

2022 LSBC 32  
Hearing File No.: HE20210027  
Decision Issued: September 15, 2022  
Citation Issued: July 23, 2021  
Citation Amended: February 4, 2022  
Citation Further Amended: June 13, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL  
HEARING DIVISION

BETWEEN:

**THE LAW SOCIETY OF BRITISH COLUMBIA**

AND:

**GREGG ANTHONY ALFONSO**

RESPONDENT

**DECISION OF THE HEARING PANEL**

Hearing date: June 27, 2022

Panel: Jacqueline G. McQueen, KC, Chair  
Nicole M. Byres, KC, Lawyer  
Kris Gustavson, Public representative

Discipline Counsel: Ilana Teicher  
Counsel for the Respondent: Robert W. Cooper, KC

Written reasons of the Panel by: Jacqueline G. McQueen, KC

## BACKGROUND AND OVERVIEW

[1] The citation in this matter was authorized by the Discipline Committee on July 8, 2021, issued on July 23, 2021, subsequently amended on February 4, 2022, and further amended on June 13, 2022 (the “Citation”).

[2] Pursuant to the Citation, the allegations against Gregg Anthony Alfonso (the “Respondent”) are as follows:

- (a) On or about September 30, 2016, the Respondent accepted a gift of \$30,000 from his client MB, when his client had not received independent legal advice, contrary to rule 3.4-39 of the *Code of Professional Conduct for British Columbia* (the “BC Code”).

(“Allegation 1”)

- (b) Between approximately September 2016 to September 2018, in relation to his client MB, the Respondent misused his trust account by doing one or more of the following:

- (i) failing to withdraw as soon as practicable \$30,000 belonging to him or his law firm from his trust account, contrary to Rules 3-58(4) and 3-60(5) of the Law Society Rules (the “Rules”); and
- (ii) using his firm’s trust account to disburse a total of \$30,000 to cover his personal expenses in circumstances where he had not provided substantial or any legal services.

(“Allegation 2”)

- (c) Between approximately December 2017 and February 2019, in relation to his clients DM and WM, the Respondent misused his trust account by doing one or more of the following:

- (i) failing to withdraw as soon as practicable \$5,197.50 belonging to him or his law firm from his trust account, contrary to Rules 3-58(4) and 3-60(5) of the Rules; and
- (ii) using his firm’s trust account to disburse a total of \$5,197.50 to cover his personal expenses in circumstances where he had not provided substantial or any legal services.

(“Allegation 3”)

- (d) In or about June 2019, in relation to his client RK, the Respondent misused his trust account by doing one or both of the following:
- (i) failing to withdraw as soon as practicable \$30,000 belonging to him or his law firm from his trust account, contrary to Rules 3-58(4) and 3-60(5) of the Rules; and
  - (ii) using his firm's trust account to disburse a total of \$30,000 to cover his personal expenses in circumstances where he had not provided substantial or any legal services.
- ("Allegation 4")
- (e) In or about June 2019, the Respondent accepted a gift of \$30,000 from his client RK, when his client had not received independent legal advice, contrary to rule 3.4-39 of the *BC Code*.
- ("Allegation 5")
- (f) Between approximately March 2018 and December 2019, in relation to his client W Ltd., the Respondent misused his trust account by doing one or more of the following:
- (i) failing to withdraw as soon as practicable some or all of \$450,000 belonging partly to W Ltd. and partly to him or his law firm from his trust account, contrary to one or both of Rules 3-58(4) and 3-60(5) of the Rules;
  - (ii) maintaining more than \$300 of his own funds in his trust account, contrary to Rule 3-60(5) of the Rules; and
  - (iii) using his firm's trust account to disburse some or all of \$164,988 of the \$450,000 to cover his personal expenses in circumstances where he had not provided substantial or any legal services.
- ("Allegation 6")
- (g) Between approximately May 2019 and June 2019, the Respondent acted in a conflict of interest when he prepared a promissory note regarding a loan in the amount of \$10,000 from his client RK to his client BH, contrary to one or more of rules 3.4-1, 3.4-2 and 3.4-26.1 of the *BC Code*.

