

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**SUSAN YON SOO KIM**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL**

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Hearing date: September 25, 2019

Panel: Jamie Maclaren, QC, Chair  
Gavin Hume, QC, Lawyer  
R.J. (Bob) Smith, Public representative

Discipline Counsel: Jaia Rai  
Counsel for the Respondent: Jeffrey P. Scouten

**BACKGROUND**

- [1] The Law Society issued a citation against the Respondent on April 19, 2018 (the “Citation”) identifying three separate allegations of professional misconduct under section 38(4) of the *Legal Profession Act* (the “Act”).
- [2] At the hearing of the Citation on September 25, 2019 (the “Hearing”), the Law Society proceeded on two of the three allegations. The two remaining allegations (the “Two Allegations”) read as follows:
1. In agreeing to represent your client, ... and throughout your representation of him, you led your client to believe that you would bill Legal Services Society at the legal aid rate to reduce fees payable by him under the terms of a private retainer agreement, but you failed to submit any claims to Legal Services Society other than a claim for disbursements related to the cost of obtaining a transcript.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act* (the “Allegation of Misleading a Client”).

2. In representing your client, ... you altered an affidavit sworn by your client and commissioned by you on May 1, 2016, after the affidavit was sworn, and subsequently filed and relied on the altered affidavit in court proceedings.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act* (the “Allegation of Altering a Sworn Affidavit”).

- [3] The Respondent admitted all of the facts and professional misconduct included in each of the Two Allegations, as stated in an Agreed Statement of Facts signed and filed by both parties on September 25, 2019 (the “ASF”). At the Hearing, the Respondent also admitted that the Law Society met all administrative and procedural requirements for the Hearing.
- [4] After hearing the parties’ submissions on facts and determination, the Panel accepted the Respondent’s two admissions of professional misconduct as supported by the admitted facts. The Panel finds that the Respondent committed professional misconduct for each of the Two Allegations.
- [5] At the Hearing, the parties also made submissions on agreed disciplinary action and costs.
- [6] The Panel accepts the parties’ agreement on disciplinary action and costs. We order the Respondent to serve a one-month suspension for professional misconduct, with payment of \$7,500 in costs to the Law Society. Our reasons follow.

## **FACTS**

- [7] The facts in evidence consisted of the ASF and the Respondent’s professional conduct record. The ASF included the Respondent’s signed admission to professional misconduct for each of the Two Allegations. The Panel accepted the ASF, and the facts outlined in this decision are summarized from that document.
- [8] The Respondent was called and admitted as a lawyer on August 31, 2000. She practised as an associate in four different law firms from her call date to 2002 when she opened her own family law and civil litigation practice under the name of Kim & Company. She practised as a sole practitioner at all times material to the Two Allegations, until December 5, 2018 when she became a non-practising Law Society member. She was still a non-practising member at the time of the Hearing.

### **Allegation of misleading a client**

[9] On February 16, 2016, the Respondent entered into a retainer agreement (the “Retainer”) with a person (the “Client”) whose family law matter had been approved for legal aid by the Legal Services Society (“LSS”). The Respondent had an LSS vendor number at the time, but had previously acted only on a single legal aid matter.

[10] The Retainer included the following term:

Our fees will be based on hourly rate [sic] and will depend on the actual time spent. I will be the main lawyer responsible for your file, but from time to time other people in our office may do some of the work. Susan Kim’s hourly rate is \$300 per hour. You have agreed to pay the difference that legal aid is not able to cover of my hourly rate.

[11] The Respondent did not seek or obtain authorization from LSS to privately bill the Client prior to entering into the Retainer, or at any time thereafter. Later, while under investigation for the Two Allegations, she stated to the Law Society that she was previously unaware of the LSS policy prohibiting vendors from making private billing arrangements without prior written authorization.

[12] On May 4, 2016, the Respondent emailed LSS in request of payment for an expedited transcript of the Client’s hearing held a week prior. The Respondent did not properly submit her payment request through the online LSS billing system, so LSS never processed her request.

