2018 LSBC 25
Decision issued: September 21, 2018
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THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GREGORY NEIL HARNEY

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing:	July 17, 2018
Panel:	Craig Ferris, QC, Lawyer, Chair Laura Nashman, Public Representative Sandra Weafer, Lawyer
Discipline Counsel:	J. Kenneth McEwan, QC
Counsel for the Respondent:	Henry C. Wood, QC

[1] Mr. Harney has been cited with three allegations: that he improperly disbursed funds to his client in breach of a trust condition; that he represented to an arbitrator, opposing party or opposing counsel that funds were held in trust when, in fact, he had already disbursed the funds; and, alternatively, that he failed to disclose that he had already disbursed the funds. Mr. Harney admits the first and third of these allegations and admits that this constitutes professional misconduct.

BACKGROUND FACTS

[2] Mr. Harney was called to the bar in 1983 and practises in commercial and civil litigation. He currently practises with Gregory N. Harney Law Corporation in Victoria, BC, which is affiliated with the law firm Shields Harney.

[3] Mr. Harney was representing CS, a stockbroker, who was involved in an employment dispute with W Inc., her former employer. Prior to Mr. Harney representing CS, she had entered into a settlement agreement with W Inc. The settlement agreement provided that the sum of $1,000,000 was to be paid to CS by W Inc. in three equal instalments – one instalment on closing (June 2009), one on December 31, 2009 and one on June 30, 2010.

[4] There was provision in the settlement agreement that, if there were claims against W Inc. arising out of the employment of CS, then the instalments would be made to counsel for CS, to be held in trust until such time as the claims were resolved. The first instalment was paid to CS directly without issue. The second instalment, pursuant to the settlement agreement, was paid to the offices of CS's then counsel, McCarthy Tétreault, in trust. In 2010, CS terminated her retainer with McCarthy Tétreault and retained Mr. Harney in relation to all matters related to her employment with W Inc.

[5] The June 2010 instalment, pursuant to the settlement agreement, was paid to Mr. Harney subject to the trust condition that the funds "not be disbursed in whole or in part to anyone, including [CS], until all of the claims and defence costs have been adjudicated, settled or dealt with." Mr. Harney confirmed that he understood these terms, and on June 20, 2010 the sum of $333,333.33 was paid to the trust account of Shields Harney.

[6] As CS and W Inc. were not able to agree on whether and to what extent the funds could be paid out, the matter went to arbitration. Mr. Harney represented CS in the arbitration. In September 2010 the arbitrator issued a written decision confirming that the claims relied on by W Inc. were, in fact, "claims" under the agreement. The arbitration continued on November 12, 2010 to determine what amount could be withheld from CS by W Inc. pursuant to their earlier Settlement Agreement.

[7] The matter did not conclude that day. On the morning of November 13, 2010 the parties elected to try and negotiate a resolution with the assistance of the arbitrator. The parties ultimately agreed on a resolution. The parties met together with the arbitrator to confirm their understanding of the settlement. Mr. Harney did not take notes of the settlement on the basis that the arbitrator had been asked to do so.

[8] The agreement was that the funds held back from the settlement between CS and W Inc. were to be transferred to an unregistered brokerage account in the name of CS at a firm acceptable to both parties. The specifics of the implementation of the settlement became a matter of dispute later on.

[9] On November 13, 2010, after the agreement was reached but before any paperwork had been finalized, or even drafted, Mr. Harney sent CS an email indicating that "I will have the cheque ready Monday at 10:00 … I am happy to have worked with you to solve the problem of the return of the money."

[10] On November 15, 2010, Mr. Harney sent CS two cheques payable to CS personally equalling the amount held in trust by Mr. Harney. No transmittal letter was sent with the cheques.

