

Conduct Reviews – 2023-47 to 2023-54

Publication of conduct review summaries is intended to assist lawyers by providing information about ethical and conduct issues that may result in complaints and discipline.

Failure to deposit trust funds and remit GST/PST

A compliance audit revealed that a lawyer deposited retainer funds into their general account prior to issuing proper invoices, contrary to Law Society Rules 3-58 and 3-72(3), and failed to remit GST and PST as required, contrary to rule 7.1-2 of the *Code of Professional Conduct for British Columbia*. The lawyer's failure to remit GST and PST occurred as a result of financial pressures brought about by a combination of the chronic underfunding of legal aid, the lawyer's health issues, and court closures during the COVID-19 pandemic. The lawyer did report the failures to remit GST and PST in Law Society trust reports. As a result of the same financial pressures, the lawyer practised for a period without any administrative or accounting support, and did not operate a trust account. The lawyer had sought to set up a flat fee billing system and retainer agreements allowing them to charge clients for non-legal aid matters without the use of a trust account, but experienced issues in delivering proper accounts to affect this billing approach. At the time of the conduct review, the lawyer had paid almost all of the GST and PST shortfalls owing, and expected to pay the remaining shortfalls in the near future. The lawyer has changed the firm's accounting and billing practices, and has engaged an accounting professional to administer the lawyer's billings. CR 2023-47

Pre-signed trust cheques

A compliance audit revealed that a lawyer had pre-signed 23 trust cheques and provided them to non-lawyer staff, contrary to rules 3.5-2 and 6.1-3 of the *Code of Professional Conduct for British Columbia*. During the COVID-19 pandemic, the lawyer signed and allowed pre-signed trust cheques to be taken home by the office manager to be stored in their home safe. If a trust cheque needed to be issued to a client, the lawyer would contact the office and instruct the office manager, and a pre-signed trust cheque would be retrieved from the safe and filled out according to the lawyer's instructions. It would then be reviewed and signed by the non-lawyer partner. The lawyer believed that because there needed to be a second signatory to each trust cheque that it was acceptable to pre-sign the trust cheque, as it could not be negotiated until their partner also reviewed and signed the cheque. The lawyer was also concerned that clients would not be able to access their funds in trust while the lawyer was on vacation. As soon as the lawyer became aware of the misconduct, they ceased the practice of pre-signing trust cheques and voided the remaining ones. The lawyer was sincerely remorseful and took full responsibility for their conduct. CR 2023-48

Trust accounting obligations

A lawyer received funds for a real estate transaction that did not complete and failed to take steps to obtain instructions from their client to pay out the funds held in their trust account as soon as practicable, contrary to Law Society Rule 3-58.1(2). The lawyer also failed to immediately eliminate trust shortages and make a written report to the Law Society of trust shortages, in amounts greater than \$2,500, contrary to Law Society Rule 3-74. A contributing factor to the trust shortages was due to the COVID-19 pandemic remote work requirements. The lawyer advised that the funds would be cleared electronically by electronic deposit and again through the physical cheque clearing process by the clients. The firm's bank rectified the double clearance of funds once they were discovered. An associate at the firm was responsible for sending trust shortage correspondence, but left the firm without sending it. The errors that resulted in trust shortages were caused by the lawyer's assumption that staff would bring these errors to the lawyer's attention. The lawyer has made the appropriate changes to their office systems and staff training, no longer holds funds in trust on a long-term basis, and will direct any repayment in accordance with the Rules. CR-2023-49

A compliance audit revealed that the lawyer withdrew or authorized the withdrawal of trust funds in payment of 12 invoices without delivering invoices to the clients prior to the trust withdrawals, or at all, contrary to Law Society Rule 3-65 and s. 69 of the *Legal Profession Act*. The lawyer had done the work, the fees were justified and the clients did not complain about the invoices when they were eventually delivered. The lawyer advised that they had been overwhelmed and did not have a system in place to ensure that invoices were not paid out of trust before they were rendered. The lawyer acknowledged that they did not pay enough attention to accounting practices and billing requirements, and their actions were irresponsible. The lawyer now has an accountant and bookkeeper and has taken steps to better manage their file workload. The lawyer consulted with a Law Society Practice Advisor, retook the Law Society accounting course and utilized the services of the Lawyers Assistance Program. CR 2023-50