[13] The Respondent addressed the issue of LSS billing in the following portion of a May 26, 2016 email to the Client:

As for billing, I tried to bill to Legal Aid and the system that they now use makes it difficult to get paid from them first and then to leave a remaining balance for you to pay. Rather, I think the only way to go is to bill you and then allow legal aid payments to reduce your legal fees, once received. Legal aid also allocates only a certain amount of units that they approve for certain steps that are taken, like making a court application, they may approve only 4 units. So, in order to work with legal aid’s system requirements, I think the only way to deal with this is to invoice you regularly, and allow legal aid payments to reduce your balance.

[14] The Respondent later told the Law Society that she was referring to her unprocessed transcript payment request when she wrote “I tried to bill Legal Aid” in her May 26, 2016 email. However, she acknowledged to the Law Society that

the same statement could be read to imply that she had submitted bills to LSS for payment of fees pursuant to the Client's legal aid matter.

- [15] On June 2, 2016, the Respondent sent an email to the Client that included the following:

Whatever I am able to recover from legal aid, I will also write off from your invoice. I'll send you legal aid approval of charges to you as well, once I receive the same.

- [16] The Respondent sent a second email to the Client on June 2, 2016 that included the following:

There were no other arrangements between us about billing other than that you would cover whatever legal aid would not cover. Since it takes a long time for legal aid to approve billing and their approval is limited on what can be approved, I've billed you and promised to further reduce your balance by whatever legal aid covered.

- [17] The Respondent also issued a June 2, 2016 statement of account to the Client for fees and disbursements totaling \$9,741.40. She never sought payment from LSS for any portion of that amount, beyond her unsuccessful May 4, 2016 request for reimbursement of transcript costs.

- [18] On June 22, 2016, the Respondent sent an email to the Client in which she stated:

I have not used any of your legal aid points, which you can transfer onto your next lawyer if they accept legal aid.

- [19] On August 7, 2016, the Respondent sent an email to the Client that included this update on the balance of fees and disbursements:

I will need for you to bring down your bill by at least \$6,000 as the unbilled balance is starting to get too high. The unbilled fees and disbursements to date comes [sic] out to about \$18,000 and there is already a balance outstanding of \$6,000.

- [20] The Respondent and the Client exchanged emails again on August 23, 2016. In an email authorizing his payment of the Respondent's fees by credit card, the Client stated:

I do want to see how much legal aid is paying as well.

[21] The Respondent did not respond to the Client's enquiry regarding LSS coverage of his fees. She sent another email to the Client on September 12, 2016 where she stated:

I'd hate to nag but we just paid the examination for discovery and translation of an email. Disbursements are going up. Please pay what you can. I will also submit rest of claim to legal aid.

[22] In the course of the Law Society's investigation of the Two Allegations, the Respondent acknowledged that her emails from the summer of 2016 could be read to imply — and in fact misled the Client to believe — that she had already billed or was about to bill LSS for payment of a substantial portion of the service fees charged to the Client. She further acknowledged that she never billed LSS for any portion of the service fees charged to the Client, despite her repeated agreement to do so.

[23] On October 6, 2016, the Client sent an email to the Respondent in which he asked:

Did you get the legal fees from legal aid yet? I want to know the detail on legal aid payment first.

The Respondent did not respond to the Client's question.

[24] Within a few days of October 6, 2016, the Client contacted LSS and learned that the Respondent had not sought payment from LSS for any of her fees in his legal aid matter. LSS further informed the Client that it was "illegal [for the Respondent] to charge both sides." The Client subsequently called the Respondent's office to request termination of the Retainer, and transfer of his file to a new lawyer.

[25] The Client's transfer request prompted the Respondent to send an email to the Client on October 12, 2016, in which she stated:

I heard that you called our office and asked to transfer the file. I can help to facilitate this but given your outstanding bill, I will need you to pay out the balance in full before your file is transferred as I have a solicitor's lien against your file.

