the Respondent in relation to the Prior Record pre-dated the disciplinary action and the Respondent could have applied to adduce this evidence during that hearing. This is not evidence that was unknown or unavailable to the Respondent before the hearing regarding the disciplinary action.

[52] It is noteworthy that the Respondent consented to the admission of his past disciplinary record, which was marked as an Exhibit in the hearing by consent of the parties. The hearing panel was not referred to the 2000 decision not to publish the Prior Record. The Respondent did not submit to the hearing panel at the time that there was any ban on referring to the record.

[53] Since the evidence regarding the decision not to publish a summary of the reasons regarding the Prior Record was available, or was discoverable by reasonable diligence before the end of the hearing regarding the disciplinary action, we find that this evidence fails the first part of the *Palmer* test and is not admissible.

THE LAW SOCIETY'S RELEASE OF INFORMATION REGARDING THE DISCIPLINARY ACTION

[54] The Respondent's application to adduce fresh evidence includes evidence related to the Law Society's Press Release in May, 2015, following his disciplinary matter. The Respondent says that the Press Release was unfair and damaging to the Respondent in that it failed to make clear that the Respondent's clients had not suffered any harm from his actions (nor had he gained from them).

[55] The Press Release was headed "Law Society suspends lawyer for backdating statements of account, improper handling of trust funds." The Respondent considered this to be an unfair summary of his disciplinary matter. He notes that the Press Release did not mention that the hearing panel had found that his conduct had not caused any harm to his clients, or that he had not gained from what had occurred.

[56] In his affidavits, the Respondent sets out his concern that the media reporting of his disciplinary action left the impression that he was suspended for misappropriating funds from his clients. The Respondent has set out in his affidavit the impact of the Press Release on both him personally and his practice.

[57] The Respondent raised this issue with counsel for the Law Society shortly after the Press Release was issued. Counsel for the Law Society replied that they did not consider the Press Release to be misleading, but that they were agreeable to a revised Press Release including a statement that the hearing panel had found that no loss or harm had resulted from the conduct.

[58] The Respondent has also referred us to the publication of information regarding his practice status in July, 2015. He sets out in his affidavit that, in July 2015, information on the Law Society website regarding the disciplinary action suggested

that he was suspended from practice. This was not accurate at the time, as he had successfully applied for a stay of the suspension. The information on the Law Society website was subsequently revised.

[59] The Respondent submits that all of this fresh evidence, and in particular its impact on the Respondent's practice, personal life and reputation, should be considered by this Review Board in considering the appropriate penalty.

[60] It is unquestionable that the evidence regarding these matters was not available before the conclusion of the hearing. It is not the case, however, that such evidence would have been "practically conclusive" of an issue before the hearing panel. Further, we do not find that, had it been available to be considered by the hearing panel, it could have affected the result.

[61] Publication of disciplinary actions imposed by the Law Society is important for transparency and for the fulfillment of the Law Society's public interest mandate. Publication of disciplinary action, by its nature, can negatively affect a lawyer's reputation.

[62] It is our view that the evidence regarding the impact of the publication of details regarding the disciplinary action upon the Respondent's practice and reputation should not be admitted as fresh evidence in this Review. The hearing panel considered at length the Respondent's submissions concerning the stress and embarrassment caused by the disciplinary process. The hearing panel expressly accepted that this matter involved a serious impact on the Respondent, stating at paragraphs 67 and 68:

> The disciplinary process to date has caused the Respondent a great deal of embarrassment and stress. He has been practising in the shadow of this process. The decision on Facts and Determination is the second "hit" when his name is searched on Google. He has also had people calling him to ask about the decision. He has found those calls gut-wrenching and feels that he has let colleagues down.
>
> The Panel finds that the suspension will have a serious impact on the Respondent and his practice. His practice is his only source of income. He has already endured substantial embarrassment and stress as a result of the disciplinary process. The Panel finds this to be a mitigating factor in its consideration of the appropriate disciplinary action.

[63] The evidence that the Respondent seeks to introduce is of a similar nature to the evidence already provided to the hearing panel. Evidence regarding the effects of

the disciplinary process on the Respondent's practice and reputation was already before the hearing panel. In our view, the additional evidence provided by the Respondent when taken with the evidence that was already presented at the penalty hearing, would not have affected the penalty imposed.

