2017 LSBC 25
Decision issued: June 29, 2017
Citation issued: February 10, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GREGORY LOUIS SAMUELS

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	May 31, 2017
Panel:	Herman Van Ommen, QC, Chair Carol Gibson, Public representative Peter D. Warner, QC, Lawyer
Discipline Counsel:	Alison Kirby
Counsel for the Respondent:	Robin N. McFee, QC and Jessie I. Meikle-Kahs

INTRODUCTION

[1] In its decision of facts and determination issued on January 16, 2017 (the "F&D Decision") this Panel found the Respondent had committed professional misconduct by:

(a) improperly withdrawing $9690.05 US from his trust account and transferring it to his general account, where it remained for over five years before being rectified;

(b) breaching his firm's agreement with his client and with the third party Ministry of Health to forward the said funds, its subrogated share of settlement proceeds, and failing to keep those funds in trust;

(c) failing, for over five years, to correct a representation he made to his client that these funds had been paid to the Ministry of Health, and that his client was potentially entitled to such funds; and

(d) commencing an action on behalf of his client, without her knowledge or instructions, after not having communicated with her for six years.

[2] Two other allegations were dismissed: first an allegation, in the alternative to (b) above, that the Respondent breached his duty to his alleged client Ministry of Health, to pay them their subrogated share; and second, that the Respondent failed to respond reasonably promptly to seven letters from the Ministry of Health.

POSITION OF THE PARTIES

Position of the Law Society

[3] Ms. Kirby submits that a suspension, rather than a fine, is the appropriate penalty and suggests a suspension of two to four months.

[4] Although dishonesty or intentional misappropriation was never alleged or found in this case, the Law Society categorizes the Respondent's series of failings as showing an arrogant, high-handed and total disregard for his client's and the Ministry's interests, exemplified by the following specific failings:

(a) transferring the Ministry's share from trust to general account and leaving it there for over five years, thus paying down his overdraft, thereby personally enjoying the use of these funds without the knowledge or consent of his client or the Ministry;

(b) transferring the monies to a special office account to gain an improved exchange rate, which he did not turn over to his client, rather taking the benefit for himself;

(c) failing to inform his client, for over five years, that his legal bill to her and settlement documents misrepresented the fact that he did not pay the Ministry its share;

(d) cancelling the cheque his office had made up to pay the Ministry, then taking no steps to ensure that the Ministry was informed of his decision not to pay them;

(e) failing, for over five years, to warn his client of the potential claim against her by the Ministry, which could have followed from his unilateral decision not to pay them their subrogated share, which his firm, as her lawyer and agent, had agreed to pay.

(f) commencing the action on his client's behalf against the Ministry in Washington State for declaratory relief concerning the subrogation entitlement without having contacted her in the preceding six years, and without advising her of the potential consequences.

[5] Ms. Kirby says that a suspension, rather than a fine, is appropriate in the following circumstances: when there is more than one proven allegation and more than one category of misconduct, where there is an element of intentional misconduct related to a fundamental quality expected of a lawyer, where there have been several serious transgressions or a pattern of misconduct, where the respondent has a discipline history that calls for progressive discipline and where the misconduct has caused some measure of harm to the integrity of the legal profession as a whole. Ms. Kirby argues that all such factors are present in this case.

[6] Both counsel agreed that the factors to be considered in determining the appropriate disciplinary action are set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, but disagree on how the Respondent's conduct is to be categorized under most of those factors.

[7] The Panel will review its own conclusions on those factors in this case, but the Law Society's position on those factors can be summarized as follows:

(a) The nature and gravity of the Respondent's failings are an aggravating factor;

(b) The age and experience of the Respondent (called as a lawyer in Washington State in 1990 and in BC in 1994), and his significant experience as a personal injury lawyer are aggravating factors;

(c) The prior discipline record of the Respondent (outlined below), although somewhat dated, is an aggravating factor calling for progressive discipline;

(d) The impact on the Ministry, as victim, is an aggravating factor, as it was deprived of its share for six years.

