2018 LSBC 14
Decision issued: May 1, 2018
Citation issued: October 18, 2016

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

BRIAN PETER GRANT KAMINSKI

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date: September 12, 2017

Majority decision:

Panel: Elizabeth Rowbotham, Chair
Carolynn Ryan, Public representative

Dissenting decision:

Donald Silversides, QC, Lawyer

Discipline Counsel: Alison Kirby
Counsel for the Respondent: Robin N. McFee, QC
Jessie Meikle-Kähs

MAJORITY DECISION OF ELIZABETH ROWBOTHAM AND CAROLYNN RYAN

INTRODUCTION

The citation

[1] The citation issued to Brian Peter Grant Kaminski contained ten allegations of conduct by Mr. Kaminski that the Law Society asserted constituted professional misconduct or were breaches of the *Legal Profession Act* (the "Act") or the Law Society Rules (the "Rules") and were therefore discipline violations.

[2] The alleged misconduct by Mr. Kaminski occurred during the period of time between November 20, 2012 and June 15, 2014 while Mr. Kaminski practised law at the law firm of Drysdale Bacon McStravick LLP ("DBM"). Nine of those allegations were the subject of this hearing. They included allegations that, during the period from November, 2012 to June, 2014, Mr. Kaminski received a total of $33,426 from nine clients, that he misappropriated those funds by depositing them into his personal law corporation's general account when they should have been deposited into either the general account or the trust account of DBM, and that he failed to account to DBM for those funds. It was also alleged that he misrepresented to DBM the amounts billed to, and received from, four of those clients.

LEGISLATION AND RULES

[3] Seven of the ten allegations in the citation included allegations that Mr. Kaminski failed to deposit retainer funds into a pooled trust account, contrary to Rule 3-58 of the Rules. This conduct was alleged to have occurred during the period of time beginning on March 4, 2013 and ending on June 25, 2014. The Rules that were in effect during that period of time were subsequently repealed and replaced or reenacted with the Rules that were in effect both at the time the citation was issued and when the hearing was held. Rule 3-58, which was in effect between March 4, 2013 and June 25, 2014, dealt with the withdrawal of funds from a separate trust account and did not deal with the deposit of funds into a pooled trust account. The current Rule 3-58 deals with the deposit of trust funds in a pooled trust account and is a reenactment of former Rule 3-51, which was in effect at the time the conduct alleged in the citation occurred. Current Rule 3-58 refers to current Rule 3-62, which is a reenactment of Rule 3-54, which was in effect at the time the conduct was alleged to have occurred.

[4] The rules below are relevant to this hearing. Rules 3-51 and 3-54 are substantive rules that were in effect during the period of time between November 20, 2012 and June 25, 2014. Rule 4-30 is a current procedural rule.

Deposit of trust funds

3-51(1) Subject to subrule (3) and Rule 3-54, a lawyer who receives trust funds must deposit the funds in a pooled trust account as soon as practicable. ...

(3) Despite subrule (1), a lawyer who received trust funds with instructions to place the funds otherwise than in a pooled trust account may place the funds in a separate trust account in accordance with section 62(5) of the Act and Rule 3-53.

(4) Unless the client instructs otherwise in writing, a lawyer must deposit trust funds in an account in a designated savings institution.

(5) As soon as it is practicable, a lawyer who deposits into a trust account funds that belong partly to a client and partly to the lawyer or the lawyer's firm must withdraw the lawyer's or firm's funds from the trust account.

Cheque endorsed over

3-54 If a lawyer receives a cheque payable to the lawyer in trust and, in the ordinary course of business, pays the cheque to a client or to a third party on behalf of the client, in the form in which it was received, the lawyer must keep a written record of the transaction and retain a copy of the cheque.

Conditional admission and consent to disciplinary action

4-30(1) A respondent may, at least 14 days before the date set for a hearing under this part, tender to the Discipline Committee a conditional admission of a discipline violation and the respondent's consent to a specified disciplinary action.

(2) The chair of the Discipline Committee may waive the 14-day limit in subrule (1).

(3) The Discipline Committee may, in its discretion, accept or reject a conditional admission and proposed disciplinary action.

(4) If the Discipline Committee accepts the conditional admission and proposed disciplinary action, it must instruct discipline counsel to recommend its acceptance to the hearing panel.

(5) If the panel accepts the respondent's proposed disciplinary action it must

(a) instruct the Executive Director to record the lawyer's admission on the lawyer's professional conduct record,

(b) impose the disciplinary action that the respondent has proposed, and

(c) notify the respondent and the complainant of the disposition.

CONDITIONAL ADMISSION AND CONSENT TO DISCIPLINARY ACTION

[5] Pursuant to Rule 4-30, Mr. Kaminski made the following admissions with respect to his conduct with initials being substituted for the names of clients or their representatives contained in the admissions:

(a) between approximately February 26, 2014 and June 4, 2014, in the course of representing N Inc., a client of DBM, Mr. Kaminski:

(i) misappropriated the sum of $1,000 provided by the client to DBM as a retainer;

(ii) failed to deposit the retainer funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules;

(iii) deposited the retainer funds into his law corporation's general account prior to rendering a bill for legal services;

(iv) failed to account to DBM for the receipt of the retainer funds;

(v) misrepresented to DBM the amounts billed and received from N Inc.

(b) between approximately April 16, 2013 and June 16, 2014, in the course of representing S Ltd., a client of DBM, Mr. Kaminski:

(i) misappropriated the sum of $3,000 provided by the client to DBM as a retainer;

(ii) failed to deposit the retainer funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules;

(iii) deposited the retainer funds into his law corporation's general account prior to rendering a bill for legal services;

(iv) altered the name of the payee on cheque number 506 signed by FG of S Ltd. without the knowledge or consent of FG;

(v) failed to account to DBM for the receipt of the retainer funds;

(vi) misrepresented to DBM the amounts billed and received from S Ltd.

(c) between approximately November 2, 2013 and June 25, 2014, in the course of representing D Ltd., a client of DMB, Mr. Kaminski:

(i) misappropriated the sum of $1,000 provided by the client to DBM as a retainer;

(ii) failed to deposit the retainer funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules;

(iii) deposited the retainer funds into his law corporation's general account prior to rendering a bill for legal services;

(iv) failed to account to DBM for the receipt of the retainer funds;

(v) misrepresented to DBM the amounts billed and received from D Ltd.

(d) between approximately November 13, 2013 and March 12, 2014, in the course of representing EG, a client of DMB, Mr. Kaminski:

(i) misappropriated the sum of $3,700 provided on behalf of the client to DBM as a retainer;

(ii) failed to deposit the retainer funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules;

(iii) deposited the retainer funds into his law corporation's general account prior to rendering a bill for legal services;

(iv) failed to account to DBM for the receipt of the retainer funds.

(e) between approximately January 16, 2014 and May 15, 2014, in the course of representing RO, a client of DBM, Mr. Kaminski:

(i) misappropriated the sum of $2,050 provided on behalf of the client to DBM as a retainer;

(ii) failed to deposit the retainer funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules;

(iii) deposited the retainer funds into his law corporation's general account prior to rendering a bill for legal services;

(iv) failed to account to DBM for the receipt of the retainer funds.

