THE LAW SOCIETY OF BRITISH COLUMBIA

ORDER (RULE 4-60)

TO: The Executive Director, Don Avison, KC and Jessica E. Abells

AND TO: [redacted]

FROM: Brook Greenberg, KC
Chair of the Discipline Committee

DATE: December 21, 2022

RE: [redacted]**: Administrative Penalty File No. PE20220001**

Pursuant to Rule 4-60 of the *Law Society Rules 2015* (the "Rules"), I hereby notify [redacted] and Executive Director Avison that I am satisfied that the breach of Rule 3-59 alleged in the captioned matter has been established on a balance of probabilities. I am also satisfied that the penalty originally assessed should be upheld.

Given the novelty of this process, the number of issues raised, and the scope of the submissions provided by the parties, I have set out my reasons for this conclusion in some detail, notwithstanding that this is intended to be a summary process. It is not my expectation or intention to imply that reasons such as these will be necessary in every dispute of an Administrative Penalty.

The Rule Breached

1. [redacted] is alleged to have breached Rule 3-59 (Cash Transactions).

2. A breach of this Rule occurs where a lawyer:

   a. receives cash funds,

   b. in an aggregate amount greater than $7,500 in respect of any one client matter,

   c. the lawyer makes use of the cash, and

   d. no exceptions as set out in Rules 3-59 apply.

Process

3. Again, given that disputing an Administrative Penalty is a new procedure, and in light of the number of issues raised by the parties, the process in this matter was as follows:

    a. [redacted] submitted an Administrative Penalties Dispute Form dated October 4, 2022;

    b. by letter dated October 28, 2022, I directed that:

        i. the Law Society may make any responsive submissions in writing, of no more than 5 pages, by November 7, 2022; and

        ii. [redacted] may make any reply submissions in writing, of no more than five pages, by November 17, 2022;

    c. each of the parties delivered submissions in writing in accordance with my directions.

Facts

4. Based on the information before me, the relevant facts are as follows.

5. [redacted] acted for a client (the "**Client**") in a residential real estate transaction (the "**Transaction**").

6. The Transaction involved the Client purchasing a residential apartment in Kelowna, British Columbia.

7. The Transaction required the Client to pay funds to the vendor (the "**Vendor**") by May 31, 2021.

8. In mid-May 2021, the Client advised [redacted] that the Client could not obtain a mortgage, and instead was borrowing money from friends and relatives to fund the Transaction.

9. [redacted] had previously encountered difficulties as a result of his bank's policy to place a hold on instruments for at least 7 days (5 business days) after deposit, which had resulted in clients missing other conveyancing deadlines.

10. On May 25, 2021, the Client met with [redacted], and sought to provide $46,000 in cash (the "**Cash**") for the purposes of completing the Transaction.

11. Given the date and the bank hold policy, there was not sufficient time for [redacted] to accept the funds through a cheque or other instrument, and still pay them to the Vendor by May 31, 2021.

12. Faced with the dilemma of accepting the Cash, or breaching an agreement by failing to complete the Transaction on May 31, 2021, [redacted] decided to take the following steps:

> I asked the [C]lient to meet me at TD branch at Lansdown and Gilbert, Richmond. Together with the bank teller, we counted and deposited the cash into my trust account for the only and express purpose of completing the purchase of the apartment for the client.
>
> (Dispute Form at paragraph 4)

13. [redacted] obtained information about the source of the Cash and satisfied himself there were no signs of illegality.

14. Around May 31, 2021, the funds made available by the deposit of the Cash were used to pay the Vendor and comply with the Transaction agreement.

15. [redacted] disclosed the cash transaction in his 2021 annual trust report to the Law Society.

16. On March 17, 2022 the Law Society wrote to [redacted] to make inquiries in respect of the receipt of the Cash.

17. On October 4, 2022, the Law Society issued a Notice of Penalty for breach of Rule 3-59, and levied an Administrative Penalty of $5,000 (the "**Administrative Penalty**") payable by November 7, 2022, pursuant to Rule 4-59.

Issues Raised by [redacted]

18. [redacted] disputes the Administrative Penalty on a number of grounds, as set out in the Dispute Form and as summarized below.