(“Allegation 7”)

- (h) In approximately October 2018, while acting for his clients JR and SB in relation to a real estate matter, the Respondent failed to properly obtain the information required to verify the identity of his clients, contrary to one or both of Rules 3-104 and 3-105 of the Rules.

(“Allegation 8”)

- [3] The Law Society did not proceed with sub-allegation (f)(ii) of Allegation 6 described above at paragraph 2.
- [4] The Citation alleges that the conduct described constitutes professional misconduct or a breach of the *Legal Profession Act*, SBC 1998 c. 9 (the “*Act*”) or the Rules, pursuant to s. 38(4) of the *Act*.
- [5] The Respondent admits proper service of the Citation through his counsel and waives the requirements of Rule 4-19.
- [6] The Respondent provided an admission letter dated June 22, 2022. The Respondent and the Law Society entered an Agreed Statement of Facts (the “ASF”), also dated June 22, 2022, where the Respondent admits to the underlying facts of the misconduct, and that his actions constitute professional misconduct pursuant to s. 38(4) of the *Act*.
- [7] The Respondent and the Law Society made a joint submission (the “Joint Submission”) to the Panel with respect to the Respondent’s admission of professional misconduct and proposed disciplinary action.
- [8] For the reasons that follow, the Panel, after careful consideration of the Joint Submission, accepts the Respondent’s admission of professional misconduct and agrees that the proposed disciplinary action in the Joint Submission is appropriate. The Panel also orders that the Respondent pay to the Law Society costs in the amount of \$3,500, payable within 60 days of this Panel’s decision.

## ISSUES

- [9] The Panel must determine:
- (a) If the conduct admitted by the Respondent amounts to professional misconduct (“Issue 1”); and

- (b) If so, whether to impose the disciplinary action proposed in the Joint Submission (“Issue 2”).

## **FACTS**

### **Agreed Statement of Facts**

[10] The following factual narrative is a summary outline of the ASF.

### **Respondent**

- [11] The Respondent has been a practising member of the Law Society since November 15, 1991, and has engaged in solo practice since June 2001.
- [12] The conduct set out in the Citation was identified during a routine compliance audit by the Law Society’s Trust Assurance Department in October 2019. Following additional investigation, the Citation was issued.

### **Allegations 1 and 2**

- [13] Allegations 1 and 2 each relate to client MB.
- [14] The Respondent acted for MB on a conveyance in September 2016. MB authorized and directed that \$30,000 from the proceeds of sale be gifted to the Respondent.
- [15] The Respondent accepted the gift. He did not ask whether MB had received independent legal advice, nor did he recommend that MB receive independent legal advice, before accepting the gift.
- [16] After accepting the \$30,000 gift, the Respondent directed payments for his personal expenses directly from trust between November 2016 and September 2018. Consequently, the Respondent continued to hold the funds in trust for a two-year period.

### **Allegation 3**

- [17] The Respondent acted for DM and WM in 2017 on a residential property transaction.
- [18] The Respondent received a commission on the transaction. The Respondent held these commission funds in trust for approximately 14 months, and directed

payments for his personal expenses directly from these funds, while held in trust.

#### **Allegations 4 and 5**

- [19] The Respondent acted for RK in several litigation matters under one file number. RK was a personal friend of the Respondent, and also acted as the Respondent's firm's accountant.
- [20] The Respondent received \$40,000 from RK in May 2018. These funds were deposited to trust and were held in trust through June 2019.
- [21] The Respondent did not bill, nor collect any legal fees, for litigation matters under the one file number, and wrote off approximately \$67,000 in fees and \$15 in disbursements on May 6, 2019 and June 11, 2019 respectively.
- [22] RK authorized and directed that the Respondent receive \$30,000 from the funds in trust as a gift.
- [23] The Respondent accepted the gift. He did not ask whether RK had received independent legal advice, nor did he recommend that RK receive independent legal advice, before accepting the gift.
- [24] The Respondent directed that the gifted amount be disbursed to pay his personal credit card.