[11] On November 16, 2010 counsel for W Inc. sent Mr. Harney an email outlining the terms of the agreement as he saw them. Mr. Harney responded that the email "was close, but not quite the agreement." Mr. Harney responded that "I agree that the arbitration will be adjourned and the holdback monies moved to a non-registered cash brokerage account acceptable to both parties acting reasonably." He further set out his disagreement with specific terms as to whether there would be security on the brokerage account, whether CS would be entitled to remove funds in excess of the holdback monies from the brokerage account, and whether monthly statements for the brokerage account had to be provided and to whom. Mr. Harney did agree however that, "apart from the pledge and security issues, you have captured the agreement." Mr. Harney did not disclose to counsel for W Inc. that he had already disbursed the monies to CS personally by this point.

[12] On November 28, 2010, after following up with counsel for W Inc. seeking confirmation concerning the exact terms of the settlement, Mr. Harney wrote to CS saying, in part, "I need to know the particulars of which account you have invested the funds, when you have a chance." CS subsequently confirmed that she had deposited the funds through an account at the brokerage firm where she then worked.

[13] By December 3, 2010, as there had been no confirmation as to the exact terms of the settlement, Mr. Harney wrote to the arbitrator and counsel for W Inc. with a draft arbitral award. The draft award prepared by Mr. Harney stated, in part:

> 2. The holdback monies in the trust accounts of Shields Harney and McCarthy Tetrault (the "Holdback Funds") will be moved by arbitral order from each trust account to an unregistered cash brokerage account (the "Brokerage |Account") in the name of [CS] at a firm acceptable to both parties acting reasonably.

[14] Further correspondence took place between Mr. Harney and counsel for W Inc. over the details of the settlement, including the extent and form of security. As

they could not agree, the matter went back to the arbitrator who, on January 18, 2011, resolved those issues contrary to Mr. Harney's position.

[15] Between January and June 2011 counsel for W Inc. and Mr. Harney exchanged email correspondence, including draft orders to move the holdback monies out of trust and into the brokerage account.

[16] At no time between November 2010 and June 2011 in the course of providing draft settlement documents, in the course of having the arbitrator resolve outstanding issues, or in the course of drafting orders to implement the settlement, did Mr. Harney tell either the arbitrator or counsel for W Inc. that he no longer held the funds in his trust account.

[17] It was not until October 2012 when the successor company of W Inc. approached Mr. Harney asking for a current statement of account for the trust monies that Mr. Harney admitted that the monies had not been in his trust account since November 15, 2010.

DETERMINATION

[18] Mr. Harney has admitted that his conduct in disbursing the monies to his client contrary to the trust condition on those monies constitutes professional misconduct. He further admits that he failed to disclose to the arbitrator or to counsel for W Inc. that he had already disbursed the funds when he knew that that information was material, and that this constitutes professional misconduct.

[19] As Mr. Harney set out in his written statement to the Hearing Panel, "I admit to professional misconduct in releasing the funds and not being appropriately forthright about that with opposing counsel and the arbitrator."

[20] The Panel finds that this conduct does amount to professional misconduct. Mr. Harney was on an undertaking not to release the funds until all matters between his client and her former employer had been settled or dealt with. While he may have regarded the results of the arbitration as "settling" all matters between CS and W Inc., clearly this was not the case. Despite months of "to and fro", as Mr. Harney calls it, no formal agreement was reached concerning the specific terms by which the monies could be released to CS. And, despite months of negotiation and a separate application to the arbitrator, at no time before October 2012 did Mr. Harney admit that the monies were no longer in his trust account. Further, Mr. Harney drafted documents and provided them to counsel for W Inc. implying that the monies were still in his account.

[21] This is not a case where there are losses associated with the failure to abide by the trust condition. CS invested the monies in a brokerage account and no loss was suffered because of the breach of undertaking. Mr. Harney did not receive a benefit from taking the monies out of trust. However, the fact that no loss was suffered and that Mr. Harney did not personally benefit from his conduct does not change the fact, nor Mr. Harney's admission, that his actions constitute professional misconduct.