(f) between approximately November 9, 2013 and December 4, 2013, in the course of representing T & J Ltd., a client of DBM, Mr. Kaminski:

(i) misappropriated the sum of $200 provided by the client to DBM as a retainer;

(ii) failed to deposit the retainer funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules;

(iii) deposited the retainer funds into his law corporation's general account prior to rendering a bill for legal services;

(iv) failed to account to DBM for the receipt of the retainer funds.

(g) on or about March 4, 2014, in the course of representing TA, a client of DBM, Mr. Kaminski:

(i) misappropriated the sum of $2,300 provided by the client to DBM as a retainer;

(ii) failed to deposit the retainer funds into a pooled trust account, contrary to Rule 3-58 of the Law Society Rules;

(iii) failed to account to DBM for the receipt of the retainer funds.

(h) between approximately November 28, 2012 and November 30, 2012, in the course of representing U Ltd., a client of DBM, Mr. Kaminski:

(i) misappropriated the sum of $8,176 provided by the client to DBM as payment on account of services rendered;

(ii) substituted his own invoice to the client in the place of an invoice dated September 18, 2012 in the amount of $8,176 from DBM;

(iii) asked the client to alter the name of the payee on a cheque dated November 28, 2012 in the amount of $8,176 signed by JD of U Ltd. in payment of the DBM invoice;

(iv) failed to account to DBM for the receipt of the funds delivered by U Ltd. in payment of the DBM invoice;

(v) misrepresented to DBM the amounts billed and received from U Ltd.

(i) between approximately June 26, 2013 and June 17, 2014, in the course of representing A Group, a client of DBM, Mr. Kaminski misappropriated a total of $12,000 provided by the client to DBM on behalf of one or more of the 16 investors listed in Schedule "A" to the citation as either a retainer or payment on account of services rendered.

[6] These admissions by Mr. Kaminski were almost identical to the allegations set out in the citation, with two exceptions. First, Mr. Kaminski, in his written letter setting out his admissions, specifically stated that he did not admit the ninth allegation contained in the citation. Second, the eighth allegation contained in the citation was that Mr. Kaminski had altered the name of the payee on a cheque dated November 28, 2012 in the amount of $8,176 signed by JD of U Ltd., which Mr. Kaminski did not admit to. Instead, Mr. Kaminski, in his admissions with respect to that allegation, admitted that he asked the client to alter the name of the payee on the cheque, as set out in sub-para. 5(h), above.

[7] In addition to his admissions with respect to his conduct, Mr. Kaminski admitted that the conduct described in para. 5, above, constitutes professional misconduct.

[8] Mr. Kaminski also consented in writing to the following disciplinary action:

(a) a suspension of three months commencing on the first day of the month following the hearing panel's decision or such other day as the hearing panel may order; and,

(b) costs in the amount of $2,551 payable on or before one year from the date of pronouncement of the decision of the hearing panel or such other day as the hearing panel may order.

[9] The Discipline Committee accepted the conditional admission and proposed disciplinary action that was consented to by Mr. Kaminski, and discipline counsel recommended to the panel at this hearing that it accept those admissions and the proposed disciplinary action.

[10] Discipline counsel informed the Hearing Panel that, in recommending the acceptance of the conditional admission and proposed disciplinary action, the Law

Society agreed not to proceed with the ninth allegation of the citation, which was not admitted by Mr. Kaminski.

[11] Under Rule 4-30, the Panel may only accept or reject the proposed disciplinary action. If it does not accept the proposed disciplinary action then it may not rely on the conditional admission or make any findings of fact or determinations or impose any disciplinary action.

ADDITIONAL FACTS AND EVIDENCE

[12] In addition to the facts set out in Mr. Kaminski's admissions, an agreed statement of facts that contained extensive documentation, including a transcript of an interview of Mr. Kaminski conducted by a lawyer employed with the Law Society's Investigations Monitoring & Enforcement Group on June 2, 2015, was filed as an exhibit. Also filed as exhibits were an affidavit sworn by Mr. Kaminski on July 6, 2017 and four letters, three of which were written by lawyers and one by a client of Mr. Kaminski. The relevant additional facts are set out below.

[13] Mr. Kaminski became a member of the Law Society of British Columbia on May 14, 1993, and thereafter he practised primarily in the fields of corporate and commercial law and, to a lesser extent, in the fields of administrative law and civil litigation. In 1997, he incorporated Brian P. Kaminski Law Corporation ("Kaminski Law Corp.") and thereafter continued his practice through Kaminski Law Corp.

[14] Mr. Kaminski, through Kaminski Law Corp., practised with DBM from February 16, 2004 until June 24, 2014. DBM was, at the time relevant to the citation, a limited partnership of two partnerships. One of the constituent partnerships was a firm known as Drysdale Kaminski Holland Law Firm ("DKH") formed effective March 31, 2010, the partners of which were Donald Drysdale, Mr. Kaminski and Laura Holland or their respective law corporations. The other was a partnership formed by Joseph McStravick, Christopher Bacon and Sharene Orstad ("MBO").

[15] DKH and MBO had an agreement that provided that they would share expenses but that each of DKH and MBO would be entitled to, and receive, the profits earned from the practice of law by their respective partners. Messrs. Drysdale and Kaminski and Ms. Holland had a written partnership agreement by which they agreed that all profits of the practice of law by them or their respective law corporations would be shared equally between the three partners.

[16] Kaminski Law Corp. maintained two general accounts but did not maintain a trust account. All trust monies received by Kaminski Law Corp. or DKH were to be deposited to a trust account maintained in the name of DBM.

[17] In 2007, Mr. Kaminski, after being approached by his partner, Mr. Drysdale, agreed to become a shareholder in TRE Ltd., a company engaged in real estate developments in the interior of British Columbia. TRE Ltd. obtained financing from an institutional lender (the "Primary Lender") in the amount of $2,200,000 (the "Primary Financing"), from a private lender (the "Secondary Lender") in the amount of $1,350,000 (the "Secondary Financing") and from a group of private lenders (the "Tertiary Lenders") in the amount of $1,000,000 (the "Tertiary Financing").

[18] As shareholders of TRE Ltd., both Mr. Kaminski and Mr. Drysdale guaranteed payment of the Primary Financing, Secondary Financing and Tertiary Financing.

[19] The real estate development business of TRE Ltd. encountered financial difficulties, and the Primary Lender commenced an action against Mr. Kaminski pursuant to his guarantee and obtained a judgment against him in the amount of $3,095,421.71 on September 21, 2011. Actions were also commenced by the Tertiary Lenders pursuant to Mr. Kaminski's guarantees. On November 1 and 2, 2011, judgments were obtained against Mr. Kaminski by one Tertiary Lender in the amount of $100,000, by two Tertiary Lenders, separately, in the amount of $200,000 each, and by another two Tertiary Lenders, separately, in the amount of $250,000 each.

[20] In 2013, the Secondary Lender made demand upon Mr. Kaminski pursuant to the terms of his guarantee of the Secondary Financing.