#### **Allegation 6**

- [25] The Respondent incorporated W Ltd. in 2002 and was, at all material times, W Ltd.'s sole voting shareholder. W Ltd. is an investment and holding company.
- [26] In 2011, W Ltd. acquired shares in two companies co-founded by the Respondent. In 2018, W Ltd. entered into an agreement to sell back the shares of the two companies for a purchase price of \$470,000.
- [27] Pursuant to the agreement, in March and April 2018, the Respondent received \$450,000 sale proceeds in trust. Between March 2018 and December 2019, the Respondent directed payments for his personal expenses directly from trust. Consequently, all or part of the \$450,000 sale proceeds remained in trust through to December 2019.

### **Allegation 7**

- [28] On June 8, 2019, the Respondent acted for RK and prepared a promissory note relating to a \$10,000 loan advanced by RK to BH, who was also the Respondent's client.
- [29] On June 10, 2019, the Respondent transferred \$10,000 held in trust for RK to BH's client file to complete the loan transaction.
- [30] The Respondent acted for BH in a property purchase in July 2019.
- [31] Despite acting for both parties to the loan, the Respondent did not ask either RK or BH if they had obtained independent legal advice with respect to the loan, nor did he recommend that either RK or BH obtain independent legal advice.

### **Allegation 8**

- [32] The Respondent acted for JR and SB in October and November 2018 on a property transaction. Neither JR nor SB was resident in Canada at the material time, and the Respondent did not meet either JR or SB in person. The Respondent's legal assistant met JR and SB at a time when the Respondent was absent; however, identification was not viewed nor copied to the file.
- [33] JR did provide electronic copies of JR's and SB's passports to the Respondent; however, these copies were not attested to and verification rules were not followed.

## **ANALYSIS**

### **Rule 5-6.5 proposal**

- [34] Rule 5-6.5 provides for the Law Society and a respondent to make a joint proposal to a specified disciplinary action.
- [35] Rule 5-6.5 provides:

**5-6.5** (1) The parties may jointly submit to the hearing panel an agreed statement of facts and the respondent's admission of a discipline violation and consent to a specified disciplinary action.

(2) If the panel accepts the agreed statement of facts and the respondent's admission of a discipline violation

(a) the admission forms part of the respondent's professional conduct record,

(b) the panel must find that the respondent has committed the discipline violation and impose a disciplinary sanction, and

(c) the Executive Director must notify the respondent and the complainant of the disposition.

(3) The panel must not impose disciplinary action under subrule (2) (b) that is different from the specified disciplinary action consented to by the respondent unless

(a) each party has been given the opportunity to make submissions respecting the disciplinary action to be substituted, and

(b) imposing the specified disciplinary action consented to by the respondent would be contrary to the public interest in the administration of justice.

(4) An admission of conduct tendered in good faith by a lawyer during negotiation that does not result in a joint submission under subrule (1) is not admissible in a hearing of the citation.

[36] In his admission letter dated June 22, 2022, and in the ASF, the Respondent admits to:

- (a) accepting gifts from clients who had not had the benefit of independent legal advice;
- (b) misuse of his trust account;
- (c) acting in a conflict of interest; and
- (d) failing to comply with client identification and verification rules.

[37] The Respondent further admits that his conduct constitutes professional misconduct pursuant to s. 38(4) of the *Act*.

**The *Anthony-Cook* test**

[38] When presented with a joint submission and consent to a specified disciplinary action, a panel is required to accept those terms unless, in accordance with the

decision of the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43 (at para. 32), the proposal would “bring the administration of justice into disrepute or otherwise be contrary to the public interest.” This public interest test is encapsulated by Rule 5-6.5(3)(b).