[64] Further, as set out in greater detail later in these reasons, it is this Review Board's view that the impact of publication of disciplinary proceedings on a respondent lawyer should generally not attract much weight in determining the appropriate penalty. We consider that publication is necessary to meet the statutory duties of the Law Society. We also consider that publication will in most instances have a negative effect on the respondent lawyer, including stress, anxiety, embarrassment and loss of reputation. These results are to be expected from disciplinary proceedings. In our view, however, it should generally not have a substantial effect on the nature of the penalty imposed.

[65] We therefore find that the fresh evidence that the Respondent seeks to admit does not meet all elements of the *Palmer* test and as such cannot be admitted. The application to admit fresh evidence is dismissed.

REVIEW OF PENALTY DECISION

[66] The primary issue for us to consider in this Review is whether to uphold the hearing panel's decision on disciplinary action or substitute a different result.

STANDARD OF REVIEW

[67] As noted in recent decisions (see for example *Law Society of BC v. Tungohan,* 2016 LSBC 45), the standard of review in Law Society review board decisions has been the subject of debate.

[68] The standard of review for some issues is well-established and uncontroversial. For questions of law, the standard of review is correctness: *Kay v. Law Society of BC*, 2015 BCCA 303 at para. 41.

[69] Where a hearing panel has heard evidence and made findings of fact, the standard of review is deferential. Findings of credibility, for example, are not interfered with unless there is a clear error: see *Law Society of BC v. Berge*, 2007 LSBC 07 at para. 21; *Law Society of BC v. Hordal,* 2004 LSBC 36 at paras. 11-12.

[70] There have been conflicting views, however, regarding the proper standard of review for decisions on penalty. It has been described in Law Society cases as

correctness, or sometimes "correctness informed by reasonableness." In contrast, the British Columbia Court of Appeal has referred with approval to authority that the standard of review for questions of penalty and other questions of mixed fact and law should be reasonableness: *Mohan v. Law Society of BC*, 2013 BCCA 489 at para. 31; *Kay* at para. 40. Some Law Society cases have interpreted these Court of Appeal decisions to change the standard of review for questions of mixed fact and law (which undoubtedly includes penalty) to a standard of reasonableness: see for example *Re: Applicant 8,* 2016 LSBC 12.

[71] Notwithstanding this uncertainty, the accepted and established approach in section 47 reviews of decisions on penalty is to consider whether the penalty imposed by the hearing panel is within an appropriate range of penalties, based on the circumstances of the misconduct and a consideration of penalties imposed in other cases of similar misconduct. This is the approach we will apply in this review.

[72] Further, it is our view that, regardless of whether the standard of review is reasonableness or correctness, the decision of the hearing panel in this case should be confirmed.

THE APPROPRIATE RANGE OF PENALTY

[73] The appropriate range concept is a reflection of the fact that most cases will give rise to an appropriate range of outcomes rather than one single correct result. If the disciplinary action imposed by the hearing panel is within the appropriate range, it should not be disturbed on review.

[74] With regard to identification of the appropriate range, it is common for hearing panels to be provided with cases covering the whole universe of outcomes for conduct that is more or less similar to the conduct before the panel. That does not mean that all of those cases define the appropriate range.

[75] In this case, the citation involved misleading conduct (as well a breach of undertaking and breach of accounting rules). Cases involving misleading conduct have resulted in a very wide range of outcomes. If all of those cases frame the appropriate range, then the range is so wide as to be almost meaningless. It is disconcerting to conclude that a hearing panel could pick any place on that range and it would not be open to a review board to intervene. This problem can be avoided by being careful not to consider every case that involves facts that can be categorized into the same category as defining the appropriate range. Some of those cases are outliers or distinguishable due to some facts or nuances particular to them.