[21] In either late 2011 or early 2012, Messrs. Drysdale and Kaminski entered into a payment plan with creditors of TRE Ltd. to whom they had granted guarantees that included a lump-sum initial payment of approximately $540,000. Mr. Kaminski and his wife borrowed monies secured by a second mortgage on their residence to finance his share of this initial payment. During 2012, Messrs. Drysdale and Kaminski entered into an agreement with one of the creditors to pay them $5,000 per month. Mr. Kaminski's share of this monthly payment was $2,500.

[22] From 2012 until he filed an assignment in bankruptcy on August 8, 2014, Mr. Kaminski's income was insufficient to meet his financial obligations. In the Law Society interview on June 2, 2015, Mr. Kaminski described his financial circumstances during this period as very desperate. He said that he became unable to pay his expenses with the income he was earning when he started in 2012 to pay

$2,500 a month to the creditor with whom he and Mr. Drysdale had made a settlement.

[23] As a result of financial pressures, Mr. Kaminski began to defraud his DKH partners in 2012 by taking monies that were payable by clients to DBM that should have been shared equally with Mr. Drysdale and Ms. Holland and paying, or causing them to be paid, instead to Kaminski Law Corp. These monies were paid, or should have been paid, to DBM either in trust by way of a retainer or to pay bills for legal services. Mr. Kaminski wrongfully took these monies in one of four ways.

[24] One method used by Mr. Kaminski was that, when he received a cheque from a client payable to DBM, he would type "For deposit to Brian B. Kaminski Law Corp." or similar words on the back of the cheque and then sign it as authorized signatory of DBM. He would then deposit the cheque to the general account of Kaminski Law Corp. In each case, these monies should have been paid to DBM and deposited to either its trust account or its general account.

[25] A second method was that Mr. Kaminski would request that the client leave the payee of the cheque blank and, after receiving the cheque, Mr. Kaminski would make the cheque payable to Kaminski Law Corp. and deposit it to the general account of Kaminski Law Corp. In each of these cases, the payee should have been DBM.

[26] A third method was that Mr. Kaminski would cross out the name of the payee as completed by a client and insert Kaminski Law Corp. as the payee. In his interview with the Law Society, Mr. Kaminski said that, whenever he used this method he told the client that he was changing the name of the payee.

[27] In addition to altering or improperly completing or endorsing cheques made by clients, Mr. Kaminski also prepared and delivered to certain clients bills that showed they were from Kaminski Law Corp. and not DBM. Mr. Kaminski told the Law Society during his interview that those bills should have been from DBM and the only reason he did that was in order to divert the payments to Kaminski Law Corp. and to have the client write a cheque payable to Kaminski Law Corp. instead of DBM. In describing the instances in which he issued a Kaminski Law Corp. bill to a client instead of a DBM bill, Mr. Kaminski told the Law Society:

> It was never a situation where I planned in advance to bill a particular file under my law corp. versus Drysdale Bacon McStravick. It was usually a circumstance where I would have a $10,000 Revenue Canada payment coming up and I didn't have the money to make that payment and then I

> would look at a file that was about to be billed and say, I can use some of these funds to help me pay the bill.

[28] In each case, the endorsement of cheques payable to DBM for deposit to Kaminski Law Corp., the insertion of Kaminski Law Corp. as the payee in blank cheques, the change of name of the payee and issuing Kaminski Law Corp. bills for fees and charges payable to DBM were acts done by Mr. Kaminski without the knowledge or consent of any partner of either DBM or MBO or any employee of those partnerships or DBM. In each case, the changes were made by Mr. Kaminski with the intent that he would deprive his partners in DKH of the benefit of the two-thirds of those payments that they were entitled to receive.

[29] In several cases where clients made payments as a retainer, some or all of the legal services that were to be provided as part of that retainer were not performed before the retainers were deposited to the general account of Kaminski Law Corp., although Mr. Kaminski told the Law Society in his interview that every client who paid a retainer that was deposited to the account of Kaminski Law Corp. did eventually receive the legal services for which the retainer was provided.

[30] In some cases, where a retainer had been paid by a client, Mr. Kaminski prepared a DBM bill to the client for performing the services for which the retainer had been provided but did not show on the bill that it had been paid, or was to be paid, with the retainer received from the client. This resulted in the records of DBM showing that there was an account receivable from the client for the amount of the bill. In these cases, Mr. Kaminski instructed the bookkeeping staff of DBM to write off the account in order to conceal from both the client and DBM that a retainer had been paid but had never been received by DBM because the retainer cheque had been deposited to the account of Kaminski Law Corp.

[31] Mr. Kaminski told the Law Society that, when he took monies for retainers that were payable, or should have been payable, to DBM he knew the funds should have been deposited into the trust account of DBM.

[32] During his interview by the Law Society, Mr. Kaminski stated the following with respect to the retainers that should have been paid to DBM, in trust, but were instead deposited to the Kaminski Law Corp. general account:

> What the objective was at the time was to relieve some financial pressures that were on me and it was my intention that once my financial circumstances changed that I would, I guess, re-account to the firm for those fees that I had diverted to myself and that was always my intention

> throughout this process. It was never meant to be a long-term situation, more of a short-term stop gap measure.

[33] The admission by Mr. Kaminski set out in para. 5(i) above related to services provided to a client whose business it was to assist potential foreign investors who wished to immigrate to the United States of America under a program whereby qualified individuals who were prepared to invest $500,000 in a business in that country might have their applications approved if they provided proof they were able to make such an investment. DBM agreed to act as an escrow holder with respect to $500,000 in United States currency paid to DBM, in trust, for each investor for an agreed fee of $750 payable for each investor. During the period of time from June 26, 2013 to June 17, 2014, Mr. Kaminski issued bills for legal fees of $750 each in respect of monies paid to and held in trust by DBM for 42 investors. Mr. Kaminski took cheques payable to DBM for 16 of these bills, being $12,000 in the aggregate, endorsed them for deposit to Kaminski Law Corp. and deposited the cheques to the general account of Kaminski Law Corp. The cheques were delivered to the law offices of DBM by mail and upon receipt were placed in an employee's in-tray. In his interview with the Law Society, Mr. Kaminski described how he dealt with those 16 cheques as follows:

> If I saw the cheque there and it was a situation where I needed some money, I would take the cheque to the typewriter and type "Please make payable to Brian B. Kaminski Law Corporation" and endorse it and deposit it to my law corporation account.

[34] Mr. Kaminski also said in his interview that he knew it was wrong to take these cheques and deposit them to the account of Kaminski Law Corp. and that the payments were payments of fees that should have been paid to DBM.

[35] On or about June 17, 2014, some of the misappropriations by Mr. Kaminski were discovered by other lawyers in the DBM firm. When confronted he admitted he had wrongfully taken money payable to DBM and converted it to his own use to Kaminski Law Corp.