- [39] The *Anthony-Cook* test has application to regulatory bodies, including Canadian Law Societies.<sup>1</sup>
- [40] This Panel must therefore consider and determine whether the Joint Submission and consent to a specified disciplinary action is,

... not so unhinged from the circumstances of the discipline violation and the respondent that its acceptance would lead reasonable persons aware of all the circumstances, including the importance of providing certainty in resolution discussions, to believe that the proper functioning of the discipline system had broken down.<sup>2</sup>

- [41] If the Joint Submission and consent to a specified disciplinary action does not fall into the exception articulated by the *Anthony-Cook* test, the proposal should be accepted.

## **Issue 1: Discipline violation**

### **Onus and burden of proof**

- [42] To establish professional misconduct, the Law Society must prove the necessary facts, on a balance of probabilities, by leading sufficiently clear, convincing and cogent evidence.<sup>3</sup>

### **Test for professional misconduct**

- [43] The test for professional misconduct is clearly articulated in *Law Society of BC v. Martin* and requires a finding that the impugned conduct constitutes a “marked departure” from that conduct generally expected of Law Society members.<sup>4</sup> Such conduct need not be disgraceful or dishonourable to qualify as a “marked departure”.

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<sup>1</sup> *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303 (at para. 14); *Law Society of Upper Canada v. Archambault*, 2017 ONLSTH 86 (at paras. 15 and 16); *Law Society of BC v. Clarke*, 2021 LSBC 39; *Law Society of BC v. Lang*, 2022 LSBC 04

<sup>2</sup> *Clarke* (at para. 79)

<sup>3</sup> *Foo v. Law Society of British Columbia*, 2017 BCCA 151 (at para. 67)

<sup>4</sup> 2005 LSBC 16 (at para. 171)

[44] *Martin* remains the leading case on the test for determining professional misconduct, having been broadly adopted, and requires an objective analysis of the conduct in question.<sup>5</sup>

### **Application of legal tests**

[45] In his admission dated June 22, 2022, and in the ASF, the Respondent admits the conduct described in the Citation and that this conduct constitutes professional misconduct.

[46] The Panel has determined that the Respondent's conduct constitutes a marked departure from that conduct the Law Society expects of lawyers, and consequently, is professional misconduct. The Panel accepts the Respondent's admission with respect to each of the allegations, as follows.

### **Allegations 1 and 2: Gift of \$30,000 and misuse of trust account**

[47] Rule 3.4-39 of the *BC Code* is applicable to gifts received from clients and provides that a lawyer must not accept a gift that is more than nominal unless the client has received independent legal advice.

[48] The Panel considers that it is self-evident that a gift of \$30,000 cannot be characterized as "nominal". The rule requires that a lawyer take pro-active steps to both inquire and encourage the client to obtain independent legal advice before making a gift of this magnitude. The Respondent failed to do so.

[49] Rules 3-58(4) and 3-60(5) establish trust accounting practices, as follows:

**3-58** (4) 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.

**3-60** (5) A lawyer may maintain in a pooled trust account up to \$300 of the lawyer's own funds.

[50] The gift proceeds of \$30,000 were held by the Respondent in trust for two years, and then disbursed directly from trust to meet his personal expenses. The Respondent's treatment of these funds ran afoul of both Rules 3-58(4) and 3-60(5).

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<sup>5</sup> *Re: Lawyer 12*, 2011 LSBC 35; *Law Society of BC v. Sangha*, 2020 LSBC 03 (at para. 67)

**Allegation 3: Misuse of trust account**

[51] Consistent with Allegation 2, the commission payable to the Respondent on the sale transaction remained in trust for approximately 14 months, and funds were then disbursed directly from trust to meet his personal expenses. The Respondent's treatment of these funds ran afoul of both Rules 3-58(4) and 3-60(5).

**Allegations 4 and 5: Misuse of trust account and gift of \$30,000**

[52] Consistent with our findings relating to Allegation 1, the Panel considers that it is self-evident that a gift of \$30,000 cannot be characterized as "nominal" (Allegation 5). The rule requires that the Respondent take pro-active steps to both inquire and encourage the client to obtain independent legal advice before making a gift of this magnitude. The Respondent failed to do so.