19. [redacted] submits that:

a. The Cash was refunded to the Client, as it was used to complete the Transaction on behalf of the Client.

b. [redacted] was compelled to accept the Cash as there was no other way of accepting the funds which would allow the Transaction to complete on time.

c. [redacted] did not "receive" the Cash, as the Client gave the cash directly to the bank teller. [redacted] did not touch the Cash, but only provided his trust account number.

d. Rule 4-59 is not applicable as it was first published in April 2022, after the Law Society began investigating this matter in March 2022.

e. COVID-19 created difficulties for the Client and [redacted], which led to the Cash being deposited in [redacted]'s trust account.

f. [redacted] only charged $1,300 in fees for this matter; and therefore, the $5,000 penalty is inequitable in the circumstances.

g. This is the first Administrative Penalty levied in respect of Rule 3-59, and it is not a "clear-cut" case.

h. The Law Society investigation took more than 6 months, which caused [redacted] prejudice.

i. It is not in the public interest to penalize [redacted] for assisting the Client.

Positions of the Parties

[redacted]

20. In accordance with the issues identified above, [redacted] submitted in the Dispute Form as follows:

    a. He did not "receive" the Cash.

b. He "did not breach Rule 3-59 by refunding the Cash Funds to the Client in the client's purchase of the property."

c. Rule 4-59 should not have retrospective effect.

d. Any breach by [redacted] was excusable in the circumstances, because [redacted] was seeking to serve the Client's best interests.

e. The Chair should exercise his discretion to find no penalty in the circumstances, as there was no damage to the Client, to the Law Society, to the legal profession, or to anyone else.

21. In support of these submissions [redacted] attached documents in respect of other matters where the bank "hold" policy had delayed other transactions.

The Law Society

22. The Law Society submitted as follows:

a. That the "No-Cash Rule" provides an absolute prohibition against a lawyer accepting cash other than in the limited circumstances explicitly set out in Rule 3-59.

b. None of the exceptions in Rule 3-59 apply.

c. Where a lawyer receives cash and no exceptions apply, the lawyer must:

i. make no use of the cash,

ii. return the cash, or if that is not possible, the same amount in cash, to the payer immediately,

iii. make a written report of the details of the transaction to the Executive Director within 7 days of receipt of the cash, and

iv. comply with all other rules pertaining to the receipt of trust funds.

d. [redacted] breached the No-Cash Rule by accepting the Cash into trust, and paying funds, equivalent to the amount of the Cash deposited, to the Vendor to complete the Transaction.

e. If [redacted]'s submissions were accepted, the No-Cash Rule would effectively be unenforceable.

f. Receiving cash does not require a Lawyer to physically handle the money.

g. Paying funds to a third party for the benefit of the Client is not a "refund" under the Rules.

h. Performing due diligence does not permit a Lawyer to breach the No-Cash Rule.

i. Rule 4-59 does apply retroactively because:

   i. this Rule is merely procedural, not substantive; and

   ii. administrative penalties are not penal, but rather, are for the purpose of protecting the public.

j. There is no basis to conclude that COVID-19 played a role in [redacted] accepting the Cash into trust.

k. The penalty amount was determined in accordance with the fee schedule established by the Law Society to balance fairness with the need to ensure administrative penalties serve their protection of the public purpose.

[redacted] in Reply

23. In response to the Law Society's submission, [redacted] submitted:

a. [redacted] was only seeking to serve the Client's best interests.

b. COVID-19 made banking services less available.

c. There was no practical way for [redacted] to refund the Cash to the Client.

d. The public interest was not jeopardized because [redacted] made reasonable inquiries about the source of the Cash, the expected use of the Cash, and the Client's identity.

e. The Law Society is obliged to demonstrate a degree of moral culpability to warrant the issuance of an administrative penalty, but it has not done so.

f. Rule 4-59 cannot be applied retrospectively.

g. Rule 4-59 is not purely procedural, as it affects the substantive rights of [redacted].

h. The length of the Law Society's investigation prejudiced [redacted].

i. The penalty imposed is disproportionate to the conduct at issue.