[36] On or about June 18, 2014 one of those lawyers, on behalf of herself and five other lawyers in the law firm, including Ms. Holland, wrote to the Law Society to report that Mr. Kaminski had caused his law corporation to collect $1,000 paid to DBM in trust as a retainer without notice to his partners or management and that he had confessed to doing so. That report included the conduct of Mr. Kaminski admitted by him as set out in para. 5(i) above.

[37] Also on June 18, 2014, Mr. Kaminski electronically filed a complaint with the Law Society on its website in which he stated he was wishing to self-report breaches by himself. He described his complaint and the action taken as follows:

> *Details of your complaint.*
>
> There were files were [sic] I took client retainers directly into my law corporation's account rather than to my firm's trust account. In addition, when I received fees from one particular client, I diverted the fees to my law corporation rather than having them run through the law firm. At the time of these events I was and still am under tremendous stress due to my personal finances. This does not justify my actions but explains why I acted as I did.
>
> *Explain what attempts you have made, if any, to resolve the problem.*
>
> I have met with the partners of Drysdale Bacon McStravick LLP regarding the matter and they have terminated my employment for cause.

[38] On July 25, 2014, at the request of the Professional Regulation Department of the Law Society, Mr. Kaminski voluntarily entered into a "practice undertaking and consent" whereby he undertook not to engage in the practice of law except to represent himself in his personal capacity, with or without the expectation of a fee, gain or reward, whether direct or indirect and to change his practice status to non-practising on or before July 28, 2014.

[39] On or about April 28, 2017, with the consent of the Law Society, Mr. Kaminski's 2014 undertaking was amended to permit him to perform paralegal services under the supervision of a practising lawyer approved by the Law Society.

[40] At the hearing of this matter, a letter dated September 11, 2017 addressed to the Law Society from Donald Drysdale was filed as an exhibit. In his letter, Mr. Drysdale stated that Ms. Holland had withdrawn as a partner of DKH in 2015, at which time he purchased her interest. Mr. Drysdale also indicated that, when he withdrew from the partnership, Mr. Kaminski had been responsible for the corporate records of approximately 400 companies and that, after he withdrew, the partnership had received approximately $67,000 in payment of accounts that Mr. Kaminski had issued before he ceased being a partner. In his letter, Mr. Drysdale also said that he had agreed with Mr. Kaminski to offset the debts he owed the DKH Partnership against the funds that the partnership would otherwise owe him in payment of accounts issued before he withdrew and the value of the 400 corporate records that remained with the partnership after Mr. Kaminski withdrew.

Mr. Drysdale said that, as a result of this agreement Mr. Kaminski had fully repaid to the DKH Partnership the monies he took that are the subject matter of the citation.

[41] Mr. Kaminski swore an affidavit on July 6, 2017, which was filed as an exhibit at the hearing of this matter. In his affidavit, he deposed that the financial difficulties resulting from the failed residential real estate development caused him to suffer adverse health consequences, including inability to sleep and anxiety stress syndrome. He did not discuss his financial situation or his stress or anxiety with anyone, including his wife. His wife had a medical condition that is exacerbated by stress.

[42] Mr. Kaminski stated that his ability to sleep and his anxiety stress syndrome made it difficult to think clearly and focus and that the stress negatively affected his cognitive functioning and ability to rationally approach matters. He began to consume large amounts of alcohol each evening while he was at home in order to try to put himself to sleep. He deposed that these symptoms took a toll on him mentally and physically, which resulted in him being unable to rationally approach matters of common sense when it came to his personal financial situation. He also stated in his affidavit that he received treatment for his anxiety stress syndrome from his general practitioner in 2014 and 2015 and psychological counselling from a clinical psychologist in late 2014.

DETERMINATION

[43] What constitutes professional misconduct is not defined in the Act or the Rules or described in the *Code of Professional Conduct*. Since the decision by the hearing panel in *Law Society of BC v. Martin,* 2005 LSBC 16, the vast majority of panels have adopted as a test for professional misconduct whether the conduct of the lawyer in question exhibited a "marked departure" from the standard of conduct the Law Society expects of lawyers. This is a subjective test that must be applied after taking into account decisions of other hearing panels, publications by the Law Society, the accepted standards for practice currently accepted by the members of the legal profession in British Columbia and what, at the relevant time, is required for protection of the public interest.

[44] A breach of the Act or failure to comply with a Rule will not necessarily amount to professional misconduct, but it may do so if the breach or failure to comply is serious.

[45] Guidance as to when a breach of the Rules can constitute professional misconduct is found in a number of discipline panel decisions. When determining whether a Rule breach may constitute professional misconduct, panels give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the lawyer's conduct (see *Law Society of BC v. Lyons*, 2008 LSBC 09 at para. 35).

[46] Mr. Kaminski has admitted the conduct described above in para. 5, which includes misappropriating monies that were paid or payable to DBM either as a retainer for services to be performed or as payment for bills for legal services that had been performed, failing to deposit monies received as retainers in a trust account as required by Rule 3-51 that was in effect at the time and misleading his firm with respect to bills to clients and retainers received to pay those bills. He has also admitted that all of the conduct described in para. 5 above constitutes professional misconduct. The Law Society submits that such conduct constitutes professional misconduct.

[47] We are satisfied that the conduct described in the citation to which Mr. Kaminski has admitted is a marked departure from the standard of conduct the Law Society expects of lawyers. We therefore find that all of the conduct described in those paragraphs of the citation constitutes professional misconduct.

BASIS FOR ACCEPTING OR REJECTING A PROPOSED DISCIPLINARY ACTION

[48] We agree with the following statements made by the panel in *Law Society of BC v. Rai*, 2011 LSBC 02 at paras. 7 and 8, regarding the purpose of Rule 4-22 (now Rule 4-30) and on what basis a hearing panel should decide whether to accept a proposed disciplinary action or not:

> This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"

> This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

OGILVIE FACTORS

[49] For several years, Law Society hearing panels and review boards have quoted, with approval, paras. 9 and 10 of the penalty decision of the hearing panel in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45, and have used the applicable factors set out there to determine what disciplinary action is appropriate. They are reproduced below:

> Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct. Section 38 of the *Act* sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.
>
> The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
>
> 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.

[50] Counsel for the Law Society submitted that the following *Ogilvie* factors were relevant to a determination of the appropriate disciplinary action in this matter:

(a) the nature and gravity of the proven misconduct (including its extent and duration);

(b) the respondent's prior discipline history;

(c) the range of sanctions imposed in similar cases; and

(d) mitigating factors such as the respondent's acknowledgment of the misconduct, the fact that no clients were affected by the misrepresentation, the fact that the respondent has settled his accounts with DBM.

[51] We believe the following *Ogilvie* factors are also relevant to a determination of the appropriate disciplinary action in this matter:

(a) the advantage gained, or to be gained, by the respondent;

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

(c) the need for specific and general deterrence; and

(d) the need to ensure the public's confidence in the integrity of the profession.

The nature and gravity of the proven misconduct

[52] Diverting funds from a lawyer's partners and misappropriating client retainer funds is serious misconduct and is recognized as such by counsel for both the Law Society and for Mr. Kaminski. In one of the cases discussed below (*Law Society of Upper Canada v. Frishette*, 2005 ONLSHP 9, [2005] LSDD No. 17) the hearing panel in that case "accepted that there was a distinction between appropriating clients' funds and appropriating funds of a firm, but that the distinction was not very great." In our view, there is no distinction. In both circumstances there is a breach of trust to a person or party to whom a fiduciary duty, a duty of utmost honesty and loyalty, is owed.