[53] Consistent with Allegations 2 and 3, the gift proceeds were held in trust by the Respondent for approximately 11 months, and funds were then disbursed directly from trust to meet his personal expenses (Allegation 4). The Respondent's treatment of these funds ran afoul of both Rules 3-58(4) and 3-60(5).

**Allegation 6: Misuse of trust account**

[54] Consistent with Allegations 2, 3 and 4, the proceeds of the share sale payable to W Ltd., of which the Respondent was principal and sole voting shareholder, were held in trust for approximately 19 months and then disbursed to meet the Respondent's personal expenses. The Respondent's treatment of these funds ran afoul of both Rules 3-58(4) and 3-60(5).

**Allegation 7: Conflict of interest**

[55] Rules 3.4-1, 3.4-2 and 2.4-26.1 of the *BC Code* are applicable to conflicts of interest, and generally prohibit a lawyer from acting or continuing to act where a conflict of interest exists, unless otherwise permitted by express or implied consent and where the lawyer reasonably believes they can act without material adverse effect to either client. The lawyer is also prohibited from acting where there is a substantial risk that their loyalty or representation would be affected by the lawyer's relationship or interest in the client or the subject matter of the services.

- [56] The Respondent acted for both parties in this loan transaction. One party, RK, was a friend, a client on other litigation matters and the firm accountant. The Respondent took no steps to address the obvious conflict, to seek the consent of the clients that he act in the face of the conflict, or to encourage either client to seek independent legal advice respecting the advisability of this arrangement.
- [57] RK and BH had directly adverse interests. This should have been apparent to the Respondent, and he should have declined to act in the absence of expressly meeting the requirements of the conflict rules to ensure adequate safeguards for each client.

### **Allegation 8: Client identification and verification rules**

- [58] Rules 3-104 and 3-105 relate to client identification and verification. A lawyer must verify the identity of individual clients when legal services in respect of a financial transaction are provided. Where the client is not in Canada and is not physically present before the lawyer, an agent must be retained to meet the client identification requirements under Rule 3-102.
- [59] The Respondent failed to comply with the client identification and verification rules and failed to engage an agent who could properly verify identity under Rule 3-104.

### **Conclusion on disciplinary violation**

- [60] The Panel notes that the Respondent's misuse of the trust account featured in four of the allegations of misconduct spanned a three-year timeframe. The Respondent, by leaving funds that he or his firm were entitled to receive in trust for lengthy periods, and then disbursing funds directly from trust in payment of his personal expenses, treated the trust account as his own personal deposit account. This conduct is entirely contrary to the requirement that trust accounts only be used for transactions related to the provision of legal services.
- [61] Trust accounting rules are in place to ensure that lawyers appropriately handle and protect client property, while allowing for the expedient completion of various types of transactions. The public has a reasonable expectation that lawyers handling trust property will strictly comply with the rules designed to protect clients, given the risk of loss if the rules are not respected. The Respondent demonstrated a cavalier approach to trust account management and a misapprehension of the purpose of this tool.