[26] On October 17, 2017, the Client stated in an email to the Respondent:

... I stopped by legal aid office to check your request of payment from legal aid office.

What I have found out was that you haven't requested any payment from legal aid even though we had contract of receiving payment from legal aid as well.

[27] The Respondent replied by email a day later, where she stated:

I already put in a request for approval for a disbursement (re: transcript) and nothing came from that. I normally would not seek payment until all is over and already know from past experience that very little is covered.

Prior to this email, the Respondent had not expressed to the Client that she intended to wait until the conclusion of his legal matter before seeking payment from LSS.

[28] On or about November 21, 2016, the Respondent sent an email to LSS in which she wrote about the Client's file:

I do not intend to collect or claim for anything from LSS for working on this file and it has recently come to my attention that one has to terminate or end the contract (?) in these circumstances. Please note that I have not made a claim or attempted to collect on this contract since the time of referral of February 2016.

I would appreciate if you would terminate this contract. I would also like to cancel my vendor number as I do not intend to take on anymore [sic] files from LSS.

[29] LSS subsequently informed the Respondent that, if she reimbursed the Client's fee payments, she could then bill LSS for the services rendered for his legal aid matter.

[30] In a January 30, 2017 letter to the Client, LSS stated the following:

Through strict application of the LSS' General Terms and Conditions, and our policy concerning private retainers ... , Ms. Kim accepted payment through privately billing the Client (both through the \$2,000 retainer and the \$8,741.54 for legal services) and therefore cannot now bill LSS.

While you and Ms. Kim were both at the time unaware that this type of private billing arrangement was prohibited on a LSS contract, you paid Ms. Kim's initial retainer and subsequently, Ms. Kim did not submit any billings to LSS even after you had obtained a contract.

Accordingly, given the concerns as outlined above, I have referred Ms. Kim to the Manager of Audit & Investigation with a recommendation that her LSS vendor number be suspended until such time Ms. Kim reimburses you for \$8,741.54 for legal services that was billed to you through the private retainer.

[31] In a letter to LSS dated April 3, 2017, the Respondent stated in part:

It is not my intention to enter into an arrangement that was contrary to the Legal Services Society's guidelines or policies. I regret that I erroneously assumed that the arrangement that I made with [the Client] was one which was in keeping with those policies. This is no one's fault but mine. I apologize for my error.

[32] The Respondent chose not to reimburse the Client for the \$8,741.54 that he paid for her legal services. In an email sent on March 7, 2017, she sought payment from the Client for a reported balance of \$30,000 in unpaid fees, disbursements and taxes. This unpaid balance included a 30 per cent discount on fees that she calculated to offset the Client's unrealized savings from his legal aid coverage.

[33] The Client declined to pay any part of the balance stated as owing in the Respondent's March 7, 2017 email, and the Respondent took no further steps to collect on the balance.

#### **Allegation of altering a sworn affidavit**

[34] In or around April 2016, the Respondent prepared a draft affidavit to be sworn by the Client in his family law matter. She met with the Client at her office on Sunday, May 1, 2016 to review and commission the affidavit. The Respondent commissioned the affidavit (the "Affidavit") in the usual prescribed manner, with a duly signed jurat and signature page.

[35] Later, in the same May 1, 2016 meeting, the Client informed the Respondent of an incident involving his daughter's soccer boots that occurred earlier that day. The Respondent and the Client agreed to revise the Affidavit to include mention of the soccer boots incident. The Respondent also agreed to email a revised version of the Affidavit to the Client for his review at home.

[36] That evening, the Respondent prepared a revised version of the Affidavit to include an additional paragraph setting out the details of the soccer boots incident. As agreed, the Respondent emailed the revised Affidavit to the Client for his review. After settling on the proposed revision and a few newly identified corrections, the Client confirmed that the revised Affidavit "looks good."