[76] It is important to note that the cases do not stipulate that a hearing panel must identify the appropriate range and the review board then determines whether the hearing panel correctly identified the range. The focus of the hearing panel is to determine a just sanction by applying the applicable *Ogilvie* factors to the case. The range of outcomes in similar cases is but one of the *Ogilvie* factors. It is the role of a review board, however, to determine the appropriate range and whether the hearing panel's decision falls within it. If the hearing panel does include an analysis of the range, the review board will have more insight to the reasoning of the hearing panel and that should be considered by the review board.

[77] With regard to how precise the range must be, we agree with the Law Society's position that the range cannot be too wide to preclude a meaningful review. We also agree with the Respondent that the range should not be limited to a certain number of months (in the case of a suspension) or a certain dollar amount (in the case of a fine). Rather, defining the range involves reviewing similar cases, discarding ones that are outliers or factually distinguishable, and identifying the appropriate range based on the particular circumstances of the case.

[78] We also recognize that exceptional circumstances may require a penalty that falls outside the typical range. The determination of a just penalty is an individualized process. Unique circumstances regarding the misconduct at issue or the respondent lawyer may justify an exceptional penalty. Accordingly, a penalty may fall outside the usual range but may be appropriate given the unique circumstances of the case.

[79] The appropriate range approach acknowledges that there is no single correct result in penalty decisions. It avoids second-guessing the hearing panel and avoids allowing any party "two kicks at the can." This is also reflected in the "no tinkering" admonition. If the penalty is within the appropriate range, it should not be changed simply because the review board may have picked another spot on that range. Notwithstanding the monetary examples given by the Benchers in *Hordal*, we are of the view that "no tinkering" is not only a quantitative admonition. It is also qualitative in the sense that it discourages substitution of the review board's assessment for that of the hearing panel unless the review board finds that the hearing panel's decision was not within an appropriate range of outcomes based on the circumstances of the case.

[80] The legal principles guiding disciplinary proceedings are grounded in the duties of the Law Society as set out in s. 3 of the *Legal Profession Act*. These duties include protecting the public, maintaining proper professional standards and upholding the integrity and reputation of the profession. Public confidence in the profession

depends on the Law Society's discipline system being perceived as transparent, justifiable and legitimate.

[81] In determining the appropriate penalty, disciplinary decisions often involve consideration of the factors identified in *Ogilvie*:

(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 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.

[82] In *Law Society of BC v. Dent*, 2016 LSBC 5, it was observed that these factors generally fall under four broad headings:

(a) Nature, Gravity and Consequences of Conduct;

(b) Character and Professional Conduct Record of the Respondent;

(c) Acknowledgment of the Misconduct and Remedial Action;

(d) Public Confidence in the Legal Profession.

[83] Some of the factors discussed in *Ogilvie* relate to the circumstances of the offence, and some relate to the circumstances of the lawyer. Others relate to the basic legal principles of disciplinary action as derived from the *Legal Profession Act*. Certain factors will attract more weight than others depending on the nature of the proceedings. The *Ogilvie* factors were not meant to be exhaustive, and not all of the factors apply in every case.

[84] In determining a disciplinary penalty, it is only necessary to identify those circumstances and principles that are important to the disciplinary decision. Decisions on penalty are an individualized process that requires the hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to disciplinary proceedings.

[85] In addition, disciplinary action must be appropriate based on the particular circumstances of the case. Although consistency and lack of arbitrariness are important in a self-regulated profession, the *Ogilvie* factors are designed to help to select the appropriate disciplinary action to best rehabilitate the Respondent and also to promote public confidence in the legal profession. This means that hearing panels will attempt to impose penalties that are appropriate for that particular individual.

[86] As well, penalties may need to evolve over time to ensure that the public continues to have confidence in the integrity of the profession.

AGGRAVATING AND MITIGATING FACTORS

[87] While there is no prescribed formula, the consideration of aggravating or mitigating circumstances will assist in determining the appropriate disciplinary action and which other cases are most similar in order to define the range of appropriate penalties.

[88] The hearing panel found that there were a number of aggravating features in this case, including the nature and gravity of the conduct, particularly in misleading the Law Society. The professional conduct record of the Respondent, although dated, involved dishonesty and was found to be an aggravating factor. The hearing panel also considered mitigating factors, including the Respondent’s admission of wrongdoing, his co-operation with the Law Society, and his efforts at re-training and improving his accounting system. The Respondent testified at the discipline hearing, and the hearing panel found his remorse to be sincere.