- [62] The Respondent accepted \$60,000 between two clients as gifts. Although the ASF confirms that the two clients made the gifts willingly, the Respondent did not take any steps to ensure that each client was independently advised prior to these gifts being accepted. The Panel considers that the rules relating to gifts must be strictly complied with to ensure the public is protected.
- [63] The Panel was troubled by the gifting described in Allegation 5, which followed the Respondent writing off significant accrued fees owed by the client. The gift in this circumstance has an additional appearance of impropriety. However, the Panel accepts the Joint Submission of the Law Society and the Respondent that the write-offs and the gift were not related, or undertaken for ulterior purposes.
- [64] The Respondent acted for both parties in a loan transaction where the divergence of the clients' interests ought to have been obvious. There is no suggestion that the Respondent, at any time, considered his obligation to avoid conflicts.
- [65] The client identification and verification rules are in place as safeguards against money laundering. The Panel heard and accepted joint submissions that no money laundering concerns or allegations of misappropriation were raised in this matter. While the Panel acknowledges that the client identification and verification rules are complex, they must be strictly complied with to protect against fraud, identity theft and the ill effects of money laundering.
- [66] The Panel notes with concern that the misconduct relates to a variety of rules over a period of years. The conduct reveals a pattern of lack of attention and care, and inadequate awareness and commitment to the fulfilment of the Respondent's professional obligations. Similar concerns were raised by a sub-committee of the Discipline Committee in the course of a conduct review in 2016. The events leading to the Citation considered by this Panel occurred in the months and year immediately following the conduct review, despite the Respondent's assurances that greater care would be paid to professional responsibilities in the future.
- [67] The Panel considers that while the Respondent's conduct did not appear to cause actual harm to his clients, conduct of this nature has the effect of diminishing the reputation of the legal profession as a whole.
- [68] The Panel finds that the evidence as set out in the ASF clearly establishes that the Respondent's conduct constitutes a marked departure from that conduct the Law Society expects of lawyers.

## Issue 2: Disciplinary action

### Joint submission

[69] In the Joint Submission, the Law Society and the Respondent agree to the following disciplinary action:

- (a) an order under s. 38(5)(b) of the *Act*, fining the Respondent \$20,000, to be paid within 60 days of the issuance of the hearing panel's decision, or such other date as the hearing panel may order; and
- (b) an order for the payment of costs in the amount of \$3,500, payable within 60 days of the issuance of the hearing panel's decision.

[70] The Panel must decide whether to accept the proposed disciplinary action.

### Sanctioning principles

[71] When considering sanction, the Panel's duty is to consider the factors set out in *Law Society of BC v. Ogilvie*<sup>6</sup> (the "*Ogilvie Factors*"), as follows:

- (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 upon the respondent of criminal or other sanctions or penalties;

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<sup>6</sup> 1999 LSBC 17

- (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.

[72] The *Ogilvie Factors* have been considered and endorsed in the leading cases on disciplinary action, namely: *Law Society of BC v. Lessing*<sup>7</sup> and *Law Society of BC v. Faminoff*.<sup>8</sup>

[73] *Lessing* is a decision of the review board. That review board referenced and affirmed the *Ogilvie Factors* as reflecting the objects and duties of the Law Society as set out in s. 3 of the *Act*.

[74] *Faminoff* confirmed that to decide on sanction, the panel must “weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to disciplinary proceedings”, considering both aggravating and mitigating factors.<sup>9</sup>

[75] The Law Society’s mandate includes a specific direction under s. 3 of the *Act* to protect the public interest; any disciplinary action imposed must reflect this mandate.

[76] The application and weight given to the *Ogilvie Factors* will necessarily vary in each case. The protection of the public (which includes public confidence in the disciplinary process and in lawyers) and the rehabilitation of the lawyer will play an important role in most cases. In a conflict between these two factors – protection of the public and lawyer rehabilitation – protection of the public will typically prevail.

[77] The Law Society and the Respondent made joint submissions with respect to the following *Ogilvie Factors*:

- (a) the nature and gravity of the misconduct;
- (b) the experience of the respondent;

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<sup>7</sup> 2013 LSBC 29

<sup>8</sup> 2017 LSBC 04

<sup>9</sup> *Faminoff* (at para. 87)

- (c) the previous character of the respondent;
- (d) the number of times the offending conduct occurred;
- (e) the need to ensure the public's confidence in the legal profession;
- (f) the presence or absence of other mitigating or aggravating factors;  
and
- (g) the range of sanctions imposed in similar cases.

