2024 LSBC 01
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Decision Issued: January 22, 2024
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THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

DAVID LESLIE SCHAEFER

RESPONDENT

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

Written materials:	August 9, 2023 October 24, 2023
Panel:	Gurminder Sandhu, KC, Chair Cyril Kesten, Public representative Kate Saunders, Lawyer
Discipline Counsel:	Kathleen M. Bradley
Counsel for the Respondent:	Joven Narwal, KC
Written reasons of the Panel by:	Kate Saunders

INTRODUCTION

[1] The Law Society of British Columbia seeks a finding of professional misconduct against the Respondent for improperly handling his clients' funds. The Respondent was granted a power of attorney by his clients, DE and AE. While acting as attorney for DE and AE, the Respondent admits he:

1. did not maintain accurate or adequate records in relation to various cash withdrawals from DE and AE's bank accounts; and

2. inadvertently made nine withdrawals from DE and AE's bank accounts for the Respondent's own personal use.

[2] Pursuant to Rule 5-6.5 of the Law Society Rules (the "Rules"), the parties submitted an agreed statement of facts. Further, the Respondent admits the discipline violation and consents to certain disciplinary action.

[3] For the reasons below, the Hearing Panel accepts the joint submissions of the parties and finds that the proposed disciplinary action is not contrary to the public interest in the administration of justice.

FACTUAL BACKGROUND

[4] The following facts are agreed to by the parties.

Respondent's Background

[5] The Respondent was called and admitted as a member of the Law Society of British Columbia on June 14, 1985. His legal practise consists of wills and estates, real estate, corporate, administrative, civil litigation, commercial lending and creditor's remedies law.

[6] From 2015 to May 4, 2020, the Respondent was a senior partner with a law firm in Vernon, British Columbia (the "Firm"). He has been a sole practitioner in Vernon since May 4, 2020.

Events Leading to Citation

[7] The Respondent was introduced to a married couple, DE and AE, by a public health nurse in March 2018. Shortly thereafter, AE's physician advised the Respondent that AE had "significant cognitive deterioration that was slowly worsening". Although AE had insight into needing someone to take care of his finances, he had limited

understanding of his finances. The physician anticipated AE's limited cognition would worsen over time.

[8] In May 2018, AE's physician advised the Respondent that DE also had difficulties with memory. The physician opined that DE also exhibited "significant cognitive deterioration that was slowly worsening".

[9] The Respondent was granted two enduring powers of attorney by DE and AE on October 3, 2018. The powers of attorney, as summarized by the parties, provided as follows:

1. The Respondent was appointed DE and AE's attorney under the *Power of Attorney Act,* RSBC 1996, c. 370.

2. The Respondent was entitled to pay himself from DE and AE's estate,

    (a) his "usual professional fees and other charges for professional services" provided by the Respondent in his capacity as a lawyer or by the Firm, and

    (b) for any other services as an attorney at the hourly rate normally charged starting from the date on which the Respondent first exercised that authority on DE and AE's behalf until the attorney's authority ended

(the "Charging Clause").

[10] On May 29, 2019, the Respondent deposited funds from DE and AE's Royal Bank account into the Firm's trust account. Thereafter until July 2019, the Respondent paid himself from DE and AE's trust funds pursuant to the Charging Clause.

[11] From 2018 to 2020, DE and AE also had two joint bank accounts at Toronto Dominion bank (together, the "Clients' Accounts"). The Respondent had a debit card for the Clients' Accounts and was one of four people who had access to the debit card. The other people with access to the debit card were AE, DE, and possibly a care aide for one evening.

[12] AE died on November 7, 2019 at age 96. DE died on October 1, 2020 at age 90.

[13] In May 2020, the Law Society of British Columbia opened an investigation into the Respondent's conduct based on concerns identified by the Respondent's former law partner.

Allegation of Improper Handling

Inadequate record keeping

[14] Between January 3, 2019 and April 14, 2020, the Respondent withdrew $9,903 from the Clients' Accounts in 33 separate withdrawals. However, the Respondent only retained receipts relating to those withdrawals totaling approximately $1,000.