Discussion and Determinations

The Law Society Rules

24. The applicable Rules are Rule 3-59, Rule 4-59, and Rule 4-60.

25. Rule 3-59 provides in part:

> *Cash transactions*
>
> **3-59** (1) This rule applies when a lawyer or law firm engages in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:
>
> (a) receiving or paying funds;
>
> (b) purchasing or selling securities, real property or business assets or entities;
>
> (c) transferring funds or securities by any means.
>
> (2) Despite subrule (1), this rule does not apply when a lawyer or law firm receives or accepts cash in connection with the provision of legal services by the lawyer or law firm

(a) [rescinded]

(b) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(c) pursuant to the order of a court or other tribunal for the release to the lawyer or the lawyer's client of cash that has been seized by a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(d) to pay a fine, penalty or bail, or

(e) from a financial institution or public body.

(3) While engaged in an activity referred to in subrule (1), a lawyer or law firm must not receive or accept cash in an aggregate amount greater than $7,500 in respect of any one client matter.

(4) Despite subrule (3), a lawyer or law firm may receive or accept cash in an aggregate amount greater than $7,500 in respect of a client matter for professional fees, disbursements or expenses in connection with the provision of legal services by the lawyer or law firm.

(5) A lawyer or law firm that receives or accepts cash in an aggregate amount greater than $7,500 under subrule (4) must make any refund out of such money in cash.

(6) A lawyer or law firm that receives cash, unless permitted under this rule to accept it, must

(a) make no use of the cash,

(b) return the cash, or if that is not possible, the same amount in cash, to the payer immediately,

(c) make a written report of the details of the transaction to the Executive Director within 7 days of receipt of the cash, and

(d) comply with all other rules pertaining to the receipt of trust funds.

…

(Emphasis added.)

26. Rule 4-59 provides in part:

Administrative penalty

4-59 (1) If the Executive Director is satisfied on a balance of probabilities that a lawyer has breached a rule, the Executive Director may assess an administrative penalty.

(2) The maximum administrative penalty that the Executive Director may assess is as follows:

(a) if no previous administrative penalty has been assessed against the lawyer, $5,000;

(b) if one or more administrative penalties have previously been assessed against the lawyer, $10,000.

…

[added 04/2022]

27. Rule 4-60 provides in part:

Review and order

4-60 (1) A lawyer who has received a notice of administrative penalty under Rule 4-59 *[Administrative penalty]* may apply before the effective date of the penalty to the chair of the Discipline Committee for a review of the penalty and an order under this rule.

(2) The chair of the Discipline Committee must consider submissions regarding the administrative penalty received within the time allowed under subrule (1) from the lawyer and, <u>if satisfied that the lawyer has breached a rule as alleged</u>, make an order

(a) confirming that the penalty must be paid in accordance with the notice delivered under Rule 4-59 *[Administrative penalty]*,

(b) reducing the amount of the penalty, or

(c) extending the date by which the penalty is to be paid.

(3) If not satisfied that the lawyer has breached a rule as alleged, the chair of the Discipline Committee must make an order cancelling the administrative penalty.

(4) The chair of the Discipline Committee must promptly notify the lawyer and the Executive Director of a decision under this rule.

(5) The lawyer must pay an administrative penalty as ordered under this rule.

[added 04/2022]

(Emphasis added.)

Determinations

Did [redacted] *Receive or Accept Cash?*

28. I conclude that [redacted] did receive or accept cash in an amount greater than $7,500 contrary to Rule 3-59(3).

29. It is clear that in prohibiting both the receipt and acceptance of cash, Rule 3-59(3) is intended to capture any participation by a lawyer in the transfer of cash, other than in accordance with Rule 3-59.

30. According to the *New Shorter Oxford Dictionary,* "accept" means:

> Take or receive with consenting mind; receive with favour or approval.

31. The definition of "receive" includes:

> Take or accept into one's hands **or** one's possession; … Be provided with or given.
>
> (Emphasis added.)

32. The definition of "receive" makes clear that receiving cash does not require that a lawyer physically handle cash. Taking cash into one's hands is one form of receiving. However,

a lawyer coming into possession of cash with their consent or approval also comprises receiving cash.