### **Application of sanctioning principles**

#### **The nature and gravity of the misconduct**

- [78] The Joint Submission acknowledges that the nature and gravity of the Respondent's misconduct is serious.
- [79] The Joint Submission references various aspects of the misconduct, as follows:
- (a) the misuse of the lawyer's trust account;
  - (b) the failure to comply with the rules relating to gifts;
  - (c) acting in a conflict of interest; and
  - (d) the failure to comply with client identification and verification rules.
- [80] The rules strictly prohibit use of a trust account to receive and disburse funds in the absence of the provision of legal services. Strict compliance with the trust accounting rules is necessary to ensure protection of the public. Trust accounts are a tool for use in protecting client interests across a variety of transactions; they are not for the personal use of lawyers.
- [81] The rules relating to gifts exist to protect clients, and require strict compliance given the very real potential for harm through overreach, manipulation or undue influence on the part of the lawyer.<sup>10</sup>
- [82] The Panel notes, with concern, the failure of the Respondent to remediate conduct that was addressed in the 2016 conduct review, including acting in a conflict of interest.

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<sup>10</sup> *Law Society of BC v. Sager*, 2019 LSBC 22 (F&D) and *Law Society of BC v. Sager*, 2020 LSBC 28 (DA) ("Sager")

[83] The Panel finds that the Respondent must take a more diligent and focused approach to understanding and meeting his professional responsibilities.

[84] The Panel finds that the nature and gravity of the misconduct is an aggravating factor.

**Joint proposal is proportionate to the experience of the respondent**

[85] The Joint Submission acknowledges that the Respondent is a senior lawyer who should have been well aware of his professional obligations.

[86] The Panel finds that this is an aggravating factor.

**Previous character and professional conduct record consistent with joint proposal**

[87] The Joint Submission acknowledges that the Respondent has a professional conduct record (“PCR”), which includes a referral to Practice Standards in 2010 and a conduct review authorized on October 29, 2015, and that his PCR is an aggravating factor.

[88] The Panel notes that the Respondent gave assurances to the conduct review sub-committee in 2016 that he would remediate his conduct. Despite these assurances, the conduct in issue before the Panel occurred shortly thereafter.

[89] The Panel finds that the Respondent’s PCR and his failure to remediate his conduct is an aggravating factor.

**The number of times the offending conduct occurred**

[90] The Joint Submission acknowledges that the Respondent’s admitted misconduct with respect to four of the allegations occurred on numerous occasions over a period of more than three years. The misconduct included serious misuse of a trust account for personal purposes, accepting substantial cash gifts from two clients, acting in a conflict of interest, and failing to comply with the client identification and verification rules.

[91] The Panel finds both the frequency and duration of the misconduct to be an aggravating factor.

**Joint submission supports the need to ensure public confidence in the legal profession**

- [92] The Joint Submission asserts that imposition of the proposed sanction would serve two purposes: first, holding the Respondent accountable for his actions, and second, maintaining the public's confidence in the ability of the Law Society to regulate the conduct of lawyers.
- [93] The Panel acknowledges that the publication of the Citation and this decision, and the imposition of a financial penalty, are forms of accountability. Further, the engagement, analysis and disposition of these matters by the Law Society Tribunal are a means of maintaining the public's confidence in the ability of the Law Society to appropriately regulate lawyers.

**Other aggravating or mitigating factors**

- [94] The Joint Submission highlights two additional factors: first, the progressive discipline and remedial interventions received by the Respondent leading up to the misconduct in question, and second, the Respondent's willingness to enter the ASF and the Joint Submission.
- [95] The Panel finds that the Respondent is a senior practitioner with many years of experience. He has had the benefit of progressive discipline and remedial interventions in the form of both a referral to Practice Standards and a conduct review. It is extremely concerning that despite receiving practice support and recommendations, including in the months immediately prior to the misconduct considered by this Panel, the Respondent continued to engage in various misconduct revealing a lack of attention, care and concern for his professional obligations.
- [96] The Panel finds these are aggravating factors.
- [97] The Panel finds that by admitting to the misconduct and entering the Joint Submission pursuant to Rule 5-6.5, the Respondent has assumed responsibility for his misconduct and has allowed for administrative efficiencies in the adjudication of this matter.
- [98] The Panel finds this is a mitigating factor.