The respondent's prior discipline history

[53] Mr. Kaminski has a professional conduct record that consists of a conduct review and a prior citation.

[54] The conduct review took place in 1996. Mr. Kaminski met with a conduct review subcommittee to discuss a letter written on behalf of a client to the client's former employer in which Mr. Kaminski threatened to make reports to both the Employment Standards Branch and the Vancouver Police if a cheque drawn by that former employer was not honoured when presented for payment a second time, contrary to the guidance provided by Rule 2(b) of Chapter 4 of the *Professional Conduct Handbook* then in effect. The conduct review subcommittee concluded that Mr. Kaminski appeared to fully accept the validity of the complaint and to understand the seriousness of his error and was satisfied that no further action needed to be taken.

[55] A citation was issued against Mr. Kaminski in 2006 regarding allegations that he had breached a written undertaking given by him, in his capacity as the lawyer for a

vendor of real property, to a notary public who represented the purchaser. As with the current matter, the citation came before the panel as a conditional admission of a disciplinary violation and consent to a specific disciplinary action. Mr. Kaminski admitted that he had committed professional misconduct and consented to disciplinary action consisting of a fine in the amount of $7,500 and costs in the amount of $2,000.

[56] In that case, Mr. Kaminski had given an undertaking to pay the mortgagee of his clients' property the amount outstanding on the trust condition that the mortgagee provide Mr. Kaminski's firm with a discharge of the mortgage in registrable form within a reasonable period of time and to provide to the notary copies of evidence of payment within five business days of closing. Mr. Kaminski did not take appropriate or diligent action to obtain a discharge of the mortgage within a reasonable period of time, and a discharge was not obtained and registered until a year after closing. As well, Mr. Kaminski never provided to the notary the documentation that he had undertaken to provide within five business days of closing.

[57] Mr. Kaminski gave the Law Society his undertaking not to practise law on July 25, 2014. On April 28, 2017, he gave an amended undertaking to only perform paralegal services under the supervision of a practising lawyer approved by the Law Society.

The advantage gained, or to be gained, by the respondent

[58] Mr. Kaminski acknowledges that he gained an advantage by diverting DBM and DKH's funds to his personal use.

Mitigating factors

[59] Mr. Kaminski has acknowledged his professional conduct.

[60] Mr. Kaminski took steps to redress the wrong by offsetting the debt he owed the DKH partnership with the funds that would have been due to Mr. Kaminski for accounts issued before he left the partnership and the value of the corporate record files that remained with the DKH partnership.

[61] Further, although in some instances he improperly took client retainer funds before doing the legal work, he did ultimately perform the legal work. As a result, no client was harmed directly.

[62] At the time of the misappropriations, Mr. Kaminski was under significant financial stress. While that is not a mitigating factor, the financial stress caused anxiety and affected his ability to sleep and his judgment to approach matters rationally.

The possibility of remediating or rehabilitating the respondent

[63] Mr. Kaminski has received treatment for this anxiety stress syndrome and some psychological counselling from a clinical psychologist. Mr. Kaminski deposed that he continues to employ the stress coping mechanisms learned during his counselling.

[64] Mr. Kaminski submitted that he truly and sincerely regretted his past conduct and deposed in his affidavit before us that there will never be any reoccurrence.

The range of sanctions imposed in similar cases

[65] We were referred to three types of similar cases: cases in which the lawyer was suspended; cases in which the lawyer ceased membership and was prohibited from re-applying for admission for a period of time; and cases in which the lawyer was disbarred. In addition, we were referred to a case where the disciplinary action was a fine.

Suspension

[66] In *Law Society of BC v. Reuben*, [1991] LSDD No. 10, the lawyer received a $2,500 cash retainer, which he did not deposit into his trust account. The lawyer refused to provide the client with a receipt and falsely denied to the Law Society that he had received the funds. The lawyer was initially disbarred, but that disciplinary action was overturned by the Benchers on review. On review, the Benchers considered the lawyer's public service record and psychiatric evidence. The lawyer was suspended for 18 months and ordered to continue to receive counselling, submit reports to the Competency Committee, work under the supervision of a mentor for at least six months on resuming practice, and submit to other conditions set by a competency review panel.

[67] In *Law Society of BC v. Ranspot*, [1997] LSDD No. 52, the lawyer, over a 14-month period, billed the Legal Services Society for services that had not been provided. The Legal Services Society was defrauded of over $4,000. The lawyer also inadvertently deposited trust cheques into his general account.

[68] At the time of his misconduct, the lawyer's marriage was failing, he was concerned for the welfare of his children, coping poorly, drinking to excess and suffering from

depression. Based on all of the evidence before the panel, the panel concluded that the lawyer's conduct was "aberrant behaviour brought on by the various pressures and psychological problems which the lawyer was suffering from."

[69] The panel found the likelihood of the lawyer misconducting himself in the future was low and indicated that, if the panel had found otherwise, the lawyer may have been disbarred. The lawyer was suspended for 18 months. In addition, the panel imposed numerous conditions on the lawyer before he could return to practice. These included a requirement that he be examined by a psychiatrist chosen by the Law Society and appear before a board of examiners chosen by the Law Society. After he returned to practice the lawyer was to have monthly meetings for a year with a senior member of the Law Society at which the lawyer's practice and accounting and billing procedures would be reviewed.

[70] In *Frishette*, the lawyer misappropriated approximately $19,085 from her firm. These were either retainers paid for in cash or cheque that the lawyer did not deposit into the firm's trust account, or retainers for clients where the lawyer acted without the knowledge of the firm and contrary to her employment agreement. The lawyer was a junior lawyer with about three years of experience. The lawyer was suspended for 12 months. Before being permitted to practise law after the suspension, the lawyer was required to complete a professional responsibility course given by the Law Society. After the 12-month suspension was completed, the lawyer was to practise for the next 12 months under the supervision of a lawyer approved by the Law Society and under a supervisory plan to be approved by the Law Society. In addition, the lawyer was to complete the practice review program given by the Law Society and complete any recommendation made by the program instructors to the satisfaction of the Law Society.

[71] In *Law Society of Upper Canada v. Wolfe*, 2006 ONLSHP 27, the lawyer misappropriated $47,713.36 from his former law firm partnership. The lawyer did so by quoting fees to clients in one amount, and preparing internal accounts for the firm's purposes in a lesser amount. When the clients paid their account, the lawyer diverted the difference to his company. The lawyer also directed the firm's accounting department to write off account receivables when he had received funds personally that should have gone to the firm. The lawyer had had marital difficulties and the diverted funds were used to pay for private school education for his children. The lawyer's conduct occurred over a 12-month period before being discovered by the firm in August 2003. The lawyer had not practised since the end of August 2003. The lawyer was suspended for 12 months, commencing July 1, 2006.

