2025 LSBC 08
Hearing File No.: HE20230023
Decision Issued: March 19, 2025
Citation Issued: December 13, 2023

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

**THE LAW SOCIETY OF BRITISH COLUMBIA**

AND:

**MICHAEL SAUL MENKES**

RESPONDENT

**DECISION OF THE HEARING PANEL ON A JOINT SUBMISSION PURSUANT TO RULE 5-6.5**

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| Hearing date: | February 3, 2025 |
| Panel: | Monique Pongracic-Speier, KC, Chair<br>Christina J. Cook, Bencher<br>Brendan Matthews, Public representative |
| Discipline Counsel: | Gagan Mann |
| Counsel for the Respondent: | Michael J. Butterfield |

## INTRODUCTION

[1] This decision disposes of a four-paragraph citation issued against the Respondent on December 13, 2023 (the "Citation"). The Citation addresses conduct that occurred on

or about September 9, 2021. The Respondent admitted to the following in allegations 1 to 3 of the Citation:

1. contrary to one or both of Rule 3-64 of the Law Society Rules (the "Rules") and his fiduciary duties, and in relation to four client files, the Respondent improperly withdrew from his trust account $707.84 in client funds and deposited the money directly into his personal bank account, when he was not entitled to the funds;

2. contrary to one or more of Rules 3-64 and 3-65, section 69(1) of the *Legal Profession Act*, SCB 1998, c 9 (the "*Act*") and his fiduciary duties, and in relation to four other client files, the Respondent improperly handled $31.91 in client funds by transferring the funds from his trust account to his law firm's trust "float" account, when he was not entitled to the funds and had not delivered a bill to his clients;

3. contrary to Rule 3-65(1.1), and in relation to three client files, the Respondent improperly withdrew $675.31 from his trust account, by failing to deposit the funds directly to his law firm's general account, in circumstances where the funds were purportedly withdrawn for the payment of fees.

[2] The Respondent further admitted that his conduct, as set out above, constituted professional misconduct pursuant to section 38(4) of the *Act*.

[3] At a hearing on February 3, 2025, the parties tendered an agreed statement of facts (the "ASF"), the Respondent's letter admitting to professional misconduct in respect of the first three paragraphs of the Citation (the "Admission"), and the Law Society elected not to pursue the fourth allegation of the Citation. By joint submission (the "Joint Submission") the parties argued that the appropriate disciplinary action for the admitted misconduct is a one-month suspension, and that the Respondent should pay the Law Society $1,000 in costs.

[4] At the conclusion of the hearing, the Panel accepted the ASF, the Admission, and agreed to impose the disciplinary action endorsed by the parties, and to award the Law Society $1,000 in costs. The Panel indicated that written reasons for our decision would follow. These are the Panel's reasons.

## THE LEGAL FRAMEWORK

[5] The Citation alleges conduct contrary to the Respondent's fiduciary duties and the following provisions of the *Act* and the Rules:

1. Section 69(1) of the *Act* provides that a lawyer must deliver a bill to a person charged.

2. Rule 3-64 provides in relevant part:

(1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are

(a) properly required for payment to or on behalf of a client or to satisfy a court order,

(b) the property of the lawyer,

(c) in the account as a result of a mistake,

(d) paid to the lawyer to pay a debt of that client to the lawyer,

(e) transferred between trust accounts,

(f) due to the [Law] Foundation under section 62(2)(b) [*Interest on trust accounts*], or

(g) unclaimed trust funds remitted to the Society …

3. Rule 3-65 sets out how a lawyer may withdraw funds from trust in payment of fees. It provides, in relevant part:

(1) In this rule, "**fees**" means fees for services performed by a lawyer … charges, disbursements and taxes on those fees, charges and disbursements.

(1.1) A lawyer who withdraws or authorizes the withdrawal of trust funds for the payment of the lawyer's fees must withdraw the funds

(a) with a cheque payable to the lawyer's general account, or

(b) by electronic transfer in accordance with Rule 3-64.1 … to the lawyer's general account.