[37] Upon receiving the Client's confirmation, the Respondent appended the Affidavit's originally signed jurat and signature page to its revised version.

[38] The Respondent then filed the revised Affidavit with the Court on May 2, 2016 in support of a chambers application being heard that day. She relied on the revised Affidavit during the application.

[39] In a September 25, 2017 interview with the Law Society, the Respondent acknowledged that filing an affidavit that had been altered after being sworn was wrong.

[40] The Respondent admitted that:

- (a) she altered the Affidavit after it had been sworn;
- (b) she subsequently filed and relied on the altered Affidavit in court proceedings; and
- (c) her conduct constitutes professional misconduct.

## **ISSUES**

[41] The issues for determination are:

- (a) Whether each of the Respondent's admissions of professional misconduct concerning the Allegation of Misleading a Client and the Allegation of Altering a Sworn Affidavit are supported by the admitted facts and constitute professional misconduct;
- (b) If the Panel affirms professional misconduct for one or both of the Two Allegations, what disciplinary action to impose on the Respondent; and
- (c) If the Panel affirms professional misconduct for one or both of the Two Allegations, what amount of costs to award to the Law Society.

## **LAW**

### **Standard and burden of proof**

[42] The standard of proof on a hearing of a citation is proof on a balance of probabilities, and the burden of proof falls on the Law Society: *Law Society of BC v. Daniels*, 2016 LSBC 17.

### **Test for professional misconduct**

- [43] Professional misconduct is not defined in the *Act*, the Rules or the *Code of Professional Conduct for British Columbia* (the “*Code*”). Hearing panels instead assess a lawyer’s conduct in specific circumstances to determine if there is “a marked departure from that conduct the Law Society expects of its members”: *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 171. In *Martin*, the hearing panel observed at paragraph 154:

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

- [44] In *Re: Lawyer 12*, 2011 LSBC 11 at paragraph 14, the hearing panel summarized previous applications of the *Martin* test as follows:

In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent’s conduct and whether that conduct falls markedly below the standard expected of its members.

- [45] The *Martin* test is not a subjective test. A panel must consider the appropriate standard of conduct expected of a lawyer, and then determine if the lawyer falls markedly below that standard. In determining the appropriate standard, a panel must bear in mind the requirements of the *Act*, the Rules and the *Code*, and then consider the duties and obligations that a lawyer owes to a client, to the court, to other lawyers and to the public in the administration of justice. Each case will turn on its particular facts.

### **Duty to practise with integrity**

- [46] The *Code* sets out the duties that a lawyer must uphold as a minister of justice, an officer of the court, a client’s advocate and a member of an ancient, honourable and learned profession. The duty to demonstrate personal integrity underpins many other duties, including the duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the court, and be faithful to clients.
- [47] Rule 2.2-1 of the *Code* affirms the foundational importance of integrity in legal practice:

A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

- [48] Commentaries [1] and [2] to Rule 2.2-1 outline what it means for a lawyer to practise with integrity:

Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

- [49] Rule 3.2-2 of the *Code* also states:

When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

## ANALYSIS

### **Allegation of misleading a client**

- [50] There are relatively few Law Society hearing panel decisions that address the allegation of misleading a client in isolation from other allegations of professional misconduct. But the decisions that do consider the specific allegation, including *Law Society of BC v. Ahuja*, 2017 LSBC 26, and *Law Society of BC v. Simons*, 2012 LSBC 23, tend to be clear in determining that misleading a client is a marked departure from the conduct expected of lawyers.
- [51] In *Ahuja*, the respondent admitted, and was found to have committed, professional misconduct by misleading his client and the court about the reason he missed his flight from Vancouver to Kelowna to attend a contested court hearing. The respondent missed his flight because he overslept after attending a work event where he consumed alcohol. He misled his client and the court to believe that he could not attend the hearing because his flight was overbooked.
- [52] In assessing the nature and gravity of the respondent's conduct, the *Ahuja* hearing panel made the following comments at paragraphs 20 and 21:

There is no dispute that misleading both the court and a client is a serious matter. The integrity of the profession is seriously challenged in circumstances where the representations of a lawyer cannot be relied upon. There are equally compelling arguments about whether it is more serious misconduct to mislead the court or a client. We need not resolve that debate, except to note that both are extremely serious and deserving of significant penalty.

