2018 LSBC 17
Decision issued: June 25, 2018
Citation issued: May 23, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

PATRICIA EVELYN LEBEDOVICH

RESPONDENT

DECISION OF THE HEARING PANEL

Written materials:	May 7, 2018
Panel:	Craig A.B. Ferris, QC, Chair Nan Bennett, Public representative Gavin Hume, QC, Lawyer
Discipline Counsel:	Alison Kirby
Counsel for the Respondent:	Patrick F. Lewis

BACKGROUND

[1] Pursuant to Rule 4-30, this Hearing Panel was appointed to review conditional admissions of disciplinary violations and to consider the appropriateness of the disciplinary action consented to by Patricia Evelyn Lebedovich (the "Respondent").

Application for hearing in writing

[2] On April 6, 2018, a Tribunal Practice Direction (the "Practice Direction") was issued with respect to applications for a hearing in writing. The Practice Direction allows parties to apply for a hearing in writing with respect to facts and determination or disciplinary action on a citation. The Practice Direction sets out

the requirements for the application, including the written materials to be included so that the application may be considered by a hearing panel.

[3] By way of an application dated April 24, 2018, the Law Society applied for an order that this hearing be conducted in writing in accordance with the Practice Direction. In the application, both parties submitted that the Panel ought to be able to make a determination under section 38(4) of the *Legal Profession Act* and take disciplinary action under section 38(5) without the need for an oral hearing. In particular, counsel for the Respondent consented to this hearing proceeding on written materials by way of an email dated April 13, 2018.

[4] The question that arises is: — In what circumstances ought a panel to grant the application to proceed on the written materials? In our view, in considering this type of application, a panel ought to ask itself whether there is any fact or legal issue arising from the written materials on which the panel requires oral submissions or testimony in order to do justice between the parties.

[5] In reviewing the materials on this application, this Panel determined that there was no factual or legal matter on which the Panel considered it required further submissions or evidence by way of oral hearing in order to do justice between these parties. The Panel considered whether the legal authorities, both with respect to liability and with respect to penalty, raised legal issues for which the Panel required further submissions and whether the facts set out in the materials were sufficiently fulsome that the Panel considered it had sufficient materials to make the determinations sought in the proceeding.

[6] In considering this question, it must be remembered that even with the benefit of an oral hearing, the legal argument and agreed statement of facts may not be as fulsome or complete as the Panel may want. Accordingly, in reviewing an application for determination on written materials, the Panel should not expect perfection and should not deny the application simply because the materials could have been supplemented. Rather, the Panel ought to concern itself with whether the legal argument or statement of facts contains such a material deficiency that it is unable to make a determination. In that circumstance, the Panel would need to dismiss the application and require an oral hearing. Given the fact that the Practice Direction requires the consent of both parties before an application for hearing on written materials will be allowed, as well as the fact that the parties are required to file all proposed exhibits, submissions and authorities, it ought to be rare to dismiss an application to proceed on written materials.

[7] In this proceeding, the Panel did not find a material deficiency in either the legal argument or the statement of facts. Accordingly, the Panel determined it can do justice between the parties by way of a hearing in writing.

Further background

[8] Under Rule 4-30, the Panel's role is limited to either accepting or rejecting the conditional admission of a disciplinary violation and the disciplinary action that the Respondent has consented to.

[9] We were provided with an Agreed Statement of Facts as a part of the Joint Book of Exhibits and a Joint Book of Authorities, along with submissions of the Law Society and the Respondent. We reviewed all of the materials provided in reaching our conclusions.

[10] The submission of the Law Society summarized the admissions of the Respondent. It reads as follows:

> In summary, the Respondent admits that she:
>
> (a) intentionally misappropriated from trust the sum of $50,516.80 received on behalf of the estate she was representing;
>
> (b) created 27 false bills for the estate and delivered them to her bookkeeper for the purpose of reconciling her trust account and concealing a trust shortage totalling $50,516.80; and
>
> (c) misappropriated the sum of $4,312.91 and improperly withdrew the balance of $13,567.50 withdrawn from trust with respect to another estate.