[15] Further, the Respondent did not maintain a cash receipt book of duplicate receipts in relation to the withdrawals from the Clients' Accounts.

Erroneous cash withdrawals

[16] The Respondent inadvertently used funds from the Clients' Accounts for his personal use on nine occasions believing he was using funds from his personal accounts. Specifically, the Respondent was responsible for the following withdrawals from the Clients' Accounts:

1. December 31, 2019 – withdrawal of $1,559.99 for "ICBC Insurance Payment";
2. January 24, 2020 – withdrawal of $140.22 for "Snowshoe Sam's Restaurant";
3. February 15, 2020 – withdrawal of $140.24 for "Snowshow Sam's Restaurant";
4. March 21, 2020 – withdrawal of $300 in cash for an unknown purpose;
5. March 21, 2020 – withdrawal of $150.88 for "Monashees Wine and Spirits";
6. March 22, 2020 – withdrawal of $109.60 for "Petro Canada";
7. March 25, 2020 – withdrawal of $300 in cash for an unknown purpose;
8. April 1, 2020 – withdrawal of $1,000 in cash for an unknown purpose; and
9. April 14, 2020 – withdrawal of $500 in cash for an unknown purpose.

[17] In respect of each of the erroneous transactions, the Respondent believed he was using funds from his personal account. At the time of the errors, the Respondent had a business Visa credit card issued by the same bank as the debit card for the Clients' Accounts. The cards for each account were the same colour and required the same PIN codes. While the Respondent usually kept the debit card for the Clients' Accounts in his office, he sometimes carried both cards in his wallet. The Respondent believes the errors

occurred when he mistook the debit card for the Clients' Accounts for his business Visa credit card.

[18] Prior to the complaint being made to the Law Society or the commencement of the Law Society's investigation, the Respondent identified his errors and immediately credited the Clients' Accounts for the inadvertently used funds.

Citation

[19] A citation was authorized by the Discipline Committee on June 24, 2022 and issued on June 28, 2022 setting out two allegations of misconduct (the "Citation"). The Respondent acknowledged service of the Citation effective the same day through his counsel.

[20] The Law Society is pursuing only one allegation in the Citation. Specifically, pursuant to s. 38(4) of the *Legal Profession Act,* SBC 1998, c. 9 (the "*Act*"), the Law Society alleges the Respondent committed professional misconduct between January 2019 and April 2020 when the Respondent improperly handled some or all of $11,400.93 while acting as an attorney under a power of attorney for AE and DE.

[21] The parties submit, and the Hearing Panel agrees, that accounting and record keeping obligations are an integral part of the proper handling of funds held in trust by a lawyer.

ISSUES

[22] The issues before the Hearing Panel are:

1. Does the Respondent's conduct constitute professional misconduct?

2. If so, does the Panel accept the disciplinary action consented to by the Respondent?

ANALYSIS

Misconduct

[23] The Law Society seeks a finding of professional misconduct against the Respondent.

[24] Section 38(4)(b)(i) of the *Act* enumerates professional misconduct as one of the determinations that a hearing panel may make. However, "professional misconduct" is not statutorily defined. Rather, the term is defined in previous disciplinary decisions as conduct that represents a marked departure from that conduct reasonably expected of lawyers: *Law Society of BC v. Martin,* 2005 BCSC 16 at para. 171.

[25] The so-called *Martin* test is objective. A hearing panel must consider the appropriate standard of conduct expected of a lawyer, and then determine if the lawyer fell markedly below that standard: *Law Society of BC v. Sangha,* 2020 LSBC 3 at para. 67; *Law Society of BC v. Weiser,* 2023 LSBC 10 at para. 117.

[26] The *Act,* the Rules, and the *Code of Professional Conduct for British Columbia* (the "*Code*") provide guidance regarding the appropriate standard of conduct expected of a lawyer. However, they do not represent an exhaustive canon of the standards expected of lawyers.

[27] Further, as *Martin* clarifies, a breach of a professional standard codified in the *Act,* the Rules, or the *Code* does not automatically constitute professional misconduct. Rather, conduct is professional misconduct when it falls "markedly below the standards". In making this determination, the Hearing Panel considers all of the circumstances and weighs the following factors:

1. the gravity of the misconduct;
2. the duration of the misconduct;
3. the number of breaches;
4. the presence or absence of *mala fides*; and
5. the harm caused.