33. The deposit of the Cash into [redacted]'s trust account resulted in the Cash coming into [redacted]'s possession.

34. Nothing in the wording of Rule 3-59 requires a lawyer to physically handle cash in order to have received or accepted it. Adopting such an interpretation would render Rule 3-59 practically ineffective. A lawyer could always have another person physically handle cash, and thereby, avoid application of Rule 3-59.

35. Physically handling cash is not the mischief that Rule 3-59 targets. Rather, Rule 3-59 is aimed at preventing lawyers, other than where an express exception applies, from engaging in transactions with cash, which in turn increase the prospects of intentional or inadvertent participation in money laundering.

36. In attending at the bank, providing the trust account number, and consenting to the deposit of the Cash into his trust account, [redacted] received the Cash, which came into his possession as a result.

Did [redacted] Refund the Cash to the Client?

37. I conclude that [redacted] did not refund the Cash to the Client by paying the equivalent funds to the Vendor on the Client's behalf.

38. Payment to a third party is not a refund, but rather, is a "use" of the Cash contrary to Rule 3-59(6).

39. "Refunding" to a client requires the return of the actual, same cash, or at least return of an equivalent amount of cash to the client, as expressly set-out in Rule 3-59(6)(b).

40. [redacted] did not return the Cash, or an equivalent amount in cash to the Client, but rather transferred funds to the Vendor.

41. Additionally, [redacted] did not make a written report of the details of the transaction to the Executive Director within 7 days of receipt of the cash, as required in Rule 3-59(6)(c).

Was [redacted]'s Receipt or Acceptance of the Cash Compelled or Excusable?

42. I conclude that [redacted]'s receipt or acceptance of the Cash was neither compelled, nor excusable.

43. I accept that as a result of the Client's circumstances and the timing of the Client's delivery of the Cash, the Transaction could not be completed as agreed. However, such circumstances cannot justify a breach of Rule 3-59.

44. The exceptions to the application of Rule 3-59 are expressly set out, and do not include an exception to preserve a commercial transaction, even if it is in a client's interests to do so.

45. Where timing of payment in a transaction is critical, arrangements should be made sufficiently in advance of the requisite deadline. The fact that the Client could not arrange to have funds available in time does not authorize or require a lawyer to breach the Rules.

46. Not only is there no express exception for commercial necessity in Rule 3-59, were one to be read-in, it would render Rule 3-59 ineffective, particularly if a client's own failure to make adequate arrangements for payment could be relied on to circumvent the "No-Cash Rule".

47. With respect to the issue of COVID-19, I accept the Law Society's submission that [redacted]'s general description of difficulties caused by COVID-19 is not a sufficient basis to conclude that the pandemic played a role in [redacted]'s receipt or acceptance of the Cash. In any event, any difficulties created by the pandemic still would not provide a justification for breaching Rule 3-59 for the same reasons there is no implied exception permitting a cash transaction for reasons of commercial necessity.

48. The consequences of not accepting the Cash may have been unfortunate for [redacted]'s Client, and [redacted]'s actions do appear to have benefitted the Client, but those factors still do not permit [redacted] to breach the Law Society Rules.

49. Exceptions to Rule 3-59 are limited to those expressly provided for in the Rule.

50. Similarly, a lawyer having conducted due diligence or having satisfied themselves that there is little risk of money laundering is not an exception to Rule 3-59.

51. Rather, the Law Society has determined that cash transactions create a sufficient risk, that it has imposed Rule 3-59 to act as a systemic safeguard against lawyers becoming advertent or inadvertent participants in money laundering.

52. In doing so, the Law Society has deliberately decided not to permit cash transactions on a case-by-case basis in reliance on an individual lawyer's due diligence. That approach has been adopted for other forms of financial transactions, but not for cash transactions.

53. Moreover, whether there was actual risk or actual harm in respect of the transactions at issue in this matter is not a consideration in respect of whether there was a breach of Rule 3-59.

54. Again, the purpose of the Rule is to provide systemic safeguards against lawyer participation in money laundering. Compliance with the Rule is required regardless of whether or not money laundering can be shown to have actually occurred.