[89] In this case, the Law Society submits that the hearing panel erred in its analysis of the mitigating and aggravating factors, and in particular by considering the following as mitigating:

(a) there was no misappropriation of funds;

(b) there were no victims of the Respondent's conduct;

(c) the Respondent did not gain any financial benefit;

(d) the Respondent's immediate acknowledgement of responsibility;

(e) the Respondent's expression of regret; and

(f) the Respondent's stress and embarrassment.

[90] The Respondent also submits that there were errors in the hearing panel's analysis of mitigating and aggravating factors: by not placing sufficient weight on the character support letters filed on behalf of the Respondent at the hearing, and by characterizing the conduct as having occurred for an extended period of time rather than a single episode of back-dating accounts.

THE ABSENCE OF MISAPPROPRIATION/FINANCIAL GAIN BY THE RESPONDENT

[91] The hearing panel found as a mitigating factor that there was no victim in the sense that the Respondent's clients did not suffer any loss. The hearing panel also considered in mitigation that there was no misappropriation of client funds and that the Respondent did not gain any financial benefit from his conduct. The Law Society submits that these should not be considered mitigating factors.

[92] We would not characterize these circumstances as mitigating factors. If clients had suffered loss or if the lawyer had misappropriated funds, it would clearly have been an aggravating factor. In our view, however, the fact that the lawyer had refrained from stealing funds should not be described as a mitigating factor. The absence of certain aggravating circumstances should not be considered in mitigation of the penalty.

[93] Furthermore, we consider that the Respondent did attempt to gain an advantage by creating back-dated accounts prior to the Compliance Audit. The advantage was to attempt to avoid detection by the Law Society in order to avoid potential disciplinary action. As well, by taking client funds from his trust account prior to

issuing a statement of account to his client resulted in the Respondent having the client's funds earlier than he was entitled to. However, the hearing panel's findings on these issues were only part of their assessment of the overall seriousness of the conduct. Although we would not have described these circumstances as mitigating factors, it was appropriate to consider the absence of any harm to the clients in determining the overall gravity of the conduct.

THE MEANING OF "VICTIM"

[94] The Law Society further submitted that the hearing panel erred in considering that there were no victims in this matter, in that the Law Society and the profession should be considered "victims" of the Respondent's conduct. As noted above, we understand the hearing panel's comments to mean that no clients suffered any loss. The Law Society submits, however, that the Law Society and the profession should be considered "victims" because misconduct by one lawyer can affect public confidence in the profession.

[95] The *Ogilvie* analysis set out above includes consideration of the harm suffered by any victims. There is some authority to suggest that the Law Society may be considered a "victim" because of harm to the reputation of the profession and the financial costs of investigations and disciplinary proceedings: see for example *Law Society of BC v. McLeod*, 2015 LSBC 3; *Law Society of BC v. Welder*, 2011 LSBC 25.

[96] Incidents of professional misconduct will often reflect poorly on the legal profession and may in some cases cause serious harm to public confidence in the profession. The *Legal Profession Act* requires that disciplinary proceedings operate to protect public confidence in the regulatory process. This should be reflected in the determination of penalty.

[97] In our view, the reference to "victim" in the *Ogilvie* analysis was likely intended to apply to those persons who are directly harmed or put at risk by the lawyer's conduct. This may include clients, opposing parties, or other persons who are directly impacted. The concept of prejudice to the profession is a different and distinct consideration in the *Ogilvie* analysis. It is also fully reflected in the disciplinary principle, derived from the duties of the Law Society as set out in the *Legal Profession Act*, that the penalty must protect public confidence in the regulatory process and the legal profession generally.

[98] Professional misconduct will almost always involve investigatory and regulatory costs. It could be argued that all professional misconduct harms the reputation of

the profession. In our view, however, it is not necessary to identify the profession as a "victim" in every case. Referring to the legal profession as a victim may be perceived as insensitive to the clients or innocent parties who have suffered direct loss as a result of the lawyer's conduct. The concept of measuring harm to the profession can be fully recognized in the principle that the penalty must be guided by the protection of public confidence in the disciplinary process and the legal profession.