### Range of sanctions in similar cases

[99] The Joint Submission asserts that in the absence of any directly applicable authority, a \$20,000 fine is the appropriate penalty, as assessed on an objective standard of reasonableness, and is consistent with the Law Society's objectives.

[100] The Panel was directed to the following authorities:

- (a) In *Sager*<sup>11</sup>, the lawyer was found to have committed professional misconduct after directing his associate to draft a will for a client naming the lawyer as a beneficiary entitled to a gift of \$75,000. While the hearing panel did not find undue influence or intent to manipulate, the lawyer failed to ensure that the client receive independence legal advice, and the failure to comply with the rule concerning gifts meant the client was at risk of serious harm. The lawyer had 20 years' experience and no professional conduct record. Many character references were provided. The hearing panel determined a \$20,000 fine and significant costs (\$20,225.69) was the appropriate penalty.
- (b) In *Law Society of BC v. Albas*<sup>12</sup>, the lawyer admitted to professional misconduct when, having previously drawn a will for a client naming himself as a beneficiary, upon learning of a new *BC Code* provision preventing a lawyer from preparing a will under which they would receive a gift, the lawyer arranged for a new lawyer to prepare a new will, and provided the new lawyer with a draft naming the lawyer's wife as beneficiary. Although there was no evidence that the lawyer pressured the client, the hearing panel found that the lawyer sought to benefit himself, and this constituted a breach of duty to the client. The new will was never executed, and the lawyer received no financial benefit. The hearing panel assessed a \$7,000 fine.
- (c) In *Law Society of BC v. Reith*<sup>13</sup>, the lawyer failed to maintain trust account records, failed to record trust transactions promptly, failed to prepare monthly trust reconciliations, failed to withdraw his funds from trust as soon as practicable, maintained more than \$300 of his own funds in trust, and made payments from trust in the absence of current trust accounting records. The lawyer admitted all misconduct and applicable facts. The conduct was serious and prolonged, and the

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<sup>11</sup> *Sager*

<sup>12</sup> 2015 LSBC 21

<sup>13</sup> 2018 LSB 23

lawyer had a PCR. Although the conduct was admitted, the admission came on the eve of hearing, and requested materials were outstanding on that date. The hearing panel ordered a 30-day suspension, significant costs (\$7,472.70) and prohibited operation of the trust account pending reconciliation.

## **CONCLUSION ON SANCTION**

[101] The Panel finds that the *Sager* and *Reith* decisions are helpful references in the assessment of sanction, and generally support the Joint Submission on sanction.

[102] The Panel finds that the misconduct was serious in substance, frequency and duration, and consequently, warrants significant penalty. It considers that a fine in the magnitude proposed will provide direct and proportionate accountability to the Respondent, will achieve the goal of general deterrence, and will support public confidence in the ability of the Law Society to effectively regulate lawyers in the public interest.

[103] Acknowledging the constraints imposed by *Anthony-Cook*, the mitigating and aggravating factors and the authorities referenced, the Panel agrees that the proposed penalty outlined in the Joint Submission is appropriate.

## **COSTS**

[104] The Law Society and the Respondent have consented to an order for costs in the amount of \$3,500, payable within 60 days of this decision.

[105] The Panel finds that the costs consented to are appropriate and are consistent with the Tariff at Schedule 4, Item No. 25 of the Rules.

## **SUMMARY OF ORDERS**

[106] The Panel accepts the Respondent's admission and instructs that the Executive Director record the admission on the Respondent's PCR.

[107] The Panel orders that:

- (a) pursuant to s. 38(5)(b) of the *Act*, the Respondent pay a fine in the amount of \$20,000, payable within 60 days from the date of this decision; and

- (b) pursuant to Rule 5-11, the Respondent pay costs to the Law Society in the amount of \$3,500, payable within 60 days from the date of this decision.