2017 LSBC 43
Decision issued: December 6, 2017
Oral reasons: September 22, 2017
Citation issued: January 5, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DARRYL WAYNE LARSON

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	September 22, 2017
Panel:	Jamie Maclaren, Chair Dr. Gail Bellward, Public representative Carol W. Hickman, QC, Lawyer
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Respondent:	Peter J. Wilson, QC

INTRODUCTION

[1] The Respondent is a Vancouver-based immigration lawyer with nearly 30 years of practice experience. On October 12, 2012, he acted on the instruction of his client AA to refund the balance of his $15,000 cash retainer to an intermediary by issuing him a $10,318.60 bank draft (the "Bank Draft").

[2] On January 5, 2017, after investigating the Bank Draft refund at some length, the Law Society cited the Respondent for contravening the cash refund requirement of Law Society Rule 3-51.1(3.2) then in force [now Rule 3-59(5)] (the "Citation").

[3] Rule 3-51.1(3.2) then stated:

> A lawyer who accepts an aggregate amount in cash of $7,500 or more under subrule (3.1), must make any refund greater than $1,000 out of such money in cash.

[4] The Citation alleged that the Respondent's contravention of Rule 3-51.1(3.2) constituted professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[5] The hearing of the Citation proceeded in Vancouver on September 22, 2017 as a conditional admission of a discipline violation pursuant to Rule 4-30. The Respondent admitted to his alleged professional misconduct on the condition that the Panel order a $4,000 fine and $1,000 in Schedule 4 hearing costs (not including Rule 5-11(5) disbursements) as a disciplinary action jointly proposed by the parties.

[6] The hearing concluded within a half-day when the Panel issued an oral decision and orders on determination, disciplinary action and costs. The Panel determined that the Respondent had committed professional misconduct. Accepting the parties' Rule 4-30 proposal as reasonable and fair in all of the circumstances, the Panel ordered the Respondent to pay a $4,000 fine and $1,262.05 in total costs and disbursements to the Law Society. The written reasons follow.

BACKGROUND

[7] The parties filed an Agreed Statement of Facts as the entirety of facts in evidence. The Agreed Statement of Facts included the Respondent's admission that he committed professional misconduct by contravening the cash refund requirement of Law Society Rule 3-51.1 (3.2) then in force. The Panel accepted the Agreed Statement of Facts, and the facts outlined in this decision are summarized from that document.

[8] The Respondent has primarily practised immigration law since his 1988 call to the British Columbia bar. He has practised with the same Vancouver law firm for the last 20 years.

[9] In January 2012, AA retained an associate at the Respondent's law firm (the "Associate") to facilitate his immigration to Canada from Iran. AA provided a $15,000 cash retainer to the Associate while she was travelling in Iran. The Associate brought the retainer funds to Canada and deposited them into the law firm's trust account.

[10] The Respondent assumed primary conduct of AA's file after April 2012. On August 17, 2012, AA emailed the Respondent to terminate his retainer and to

arrange for the refund of all unused retainer funds to him in Iran. The Respondent calculated the unused retainer funds to be $10,318.60, and proposed that the Associate bring that amount in cash to AA in October 2012 when she was due to travel to Iran.

[11] The Associate expressed discomfort with the plan to enter Iran with such a large amount of cash, so the Respondent emailed AA on October 2, 2012 with a new proposal to deposit the funds in AA's American bank account. On October 12, AA replied by email to instruct the Respondent to instead pay the funds to a trusted relative (the "Designate") who was travelling to Vancouver from the United States that weekend. AA did not specify how the funds should be transferred to the Designate.

[12] The Respondent immediately confirmed AA's proposed plan with the Designate who requested that the funds be made payable to his name. Later on October 12, the Respondent secured the Bank Draft. The Respondent's assistant provided the Bank Draft in person to the Designate on October 14 after verifying his identification and obtaining a signed acknowledgement of receipt. The Respondent understood that the Designate planned to take the Bank Draft to the United States where he would credit the funds to AA.

[13] The Respondent was aware of the cash refund requirement under Rule 3-51.1(3.2) when he issued the Bank Draft. But he did not seek guidance from the Law Society regarding the application of Rule 3-51.1(3.2) prior to refunding AA's retainer.

[14] In filing his firm's 2012 trust report with the Law Society, the Respondent answered "yes" to the question that asked, "Did the practice pay any refunds related to cash receipts, in excess of $1,000?" He answered "no" to the question that asked, "Were all such refunds done by way of a cash payment (not by trust cheque) as required by Rule 3-51.1(3.1)?" The Respondent explained his "no" answer thus:

> The excess trust funds of $10,318.60 were were [sic] returned to the client using a money order. Which we were instructed to forward to a relative in the U.S. We could not have done this by sending cash.