DISCIPLINE ACTION

[22] Mr. Harney and the Law Society have proposed a 30-day suspension. The Panel has reviewed the relevant jurisprudence and has determined that a 30-day suspension is warranted. In so determining, we have taken into account the relevant factors: the nature and gravity and consequences of the conduct; the character and professional conduct record of the Respondent; the acknowledgement of misconduct; and public confidence in the legal profession. (*Law Society of BC v. Dent*, 2016 LSBC 05)

Nature, gravity and consequences

[23] In this case, there are two elements to the misconduct, each of which is serious in its own right. First, there is the disbursement of the monies to Mr. Harney's client in breach of the trust condition. Second, there is the failure to apprise W Inc.'s counsel and the arbitrator that the monies were no longer in trust. Each element impacts negatively on the ability of opposing counsel (or the arbitrator) to rely on the word of counsel. This impacts not only on the practice of the profession but also on the integrity of the profession as a whole. As the panel held in *Law Society of BC v. Nejat*, 2014 LSBC 51 at para. 37:

> … A legal system in which the courts and other actors cannot trust a lawyer to be accurate in his or her representations cannot hope to achieve justice or maintain the respect of the public.

Character and professional conduct record

[24] The Respondent has a lengthy practice history and by all accounts a very good reputation within the bar. He has volunteered with CBA, for CLE and with the Inns of Court. He has two unrelated conduct reviews much earlier in his career. On the one hand, it is a mitigating factor that he has no related professional conduct record. On the other hand, as an experienced commercial litigator, he should have

understood the significance of the trust condition put on him and of the significance of his duty of candour.

[25] The Respondent has admitted the professional misconduct and consented to the proposed disciplinary action. Before the Hearing Panel, Mr. Harney raised the fact that, in June 2011, he drafted a letter disclosing that the funds were no longer in trust and had been disbursed. He was not able to obtain his client's instructions to forward this letter to the arbitrator or counsel for W Inc. Counsel for Mr. Harney indicated that this letter is a mitigating factor as it shows that Mr. Harney knew that disclosure should occur. The Panel accepts that this is one view of that letter (which was not entered into evidence). However, equally it shows that Mr. Harney was aware of the significance of the non-disclosure and yet did nothing from June 2011 to October 2012 to admit to or attempt to rectify his mistake. In the circumstances, we do not see the June letter as either mitigating or aggravating the appropriate penalty in this case.

Public confidence in the profession

[26] It is imperative that the public have confidence in the profession and in the integrity of those in the profession. It is imperative as well that other lawyers, arbitrators and the courts can trust both the undertakings and the representations of members of the bar. Finally, it is also equally important, if not more so, that the public has confidence in the ability of the profession to govern, and where appropriate, discipline its members. As the hearing panel stated in *Law Society of BC v. Heringa*, 2003 LSBC 10 (cited with approval 2004 BCCA 97):

> [37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
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> [38] The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

FINDING ON DISCIPLINE ACTION

[27] Given the factors set out above, it is important that such significant breaches of undertakings or trust conditions be given suspensions rather than fines. We agree with the panel in *Law Society of BC v. Hill*, 2011 LSBC 16, that there is a risk that imposing a fine may be construed as a mere cost of doing business and would not sufficiently reflect on the importance of undertakings to the practice of law.

[28] In addition to the breach of trust condition, in this case we also have the failure to disclose the disbursement of the trust funds. The cases also point to a range of penalties of suspensions between 30 to 90 days (*Law Society of BC v. Chiang*, 2013 LSBC 28, affirmed on review). In all the facts of this case, including Mr. Harney's admissions and cooperation with the Law Society, we consider the 30-day suspension sought by the Law Society and agreed to by Mr. Harney to be an appropriate penalty.

[29] There was some discussion at the hearing concerning the timing of the suspension. The Panel orders that the suspension is to commence on October 1, 2018, or another date mutually agreed upon between the Law Society and Mr. Harney, provided the suspension commences no later than November 1, 2018.

[30] The Law Society is entitled to its costs. If the amount of those costs cannot be agreed upon, the parties may provide written submissions to the Panel on or before November 1, 2018.