[11] In addition, the Respondent consented to an order that she be disbarred.

[12] The Panel concluded that the conduct admitted by the Respondent constituted professional misconduct and that the appropriate discipline in the circumstances is disbarment.

ISSUES

[13] The Panel, in reaching its conclusion considered two issues:

1. Did the actions of the Respondent constitute professional misconduct?

2. In the circumstances, what is the appropriate discipline?

FACTS

[14] The Respondent admitted that she was served with the citation in accordance with the requirements of Rule 4-19 of the Law Society Rules.

[15] The Agreed Statement of Facts can be summarized as follows:

1. The Respondent was called and admitted as a member of the Law Society of British Columbia in 1982. Commencing in 1997, she practised as a sole practitioner in Nanaimo and ultimately in Parksville.

2. Between 2007 and 2014 the Respondent had a bookkeeper who worked out of her own office. However, from time to time the Respondent issued her own trust cheques and prepared and delivered her own invoices to her clients.

3. In 2012 and 2013 the Respondent primarily practised wills and estates law. Between August 21, 2014 and December 31, 2015 the Respondent was a non-practising member of the Law Society and on January 1, 2016 became a former member of the Law Society.

4. HM, the daughter of EM, was named the executor of her mother's will and the Respondent was named as an alternative executor. The daughter did not probate her mother's will or fully administer her estate. When the daughter died, it was discovered that her mother's house was still registered in her mother's name.

5. DS, who was named as the executor and acted as personal representative of the daughter HM, retained the Respondent to probate the mother EM's will so the house could be sold.

6. Ultimately, the house was sold and the net sale proceeds were received and deposited in the Respondent's trust account.

7. Between March 23, 2012 and September 27 2013 the Respondent prepared 30 invoices with respect to "The estate of EM" and withdrew $68,805.86 from her trust account in purported payment of the invoices. The funds were deposited in her personal account.

8. Only three of the 30 invoices were delivered to her client, DS and were legitimate accounts for services rendered. The balance of the invoices totaling

$50,516.80 were false invoices prepared by the Respondent and given to her bookkeeper so that her trust account would reconcile when the bookkeeper prepared the monthly trust reconciliation. None of the false invoices were delivered to her client DS. The Respondent withdrew $50,516.80 from her trust account when she was not entitled to the funds.

9. Between December 6, 2013 and June 26, 2014 the Respondent prepared five invoices with respect to the Estate of the daughter HM and withdrew $13,567.50 from her trust account depositing the funds in her general account. None of the accounts were delivered to her client DS.

10. In addition to failing to deliver the accounts to her client, the Respondent was not entitled to at least $4,312.91 of the funds she withdrew in purported payment of the five invoices.

11. During the course of the Law Society's investigation, the Respondent prepared amended versions of the five invoices to reflect the work she states she actually did with respect to the estate of HM. The Respondent subsequently admitted that she misrepresented the work performed in order to falsely inflate the amount of the invoices and that she intentionally misappropriated $4,312.91 in trust funds from the HM estate.

12. During the course of the Law Society investigation, the Respondent was interviewed. During the interview the Respondent admitted she was familiar with the trust accounting rules with respect to withdrawal of funds from trust and the requirement to deliver bills to the client prior to withdrawal. She also admitted that she was not truthful during the Law Society investigation.

13. Her explanation was, in effect, that she was under financial distress and "just ended up basically taking money from the trust to live". The financial distress was as a result of ongoing litigation with her husband and $60,000 unpaid back taxes.