Law Society of BC v. Lyons, 2008 LSBC 9 at paras. 32 to 35

[28] A finding of professional misconduct does not require behaviour that was disgraceful or dishonourable, nor is intentional malfeasance required: *Law Society of BC v. Harding,* 2014 LSBC 52 at para. 70.

Inadequate record keeping

[29] The improper handling of funds alleged in the Citation is divided into two general categories of conduct: inadequate record keeping and erroneous cash withdrawals.

[30] With respect to the Respondent's alleged inadequate record keeping, the Law Society says the Respondent's conduct breached Law Society Rules 3-55, 3-67 and 3-70.

[31] Rule 3-55(3) requires a lawyer produce on demand certain records for any period for which the lawyer is responsible for fiduciary property. Those records include "accounts and other records respecting fiduciary property" and "all invoices… and other records necessary to create a full accounting of the receipt or disbursement of the fiduciary property…". This Rule applies for ten years from the final accounting transaction. Further, Rule 1 defines "fiduciary property" as:

> (a) funds, other than trust funds, and valuables for which a lawyer is responsible in a representative capacity or as a trustee, if the lawyer's appointment is derived from a solicitor-client relationship,
>
> but does not include
>
> (b) any funds and valuables that are subject to a power of attorney granted to the lawyer if the lawyer has not taken control of or otherwise dealt with the funds or valuables;

[32] The requirement to maintain certain accounting records is further codified in Rule 3-67. Specifically, that Rule requires a lawyer to record all funds received and disbursed in connection with the lawyer's law practice by maintaining certain accounting records and supporting documents. Those records include, but are not limited to, bank vouchers and similar documents, vendor invoices, and bills for charges and disbursements.

[33] Rule 3-70 concerns records of cash transactions. It requires a lawyer who receives cash for a client to maintain a cash receipt book of duplicate receipts and make a receipt in the cash receipt book for any amount of cash received. It also sets out procedures that must be followed when receiving cash. For example, the record of the transaction must be signed by the lawyer who receives the cash (or an individual authorized by the lawyer to sign on the lawyer's behalf). It must also identify certain information including the date on which the cash was received, the amount of cash received, and the client for whom the cash is received. Cash receipt books are required to be kept current at all times.

[34] The Respondent admits his conduct breached Rules 3-55 and 3-70.

[35] The Hearing Panel agrees with the parties that the funds in the Client Accounts constitute "fiduciary property" within the meaning of Law Society Rule 1. The Respondent had a solicitor-client relationship with AE and DE, and was granted enduring powers of attorney. When AE and DE were no longer capable of managing their

finances, the Respondent assumed control over some of AE and DE's financial affairs, including the funds in the Clients' Accounts. He did so in a representative capacity.

[36] Therefore, the Respondent's failure to maintain and produce receipts in relation to withdrawals of approximately $8,903 from the Clients' Accounts as well as duplicate receipts for the withdrawals constitute violations of Rules 3-55 and 3-70.

[37] The Respondent does not admit that his conduct breached Rule 3-67. Nonetheless, the Hearing Panel must assess whether the conduct admitted by the Respondent constitutes a breach of that Rule.

[38] In the context of an enduring power of attorney relationship, receipts for funds spent on behalf of the clients using the client's funds are necessary for the maintenance of accounting records. While the definition of "supporting documents" in Rule 3-67 does not explicitly include receipts, the definition is non-exhaustive and does include "vendor invoices". In practice, a "vendor invoice" constitutes, at a minimum, half of a receipt. It evidences the amount owed. The other half of the receipt is the proof of payment remitted. When acting as an attorney under a power of attorney, proof of both the amount owed and proof of the amount remitted is necessary to maintain accurate accounting records. Therefore, "supporting documents" in Rule 3-67 must include receipts for any transactions where a lawyer uses client's funds on their client's behalf pursuant to a power of attorney.