[99] As noted above, the hearing panel's conclusion that there were no victims in this case was based on the evidence that the clients did not suffer any loss. In our view, this was a proper and important consideration for the determination of penalty.

STRESS AND EMBARRASSMENT AS A MITIGATING FACTOR

[100] The hearing panel heard testimony from the Respondent, which included how the citation has affected him and his practice. The hearing panel found that the suspension from practising law will have a significant impact on the Respondent, particularly because he is a sole practitioner. The hearing panel considered that a lengthy suspension could potentially ruin the Respondent's practice. The hearing panel also noted the effects of online publication of the disciplinary proceedings, in that he has endured substantial embarrassment and stress.

[101] The Law Society submits that the hearing panel erred in considering the Respondent's stress and embarrassment as a mitigating factor.

[102] Some Law Society disciplinary decisions have suggested that adverse publicity and the corresponding embarrassment and shame should not be considered mitigating factors: see for example *Law Society of BC v. O'Neill*, 2013 LSBC 23; *Law Society of BC v. Johnson*, 2014 LSBC 50 and *Law Society of BC v. Chiang,* 2014 LSBC 55.

[103] Others cases have considered that, in some circumstances, adverse publicity and the impact of disciplinary proceedings on the lawyer in terms of stigma and embarrassment may be relevant to the penalty: see *Law Society of BC v. Martin*, 2006 LSBC 15 at para. 55; *Law Society of BC v. Harding,* 2015 LSBC 25 at para. 67; *Law Society of BC v. Boyd,* 2010 LSBC 21 at para. 23. This is particularly the case where the publicity has been unfair or misleading.

[104] It is our view that the impact of the proceedings in terms of stress and embarrassment should generally not attract much weight as a mitigating factor. Publication of disciplinary proceedings is an important aspect of the Law Society's statutory duties with respect to the public interest. Further, disciplinary

proceedings will invariably lead to stress and embarrassment for the lawyer. This can be expected where the lawyer's professional reputation and in some cases the ability to practise may be at risk.

[105] While we would not place much weight on this type of evidence as mitigating the penalty, the evidence may be relevant in considering whether the lawyer has demonstrated insight into their conduct, is at risk of future misconduct, or needs to be deterred from future misconduct. These are aspects of the *Ogilvie* analysis. In this respect, the impact of the proceedings on the lawyer can be relevant to the penalty decision.

THE RESPONDENT'S REMORSE AND ACKNOWLEDGEMENT OF WRONGDOING

[106] The Law Society submits that the hearing panel erred in finding that the Respondent's acknowledgment of wrongdoing and his expression of remorse were mitigating factors in light of the hearing panel's finding that he intended to mislead the Law Society.

[107] The hearing panel made a finding in the decision on facts and determination that the Respondent's conduct was intended to mislead the Law Society auditor who was tasked with reviewing his accounting records. Following the decision on facts and determination, the Respondent testified at the disciplinary hearing. In his testimony, he explained what was in his mind at the time that he created the accounts. His testimony also included his acknowledgment of wrongdoing and his expression of regret.

[108] Having heard testimony from the Respondent, the hearing panel was in the best position to assess his insight and his attitude towards this incident. The hearing panel considered his regret and remorse to be sincere. The standard of review for findings of credibility requires deference, unless the findings are clearly wrong or unreasonable: *Berge* at para. 21.

[109] We are concerned that the Respondent was not prepared to admit that he intended to mislead the Law Society. We are also concerned that the hearing panel found that the Respondent did intend to mislead the Law Society and yet still found that his regret and his acknowledgement of wrongdoing was a mitigating factor. However, we believe that the hearing panel considered all of the relevant evidence, and we would not interfere with the hearing panel's findings of fact in this regard.

THE RESPONDENT'S POSITION

[110] The Respondent also submitted that there were errors in the analysis of aggravating and mitigating factors.

[111] The Respondent submits that the hearing panel erred by placing insufficient weight on reference letters filed on behalf of the Respondent. These consisted of several letters from colleagues and a former client. The authors spoke highly of the Respondent's character.