55. Rule 3-59 is meant to be preventive on a systemic basis. The public interest is protected by the Law Society enforcing Rule 3-59 irrespective of the particulars of any individual transaction.

56. Consequently, [redacted] received or accepted the Cash in breach of Rule 3-59, and none of the exceptions set out in Rule 3-59 applies in the circumstances of this matter.

57. The scope of this review under Rule 4-60 is only as to whether or not a rule breach has occurred, and if so, whether the penalty should be confirmed or reduced, or time to pay extended.

58. Whether the lawyer in question was "morally culpable" forms no part of this review process.

Did the Length of the Investigation Cause Prejudice?

59. I conclude that the Law Society's investigation was not inordinately long, and did not cause [redacted] actual prejudice in any event.

60. There is no basis in the materials or submissions before me, other than [redacted]'s bare assertion, to conclude that an investigation of 202 days is inordinate or unreasonable.

61. In any event, other than general claims of prejudice, [redacted] has not identified any concrete negative effect arising as a consequence of the length of the investigation, nor has [redacted] identified how a briefer investigation would have avoided such prejudice.

Does R. 4-59 Apply Retrospectively?

62. For the reasons that follow, I conclude that Rule 4-59 can have retrospective application.

63. In particular, I conclude that although the introduction of Rule 4-59 affected substantive, and not merely procedural rights, as a provision intended to protect the public retrospective application of the Rule is permitted.

64. In its submissions, the Law Society cited *R. v. Dineley*, 2012 SCC 58, to the effect that merely procedural provisions can have retrospective application:

> … absent clear legislative intent, the presumption against retrospectivity is assumed to apply to new laws that affect substantive rights, but not to new procedural laws that are designed to govern only the manner in which rights are asserted or enforced. Such procedural legislation is presumed to apply immediately to both pending and future cases.
>
> (Emphasis added.)

65. I accept that summary of the law.

66. However, I do not accept that the introduction of Rule 4-59 only changed the manner in which rights are asserted or enforced.

67. Prior to Rule 4-59, the nature of a potential breach of the No Cash Rule was dealt with through the Law Society's discipline process.

68. As [redacted] submitted, the discipline process involves the application of a different standard than in this review; namely, the "professional misconduct standard", at least in respect of matters that rise to the level of a citation.

69. In *Lyons (Re)*, 2008 LSBC 9, the Panel explained the distinction between a breach of the Rules and "professional misconduct" as follows:

> [31] This Panel is satisfied that the breach of the "No Cash Rule" was established by the evidence. The key issue is whether or not the evidence supports the Law Society's contention that the Respondent's conduct goes beyond that and constitutes professional misconduct.
>
> [32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).

70. I have determined that the professional misconduct standard does not apply here, given the language of Rules 4-59 and 4-60.

71. It follows that it cannot be the case that where the standard in respect of Rule 3-59 has effectively changed from professional misconduct to a mere "Rules breach", is only a procedural change, rather than substantive.

72. Rather, Rule 4-59 clearly affects substantive rights in dealing with the No Cash Rule by removing consideration of whether the lawyer has engaged in professional misconduct, as opposed to consideration only as to whether the Rule has been breached.

73. In *Dineley*, the Supreme Court held:

> [11] Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed.) 2011), at p. 191). Thus, the key task in determining

> the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions "procedural" or "substantive", but in discerning whether they affect substantive rights.
>
> …
>
> [16] The fact that new legislation has an effect on the content or existence of a defence, as opposed to affecting only the manner in which it is presented, is an indication that substantive rights are affected.

74. The Supreme Court went on at paragraph 18 of *Dineley* to find that because the ability to raise a reasonable doubt about the reliability of a breathalyzer test result had been removed, a potential defence had been eliminated. As a result, the provisions were held not to be merely procedural. Rather, the provisions affected the availability of a defence, and therefore, affected substantive rights, and as a result, should not have retrospective application.

75. In the matter at hand, the applicable standard and the defences available under Rule 4-59 are different than was the case prior to its introduction. When Rule 3-59 was addressed through the discipline process, rather than through the administrative penalty process, it was at least possible for a lawyer to contend that a breach of Rule 3-59 did not satisfy the test for professional misconduct.