It was noted in argument that most subjects of misleading statements are related to the substance of the matter in dispute. This circumstance is unusual in that it did not involve a representation at the heart of the dispute. We see little significance in the distinction. The outcome is identical. The court is misled, and the client is disappointed by the lack of candour.

- [53] In *Simons*, the respondent admitted, and was found to have committed, professional misconduct by failing to provide his client with acceptable quality of service and by misleading his client regarding the status of her court action. The hearing panel stated at paragraphs 51 and 52:

Misleading a client is serious misconduct, particularly in this instance as the impact on the Client was considerable – the Court Action was dismissed, without notice to her, and she was then without counsel. In this case, the Respondent misled the Client about the status of the court action and the quality of service he had provided to her in respect of the Court Action. The Respondent's failure to take steps to conclude the Court Action is exacerbated by his failure to communicate effectively with the Client.

The Panel does take into consideration that the Respondent's misconduct appears to have conveyed little or no benefit to the Respondent. His misleading statements to the Client eventually caught up with him.

- [54] The *Simons* hearing panel further stated at paragraph 54:

However, the continued independence of the legal profession and the need to preserve its self-regulation is of utmost importance. One of the characteristics of an independent Bar is that it is forthright and honest with clients, with the members of the public, and with other members of the profession. The profession demands that a clear and unequivocal message is delivered in respect to behaviour that would serve to erode the public's confidence in the integrity of the legal profession.

- [55] In the matter before the Panel, the Respondent entered into a prohibited billing arrangement with the Client, but nonetheless had a duty to the Client to make reasonable efforts to obtain fee payments from LSS as agreed. Aside from one

failed attempt to seek payment for a minor disbursement, she took no steps to contact LSS to determine how she could receive payment for any of her fees and disbursements totalling over \$50,000; this despite repeated assurances to the Client that she would do so.

- [56] The clear inference from the Respondent's conduct is that she chose her own convenience over her duties to the Client. After a single failed attempt to use the online LSS billing system for payment of fees, the Respondent never bothered to try again, or to explain to the Client that she would seek LSS payments once his matter was concluded. She effectively denied the Client his right to consider and weigh the risks of continuing to retain her under the true circumstances. He felt compelled to transfer his file to another lawyer at a much later stage than necessary.
- [57] The Respondent's conduct, even in the absence of intent to mislead the Client, is clearly a marked departure from the conduct expected by the Law Society. This type of conduct erodes public confidence in the integrity of lawyers and the legal profession and undermines the trust that is essential to every solicitor and client relationship.

#### **Allegation of altering a sworn affidavit**

- [58] In considering the Allegation of Altering a Sworn Affidavit, the Panel is guided by Appendix A to the *Code*. Commentary 15 to Appendix A provides as follows:

If an affidavit is altered after it has been sworn, it cannot be used unless it is resworn. Reswearing can be done by the commissioner initialling the alterations, taking the oath again from the deponent and then signing the altered affidavit. A second jurat should be added, commencing with the word "resworn".