(2) A lawyer who withdraws or authorizes the withdrawal of trust funds under subrule (1.1) in payment of the lawyer's fees must first prepare a bill for those fees and immediately deliver the bill to the client.

(3) A bill or letter is delivered within the meaning of this rule if it is

(a) mailed to the client at the client's last known address,

(b) delivered personally to the client,

(c) transmitted by electronic facsimile to the client at the client's last known electronic facsimile number,

(d) transmitted by electronic mail to the client at the client's last known electronic mail address, or

(e) made available to the client by other means agreed to in writing by the client.

…

[6] The Citation was heard pursuant to Rule 5-6.5. The Rule permits the Law Society and a respondent to jointly submit to the hearing panel an agreed statement of facts, the respondent's admission of a discipline violation and the respondent's consent to a specified disciplinary action: Rule 5-6.5(1). If the panel accepts the agreed statement of facts and the respondent's admission of a discipline violation, then, pursuant to Rule 5-6.5(2):

(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 disciplinary action, and

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

[7] Rule 5-6.5(3) provides that, in imposing disciplinary action, the panel must not depart from the 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 disciplinary action to which the respondent has consented would be contrary to the public interest in the administration of justice.

[8] For a consideration of Rule 5-6.5(3), the Panel adopts the "public interest" test for assessing joint criminal sentencing recommendations set out in *R. v. Anthony-Cook*, 2016 SCC 43. *Anthony-Cook* held that a joint sentencing submission should not be rejected unless the action proposed would bring the administration of justice into disrepute or otherwise would be contrary to the public interest: *Anthony-Cook* at para. 32. The question to be asked, in assessing a proposed sentence, is whether it is "so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the … justice

system": *Anthony-Cook* at para. 33. This inquiry has been adopted as the basis to assess proposals made under Rule 5-6.5(3), or the rule as it then was; see, *e.g*. *Law Society of BC v. Lang*, 2022 LSBC 4 at paras. 27 to 28; and *Law Society of BC v Mills*, 2024 LSBC 35 at paras. 12 to 15.

## ISSUES

[9] There are three issues for the Panel:

1. Should the Panel accept the ASF?
2. Should the Panel accept the Admission?
3. Should the Panel accept the Joint Submission?

## ANALYSIS

### Issue 1: Should the Panel accept the ASF?

[10] The parties' decision to proceed pursuant to Rule 5-6.5 does not obviate the need for the Panel to consider whether the ASF proves the admitted misconduct on the balance of probabilities: *Lang* at para. 17.

[11] The ASF stipulates as follows.

[12] The Respondent was called and admitted as a member of the Law Society in May 1996. He has practised as a sole practitioner in New Westminster since June 1996. He works primarily in the areas of criminal law and civil litigation, supplemented by some real estate and wills and estates work. At the times material to the Citation, the Respondent handled his own billing and trust accounting and was the sole signatory to his trust account. In addition to operating the trust account, the Respondent had a general account for his practice and a personal bank account.

[13] A Law Society compliance audit in December 2021 and January 2022 revealed that, on September 9, 2021, the Respondent had made the withdrawals from his trust account that underpin the Citation.

[14] The facts agreed with respect to allegations 1 and 3 of the Citation are that, on September 9, 2021, the Respondent issued himself a trust cheque in the amount of $1,383.15 and deposited it into his personal account. The funds were for payment of fees on seven inactive client matters. The Respondent did not have sufficient documentary evidence to support billings of $707.84 on four of the seven files; the Respondent billed

the clients for "review [of] file for closing". The Respondent's decision to bill out the four files was based on unrecorded time spent on the matters, which he had discovered during the file reviews. The bills to the clients had the effect of eliminating the trust balances for those four matters.

[15] For one of the four withdrawals, the Respondent mistakenly withdrew funds held to the account of a different client. The Respondent rectified this error by delivering a trust cheque to the affected client.