14. The Respondent made the following admissions of misconduct:

    (a) The Respondent admits as set out in allegation 1 of the Citation, that between approximately July 2012 and February 2013, in the course of representing the estate of EM, she misappropriated the sum of $50,516.80 received on behalf of the estate by withdrawing the funds from trust when she was not entitled to do so, contrary to Rule 3-56 of the Law Society Rules then in force [now Rule 3-64];

(b) The Respondent admits as set out in allegation 2 of the Citation, that between July 2012 and February 2013, in the course of representing the estate of EM, she created 27 false bills for the estate and delivered them to her bookkeeper for the purposes of reconciling her trust account and concealing a trust shortage totaling $50,516.80;

(c) The Respondent admits as set out in allegation 3 of the Citation, that between December 2013 and June 2014, in the course of representing the estate of HM, she misappropriated the sum of $4,312.91 and improperly withdrew the balance of the $13,567.50 from trust with respect to the estate by:

(i) withdrawing the funds from trust and depositing the money into her general account when she was not entitled to the funds, contrary to Rule 3-56 of the Law Society Rules then in force (now Rule 3-64);

(ii) preparing invoices dated January 24, 2014 and January 30, 2014 which were false and in which she overcharged for the services rendered by $4,312.91;

(iii) withdrawing funds from trust in payment of her fees and disbursements prior to delivering a bill, contrary to Rule 3-57(2) of the Law Society Rules then in force (now Rule 3-65(2)).

(d) The Respondent admits that her conduct in doing so constitutes professional misconduct.

ANALYSIS AND LEGAL REASONING

[16] The first issue to be determined is whether or not the Respondent's conduct is professional misconduct. While professional misconduct is not a defined term in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook* or the *Code of Professional Conduct*, since the *Law Society of BC v. Martin*, 2005 LSBC 16 decision the test has been:

> … whether the facts as made out disclose a marked departure from the conduct the Law Society expects of its members; if so, it is professional misconduct. (para. 171)

[17] In the *Martin* decision, the panel at paragraphs 151 to 154 concluded that a finding of professional misconduct did not require disgraceful or dishonourable conduct. Instead it concluded:

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

The *Martin* test has been accepted by many subsequent panels and was again affirmed by a review Panel in *Re: Lawyer 12*, 2011 LSBC 35.

[18] We have no difficulty in concluding that the actions of the Respondent constituted professional misconduct as that term has been described. The Respondent intentionally misappropriated $50, 516.80 from the estate of EM, created false bills for the purpose of reconciling her trust account with respect to that misappropriation. She then misappropriated the further sum of $4, 312.91 from the estate of HM. In addition, she withdrew additional funds from her trust account with respect to that estate when she was not entitled to, prepared false invoices overcharging for her services and withdrew funds from trust in payment of her fees and disbursements prior to delivering a bill to her client, contrary to the Law Society Rules. This conduct is a marked departure from the conduct the Law Society expects of its members.

[19] As a result, we accept the Respondent's admissions of professional misconduct.

[20] The second issue to be determined is the appropriateness of the discipline recommend by the Discipline Committee and consented to by the Respondent. The Discipline Committee recommends disbarment and the Respondent consents to an order that she be disbarred. For the reasons that follow, we have no difficulty in concluding that we should accept the recommendation.

[21] The Law Society appropriately submits that this Panel should act with deference with respect to the Discipline Committee's recommendation. We agree with that submission but find it unnecessary in the circumstances of this case to defer to the Discipline Committee's recommendation. In our view, the actions of the Respondent are so egregious that it is unnecessary for us to defer to the recommendation. The actions of the Respondent are so outside the acceptable behaviour expected of a lawyer in British Columbia that we have no difficulty in concluding that she should be disbarred.

[22] We recognize that disbarment is the ultimate sanction that the Law Society can impose and normally should only be used when there is no other means to protect the public. However, as was stated by the hearing panel in *Law Society of BC v. McGuire*, 2006 LSBC 20 at paragraph 24:

> ... 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 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.