- [59] In *Law Society of BC v. Nielsen*, 2007 LSBC 35, the respondent admitted, and the hearing panel found, that he committed professional misconduct by altering an exhibit to his client's affidavit after it was sworn and by later filing the altered affidavit in court — all without his client's knowledge or consent. The respondent explained that he thought he was correcting a problem by making the exhibit consistent with the affidavit. He did not make the changes with any intention to mislead the court or for any personal gain.
- [60] In *Law Society of BC v. Batchelor*, 2014 LSBC 11, the respondent electronically filed two improperly commissioned affidavits and exhibits without complying with the Rules of Court respecting electronic filing. He also falsely represented the affidavits and exhibits to the court. The hearing panel had no difficulty in

concluding that he committed professional misconduct. In reaching that conclusion, the hearing panel stated at paragraph 14:

In our view, the Respondent's conduct is without a doubt a marked departure from the standards that the Law Society expects of its members. Members of the profession are officers of the court and as such the defenders of the Rule of Law, which is inherent in the office and in their duties. Confidence in the court's ability to fairly and judiciously view and receive evidence is eroded when sworn affidavits are falsified.

- [61] In *Law Society of Upper Canada v. Clarke*, 2016 ONLSTH 127, the respondent prepared and filed two affidavits that were altered after she commissioned them or after the affiants signed them. The respondent admitted, and the hearing panel found, that she committed professional misconduct. The hearing panel held at paragraph 22:

The above agreed facts substantiate that the Lawyer failed to act with integrity by relying on two affidavits that were altered after they had been signed and without further review by the affiants either after the Lawyer commissioned them or between when the affiants signed them and when the Lawyer commissioned them. Lawyers are officers of the court and make representations that the court should be able to rely upon. The profession and the public must be able to rely on sworn documents as being correct in all respects. Submitting affidavits that have been altered after being signed and commissioned brings the integrity of the Lawyer and the profession into disrepute: *Law Society of Upper Canada v. Nijhawan*, 2006 ONLSHP 17.

- [62] In *Law Society of BC v. Walters*, 2005 LSBC 39, the respondent admitted that she committed professional misconduct by signing the jurat of an affidavit as having been sworn before her as a commissioner for taking affidavits while leaving the jurat undated. The hearing panel accepted her admission and confirmed a finding of professional misconduct. It noted that the respondent's difficult personal circumstances could not justify her actions. It emphasized the importance of lawyers strictly and scrupulously adhering to the formalities of commissioning of affidavits and adopted the following language of the Law Society hearing panel decision in *Re: Lawyer 3*, 2004 LSBC 27, at paragraph 28:

Allowing this conduct to go uncensured would harm the standing of the legal profession. Documentary evidence sworn before lawyers would lose its value if the public and the courts became aware that scrupulous adherence to the rules of swearing such documents was not being practised.

[63] By altering the Affidavit after it had been sworn, the Respondent exhibited behaviour that is another marked departure from the conduct expected by the Law Society. All justice system actors must be able to rely on the accuracy of documents commissioned by lawyers. The process for commissioning affidavits must be scrupulously followed to maintain public confidence in their truthfulness. Such truthfulness is rooted in being accurate and, equally, in following strict protocols to support that accuracy. Specifically, with respect to affidavits used in court proceedings, any impropriety in the commissioning of those affidavits undermines the court's trust in lawyers — trust that is foundational to the administration of justice.

### **DETERMINATION**

[64] The Panel finds that, in each instance of misleading the Client and altering the sworn Affidavit, the Respondent exhibited behaviour that was a marked departure from the standard of conduct expected of lawyers. We therefore find, for each of the Two Allegations, that the Respondent has committed professional misconduct as admitted.

### **DISCIPLINARY ACTION**

[65] The Law Society's disciplinary proceedings are designed to fulfill its mandate to uphold and protect the public interest in the administration of justice as set out in section 3 of the *Act*.

[66] For many years, Law Society panels have considered the long non-exhaustive list of penalty factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. In *Law Society of BC v. Lessing*, 2013 LSBC 29 at paragraphs 57 to 60, the review panel identified the two most important penalty factors from *Ogilvie* as: (i) the need to ensure the public's confidence in the integrity of the profession; and (ii) the possibility of remediating or rehabilitating the respondent. The *Lessing* review panel also observed that, where there is a conflict between these two factors, protection of the public should take priority over rehabilitation of the respondent.