[16] The gravamen of the allegation 1 of the Citation is that the four withdrawals were made without adequate documentation. The gravamen of the allegation 3 is that the Respondent erroneously deposited the $707.84 into his personal account and not into his practice's general account.

[17] The facts agreed with respect to allegation 2 of the Citation are that the Respondent transferred a total of $31.91from four client trust ledgers to the trust "float" balance he maintained to offset any service charges which might be applied to his trust account. The transfers to the trust float zeroed out the trust ledgers for the affected clients. The Respondent did not issue or deliver invoices to the clients. These transfers are characterized in the ASF as "data entry" errors which were corrected on September 15, 2022, when the Respondent reversed the transfers from the float and returned the balance to the client trust ledgers.

[18] The Respondent acknowledges that his practice with respect to the transfers on September 9, 2021 was "sloppy": he deviated from his usual practice of time keeping data entry and billed the clients in lump sums for file review and closing, and he made a procedural error in judgment in transferring funds held to his clients' account to his trust float. The Respondent attributes the sloppiness and errors to "fatigue and convenience".

[19] The parties agree that the Respondent was experiencing health issues at the time of the misconduct, and that these were major factors in his poor decision-making. Specifically, the Respondent was coping with chronic migraine headaches in September 2021, which led him to suffer from general inattention and difficulty concentrating. There is opinion evidence from a neurologist that the Respondent's concentration and inattention likely would have been impaired when the headaches were at their most severe, and that this would have affected the Respondent's work.

[20] Having reviewed the ASF and attached documents, the Panel accepts the ASF. We are satisfied that the facts to which it stipulates prove the conduct admitted in allegations 1 to 3 of the Citation.

**Issue 2: Should the Panel accept the Admission?**

[21] To find that the Respondent engaged in professional misconduct, we must be satisfied not only that the conduct alleged occurred but that the proven conduct reaches the threshold for professional misconduct: *May v. Law Society of British Columbia*, 2023 BCCA 218, at para. 61.

[22] "Professional misconduct" is conduct which represents a marked departure from the standards expected of a member of the Law Society: *Law Society of BC v. Martin,* 2005 LSBC 16, at para. 171; *Strother v. Law Society of British Columbia*, 2018 BCCA 481, at para. 64. This is conduct "grounded in a fundamental degree of fault". It may include conduct originating in intentional malfeasance or a gross, culpable neglect of a lawyer's duties: *The Law Society of British Columbia v. Yen*, 2024 BCCA 416, at paras. 53 to 54.

[23] The test for professional misconduct requires the Panel to consider the appropriate standard of conduct expected of a lawyer and to determine if the Respondent's conduct falls markedly below that standard: *Law Society of BC v. Kim*, 2019 LSBC 43, paras. 43 to 45. In so doing, all relevant circumstances must be taken into account, including any pertaining to the Respondent's health: *Gregory v. Law Society of British Columbia*, 2024 BCCA 350, at para. 85.

[24] The Admission admits to professional misconduct and confirms that the Admission was made after obtaining independent legal advice.

[25] The parties both say we should accept the Admission. We do. For a lawyer to breach the lawyer's fiduciary duty to his clients, in respect of eight different client matters, represents a serious departure from the standard of conduct expected of lawyers in British Columbia. The Respondent's disregard of the requirements of s. 69(1) of the *Act* and Rules 3-64 and 3-65, due to inattention and convenience, likewise shows a serious and culpable neglect of the lawyer's duties in handling trust funds. We can do no better to express why the Respondent's conduct amounts to professional misconduct than to repeat the words of the hearing panel in *Law Society of BC v. Atmore*, 2020 LSBC 4, at para. 22:

> … The public must be able to trust money to lawyers knowing that it will be properly accounted for. The public interest requires that a clear message be sent to the legal profession that *the withdrawal of trust funds in contravention of the Law Society Rules, even in relatively small amounts to which a lawyer is beneficially entitled, will not be tolerated*.
>
> [Emphasis added.]