(e) The personal gain of the Respondent in personally using the funds in question for over five years is an aggravating factor;

(f) The failure of the Respondent to appreciate the seriousness of his misconduct and his attempt to shift some of the blame onto his associate junior lawyer are aggravating factors calling for specific deterrence;

(g) The admitted impact of a suspension on a sole practitioner (Mr. Samuels has one associate who is only called in Washington State) has a greater effect than the suspension of a lawyer in a firm, but there is authority for the proposition that firm size is not enough to avoid a suspension (*Law Society of BC v. Siebenga*, 2015 LSBC 44);

(h) The range of sanctions in similar cases (reviewed below) include periods of suspension from one to four months; and

(i) There is a need in this case to impose a penalty that will attempt to ensure the public's confidence in the integrity of the legal profession

POSITION OF THE RESPONDENT

[8] Mr. McFee submits that the appropriate penalty is a fine of $5,000 plus costs. He argues that the transgressions of the Respondent arose entirely out of his honest but mistaken belief that the Ministry was not entitled to any subrogated share, and that his behaviour was motivated not by dishonesty or misappropriation, but by his zealousness to advocate on his client's behalf. His expert on Washington State law on such subrogation issues did support this opinion on entitlement, and the Ministry, despite being invited to do so by the Respondent, did not seek a court ruling in Washington on their entitlement. Had the Panel not found in its F&D Decision that the Respondent was nonetheless bound contractually to pay the Ministry, the Respondent's belief may have had a greater impact on our findings.

[9] Mr. McFee has a different categorization of the Respondent's failings than those described by the Law Society and summarized in paragraph [4] above, details of which can be summarized as follows:

(a) The Respondent had failed to learn and realize that his associate had made an agreement with the Ministry, and then failed to take care to

ensure that the funds removed from trust had been properly returned to trust;

(b) The Respondent is embarrassed by his oversights regarding the movements of the funds, the trust accounting errors, the exchange rate issue, the failure to ensure the Ministry was advised of his firm's decision not to pay, the failure to communicate better with his client on several issues, the failure to get instructions to commence the action and wrongly believing that he had implied authority to commence an action from his retainer agreement with her, signed six years earlier;

(c) The Respondent did not intentionally attempt to mislead the Ministry or his client, but does accept that his failures do constitute professional conduct;

(d) The Respondent's commencement of the action without client consent was done with good intentions, and to secure the disputed funds for his client;

(e) Although the passage of five or six years between the errors and the repairs is regretted, it is at least explainable by the fact that, once the Respondent became aware of the Ministry's demand letters for their share, he did address the problem with a reasonable degree of promptness;

(f) In summary, the Respondent does not seek to excuse his behaviour but rather to put his misconduct in context as falling outside the type of conduct that warrants suspension.

[10] Mr. McFee's position on the *Ogilvie* factors can be summarized as follows:

(a) The transgressions are serious but, by nature, are ones of mistaken belief, inattention and accounting errors, and as such they ought not to be aggravating factors. There has been no finding of dishonesty, fraud or misappropriation;

(b) The Respondent's prior discipline record (outlined below) is entirely unrelated to the current case, and the misconduct finding that resulted in a 90-day suspension happened 18 years ago, and should not be an aggravating factor. The case of *Law Society of BC v. Lessing*, 2013 LSBC 29, says that the weight to be accorded to a prior discipline record should be based on the dates of the offences, the seriousness of them, the

similarity of them to the current offence and any remedial actions taken by the respondent (paras. 71-72). Mr. McFee submits that progressive discipline is not called for in this case;

(c) Neither the Ministry nor the client suffered any real harm or disadvantage, and the Respondent has now paid the Ministry its subrogated share with his client's consent. This should not be an aggravating factor;

(d) The advantage the Respondent gained from having the use of approximately $10,000 for about five years is not one he intentionally sought, which does not indicate an aggravating factor;

(e) As to the number of times the offending conduct occurred, each proven allegation occurred only once;

(f) The Respondent acknowledges his misconduct and took steps to redress the wrong in 2015 by returning the money to trust and later paying the Ministry its share after receiving such instructions from his client;

(g) The need to remediate or rehabilitate the Respondent is not an aggravating factor as he has learned his lesson, reformed his communication procedures with the Ministry, hired a new accountant and now uses "PC Law" a leading practice management software;

(h) The impact of a suspension on the Respondent, who is essentially a sole practitioner vis-à-vis his BC practice, would be severe, and the Washington State Bar will reciprocate with an identical suspension. During any such suspension clients may be lost, staff may have to be laid off and his firm's already precarious financial position will be worsened;

(i) There is no need for specific deterrence as the Respondent is unlikely to reoffend;

(j) On the "public confidence" factor, Mr. McFee stresses that no client was harmed and that publication of the penalty will ensure that the public is aware of it; and

(k) On the "range of penalties" issue, similar cases (reviewed below) indicate a fine of $5,000 would be appropriate and consistent with previous cases of this nature.