[15] The Respondent's 2012 trust report answers caused a Law Society auditor to express concerns of misconduct to the Law Society's Professional Conduct department in October 2013. Following a lengthy investigation of those concerns, the Law Society issued the Citation.

[16] In the Agreed Statement of Facts, the Respondent admitted that refunding the balance of AA's cash retainer to the Designate by way of the Bank Draft was

contrary to Rule 3-51.1(3.2) then in force. He further admitted that it amounted to professional misconduct.

ISSUES

[17] The Panel must determine:

(a) Whether the Respondent's admitted contravention of the cash refund requirement of then Rule 3-51.1(3.2) constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act*; and

(b) If (a) is affirmed, whether the jointly proposed disciplinary action of a $4,000 fine and a $1,000 costs order (not including disbursements) is fair and reasonable in all of the circumstances.

LAW

Cash transactions

[18] When the Respondent contravened the cash refund requirement of Law Society Rule 3-51.1, subrules (3.1) and (3.2) stated:

(3.1) … a lawyer may accept an aggregate amount in cash of $7,500 or more in respect of a client matter or transaction for professional fees, disbursements, expenses or bail.

(3.2) A lawyer who accepts an aggregate amount in cash of $7,500 or more under subrule (3.1), must make any refund greater than $1,000 out of such money in cash.

Test for professional misconduct

[19] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules or the *Code of Professional Conduct for British Columbia*. The Benchers instead assess a lawyer's conduct in specific circumstances to determine if there is "a marked departure from that conduct the Law Society expects of its members": *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 171. In *Martin*, the hearing panel observed at paragraph 154:

> ... The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[20] In *Re: Lawyer 12*, 2011 LSBC 11 at paragraph 14, the hearing panel summarized previous applications of the *Martin* test as follows:

> In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

This articulation of the *Martin* test was accepted by the review panel in *Re: Lawyer 12*, 2011 LSBC 35 at paragraph 8.

[21] Not every breach of the Law Society Rules – including cash transaction rules – will amount to professional misconduct. In *Law Society of BC v. Chan*, 2008 LSBC 30, the respondent received cash for the purpose of paying a client's government program fee, in breach of then Rule 3-51.1. Prior to receiving the cash, the respondent reviewed the *Professional Conduct Handbook* (then in force) for his obligations in the prevention of money laundering, but overlooked his duties under the Law Society Rules. The hearing panel "hesitantly" concluded that his conduct amounted to a rules breach rather than professional misconduct.

[22] Upon review in *Law Society of BC v. Chan*, 2009 LSBC 20, the majority of the Benchers upheld the underlying rules breach decision on the basis that there was no precedent for a determination of professional misconduct where a breach of Rule 3-51.1 was unwitting. The minority, meanwhile, relied upon *Law Society of BC v. Kirkhope*, 2005 LSBC 23 for the proposition that a lawyer's failure to ascertain and observe Rule 3-51.1 was sufficient for professional misconduct.

[23] In *Law Society of BC v. Lyons*, 2008 LSBC 09, the respondent sought guidance from the Law Society before depositing a client's cash pre-payment into trust. Though the parties' evidence differed on whether the Law Society advised the respondent that his contemplated breach of Rule 3-51.1 was a rule "exception" rather than a rule "violation", the hearing panel found that the respondent's breach was intentional, and consequently confirmed his admission of professional misconduct. The hearing panel also opined on the purpose and effect of Rule 3-51.1 at paragraph 26:

> It should also be noted that the purpose and effect of Rule 3-51.1 are to prevent money laundering in the simplest way possible – "If cash cannot be accepted, it cannot be laundered." The rule is a financial transaction rule, not a money laundering rule. It is objective and simple, and does not call for any application of judgment or due diligence as to the purpose or intentions of the person tendering the prohibited cash to the lawyer.

EVIDENCE

[24] In the Agreed Statement of Facts, the Respondent admitted to knowingly contravening the cash refund requirement of Rule 3-51.1(3.2) on October 12, 2012. He reported the fact of his breach to the Law Society in his law firm's 2012 Trust Report on March 31, 2013. In a letter to Law Society staff dated June 9, 2014, he explained that he provided the Bank Draft instead of cash to the Designate because he viewed it as "more convenient and safer" under the circumstances.

[25] The Respondent admitted to being fully aware of the application of Rule 3-51.1(3.2) when he issued the Bank Draft. As a final statement in the Agreed Statement of Facts, and as a conditional admission of a discipline violation pursuant to Rule 4-30, the Respondent admitted that his conduct amounted to professional misconduct.