[39] By failing to maintain receipts in relation to withdrawals of approximately $8,903 from the Clients' Accounts, the Respondent breached Rule 3-67.

Erroneous cash withdrawals

[40] With respect to the Respondent's alleged erroneous cash withdrawals, the Law Society alleges that the Respondent's conduct breached rules 3.5-2 and 3.5-6 of the *Code*.

[41] Rule 3.5-2 of the *Code* provides:

> A lawyer must:
>
> (a) care for a client's property as a careful and prudent owner would when dealing with like property; and
>
> (b) observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

[42] Rule 3.5-6 requires a lawyer to "account promptly for clients' property that is in the lawyer's custody…".

[43] The Hearing Panel notes that rule 3.5-4 of the *Code* requires that "a lawyer must clearly label and identify clients' property and place it in safekeeping distinguishable from the lawyer's own property".

[44] "Client property" includes a client's money: rule 3.5-1 of the *Code*.

[45] The Respondent does not admit breaching rules 3.5-2, 3.5-4, or 3.5-6 of the *Code*. However, the Respondent does admit to inadvertently using funds from the Clients' Account for his own personal use on nine occasions. The Respondent believes the errors occurred when he mistook the debit card for the Clients' Accounts for his business Visa credit card when he kept both cards in his wallet.

[46] The parties agree that:

1. four of the errors were "corrected and credited to the estate as soon as they were discovered, prior to the Law Society's investigation beginning"; and

2. the remaining five errors "were corrected and credited to the estate as soon as they were discovered in February or March of 2020, prior to the Law Society complaint being made, and prior to the Law Society's investigation."

[47] It is unclear whether the first four errors were discovered and corrected before the next five errors. Therefore, the Hearing Panel cannot conclude that the Respondent failed to rectify his conduct after becoming aware of the perils of his practice of keeping the debit card for the Clients' Accounts in his wallet.

[48] Further, as it is unclear when the errors were identified and rectified, the Hearing Panel cannot find that the Respondent failed to account promptly for AE and DE's property. A violation of rule 3.5-6 of the *Code* is not established.

[49] The Respondent was required to care for AE and DE's property "as a careful and prudent owner would". He was required to take appropriate steps to prevent inadvertent withdrawal of his clients' funds for his own personal use. Storing his clients' debit card in his personal wallet and/or assigning the debit card the same PIN as the Respondent's personal accounts do not constitute careful or prudent care.

[50] Further, the Respondent failed to clearly label and identify the debit card for the Client Accounts and place it in safekeeping distinguishable from the Respondent's own property.

[51] The Hearing Panel finds the Respondent breached rules 3.5-2 and 3.5-4 of the *Code*.

Professional misconduct

[52] The Law Society alleges the Respondent's breaches of Law Society Rules 3-55, 3-67, and 3-70 as well as rules 3.5-2 and 3.5-4 of the *Code* constitute misconduct. The Respondent admits his conduct constitutes misconduct.

[53] The Respondent's conduct took place over the course of 15 months and constituted at least 42 separate breaches. While the Respondent's conduct lacked bad faith or dishonest intent and there is no evidence of an ultimate financial detriment to his clients, those factors are not determinative. The Respondent's conduct was, at best, cavalier and sloppy.

[54] Practising law is a significant privilege afforded to a small percentage of society. With that privilege comes considerable responsibilities. There is no room for a cavalier attitude or sloppy practice. This is especially true when the lawyer's clients are peculiarly vulnerable. The type of conduct exhibited by the Respondent undermines the public's trust in lawyers.

[55] After considering all of the circumstances and the *Lyons* factors, the Hearing Panel finds that the Respondent's conduct represents a marked departure from that conduct the Law Society expects of lawyers and, therefore, constitutes professional misconduct.

The Proposed Disciplinary Action

Limitations when proceeding under Rule 5-6.5

[56] The parties seek to proceed pursuant to Rule 5-6.5 which permits them to jointly submit an agreed statement of facts and the Respondent's admission of a discipline violation and consent to a specified disciplinary action.