[72] In *Law Society of BC v. Schauble*, 2009 LSBC 11 and 2009 LSBC 32, the lawyer misappropriated approximately $90,000 from a law firm. The lawyer's action was partly in response to his belief that the lawyer with whom he was in an office sharing arrangement was referring personal injury files to another lawyer, contrary to their agreement. The lawyer was suspended for three months. In reaching its decision that three months was an appropriate penalty, the panel considered the actions of the other lawyer to be a mitigating factor.

Disbarment

[73] In *Law Society of BC v. Eisbrenner*, 2003 LSBC 03, the lawyer diverted fees that should have been paid to his employer. The lawyer was disbarred. In reaching its decision, the panel observed that the lawyer's psychosis, which manifested itself in paranoid delusions and obsessive behaviour, was largely untreated as the lawyer did not use recommended anti-psychotic medication but instead relied on marijuana and alcohol. The lawyer did not appear before the hearing panel at the disciplinary stage of the hearing, and the panel had nothing before it to suggest that the lawyer's condition had improved since the facts and determination portion of the hearing. On the contrary, based upon recent communications by the lawyer to the Law Society, the lawyer appeared to remain delusional and untreated. That being the case, the panel found that suspension and conditions on return to practice was not an option.

[74] In *Law Society of BC v. McGuire*, 2005 LSBC 43, 2006 LSBC 20 and 2007 BCCA 442, the lawyer was found to have misappropriated client monies by, among other things, making withdrawals for fees or disbursements on other files when the client did not have enough funds on deposit and withdrawing funds prior to a bill being prepared. In addition, the lawyer backdated statements of account, inadequately maintained books and records, and failed to deposit trust funds as soon as practicable. At the time of the incident, the lawyer's personal relationship was failing and his dog, which had provided him with emotional support during difficult times, had died leaving the lawyer with a veterinary bill he could not pay. The lawyer was depressed, but had not received medical treatment. The lawyer was disbarred.

[75] In *Law Society of BC v. Hainer*, 2007 LSBC 48, the lawyer misappropriated funds from the firm she where was employed by failing to provide funds she received from clients of the firm. The lawyer was a junior lawyer with about four years of practice experience. When deciding to disbar the lawyer, the panel observed that there was no evidence of medical or contextual mitigating circumstances to explain the misconduct. The lawyer did not appear at the disciplinary phase of the hearing.

Limitations on application for readmission

[76] *Law Society of BC v. Mackay*, Discipline Digest, July 1989, proceeded by way of conditional admission. In that matter there were five instances in 1986 where the lawyer deposited monies (cheques and cash) to his own personal account rather than to the firm's account. The law firm only became aware of the issue when the lawyer repaid the money in the fall of 1987. The lawyer was a third year call when the misappropriations occurred and his judgment was impaired by alcohol and cocaine use. The lawyer ceased to be a member of the Law Society on December 31, 1987. The Discipline Committee required that the lawyer to undertake not to apply for reinstatement as a member of the Law Society until February 1991.

[77] *Law Society of BC v. Lam*, Discipline Digest, November 1990, was also a conditional admission decision. In that matter the lawyer had been in a partnership with two other lawyers. When the partnership dissolved, all accounts receivable on work in progress prior to the dissolution was to be divided among the partners. When the lawyer received payment from clients who had retained him during the partnership, he deposited the funds to his own personal and general bank accounts. The lawyer did not disclose receipt of the funds to his former partners. At the time, the lawyer was under tremendous emotional strain as a result of his workload and the recent breakup of the partnership. The lawyer was permitted to resign from the Law Society on his undertaking not to apply for reinstatement to the Law Society for two years.

[78] In *Law Society of BC v. Wood*, Discipline Digest, November 1990, the Discipline Committee accepted the conditional admission of a lawyer on the lawyer's resignation from the Law Society and undertaking not to apply for reinstatement to the Law Society for two years. In that matter, the lawyer had received a $300 retainer but had failed to deposit the money into the firm's trust account. The lawyer also misled a new lawyer who took over the file and the Law Society as to the status of the retainer.

[79] In *Law Society of BC v. Barber*, Discipline Digest, November–December 2006, the lawyer had misled four clients as to the status of their immigration applications, had misappropriated firm funds for her personal use, and had attempted to mislead the law firm and the Law Society regarding the disposition of the misappropriated funds. At the time of the incident the lawyer had been practising for four years. The lawyer ceased practising law in or about July, 2004. In 2006, the Discipline Committee accepted the lawyer's admission of misconduct and undertaking not to apply for reinstatement until July 2008.

Fine

[80] In *Law Society of BC v. Morrison*, [1997] LSDD No. 193, the lawyer failed to account to his partner on two separate occasions for monies received from a client for work done and failed to record the monies in accordance with the Law Society Rules. The lawyer had been experiencing financial difficulties at the time. The lawyer was intending to reimburse the partnership for the payments. The lawyer was reprimanded and ordered to pay a fine of $7,500.

The need for specific and general deterrence and the need to ensure the public's confidence in the integrity of the profession

[81] We have struggled with the appropriateness of a suspension as a disciplinary sanction in this matter.

[82] As mentioned, misappropriation of funds constitutes serious professional misconduct. It is important that any disciplinary action underscore the seriousness of that misconduct.

[83] Discipline counsel submitted that misappropriation "is perhaps the most serious misconduct a lawyer can commit" and "… absent rare and extraordinary mitigating factors, disbarment is the appropriate disciplinary action for intentional misappropriation of client trust funds."

[84] In her submissions, discipline counsel submitted that disbarment is an extreme remedy and should be ordered in those cases where it is the only means by which the public (including the public interest) can be protected, and referred us to three decisions in support of that proposition: *McGuire* (BCCA), *Law Society of BC v. Basi*, 2007 LSBC 25, and *Adams v. Law Society of Alberta*, 2000 ABCA 240, [2000] 11 WWR 280.

[85] Although the *Basi* and *Adams* cases were not included in the Law Society's Book of Authorities, we have reviewed them as well. In *Basi*, the lawyer had allowed a client company to be struck from the corporate registry and had failed to promptly respond to the client's request for corporate records. The lawyer also failed to respond to numerous communications from the Law Society. By the date of the hearing, the lawyer had resigned from the Law Society. At issue in the *Basi* matter was the lawyer's governability. The panel did not find the lawyer ungovernable but determined that the lawyer should be suspended for 18 months and that, upon an application for reinstatement, the lawyer would be required to provide appropriate medical documentation confirming the his psychological condition was stable.