**Issue 3: Should the Panel accept the Joint Submission?**

[26] The disciplinary action proposed in the Joint Submission should be accepted unless it would bring the administration of justice into disrepute or otherwise be contrary to the public interest: *Law Society of BC v. Palmer*, 2024 LSBC 2 at paras. 42 to 44; *Law Society of BC v. Mills*, 2024 LSBC 35 at paras. 12 to 15.

[27] The criteria for determining disciplinary action for professional misconduct assist us in assessing whether the proposal in the Joint Submission would bring disrepute to the administration of justice or would otherwise be contrary to the public interest. *Law Society of BC v. Dent* 2016 LSBC 5 describes the criteria as follows:

(a) the nature, gravity, and consequences of the impugned conduct;

(b) the Respondent's character and professional conduct record ("PCR");

(c) the Respondent's acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession, including public confidence in the disciplinary process.

[28] Assessing disciplinary action is "an individualized process that requires the hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to the disciplinary proceedings": *Law Society of BC v. Faminoff,* 2017 LSBC 4, at para. 84. Appropriate disciplinary action promotes public confidence in the legal profession and the rehabilitation of the respondent: *Faminoff*, at para. 85.

[29] The parties submit that the proposed disciplinary action is appropriate when assessed against the circumstances in which it occurred, similar prior cases and the Law Society's overarching mandate to protect the public. We agree, for the reasons that follow.

**(a) The nature, gravity and consequences of the impugned conduct**

[30] The Respondent's professional misconduct demands significant disciplinary action. The Respondent mishandled trust funds. He took what the Joint Submission characterizes as a "casual approach to his client's trust funds and failed to comply with the Law Society's basic trust accounting obligations". This form of misconduct has been described as serious professional misconduct "because being entrusted to deal honestly with a client's funds goes to the heart of the lawyer's integrity and the fiduciary duties lawyers owe to clients": *Law Society of BC v. Mann*, 2015 LSBC 48, at para. 43.

[31] The parties agree that the Respondent's misconduct warrants a suspension. This is an indicator of the gravity of the misconduct. As the review panel noted in *Law Society of BC v. Cole*, 2025 LSBC 2, at para. 38, "A suspension sends a stronger message of disapproval than a fine and is therefore a more suitable form of disciplinary action to address serious misconduct."

[32] At the same time, the Panel recognizes that the consequences of the Respondent's misconduct do not fall at the severe end of the spectrum. The Law Society and the Respondent agree that misappropriation is not at issue. The Panel agrees that the Respondent's actions do not amount to misappropriation.

[33] Consideration of the proposed disciplinary action against the first *Dent* factor suggests that a one-month suspension of the Respondent would not be contrary to the public interest.

**(b) The Respondent's character and PCR**

[34] The Respondent's PCR discloses a concerning history of disciplinary issues:

1. In 2016, the Respondent was found to have engaged in professional misconduct by failing to provide quality and appropriate legal services to a client. He was fined $7,500 and ordered to pay costs.

2. In 2005, 2007 and 2009, the Respondent was subject to conduct reviews for making a false affidavit, rudeness to a Provincial Court judge, and breaching an undertaking and not fulfilling his duty to attend to incoming correspondence, respectively.

3. Between 2011 and 2014, the Respondent was followed by the Practice Standards Committee, which made recommendations, including that the Respondent attend counselling, complete the Small Firm Practice Course and implement new practice management systems. The Respondent was also directed to provide monthly compliance and file status reports.

4. In August 2015, the Respondent failed to pay costs resulting from two practice review reports until approximately four months after they were due.

[35] The parties agree that the Respondent's PCR is an aggravating factor in determining the appropriate disciplinary action. The Panel agrees. The Respondent's PCR suggests that a suspension for the admitted misconduct would not be contrary to the public interest.