76. Therefore, substantive rights have been affected by the introduction of Rule 4-59, and not just "the manner in which [a defence] is presented."

77. Although I do not agree with the Law Society that Rule 4-59 may have retrospective application as a purely procedural provision, I accept that Rule 4-59 is permitted to have retrospective application as a provision intended for protection of the public.

78. In *Brosseau v. Alta. Securities Commission* [1989] 1 S.C.R. 301, the Supreme Court held at p. 319:

> A sub-category of the third type of statute described by Driedger is enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public.

(Emphasis added.)

79. At p. 320, the Supreme Court applied that distinction to the matter before it:

> The present case involves the imposition of a remedy, the application of which is based upon conduct of the appellant before the enactment of ss. 165 and 166. Nonetheless, the remedy is not designed as a punishment for that conduct. Rather, it serves to protect members of the public.

80. The Court went on at p. 321 to hold:

> The provisions in question are designed to disqualify from trading in securities those persons whom the Commission finds to have committed acts which call into question their business integrity. <u>This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the Commission</u>.
>
> (Emphasis added.)

81. The principles set out by the Supreme Court of Canada in *Brousseau* were applied in *Anthony v. British Columbia College of Social Workers,* 2011 BCSC 729.

82. There, the petitioner objected to the ability of the regulator to impose penalties which had been made available to be imposed only after the petitioner had engaged in the conduct at issue.

83. Notably, the new penalties made available to the regulator included the ability to impose a fine.

84. The court set out the implications of the changes to the College's authority at paragraph 33:

> The change to the penalties available to the College, as opposed to its predecessor, are of some moment to the petitioner. Under the Old Act, the only penalties available were suspension or cancellation of the registrant's license or the imposition of terms on his or her ongoing practice. These penalties were moot in respect of members ho resigned prior to a conduct review. Under the New Act, College has [the] power to levy meaningful sanctions against former registrants found guilty of misconduct.

85. The court went on to hold at paragraph 61:

> …the presumption against retroactivity does not apply to statutes aimed at protecting the public. The presumption against retroactivity applies to penal statutes. Professional disciplinary proceedings are not penal in nature but, rather, are for the purposes of protecting the public…
>
> (Emphasis added).

86. At paragraph 65, the court held:

> The conduct of disciplinary hearings coupled with the posting of reasons for disciplinary action accomplish two important objectives: to notify the public of the conduct record of persons engaged in the wide range of services falling under the rubric of social work and to inform the profession of the professional standards to which they must adhere.

87. Further, at paragraph 66, the court held:

> In the result, although I conclude that the New Act does not retroactively remove an accrued or acquired right enjoyed by the petitioner under the Old Act, even if I were to have found that to be so, the presumption against its enforcement does not apply because its underlying objective is not penal in nature.
>
> (Emphasis added.)

88. The Law Society is a regulator, charged with protecting the public interest. In this regard, the Law Society's role is analogous to the role of the Alberta Securities Commission in *Brosseau*, and the College of Social Workers in *Anthony*.

89. More particularly, both the No Cash Rule in Rule 3-59, and the more recently introduced Administrative Penalties provided for in Rule 4-59, were implemented to provide systemic safeguards against lawyers involving themselves, knowingly or inadvertently, in money laundering.

90. In that respect, the purpose of the Rules at issue is protection of the public, and not penal.

91. Just as the court concluded in *Anthony,* that professional disciplinary proceedings are not penal, but are for the purposes of protecting the public, the purpose of Rules 3-59 and 4-59, and Law Society regulation more generally, is to protect the public.

92. Rule 3-59 is intended to protect the public from lawyers involving themselves in money laundering, as well as to ensure that lawyers do not aid, counsel or assist any person to act in any way contrary to the law, as required by the *Code of Professional Conduct for British Columbia* (the "Code").

93. Rule 4-59 is a new means of ensuring lawyers comply with their professional obligations under Rule 3-59 and the Code.