In *McGuire v. Law Society of BC*, 2007 BCCA 442, the court upheld the decision of the hearing panel including at paragraph 14 concluding that "general deterrence can be an important means of protecting the public."

[23] A number of decisions discuss the factors that should be considered in determining the appropriate disciplinary action. In *Law Society of BC v. Ogilvie*, 1999 LSBC 17 the factors most frequently reviewed are listed. In *Law Society of BC v. Faminoff*, 2017 LSBC 04, the reviewing panel confirmed that the appropriate approach to determine an appropriate disciplinary sanction was to apply the relevant factors to the misconduct and the respondent.

[24] The first relevant factor from the *Ogilvie* list is the nature and gravity of the misconduct. In our view misappropriation of a client's funds, particularly over a period of time, is the most serious misconduct a lawyer can commit. Other panels have reached the same conclusion: *McGuire, Ogilvie, Law Society of BC v. Tak*, 2014 LSBC 57, *Law Society of BC v. Gellert*, 2014 LSBC 05, *Law Society of BC v. Briner*, 2015 LSBC 53.

[25] While some panels have indicated that there may be rare and extraordinary mitigating circumstances where disbarment may not be appropriate, this is not such a case. Many can face financial distress in their lives. However, that does not justify the misappropriation of client's funds.

[26] The second relevant *Ogilvie* factor is the need to ensure the public's confidence in the integrity of the profession. The legal profession is self-regulated by the Law Society. The public must be satisfied that the Law Society has the public interest in mind as it regulates. The sanction imposed must reflect the seriousness with which the Law Society, and through it the legal profession, views the intentional misappropriation of trust funds. As the hearing panel in *Tak* stated at paragraph 38:

> There should be no doubt that a strong message of general deterrence should be sent to other members of the Law Society in respect of misappropriating funds, and it should be unequivocal that such misconduct will almost certainly result in the revocation of the right to practise law.

The foregoing supports the Respondent's proposed disbarment.

[27] The third factor from the *Ogilvie* list that is usually examined in determining the appropriateness of the disciplinary penalty is the professional conduct record of the member. In 2009 the Respondent was subject to a conduct review with respect to a potential conflict of interest arising from acting as the lawyer for a company in which she was also a director and shareholder. In this instance, the Respondent's record is dated and not directly relevant to the matter before us and as a result is not something we have relied on for our decision.

[28] The fourth relevant *Ogilvie* factor is the range of sanctions imposed in similar cases. Disbarment is the usual sanction imposed when a lawyer has deliberately misappropriated a client's funds particularly when it is a significant amount and done over a period of time*: Gellert, Tak, Ogilvie, Law Society of BC v. Harder*, 2006 LSBC 48, *Law Society of BC v. Ali*, 2007 LSBC 18 and 2007 LSBC 57, and *Briner*.

[29] The last relevant *Ogilvie* factor is to consider any mitigating factors. The Respondent has apologized for her misconduct and, while not seeking to justify it, has expressed her remorse and provided an explanation. She was subject to what she described as extreme financial and mental distress caused by a number of factors including some difficult personal litigation and debt to the Canada Revenue Agency beyond her ability to pay. We accept that the Respondent was under considerable distress. However, in our view and as we have indicated, this does not justify the misappropriation of client funds.

RESULT

[30] In conclusion, we accept the admissions of the Respondent that her conduct constituted professional misconduct and that the appropriate discipline in the circumstances is disbarment. We order that the Respondent be disbarred under Rule 38 (5)(e) of the *Legal Profession Act*.

NON-DISCLOSURE ORDER

[31] The Law Society applies for an order under Rule 5-8(2)(a) that the portions of the exhibits that contain confidential client information or privileged information not be disclosed to members of the public. We order that, if any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, the client names, identifying information and any information protected by solicitor–client privilege be redacted from the exhibit before it is disclosed to that person.

[32] The Law Society does not seek costs of this hearing, and so we do not make any order as to costs.