[57] Where a hearing panel accepts the agreed statement of facts and the respondent's admission of a discipline violation, the panel must not impose a sanction that is different from the disciplinary action consented to by the respondent unless the disciplinary action would be contrary to the public interest in the administration of justice: Rule 5-6.5(3)(b).

[58] For clarity, Rule 5-6.5(3) is "all or nothing". Unless imposing the disciplinary action would be contrary to the public interest in the administration of justice, the hearing panel cannot accept the agreed statement of facts and the admission of a discipline violation without also accepting the specified disciplinary action consented to by the respondent.

[59] Rule 5-6.5(3) reflects the principles enumerated by the Supreme Court of Canada in *R. v. Anthony-Cook,* 2016 SCC 43 at paras. 34, 44, and 63. Specifically, it balances three interests: certainty for the parties, eliminating the negative aspects involved in requiring witnesses to testify, and creating efficiencies in the system: *Law Society of BC v. Clarke,* 2021 LSBC 39; *Law Society of BC v. Davison,* 2022 LSBC 23 at paras. 10 to 11; *Law Society of BC v. Lang,* 2022 LSBC 4 at paras. 27-28.

[60] A joint submission will only be contrary to the public interest in the administration of justice, within the meaning of Rule 5-6.5(3)(b), where "it is so unhinged from the circumstances of the discipline violation and the respondent that its acceptance would lead reasonable persons aware of all the circumstances… to believe that the proper functioning of the discipline system had broken down": *Law Society of BC v. Clarke,* 2021 LSBC 39 at para. 87. As such, there is a high threshold that must be met before a hearing panel may reject a joint submission.

Ogilvie factors

[61] The Law Society and the Respondent jointly propose a one-month suspension.

[62] The non-exhaustive list of factors to be considered when determining whether to accept proposed disciplinary action is set out in *Law Society of BC v. Oglivie,* 1999 LSBC 17. Those factors were consolidated in *Law Society of BC v. Dent,* 2016 LSBC 5 to the following list:

1. nature, gravity and consequences of conduct;
2. character and professional conduct record of the respondent;
3. acknowledgement of the misconduct and remedial action; and
4. public confidence in the legal profession including public confidences in the disciplinary process.

[63] For the reasons enumerated below, the Hearing Panel finds that a one-month suspension of the Respondent is not contrary to the public interest in the administration of justice.

Nature, gravity and consequences of conduct

[64] The seriousness of the misconduct is the prime determinant of the disciplinary action to be imposed: *Law Society of BC v. Gellert,* 2014 LSBC 5 at para. 39. This factor weighs the severity of the misconduct including its length and frequency, whether the

respondent profited from the conduct, the impact on the victim, and whether there were consequences for the respondent.

[65] Minor accounting irregularities may not require a disciplinary response. However, the timely maintenance of adequate accounting records is an important responsibility for a lawyer. At all times, lawyers must be able to produce accurate and current accounting records relating to trust funds.

[66] As noted above, the Respondent's conduct took place over 15 months and constituted at least 42 separate breaches. However, there is no evidence of any financial gain to the Respondent arising from his conduct or a financial detriment to his clients.

[67] Further, the Respondent's conduct lacked *mala fides*. Instead, the misconduct appears to be a result of a cavalier or sloppy approach to his professional responsibilities.

[68] Nevertheless, the severity of the misconduct is compounded by the peculiar vulnerability of his clients as well as the apparent wilful blindness or recklessness of the Respondent in not identifying and preventing the repeated inadvertent use of his clients' funds for the Respondent's personal use.

Character and professional conduct record of the respondent

[69] The second factor weighs the respondent's age, experience, reputation and professional conduct record.

[70] The principle of progressive discipline provides that a lawyer who has previously been disciplined, whether for the same or different conduct, will be subject to a more significant disciplinary sanction than someone with no prior discipline.

[71] The Respondent was called to the bar in 1985. He has only one matter on his professional conduct record unrelated to the Citation. In 1997, the Respondent underwent a conduct review relating to failures to communicate effectively and in a timely manner with a client including failing to issue a retainer letter at the commencement of his retainer (the "1997 Conduct Review"). Given the age and unrelated nature of the 1997 Conduct Review, the Law Society submits that the principle of progressive discipline should not apply. The Hearing Panel accepts the Law Society's submission. However, as discussed further below, the Hearing Panel finds the Respondent's actions in response to the 1997 Conduct Review are relevant.