94. The means to enforce these professional obligations is a fine, which was one of the potential enforcement options newly made available in *Anthony.*

95. Moreover, Rule 4.48(1.2) requires the Executive Director to publish a summary of the circumstances of the rule breach and the administrative penalty imposed under Rule 4-59.

96. As in *Anthony*, the purpose of publishing a summary is to notify the public of the conduct at issue, and to inform the profession of the professional standards to which they must adhere.

97. Consequently, Rule 4-59 is, as was held in *Anthony*, part of a professional discipline system intended to protect the public, rather than being penal in nature.

98. As a result, Rule 4-59 is enforceable, notwithstanding that it was introduced and applied after the conduct at issue occurred.

99. In addressing the issue of the retrospective application of Rule 4-59, [redacted] relied on *Aheer Transportation Ltd. v. The British Columbia Container Trucking Commissioner,* 2022 BCSC 1779 for the proposition that Rules should not be enforced retroactively.

100. However, the issue in *Aheer* was whether the Petitioner, who had sought an order of mandamus requiring the Commissioner in that matter to make rules regarding practice and procedures for applications, audits, complaints, reconsiderations, submissions, and

hearings, could benefit from such rules which were implemented after the Commissioner's decision which was at issue had been made.

101. The court in *Aheer* held, at paragraph 103, that changes to the rules following the decision at issue could not be applied retroactively or retrospectively to the "now concluded proceedings before the Commissioner."

102. The question in *Aheer,* whether post-decision rule changes could alter the decision which had been made, was very different from the issue here: a Rule could be retrospectively applied to form the foundation of the decision being reviewed.

Amount of the Penalty

103. I conclude that the amount of the penalty imposed is not disproportionate to the breach of Rule 3-59.

104. The Law Society has made it a priority to educate lawyers in British Columbia about the Rules intended to prevent, and their obligations to be on guard against, potential money laundering.

105. Given Canadian lawyers' exemption from other money laundering prevention programs, the Law Society's safeguards and adherence to them are imbued with added importance.

106. The Law Society implemented both Rule 3-59 and Rule 4-59 as components of a systemic effort to prevent money laundering, and lawyer participation in money laundering, for the protection of the public.

107. While both the Director at first instance, and I in this review, have the discretion to assess a different amount for the Administrative Penalty, such discretion should be exercised with care.

108. The discretion to assess a lower penalty should be exercised where there is both:

    a. a good reason to do so; and

b. the beneficial effects of assessing a lower penalty do not outweigh the negative effects.

109. An example of a good reason to assess a lower penalty may be that the amount of the penalty would cause particular hardship for the lawyer, or would affect the public interest in maintaining or enhancing access to justice.

110. Here, [redacted] has submitted that the Client was only charged $1,300, whereas, the penalty has been assessed at $5,000.

111. The Law Society submits that penalties under Rule 4-59 were intended to balance fairness with the need to ensure that administrative penalties represented more than a cost of doing business.

112. In light of the importance of Rule 3-59, and the need for lawyers in British Columbia to adhere to the Law Society's Rules generally, and more particularly, to those intended to prevent participation in money laundering, I accept that the penalty in this matter is reasonable.

113. The amount charged to a client in a particular matter may be a relevant consideration to the exercise of discretion, but does not, in and of itself, provide a reason to assess a lower penalty.

114. Had there been evidence of financial hardship or inability to provide the public with legal services, or some other compelling reason, there would have been a basis for me to consider exercising my discretion under Rule 4-60(2)(b) to reduce the penalty imposed. However, in the circumstances of this matter, such reasons are absent.

115. The original Notice of Penalty, dated October 4, 2022, directed [redacted] to pay the penalty by November 7, 2022.

116. I direct, pursuant to Rule 4-60(2)(c) that [redacted] must pay the Administrative Penalty, as originally assessed at $5,000, by January 31, 2023, or such other date as [redacted] and the Law Society may agree, or that I may direct on further application by either of the parties.

Order

I therefore order that:

> The penalty is confirmed and must be paid in accordance with the original notice delivered under Rule 4-59, and is due January 31, 2023, or such other date as [redacted] and the Law Society may agree, or that I may direct.

Dated: December 21, 2022

Brook Greenberg, KC
Chair of the Discipline Committee