[86] In *Adams*, the lawyer was retained by the complainant, a 16 year old girl who was in youth detention and her boyfriend, who was also in prison. When the complainant was released on bail, the lawyer persuaded her to have sex with him. The lawyer was disbarred. In upholding the disbarment, the Alberta Court of Appeal stated, at paras. 10 to 11:

> Historians may question the origin and the history of the oft-repeated statements about the honour and integrity of the legal profession, but it cannot be denied that the relationship of solicitor and client is founded on trust. That fundamental trust is precisely why persons can and do confidently bring their most intimate problems and all manner of matters great or small to their lawyers. That is an overarching trust that the profession and each member of the profession accepts. Indeed, it is the very foundation of the profession and governs the relationships and services that are rendered. While it may be difficult to measure with precision the harm that a lawyer's misconduct may have on the reputation of the profession, there can be little doubt that public confidence in the administration of justice and trust in the legal profession will be eroded by disreputable conduct of an individual lawyer.
>
> It is therefore erroneous to suggest that in professional disciplinary matters, the range of sanctions may be compared to penal sentences and to suggest that only the most serious misconduct by the most serious offenders warrants disbarment. Indeed, that proposition has been rejected in criminal cases for the same reasons it should be rejected here. It will always be possible to find someone whose circumstances and conduct are more egregious than the case under consideration. Disbarment is but one disciplinary option available from a range of sanctions and as such, it is not reserved for only the very worst conduct engaged in by the very worst lawyers.

[87] In the hearing on penalty in *McGuire*, 2006 LSBC 20, the panel stated, at paras. 23 to 25:

> We cannot accept the Respondent's argument, for two reasons. First, a restriction on a lawyer's use of his trust account is appropriately used, as it was in this case, as an interim measure pending a full examination of the lawyer's conduct. Once the misappropriation has been proved, however, we cannot see how such a restriction can properly be used as a permanent condition on a lawyer's ability to practise. To put it bluntly, a lawyer

who, in light of his past conduct, cannot be completely trusted with sole control of his trust accounts should not be practising law.

The second reason relates to the protection of the public. We accept that disbarment is a penalty that should only be imposed if there is no other penalty that will effectively protect the public. *Protecting the public, however, is not just a matter of protecting the Respondent's clients in future.* Even if the latter could properly be done by imposing restrictions on the Respondent's use of his trust account, we do not think that such a measure adequately protects the public in the larger sense. Wrongly taking a client's money is the plainest form of betrayal of the client's trust. In our view, the public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, "Don't even think about it." And that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards. A penalty in this case of a fine and a practice restriction is, in our view, wholly inadequate for the protection of the public in this larger sense.

We do not go so far as, on one reading of it, *Bolton v. Law Society*, [1994] 2 All E.R. 486, did. We do not think that, in relation to penalty, maintaining public trust in the profession trumps all other considerations including the personal circumstances of the Respondent. There may be mitigating factors even for the deliberate taking of trust funds. For example, the lawyer's powers of judgment may have been thrown completely off-kilter by illness or by a sudden shock. He or she may have been under emotional pressures that nobody can be expected to resist. However, we think that the Respondent's circumstances in this case, while they certainly elicit compassion, cannot be described as mitigating factors analogous to these. Without in any way minimizing how difficult a time it was for him, the crisis he went through, on the evidence we have, was not such as to impair the Respondent's capacity for moral judgment. Nor did he act under the pressure of a sudden and overwhelming event. He engaged in a series of withdrawals of trust funds, known to be wrongful, extending over many months. Nor can one say for sure that he will never find himself under this kind of emotional and financial pressure again.

[emphasis added]

[88] The reasons for decision in the *McGuire* matter underscore the important role a discipline sanction has on general deterrence. As summarized above, in *McGuire* the lawyer was disbarred.

[89] We think it worth noting that, if a person is disbarred or voluntarily resigns in the face of misconduct, the person is not necessarily prohibited from practising law for all time. The person may, after a period of time, apply for reinstatement. Any such application would require the former lawyer to demonstrate the requisite character and integrity to be entrusted with the privilege to practise law and all of the duties and responsibilities that entails. By proceeding by way of conditional admission, the Law Society and Mr. Kaminski have minimized Mr. Kaminski's opportunity to demonstrate he has rehabilitated his character and integrity. We acknowledge that Mr. Kaminski submitted three letters of reference attesting to his good character and that two of the letters of reference characterized his misconduct in 2013-2014 as a serious lapse in professional judgment that was not in keeping with his character. Two of the letters of reference also comment on Mr. Kaminski's remorse over his actions.

APPROPRIATENESS OF PROPOSED DISCIPLINARY ACTION

[90] As mentioned, our role is to accept or reject the proposed disciplinary action. It is not open to us to substitute another disciplinary consequence or to attach additional conditions.

[91] Ultimately, we have decided that the proposed disciplinary action is within the range of a fair and reasonable disciplinary action.

[92] In this regard, Mr. Kaminski has been out of practice for approximately 45 months. A three-month suspension, to be served after this Panel's decision, will result in an effective suspension of approximately 48 months or four years. This is similar to the length of time lawyers who were permitted to resign were required to undertake not to apply for reinstatement to the Law Society (e.g., *Mackay, Lam, Barber*).

DISCIPLINARY ACTION AND COSTS

[93] We order that Brian Peter Grant Kaminski be suspended for three months and that the suspension begin on May 1, 2018.

[94] We order that Brian Peter Grant Kaminski pay the costs of the hearing in the amount of $2,551 and that such costs are to be paid on or before one year from the date this decision is released.

DISSENTING DECISION OF DONALD SILVERSIDES, QC

[95] I have had the opportunity to read and consider the decision by the majority of the members of this Hearing Panel.

[96] I agree with and adopt the decision by the majority of the Panel for the most part, including their findings regarding additional facts and evidence. I also agree with the majority of the Panel that there is no distinction between a lawyer misappropriating monies from a client and misappropriating monies from other lawyers, such as their partners.

[97] I disagree, however, with the decision of the majority of the Panel to accept the proposed disciplinary action.

[98] Both the Law Society and Mr. Kaminski rely on the decision of the Benchers on review in *Law Society of BC v. Lessing*, 2013 LSBC 29. At para. 44, the Benchers quoted the following passage by the Benchers at para. 14 in *Law Society of BC v. Hordal*, 2004 LSBC 36:

> Similarly, questions of whether particular misconduct should lead to particular penalties can often be easily answered by the Benchers. *Should particular conduct lead to penalty of disbarment versus a penalty of suspension, is a question often faced by Benchers, and again is a question which is relatively susceptible to the test for correctness*. For example, it is the nearly unanimous view of the Benchers, that a misappropriation of client funds, the ultimate breach in trust, should carry the ultimate penalty of disbarment. Should a panel find to the contrary, it would not be surprising for the Benchers to substitute their judgment in seeking to establish a "correct" determination in that matter.
>
> [emphasis added by the Benchers in *Lessing*]

[99] The Law Society also relies on a statement by the Benchers in *Lessing* at para. 57 that there are two factors that will, in most cases, play an important role in determining the appropriate disciplinary action. The first is the protection of the public, including public confidence in the disciplinary process and public confidence in the profession generally, and the second is the rehabilitation of the lawyer.