[112] Generally, letters describing the good character and integrity of a respondent lawyer may be useful in determining the issues to be decided in disciplinary action. This type of evidence is often considered in determining penalty. In this case, the hearing panel noted that the authors did not appear to be aware of the Respondent's previous disciplinary record. They accordingly did not place much weight on this evidence. The weight to be given to this evidence was within the discretion of the hearing panel, and we do not find that hearing panel erred in their approach.

[113] The Respondent also takes issue with the hearing panel's characterization of the conduct as occurring numerous times over an extended period of time rather than as a single course of misconduct. The Respondent was involved in backdating 44 statements of account over three days. The citation also included failing to properly maintain accounting records and breaches of undertakings over a time period spanning three years. We would not interfere with the hearing panel's characterization of the evidence.

REVIEW OF SIMILAR CASES

[114] Most of the submissions before us focused on cases where there was misleading behaviour of one sort or another involving the courts, clients or the Law Society. This case is about misleading behaviour involving the Law Society, as well as improper trust accounting and breaches of undertaking. The submissions generally focused on the misleading behaviour but we have kept in mind all of the professional misconduct. Our analysis regarding the *Ogilvie* factors addresses some of the nuances and important issues such as the extent of the misleading behaviour, whether it was acknowledged or admitted, whether there was intention to mislead, whether there were victims, and whether there was financial gain.

[115] The appropriate approach where there is a finding of professional misconduct relating to more than one allegation and more than one category of misconduct, as in this case, is to first determine whether a fine or a suspension is warranted. If, as

in this case, a suspension is warranted, then the length of the suspension should be determined on a global basis: *Lessing* at paras. 75-78; *Harding* at paras. 46-47.

[116] With regard to cases involving misleading conduct, we have reviewed *Chiang*; *Law Society of BC v. Nguyen*, 2016 LSBC 21; *Law Society of BC v. Liggett,* 2012 LSBC 07; *Law Society of BC v. Galambos,* 2007 LSBC 31; *Law Society of BC v. Geronazzo*, 2006 LSBC 50; *Law Society of BC v. Botting*, 2000 LSBC 30; *Hordal; Berge;* and *Law Society of BC v. Luk,* 2007 LSBC 13.

[117] In some of these cases, the misleading behaviour occurred only once or was limited temporally, relative to the multiple false accounts created here. On the other hand, in some of those cases there was financial gain. In other cases there was financial harm to the client or others.

[118] Some of the cases involve misleading the courts. During the course of submissions, we asked counsel whether there was a difference in misleading the courts or misleading the Law Society. Counsel for the Law Society submitted that there is no difference. We are of the view that, while both are abhorrent, and both institutions rely on the absolute candour of lawyers, there is a difference. Courts are extremely vulnerable to misleading behaviour. They have no powers of inquiry or investigation. The same is true of clients. However, the Law Society does have the power of inquiry and investigation. It is a subtle factor, but in comparing cases on misleading conduct, it should be taken into account.

[119] In *Chiang,* for example, the Law Society supported and the review board upheld a suspension of one month for misleading behaviour involving the court. There was one instance of misleading behaviour that was intentional, for financial gain and there were victims. The lawyer refused to acknowledge the extent to which she misconducted herself throughout the complaint and disciplinary process. At paragraphs 42-43 the review board said:

> The panel considered the range of penalties in other cases at paragraph 27 as follows:
>
> > The reported cases suggest that the penalty for misleading behaviour can be a fine or a period of suspension in the range from 30 to 90 days. The cases in which a fine was imposed are generally found to be situations where there is an explanation for the behaviour that suggests an absence of intent or a result from a mistake or misunderstanding. The longer periods of suspension were provided in those instances where there was particularly

> egregious misbehaviour or repeat instances of misleading behaviour.
>
> In our view, it is clear that intentionally misleading with financial motivation requires a suspension in the range of 30 to 90 days. A 30 day suspension for this conduct is at the lower end of the range. However, it is our view that the hearing panel did identify the appropriate range and this sanction falls within it.