[72] The Respondent provided nine letters attesting to the Respondent's character. Character evidence has limited weight: *Law Society of BC v. Gregory,* 2022 LSBC 17 at paras. 45 to 49. The Hearing Panel's responsibility is not to gauge the Respondent's

popularity. Rather, it is to impose a sanction that "appropriately furthers the objectives of protecting public confidence in the justice system and the legal profession": *Law Society of BC v. Guo,* 2022 LSBC 3 at para. 40.

[73] The Law Society admits the letters provide some evidence that the Respondent has a good reputation in the community. The Hearing Panel accepts the Law Society's admission in this regard.

Acknowledgment of misconduct and remedial action

[74] The third *Dent* factor weighs the steps, if any, the respondent has taken to acknowledge the misconduct, prevent reoccurrence, remedy the misconduct and rehabilitate themself. Other circumstances, such as the respondent's health, may also be considered.

[75] The Respondent acknowledged his misconduct, albeit four days before the commencement of the Hearing.

[76] Notably, the Conduct Review Subcommittee's Report arising from the 1997 Conduct Review Matter notes, among other things, the following issue was discussed with the Respondent:

> In response to queries from the Law Society, the member acted defensively, rather than candidly admitting his error. This led to a protracted exchange of sometimes heated correspondence among the member, the Law Society and [the client]. This might have been avoided altogether by an early apology to [the client].

[77] Despite counsel for the Respondent claiming the Respondent is "deeply remorseful" in this instance, the Hearing Panel reviewed no evidence substantiating the same. Nevertheless, the joint submissions of the parties and the Respondent's admission of misconduct are mitigating factors.

[78] There are other mitigating factors.

[79] The Respondent voluntarily completed legal accounting courses and a course on acting for clients with dementia.

[80] After the commencement of the Law Society's investigation, the Respondent voluntarily made undertakings requiring him to operate his trust accounts in compliance with a trust supervision agreement. He also executed a trust supervision agreement requiring, among other things, a second lawyer signatory on all withdrawals and transfers from his trust accounts, and monthly trust reconciliations performed by two lawyers. The Respondent has complied with the undertakings and agreement for more than three years.

[81] Prior to the commencement of the Law Society's investigation, the Respondent identified his inadvertent use of his clients' funds and credited the amounts back to the Clients' Account. There is no evidence of harm suffered by his clients.

Public confidence in the legal profession

[82] The final *Dent* factor weighs the specific and general deterrent value in the proposed disciplinary action. The proposed disciplinary action should uphold the public confidence in the integrity of the legal profession. To assist with upholding public confidence, similar types of misconduct should attract similar disciplinary sanctions.

[83] The parties' proposed sanction of a one-month suspension is within the range of sanctions imposed in similar cases: *Law Society of BC v. Derksen,* 2015 LSBC 24; *Law Society of BC v. Faminoff,* 2015 LSBC 20; *Law Society of BC v. Reith,* 2018 LSBC 23; and *Law Society of BC v. Pham,* 2015 LSBC 14.

[84] The proposed sanction is significant, meaningful, and reflects the importance of lawyers' accounting obligations and taking appropriate care for a client's property to the public confidence in the integrity of the legal system.

COSTS

[85] The parties jointly request an order that the Respondent pay the Law Society costs in the amount of $1,000. The proposed order is consistent with the lowest end of the range of Item 25 of Schedule 4 of the Tariff.

[86] The Hearing Panel accepts the parties' joint request.

DISPOSITION

[87] Pursuant to Rule 5-6.5(3), the Hearing Panel accepts the disciplinary action consented to by the Respondent.

[88] The Hearing Panel orders:

(a) the Respondent be suspended from the practice of law for a period of four weeks, commencing on March 1, 2024; and

(b) the Respondent pay costs to the Law Society in the amount of $1,000, inclusive of disbursements, payable by a date agreed to in writing by the parties, but no later than March 1, 2024.