[100] The panel in *McGuire*, 2006 LSBC 20, stated the following at para. 24:

> … Wrongly taking a client's money is the plainest form of betrayal of the client's trust. In our view, the public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, "Don't even think about it." And that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards. …

[101] After the hearing panel in *McGuire* disbarred the lawyer, he appealed their decision to the British Columbia Court of Appeal. The Court of Appeal upheld the disbarment and quoted, with approval, the following statement by the panel in *McGuire* at para. 29:

> The Respondent is a good man, but at a time of great difficulty in his life he allowed himself to do what a lawyer, regardless of what strains or pressures he is under, must never do. The standard he broke was not one of unattainable perfection, which humans are expected to fall short of from time to time. On the contrary, it is an absolute standard. When it is deliberately broken, as it was here, the seriousness of the misconduct is, except in very unusual circumstances, impossible to mitigate. No case was cited to us in which the deliberate, repeated recourse to trust funds to ease the lawyer's personal cash flow problems was sanctioned with anything less than disbarment.

[102] The Law Society relies on the decision of the Benchers on review in *Law Society of BC v. Sas*, 2017 LSBC 08, aff'd: 2016 BCCA 341. The Benchers on review stated the following in paras. 95 to 97 of *Sas*:

> The hearing panel's review of the previous decisions highlights other decisions in which the protection of the public was cited as a consideration for the assessment of the appropriate discipline in cases of the misappropriation of client's trust fund. Those decisions include *McGuire*, 2006 LSBC 20, *Law Society of BC v. Harder*, 2006 LSBC 48, and *Law Society of BC v. Gellert*, 2014 LSBC 05.
>
> In each of those cases, protecting the public was cited as a factor to justify disbarment of the lawyer.
>
> On our reading of paragraphs 93 to 95 of the Decision (in which the panel refers to the protection of the public four times), there is little doubt that the panel also recognized the importance of the public interest in assessing penalty. However, unlike the circumstances in *McGuire, Harder* and

> *Gellert*, the fact that the mitigating *Ogilvie* factors outweighed the aggravating factors allowed the panel to depart from disbarment as the appropriate penalty for misappropriation of trust funds.

[103] In *Sas*, the lawyer, who had been a sole practitioner, joined a firm of lawyers and needed to deal with small amounts of monies held in trust for clients as retainers where, in most cases, the legal services had been completed and the client had been billed. She misappropriated monies from 23 of these clients by preparing bills that were not sent to them and using monies held in trust for them to pay those bills. The amount involved was less than $2,000 and her actions were motivated by administrative convenience and not monetary enrichment. The hearing panel found her previous character was unblemished and that she was an excellent lawyer with an enviable record both as counsel and with respect to her contributions to the legal profession and society generally. The hearing panel concluded it was unnecessary to take disciplinary action to ensure her remediation or rehabilitation but that it was important that their decision act as a deterrent to lawyers who might be tempted to improperly take monies held in trust for clients for administrative convenience. The lawyer was suspended for a period of four months.

[104] In *Harder*, the lawyer misappropriated an amount of up to $56,625 from approximately 20 clients and used those funds to support the continuation of his practice and to pay his living expenses when his health was significantly deteriorating. Prior to his illness he had been a high profile volunteer in his community, having served as a city councillor, a member of the Human Rights Commission and a trustee and vice-chair of the hospital board. The lawyer was disbarred. The panel in *Harder* stated the following at para. 57:

> In circumstances such as these, it is our opinion that the protection of the public demands that this Respondent be disbarred and this decision is necessary not just because we must ensure that this Respondent is no longer able to practise and that we provide a safeguard to the public by this action, but also we must generally deter any other member of the Law Society who might think that deteriorating health will offer a defence to a misappropriation scheme such that disbarment will not necessarily follow in the result.

[105] In *Gellert*, the lawyer misappropriated approximately $14,500 of monies held in trust for 31 clients over a period of two years. The lawyer was disbarred. At paras. 43 and 44, the panel stated the following:

> Granted, disbarment is the most serious penalty available, and will often have a drastic impact on many aspects of a lawyer's life, including his or her economic well-being, sense of self and reputation in the community.
>
> Yet this sanction is usually imposed for deliberate misappropriation from a client – almost always where the amount is substantial (*Harder*, para. 9; *MacKenzie*, *Lawyers and Ethics: Professional Regulation and Discipline*, loose-leaf (Toronto: Carswell, 1993), p. 26-1) – because in such cases disbarment is usually the only means of fulfilling the goal of protecting the public and preserving public confidence in the legal profession. Deliberate misappropriation of funds is among the very most serious betrayals of a client's trust and constitutes gross dishonesty. Disbarment absolutely ensures no further recurrence of such conduct on the part of the lawyer. It also promotes general deterrence (*McGuire* (BCCA), para. 15; *Goulding*, para. 17; *Harder*, para. 57). And disbarring a lawyer who has deliberately misappropriated client funds is usually the only way to maintain public confidence in the legal profession.

[106] Of the *Ogilvie* factors that are relevant to this case, I believe the most important are the nature and gravity of the conduct and the need to ensure the public's confidence in the integrity of the profession.

[107] For a period of more than 18 months, Mr. Kaminski regularly misappropriated monies from his partners. During this period of time he also took monies that had been paid to his law firm and were held in trust as retainers for clients without the knowledge or consent of those clients and before he had performed the legal services for which those retainers had been paid. By doing so, he misappropriated those monies from his clients. While he later performed the services for which the retainers were paid, that does not change the fact that, at the time he took the monies, he was not entitled to them and by doing so he committed theft.

[108] Mr. Kaminski continued to misappropriate these monies because he needed the money to meet his financial obligations. While he was undoubtedly suffering mental and emotional stress as a result of his financial circumstances, these difficulties do not justify his wrongful acts.

[109] In order to conceal the fact that he was stealing money he fabricated fictitious accounting errors and lied to members of his firm. As well, he unlawfully used his signing authority as a partner to endorse cheques payable to his firm for deposit to an account maintained by his personal law corporation.

[110] It is clear from Mr. Kaminski's interview by the Law Society that, each time he misappropriated monies from his clients or his partners, he knew he was not entitled to those monies and he knew that it was wrong to do so.

[111] Mr. Kaminski only stopped his misappropriations when he was found out by the other lawyers in his firm, and it was only after his misappropriations had been discovered that he reported himself to the Law Society. A self-report after a lawyer has been caught stealing is not a significant mitigating factor.

[112] Knowingly taking monies from someone else without their permission is always wrong. A lawyer who misappropriates funds betrays the fundamental precepts of trust and honesty underlying the legal profession, and such misconduct can never be tolerated or excused.

[113] Protection of the public and its interest, particularly clients of lawyers, is of paramount importance in this case. The public interest requires the Law Society to demonstrate to members of the public that appropriate disciplinary action will be taken when a lawyer misappropriates monies and that such misconduct will not be treated lightly.

[114] Over a period of 18 months Mr. Kaminski misappropriated monies on 24 separate occasions using a similar pattern of deception, and he only stopped doing so when his thefts were discovered by his law firm. The amount taken was over $33,000. This was very serious misconduct, and there were very few mitigating factors, and those were minor in comparison to his wrongful acts. Mr. Kaminski's misconduct requires clear and unequivocal denunciation.

[115] In my view, disciplinary action consisting of a three-month suspension of Mr. Kaminski is woefully inadequate in the circumstances of this matter and is neither appropriate nor acceptable. I would therefore reject the proposed disciplinary action.