DISCUSSION AND FINDINGS

The *Ogilvie* factors applied

[11] *Nature and gravity*: Despite the Panel not having made a finding of dishonesty, the failure of the Respondent to take required steps on multiple occasions spread over many years is an aggravating factor. He failed in many ways to respect and safeguard the interests of both his client and the third-party Ministry with whom his firm had contracted. His breach of that contract was wilful, evidenced by his cancelling the cheque payable to the Ministry and putting the money in his own general account. Commencing the action without instructions six years after last contact with his client was an arrogant, thoughtless disregard of her interests, particularly when she had instructed him to pay the Ministry six years earlier.

[12] *Age and Experience*: The Respondent is an experienced and specialized practitioner in this area, and we find that to be an aggravating factor. He ought to have known better.

[13] *Previous character and prior discipline*: In the 1999 case *Law Society of BC v. Samuels*, 1999 LSBC 36, a finding of professional misconduct was made, and the Respondent was suspended for 90 days. He had misrepresented to the court how recently he had contacted his clients' mothers. It is important to note that he did this to gain an adjournment. He admitted that he knowingly made the inaccurate representation. The panel said, at page 2, "… it is a cornerstone of our justice system that the court be able to rely on submissions from counsel as fact. For a lawyer to mislead the court is an assault on the integrity of the system and a very serious matter." The present case is similar in that, as well as the courts, clients and third parties who contract with lawyers ought to able to rely on representations made to them by lawyers. The Respondent failed both his client and the Ministry in this case, and although the 1999 misconduct was 18 years ago measured from today, it was only 11 years prior to the start of his course of misconduct in this case, which began in 2010.

The Respondent was subject to a conduct review in 2005, which concluded that he had not provided a full and complete reasoning for his termination of a client retainer and had allowed his client to be misled as to the professional status of his paralegal. These again are both failures of communication and a failure to respect the interests of a client.

The panel finds the Respondent's prior discipline record to be an aggravating factor.

[14] *The advantage gained*: We agree with Mr. McFee that, having use of the modest sum of $10,000 interest free for six years would not be an aggravating factor.

[15] *Impact on the victim*: We find this to be a somewhat aggravating factor because his failures were an abuse of his position of trust with his client and an abuse of his contractual obligations to the Ministry. The Ministry was deprived of its share for over seven years.

[16] *The number of times the conduct occurred*: While it can be said that each offence was committed just once, we note that there were several offences and several categories of offences committed over a long period of time. This supports our finding of a pattern of misconduct in this case and is an aggravating factor.

[17] *Acknowledgement of misconduct and steps to redress*: While the Respondent did attempt before and during our hearing to blame his junior associate for some of his misconduct, we agree with Mr. McFee that steps were taken to redress the wrongs when they became clear to the Respondent, and so we find this to be a moderately mitigating factor.

[18] *Possibility of remediating the respondent*: We note that the Respondent expressed acknowledgment, regret and embarrassment of and for his misconduct during the hearing, and we agree that he is unlikely to re-offend. We take note of the several reference letters that we received, all describing the Respondent as a person who listens to and cares about people. He has worked hard over many years as a volunteer and leader in worthy organizations that try to make the world a better place. We find this to be a mitigating factor.

[19] *Impact of penalties on the respondent*: The Respondent tendered his affidavit and oral testimony on the precarious financial condition of his law corporation and the highs and lows of a personal injury practice from year to year. Absent was any evidence of his own personal income or financial net worth. We were assured by Mr. McFee that the Respondent was not attempting to establish indigent status. While a suspension has a greater impact on a sole practitioner than on a member of a firm, we agree with *Siebenga* that firm size is not enough to avoid a suspension. The Respondent has one Washington State-called associate, a staff and has engaged BC lawyers on a contract as-needed basis in the past.

[20] *Impact on the respondent of other sanctions or penalties*: The Panel recognizes that the Washington State Bar is likely to impose the same period of suspension in their jurisdiction as a result of reciprocal enforcement provisions in force.

[21] *Need for specific deterrence*: We note the prior 90-day suspension of the Respondent for a similar offence and find this to be an aggravating factor.

[22] *Need to ensure public confidence in the integrity of the profession*: In *Lessing* (on review) the review panel observed that not all the *Ogilvie* factors would come into play in all cases, but "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 … if there is a conflict between these two factors, then protection of the public will prevail." The Panel adopts that reasoning.