[67] In *Law Society of BC v. Dent*, 2016 LSBC 05, the hearing panel affirmed the prioritization of penalty factors in *Lessing*, and, at paragraphs 19 to 25, consolidated the wider list of *Ogilvie* factors into four general factors for determining appropriate disciplinary action: (i) the nature, gravity and consequences of the misconduct; (ii) the character and professional conduct record of the respondent; (iii) acknowledgement of the misconduct and remedial action;

and (iv) public confidence in the legal profession including public confidence in the disciplinary process.

[68] In *Law Society of BC v. Faminoff*, 2017 LSBC 04, the review board endorsed the four general factors outlined in *Dent* for determining appropriate disciplinary action and expanded on the guidance contained in *Lessing*. The review board held at paragraph 80 that, “public confidence in the profession depends on the Law Society’s discipline system being perceived as transparent, justifiable and legitimate.”

[69] The review board in *Faminoff* also emphasized that imposition of a sanction is an individualized process. It further held at paragraphs 84 to 86:

In determining a disciplinary penalty, it is only necessary to identify those circumstances and principles that are important to the disciplinary decision. Decisions on penalty are 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 disciplinary proceedings.

In addition, disciplinary action must be appropriate based on the particular circumstances of the case. Although consistency and lack of arbitrariness are important in a self-regulated profession, the *Ogilvie* factors are designed to help to select the appropriate disciplinary action to best rehabilitate the Respondent and also to promote public confidence in the legal profession. This means that hearing panels will attempt to impose penalties that are appropriate for that particular individual.

As well, penalties may need to evolve over time to ensure that the public continues to have confidence in the integrity of the profession.

[70] Here, the Panel considers each of the four general factors endorsed in *Faminoff* in assessing appropriate disciplinary action for the Respondent’s two instances of professional misconduct, with protection of the public foremost in mind.

### **Nature, gravity and consequences of the misconduct**

[71] The Respondent repeatedly misled the Client about the status of fee payment requests made (or more accurately not made) to LSS. As a lawyer, she had a duty to keep the Client apprised of all information known to her that could materially affect his interests. After a single failed attempt to collect an LSS payment, the Respondent never bothered to try again, or to explain to the Client that she would seek LSS payments upon completion of his matter. She behaved in this way for no apparent reason other than convenience. Her behaviour displayed a serious lack of

integrity and had negative consequences for the Client, who felt it necessary to retain new counsel.

- [72] More significantly, the Respondent failed to act with integrity by altering the sworn Affidavit and then filing and relying on it in court. The court, the profession and the public must be able to rely on commissioned affidavits as being correct in all respects. Though it did not have negative consequences for the Client, the Respondent's conduct compromised the integrity of the court system and brought the integrity of the profession into disrepute. Again, she behaved in this way for no apparent reason other than convenience.

### **Character and professional conduct record of the respondent**

- [73] The Respondent's professional conduct record consists of a conduct review held in November 2012 and recommendations made by the Law Society's Practice Standards Committee in May 2013.
- [74] The 2012 conduct review related to her involvement in a corporate matter where she was retained by an individual to incorporate a company and act on the acquisition of a restaurant for the company. The conduct review addressed her failure to advise two unrepresented investors in the company that she acted only for the company and was not protecting their interests. It also addressed her failure to supervise her staff properly, resulting in unlicensed staff performing tasks and functions to which she was required to attend personally. These incidents occurred in 2005.
- [75] The 2013 Practice Standards Committee recommendations sought to improve the Respondent's standard of practice and file management protocols as they related to communications with clients and the challenges of sole practice.
- [76] The Panel ascribes minimal weight to the Respondent's professional conduct record since it is unremarkable and has little relevance to the issues here.