**(c) The Respondent's acknowledgement of the misconduct and remedial action**

[36] The Joint Submission points out that the Respondent's admission of professional misconduct has saved the Law Society the time and resources that otherwise would have been required to prove the misconduct, and has eliminated the need to call witnesses at the hearing.

[37] The Respondent has, moreover, taken remedial action to rectify his actions by delivering a trust cheque to the client from whom he has mistakenly withdrawn trust funds, and he reversed all of the transfers to his "float" trust account. Further, the Respondent has been receiving treatment for the migraine headaches that were afflicting him in September 2021.

[38] The parties submit that the Respondent's admission of misconduct and the steps he has taken to rectify that misconduct and his health issues, are mitigating factors which suggest that the proposed one-month suspension is not contrary to the public interest. We agree.

**(d) Does the Joint Submission support public confidence in the profession and the disciplinary process?**

[39] The Joint Submission notes that public confidence in the profession and the disciplinary process is fostered by sanctions that are proportionate to the misconduct, and fair and reasonable in all of the circumstances. In oral submissions, the Law Society also stressed that general deterrence is an important consideration in evaluating the disciplinary action proposed in this case.

[40] The parties agree that the Panel should consider disciplinary action imposed in prior, comparable cases in deciding whether the proposed disciplinary action is contrary to the public interest. The parties draw the following decision and consent agreements to the Panel's attention:

1. In *Law Society of BC v. MacDonald,* 2019 LSBC 28, the lawyer misappropriated trust funds for nine inactive client matters. He issued invoices with fees that corresponded exactly to the residual amount held in trust for each matter. The trust withdrawals occurred on a single day and there was no evidence of comparable conduct at other times. The lawyer acknowledged the professional misconduct, expressed remorse and cooperated with the Law Society. A two-month suspension was ordered.

2. As described in a 2021 consent agreement in *Re Routtenberg*, a lawyer who was experiencing health issues misappropriated or improperly withdrew client funds from trust to clear out aged trust balances prior to a compliance audit. The lawyer failed to deliver bills to the clients before the withdrawals. After the withdrawals were made, the lawyer returned the funds to trust or applied to remit them to the Law Society. He admitted to misconduct. The lawyer did not personally benefit from the misconduct, was remorseful, apologized for his actions and cooperated with the Law Society. The lawyer agreed to a 10-week suspension and undertook not to handle trust funds for two years.

3. In a 2023 consent agreement in *Re Shiau*, the lawyer improperly handled trust funds by: depositing retainer funds directly into the lawyer's general account on two occasions, when the lawyer was not entitled to the funds and had not delivered a bill to the clients, and by withdrawing funds from trust on four occasions when he had not delivered bills to the clients. The lawyer expressed remorse, completed remedial education and made changes to his practice. The lawyer did not have a PCR. The lawyer was suspended for four weeks.

[41] These cases show that the proposed disciplinary action falls within the range of suspensions imposed in previous cases for basically comparable misconduct.

### Conclusion on assessment of the Joint Submission

[42] The various mitigating and aggravating factors relevant to the Respondent's misconduct, and the lengths of suspensions imposed in comparable cases, allow us to reach the conclusion that the proposed disciplinary action is not contrary to the public interest. No reasonable person would consider the Joint Submission so out of line with expectations as to represent a breakdown of the proper functioning of the justice system: *Anthony-Cook* at para. 33.

## COSTS

[43] The costs agreed between the parties fall at the lowest range of the tariff at Schedule 4 of the Rules. Having regard to the manner in which the hearing of the Citation proceeded, this is reasonable.

## ORDER

[44] As announced at the conclusion of the hearing, we order as follows:

1. The Respondent shall be suspended from the practice of law for a period of one month, commencing April 15, 2025 or such other date as may be agreed between the parties in writing.

2. The Respondent shall pay the Law Society $1,000 in costs within 30 days of February 3, 2025.