DETERMINATION

[26] On the facts established by the Agreed Statement of Facts, the Panel found that the Respondent's knowing contravention of the cash refund requirement of then Rule 3-51.1(3.2) was a marked departure from the standard of compliance expected of lawyers. He made no effort to ascertain from the Law Society how to properly observe the cash refund rule under the circumstances. Apart from his own stated concerns of safety and convenience, nothing prevented him from providing cash to the Designate in fulfillment of AA's instructions and in compliance with the Law Society Rules.

[27] This Panel found that the Respondent displayed culpability grounded in a fundamental degree of fault by deliberately disregarding Rule 3-51.1(3.2) for the sake of perceived safety and convenience. His behaviour therefore constituted professional misconduct as conditionally admitted.

DISCIPLINARY ACTION

[28] The Law Society's disciplinary proceedings are designed to fulfill its mandate to uphold and protect the public interest in the administration of justice as set out in section 3 of the *Legal Profession Act*.

[29] Here, as an essential aspect of the parties' Rule 4-30 proposal, the Respondent consented to the disciplinary action of a $4,000 fine and $1,000 in Schedule 4 assessed hearing costs (not including Rule 5-11(5) disbursements). The Panel considered whether the proposed fine and costs order were acceptable as "within the range of a fair and reasonable disciplinary action in all the circumstances." (*Law Society of BC v. Rai*, 2011 LSBC 2, para. 7). Under Rule 4-31, if the Panel did not accept the proposed disciplinary action, the Citation would proceed to a new hearing before another panel.

[30] The Rule 4-30 process of conditional admissions and consent to disciplinary action facilitates the settlement of disciplinary proceedings. It often saves the Law Society and respondents from expending significant resources over the course of a full-scale investigation and hearing. It provides the systemic means by which parties can craft pragmatic and fair settlements with a whole range of professional and personal factors taken into account.

[31] In accepting or rejecting a proposed disciplinary action under Rule 4-30, a panel does not decide what disciplinary action it would itself impose under the circumstances, but instead exercises its independent judgment to determine if the proposed disciplinary action is fair and reasonable as measured against the appropriate penalty factors.

[32] For many years, Law Society panels have considered the long non-exhaustive list of penalty factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. In *Law Society of BC v. Lessing*, 2013 LSBC 29, at paragraphs 57-60, the review panel identified the two most important penalty factors from *Ogilvie* as: (i) the need to ensure the public's confidence in the integrity of the profession; and (ii) the possibility of remediating or rehabilitating the respondent. The *Lessing* review panel also observed that, where there is conflict between these two factors, protection of the public should take priority over rehabilitation of the respondent.

[33] More recently, in *Law Society of BC v. Dent*, 2016 LSBC 05, the hearing panel affirmed the prioritization of penalty factors in *Lessing*, and, at paragraphs 19-25, consolidated the wider list of *Ogilvie* factors into four general factors for determining appropriate disciplinary action: (i) the nature, gravity and consequences of the misconduct; (ii) the character and professional conduct record

of the respondent; (iii) acknowledgement of the misconduct and remedial action; and (iv) public confidence in the legal profession including public confidence in the disciplinary process.

[34] The Panel considered each of the four general factors from *Dent* in assessing whether the proposed disciplinary action is within the range of fair and reasonable outcomes in all of the circumstances, with protection of the public foremost in mind.

Nature, gravity and consequences of the misconduct

[35] In *Law Society of BC v. Norton*, 2008 LSBC 36, the hearing panel commented on the importance of then Rule 3-51.1 in assessing discipline for the respondent who had accepted cash from his client in unknowing breach of the rule, but who had promptly reported his conduct and repaid the cash upon discovering his error. The panel stated at paragraph 2:

> The Panel notes that this provision of the Rules is an important and critical provision for the legal profession in Canada. This Rule is intended to ensure that lawyers do not inadvertently assist in money laundering transactions. It takes the place of the mandatory reporting rules of the Federal Government respecting large cash deposits and suspicious transactions that apply to other professionals but conflict with lawyers' duty of confidentiality to their clients. Accordingly, the importance of this Rule and its enforcement must not be understated.

[36] Here, the Respondent's decision to issue the Bank Draft had no known negative consequences, but his conscious and somewhat casual disregard for an important rule designed to prevent inadvertent money laundering contributed to the gravity of his misconduct. He had sufficient time and knowledge to pursue the perfectly acceptable option of refunding AA's retainer to the Designate in cash, but he instead chose to breach Rule 3-51.1(3.2) for the sake of perceived safety and convenience.

Character and professional conduct record of the respondent

[37] The Respondent has no professional conduct record over his 29 years of practice in British Columbia. Neither party provided any evidence about his character.