[120] *Nguyen* involved conduct that is similar to this case. The Law Society sought a suspension of one month for fabricating a disbursement to a client and by falsely representing to the Law Society that the disbursement was genuine. This misrepresentation was repeated two further times and was maintained until the Law Society initiated an investigation. The hearing panel rejected the Law Society's proposal of a one-month suspension and imposed a two-month suspension and a fine of $10,000. The review panel held that the hearing panel had erred in imposing both a fine and a suspension. The review panel quashed the fine but left the two-month suspension in place.

[121] We consider *Jamieson*, *Berge* and *Luk* to be outliers. *Jamieson* was a one-bencher panel who imposed a suspension of eight months for a lawyer who lied to the Law Society about his representation of a client, including fabricating three letters he said he had sent to the client but had not. Although this serious behaviour warranted a suspension, the length of that suspension is beyond the appropriate range for this case. *Berge* was a case involving thwarting a police investigation, resulting in charges of obstruction of justice. This occurred while he was 1st Vice-President of the Law Society. He was suspended one month. Finally, in *Luk*, the lawyer was found to have professionally misconducted herself by misleading the Law Society in providing a fabricated document and failing to provide the quality of service to her client equal to that of a competent lawyer. The lawyer consented to a suspension of 18 months. The case contains no analysis of the reasons for the disciplinary action except that it was consented to.

[122] Generally, the majority of cases involving misleading conduct demonstrate a range of one to three months. Had this case involved backdating the accounts and misleading conduct alone we would have put the range at one to three months given all of the facts of the case including that many invoices were backdated.

[123] With regard to breach of undertaking and breach of the accounting rules, we have reviewed *Law Society of BC v. Bowes,* 2011 LSBC 15; *Law Society of BC v. Rai,* 2005 LSBC 37; *Law Society of BC v. Cruickshank,* 2012 LSBC 27; *Law Society of BC v. Sas,* 2016 LSBC 3, *Boyd* and *Hordal.*

[124] Many of the breach of accounting rules cases resulted in a fine. An exception is *Cruickshank*, where the misconduct included breach of an undertaking, failure to comply with Law Society rules on trust accounting, failure to remit PST and GST in a timely way, and failing to enter into written contingency fee agreements. The lawyer had a lengthy history with Law Society discipline matters, including three conduct reviews and a citation resulting in a finding of professional misconduct. The disciplinary action was one month for the breach of undertaking, breach of Law Society accounting rules, failure to remit PST and GST and failure to enter into written contingency fee agreements.

[125] Cases involving breach of accounting rules coupled with misappropriation attract much higher disciplinary action. For example, in *Sas*, the lawyer breached accounting rules many times on many files. There were very small residual funds in trust when her representation of these clients ceased, but instead of returning the funds to the clients, she billed them for disbursements that had not actually been incurred. The total misappropriation was $1,947.39 for 22 clients over a period of six months. She also withdrew funds held in trust for 43 clients without issuing bills. The lawyer was suspended for four months.

[126] *Hordal* involved breach of undertaking and misleading for personal gain and to the detriment of another lawyer's client. The lawyer was suspended for six months. This case is helpful to set the range as it involves the combination of misleading and breach of undertaking. We consider *Hordal* to be a more serious case than this one (although it does not involve breach of accounting rules).

[127] Taking all of this into account, we are of the view that the combination of breach of accounting rules, misleading the Law Society and the breach of undertakings, but without misappropriation, results in an appropriate range of disciplinary action of six weeks to six months. We would have put the range at six weeks to four months but for the *Hordal* case.

CONCLUSION

[128] After considering all of the circumstances in this matter, including the circumstances of the misconduct, the circumstances of the Respondent, the mitigating and aggravating factors, and other cases involving similar misconduct, it is our view that a suspension of two months falls within the appropriate range. It is our view that, in the circumstances of this case, it was an appropriate result.

[129] We confirm the penalty decision of a two-month suspension. The suspension will commence 30 days from the date of this decision, unless the parties agree to

another date. If the parties agree to another date, the suspension will commence on that date.

[130] If the parties are unable to agree on costs, they may make written submissions to this Review Board within 30 days of this decision.