### **Acknowledgement of the misconduct and remedial action**

- [77] The Respondent admitted all of the facts and professional misconduct included in each of the Two Allegations by way of the Agreed Statement of Facts signed and filed by both parties on September 25, 2019 — the day of the hearing. She agreed to the one-month suspension proposed by the Law Society at the hearing. Though presented very late in the proceedings, the Respondent's admissions and agreement regarding sanction do suggest that she understands that her conduct was very unprofessional.

### **Public confidence in the legal profession including confidence in the disciplinary process**

- [78] To maintain public confidence in the trustworthiness of lawyers, the Law Society must respond firmly — and be perceived to respond firmly — to instances where lawyers fail to fulfill their duties to clients for reasons of expediency and convenience. The public will have greater confidence in Law Society disciplinary processes when the sanctions are proportionate, fair and reasonable in all of the circumstances, including the range of sanctions levied in prior similar cases.
- [79] Here, the Law Society seeks a one-month suspension and a \$7,500 costs order as disciplinary action. The Respondent agrees to both.
- [80] There are few prior similar cases involving a respondent who either misled a client or altered a sworn affidavit or both. In *Ahuja*, the hearing panel ordered a one-month suspension and \$3,500 in costs. In *Law Society of BC v. Johnston*, 2013 LSBC 04, where the respondent provided poor quality of service and made intentional misrepresentations to his client, the hearing panel ordered a one-month suspension and \$6,448 in costs. In *Simons*, the hearing panel ordered a one-month suspension and no costs. In *Clarke and Batchelor* — two decisions involving a respondent who altered an affidavit after it was sworn — the hearing panel ordered a one-month suspension and costs.

### **DISPOSITION**

- [81] Having affirmed that the Respondent committed professional misconduct for each of the Allegation of Misleading a Client and the Allegation of Altering a Sworn Affidavit, the Panel orders the Respondent to serve a one-month suspension.

### **COSTS**

- [82] The Law Society provided a Bill of Costs for \$10,150.40 in total Rule 5-11 and Schedule 4 costs and disbursements. However, the Law Society agreed with the Respondent that, under the circumstances, the total in costs and disbursements should be reduced to \$7,500. They also agreed that the Respondent should have until May 25, 2020 to pay the total amount.
- [83] Finding no facts to justify departing from the agreement between the Law Society and the Respondent, the Panel orders the Respondent to pay \$7,500 in costs to the Law Society on or before May 25, 2020.

## **NON-DISCLOSURE ORDER**

- [84] The Law Society seeks an Order under Rule 5-8(2) of the Rules that specific tabs of the ASF that contain confidential client information or privileged information not be disclosed to members of the public.
- [85] The Law Society has the right to override a lawyer's duty to keep client confidentiality and to maintain solicitor-client privilege by compelling lawyers to produce confidential and privileged information to the Law Society during its investigation and hearing processes. Sections 87 and 88 of the *Act* are the sections that compel disclosure to the Law Society and protect confidential and privileged information from disclosure.
- [86] Rule 5-9(2) allows any person to obtain a copy of an exhibit that was tendered in a Law Society hearing that was open to the public, subject to solicitor-client privilege. Rule 5-9 is subject to any order made under Rule 5-8(2).
- [87] In order to prevent the disclosure of confidential or privileged information to the public and with the consent of both parties, the Panel grants an order under Rule 5-8(2) excluding tabs 4 to 6, 8 to 17, 19, 24 to 26 and 32 to 34 of the Agreed Statement of Facts before it is provided to the public.

## **ORDERS**

- [88] The Panel orders as follows:
- (a) The Respondent must serve a one-month suspension beginning on January 1, 2020, or on a later date determined prior to January 1, 2020 by agreement of the Law Society and the Respondent;
  - (b) The Respondent must pay \$7,500 in costs to the Law Society on or before May 25, 2020; and
  - (c) If any person other than a party requests access to the Agreed Statement of Facts, tabs 4 to 6, 8 to 17, 19, 24 to 26 and 32 to 34 must be excluded before the document is made available.