Acknowledgement of the misconduct and remedial action

[38] The Respondent freely acknowledged his breach of Rule 3-51.1(3.2) in his law firm's 2012 Trust Report – roughly five and a half months after the fact. He was forthright in admitting that he was aware of the application of Rule 3-51.1(3.2) at the time. He also acknowledged and admitted his misconduct through the Rule 4-30 process shortly after being issued the Citation.

Public confidence in the legal profession including public confidence in the disciplinary process

[39] To maintain public confidence in its efforts to prevent lawyers' inadvertent facilitation of money laundering, the Law Society must respond firmly – and be perceived to respond firmly – to instances where lawyers breach a cash transaction rule despite full knowledge of its terms and application. The public will have greater confidence in Law Society disciplinary processes when the sanctions are proportionate, fair and reasonable in all of the circumstances, including the range of sanctions levied in prior similar cases.

[40] There is a small array of prior Law Society decisions on penalty for breach of the cash receipt requirement under former Rule 3-51.1 [now Rule 3-59(3)], but no prior decisions on a breach of the cash refund requirement under former Rule 3-51.1(3.2) [now Rule 3-59(5)]. Accordingly, this Panel found limited guidance in the range of penalties from prior Law Society decisions.

[41] In prior Law Society decisions on penalty for breach of the cash receipt requirement, the penalties range from a $500 fine in *Norton* to a $2,000 fine in *Law Society of BC v. Van Twest*, 2011 LSBC 20, where the respondent was aware of then Rule 3-51.1 but breached the cash receipt requirement by accepting $9,000 in cash while under the mistaken impression that the limit was $10,000 rather than $7,500.

[42] In *Lyons*, where the respondent admitted to knowingly breaching then Rule 3-51.1 twice in nine months while of the view that it amounted to a rule "exception" rather than a rule "violation", the panel ordered a $1,500 fine. Shortly thereafter, in *Law Society of BC v. Adelaar*, 2009 LSBC 1, the panel assessed a $1,000 fine to the respondent who had knowingly but unexpectedly breached then Rule 3-51.1 because his compliance likely would have violated provisions of the *Professional Conduct Handbook* (then in force), and compromised his client's significant financial interests.

[43] In *Law Society of BC v. Chan*, 2009 LSBC 31, the hearing panel fined the respondent $1,000 for his unwitting breach of then Rule 3-51.1. In *Law Society of BC v. Burgess*, 2011 LSBC 3, the hearing panel fined the respondent $750 for breaching then Rule 3-51.1 while under the mistaken impression that his conduct was an allowable exception.

DISPOSITION

[44] Having affirmed the Respondent's contravention of the cash refund requirement of then Rule 3-51.1(3.2) as professional misconduct, the Panel found the jointly proposed disciplinary action of a $4,000 fine and a $1,000 costs order (not including disbursements) to be fair and reasonable in all of the circumstances.

[45] This is the Law Society's first disciplinary action for a breach of the cash refund requirement under former Rule 3-51.1(3.2) and current Rule 3-59(5). Though a $4,000 fine is higher than any previous fine levied for a knowing or unknowing breach of Rule 3-51.1, it is not outside what the Panel viewed as fair and reasonable discipline in circumstances where the lawyer knowingly breached an important cash transaction rule for the main reason of convenience.

[46] Importantly, the proposed disciplinary action was the product of pragmatic negotiation between the Law Society and the Respondent who was ably represented by experienced counsel, and who had ample time to consider the implications of the Rule 4-30 proposal. The Panel did not hear or consider all of the practical reasons that led the parties to jointly propose a $4,000 fine and $1,000 in Schedule 4 costs. It is not necessarily what the Panel would have assessed as disciplinary action in a full-scale hearing under section 38 of the *Legal Profession Act*. Nor is it instructive for determining the range of future penalties for a breach of Rule 3-59(5). But it is fair and reasonable in all of its particular circumstances.

[47] The Panel consequently ordered the Respondent to pay a $4,000 fine to the Law Society by October 31, 2017. The Respondent's hearing took about a half-day to be heard. The Panel therefore awarded $1,262.05 in costs to the Law Society. This amount is composed of $1,000 for a complete hearing, pursuant to Schedule 4 Tariff Item 25, and $262.05 in total Rule 5-11(5) disbursements, including the court reporter fees for half-day attendance.

NON-DISCLOSURE ORDER

[48] Pursuant to its discretion under Rule 5-8(2), the Panel ordered that the hearing transcript refer to the Respondent's client as AA, and that the hearing transcript and

all materials entered into evidence be redacted to remove any client names, any identifying information and any solicitor-confidential information before being released to a member of the public pursuant to Rule 5-9(1) or (2).