A compliance audit revealed that a lawyer received a \$4,000 cash retainer from their client and failed to deposit the funds into the firm's trust account, contrary to Law Society Rule 3-58(1), instead depositing the funds into a cash envelope that was kept in the office. The lawyer recorded the funds as revenue in firm accounting records and PST and GST were paid on the funds. There was no written retainer agreement with the client; the terms of the oral agreement were written on a cash receipt: "Purpose: fixed legal fee for one RPDI application, up to hearing." At the conclusion of the file, the lawyer failed to issue an account for the work performed, contrary to s. 69 of the *Legal Profession Act*. At the time, it was the lawyer's understanding that the money could go straight into a general account. He explained his regular practice was entirely contingency fee agreements and was influenced by the fact it was a modest amount of money. The subcommittee advised that the amount of money was not the issue, and it was the client's

money until an invoice was rendered for the legal services performed. The lawyer now understands that funds need to be deposited in trust, regardless of the amount. CR 2023-51

A lawyer a) failed to remit GST and PST, contrary to rule 7.2-1 of the *Code of Professional Conduct for British Columbia* (“Code”), b) failed to report and eliminate trust shortages, contrary to Law Society Rules 3-74, 3-63, and 3-64 (“Rules”), c) failed to properly supervise their firm’s staff to ensure the Law Society trust accounting rules were followed, contrary to Rule 3-54 and rule 6.1-1 of the *Code* and d) filed a trust report that was inconsistent with the findings of a Law Society compliance audit. The lawyer advised there was a dispute with CRA regarding the GST arrears and they did not realize that a failure to remit GST to CRA for the entire amount payable for billings, was a matter they must report to the Executive Director. The lawyer further stated that they were unaware of the trust shortages, as there were procedures in place for staff to bring trust shortages to their attention, but those procedures were not followed. The lawyer agreed they ought to have carefully reviewed the bank statements and monthly reconciliations themselves and asked appropriate questions of their accounting staff. The lawyer advised that shortly after their firm opened, it grew rapidly in a short period of time and they should have supervised the staff better to ensure everyone understood the trust accounting procedures.

The lawyer is now practicing with a national law firm where there is greater support to run the administrative, business and trust accounting side of their practice. The subcommittee reminded the lawyer that if they are stressed in their practice, there are supports available through the Law Society such as the Lawyer’s Assistance Program or LifeWorks. CR 2023-52

Conflict of interest

A compliance audit revealed that a lawyer acted in a conflict of interest when they represented both the third mortgage holder and the mortgage broker in transactions to pay out first and second mortgage holders and transfer those first and second mortgages to the mortgage broker. The lawyer also prepared a demand promissory note providing for payment of the third mortgage from the mortgage broker to the third mortgage holder clients. The lawyer did not obtain written consent of each party for joint representation, contrary to rules 2.1-3, 3.4-1 and commentary, 3.4-2, 3.4-5, and Appendix C of the *Code of Professional Conduct for British Columbia*. The lawyer considered the parties’ legal interests were primarily aligned; however, the lawyer should have advised each of the clients as to the consequences of a joint engagement and should have advised the mortgage broker to obtain independent legal advice. The lawyer has new systems in place including revised file opening and conflicts search systems; when opening a new matter, the lawyer’s new system will prompt the lawyer to consider conflicts and address them before a file can be opened. CR 2023-53

Breaches of undertaking and failure to respond

A lawyer breached undertakings in a real estate transaction when they failed to obtain a registrable discharge of assignment of rents until seven months after the closing date and failed to pay special levies in full and provide confirmation thereof, contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia* (the “Code”). The lawyer also failed to respond to several communications from opposing counsel with respect to the undertakings in a timely manner, contrary to rule 7.2-5 of the *Code*. The lawyer acknowledged that the conduct occurred when they had an unprecedentedly high number of files and overly relied on their assistant who was still in training. The lawyer recognized that their staff’s actions are the lawyer’s responsibility and the importance of properly supervising staff. The lawyer now reviews every conveyance file for mortgage discharge and undertakings and has a diarizing system for a monthly review of all files. The subcommittee advised the lawyer of the importance of considering their own boundaries, limits, mental health and encouraged the lawyer to take advantage of supports such as the CBA Real Property section, other colleagues, benchers or practice advisors. CR 2023-54