CONCLUSIONS

[23] The Panel has determined that, on the application of the above *Ogilvie* factors to this case, a suspension is warranted. While the Respondent's 1999 suspension for 90 days might arguably call for a suspension of equal or greater duration, a review of recent cases on suspension have led the Panel to conclude that a suspension of 30 days is appropriate.

[24] Mr. McFee and Ms. Kirby referred us to many Law Society of BC cases that they submitted were relevant:

1. *Law Society of BC v. Dent*, 2015 LSBC 04, where a $5,000 fine was substituted on review in place of a 45-day suspension for improper withdrawal of $2,000 to pay a bill without consent where the funds were in trust for another purpose.

2. *Law Society of BC v. Tungohan*, 2016 LSBC 45, where a $3,000 fine was upheld on review for the offences of failing to report a judgment, failing to render bills before withdrawing trust funds to pay for work done, and various accounting failures. There is no mention of any prior discipline history.

3. *Law Society of BC v. Mann*, 2015 LSBC 48, where a fine of $4,000 was imposed in the single-count case of a lawyer who accidently mixed a cash retainer of $4,000 with his own funds instead of placing it in trust. The lawyer's prior discipline record was a failure to produce records during a compliance audit.

4. *Law Society of BC v. Cruikshank*, 2012 LSBC 27, where a one-month suspension followed a finding of professional misconduct for numerous trust account breaches involving improper withdrawals without billing, failure to deposit in trust promptly, failure to record funds in and out of trust, breaching

undertakings concerning when trust funds could be paid out, improper contingency agreements, failure to remit provincial sales taxes and staff payroll deductions, and various bookkeeping breaches, all over a five year period. There was, however, no finding of malice, deception or profiting, and the lawyer was described as being "profoundly sloppy." He had four prior conduct reviews (being unprepared in court, breach of undertaking to pay another lawyer's disbursements in 21 days, losing his temper and misleading police in a motor vehicle accident he was involved in).

5. *Law Society of BC v. Faminoff*, 2017 LSBC 04, where the review board upheld a two-month suspension. The lawyer withdrew trust funds to pay for fees without bills, then when faced with a Law Society audit, he falsified and back-dated 44 bills to mislead the Law Society. He also failed to maintain proper records, and breached undertakings to ICBC as to the timing of release of settlement funds. He had a prior disciplinary record 17 years earlier for false representations.

6. *Law Society of BC v. Spears*, 2006 LSBC 29, where a 60-day suspension was imposed for the breach of six accounting rules, preferring the interests of one client over another, failing to explain the principle of undivided loyalty, entering into a settlement without instructions, failing to keep his client informed, failing to respond to the Law Society, failing to deposit funds in trust promptly, withdrawing trust funds without first rendering an account and continuing to act in the face of conflict of interest.

7. *Law Society of BC v. Marsden*, 2003 LSBC 47 where a 30-day suspension was imposed for several offences, including entering a consent order without instructions, failure to inform the client about a settlement offer, and allowing an order for relocation of a child across Canada to go by consent when his client was opposed and then signing the consent order.

8. *Law Society of BC v. Johnston*, 2013 LSBC 04, where professional misconduct was found and a one-month suspension imposed for several offences: failing to follow client instructions to proceed to trial, and failing to withdraw an offer and making another offer without instructions. There was no prior discipline record, and the panel found that the lawyer had tried to advance the best interests of the client as he understood them.

[25] In the Panel's view, a consideration of these cases and our application of the *Ogilvie* factors (above) warrant a 30-day suspension. In determining the appropriate length of suspension we have considered that Washington State is likely to impose an identical suspension. We have allowed for the suspension to be

served sometime in 2017 to allow the Respondent an opportunity to arrange to have the suspensions served concurrently rather that serially.

COSTS

[26] Having heard submissions on costs, the Panel approves the Law Society costs in the amount of $16,090, which we arrived at on the following basis:

(a) The costs were presented at $19,130.91;

(b) We reduced item 9 for preparation of the Notice to Admit from 15 units to 12 units;

(c) We reduced the entire fee portion by 20 per cent ($2,740) because two of the allegations were dismissed;

(d) We did not reduce the claimed disbursements by any percentage because they would all have been necessary even without the two allegations that were dismissed.

ORDER

[27] The Panel orders as follows:

(a) That the Respondent be suspended from the practice of law for a period of 30 days to be commenced and completed at a time during 2017 to be agreed upon by counsel, or failing agreement on a start date, either party may apply in writing to this Panel for directions;

(b) That the Respondent pay to the Law Society of BC costs in the sum of $16,090 before October 1, 2017