



Discipline Digest

June 1993 Vol. 1 No. 5

Misappropriation

Watt, Robert Charles
Toronto, Ontario
Age 47, Called to the Bar 1973

Particulars of Complaint:

- professional misconduct
 - misappropriation

Recommended Penalty:

- disbarment

Convocation's Disposition (June 24, 1993):

- disbarment

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

Douglas Crane

It was alleged in the complaint against the Solicitor that he had misappropriated \$513,447.25 from a client's estate. The Solicitor did not deny that the funds in question, which should have gone to the beneficiaries of the estate, were actually credited to him personally. He testified, however, that he thought that he was entitled to the money as fees for which no bills had been rendered but which he had earned.

The discipline hearing panel, after a seven-day hearing, disbelieved the Solicitor and recommended that he ought to be disbarred. The panel observed that in the absence of exceptional mitigating factors, the penalty for misappropriation is disbarment. Such mitigating factors as restitution, remorse, mental illness, and overwhelming financial pressure were absent in this case.

Convocation accepted the recommendation of the discipline hearing panel and the Solicitor was disbarred.

Misappropriation

Lebo, Herschel Wilfred
Toronto, Ontario
Age 54, Called to the Bar 1967

Particulars of Complaint:

- professional misconduct
 - misappropriation

Recommended Penalty:

- disbarment

Convocation's Disposition (June 24, 1993):

- disbarment

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

Brian Greenspan

In September 1992, the Society received a complaint from clients of the Solicitor who claimed that he had misappropriated \$75,000 that he had invested in a mortgage on their behalf. After the mortgage had come due, the clients had instructed the Solicitor to return the invested funds to them, but he did not do so. The clients then spoke directly with the mortgagor who reported that she had paid off the mortgage by returning the funds to the Solicitor. When the clients spoke to the Solicitor, he said that he did not have the money and that he would need time to pay off his clients.

When the Society's auditor met with the Solicitor and his counsel, the Solicitor acknowledged that between 1990 and 1992 he had misappropriated \$211,079.36 in client funds. The Solicitor has been unable to make restitution.

The discipline hearing panel recommended that the Solicitor be disbarred. Counsel for the Solicitor had argued that

Cases

- Gerald Grupp
North York
- Gabriele Hauser
Toronto
- Herschel Lebo
Toronto
- Roderick MacGregor
North York
- Donald G. Martin
Toronto
- William Palamar
Toronto
- Francis Reilly
St. Catharines
- David Royer
Cornwall
- Timothy Salomaa
Mississauga
- Brian Sherman
Richmond Hill
- Robert Watt
Toronto

he should be permitted to resign his membership in the Law Society. In support of this submission he noted, among other things, that the Solicitor had cooperated fully in the Society's investigation; that he was under extremely heavy financial pressures; and that criminal charges were pending and that he may be subject to further punishment. The discipline hearing panel rejected this submission and emphasized that the governing body of the profession must express its disapproval of a lawyers' misappropriation in the strongest possible terms.

Convocation accepted the recommendation of the discipline hearing panel and the Solicitor was disbarred.

Misappropriation

Grupp, Gerald

North York, Ontario

Age 51, Called to the Bar 1968

Particulars of Complaint:

- professional misconduct
 - misappropriation

Recommended Penalty:

disbarment

Convocation's Disposition (April 22, 1993):

disbarment

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

Andrea Tuck-Jackson

The Solicitor submitted a signed statement to the discipline hearing panel wherein he admitted that between 1989 and 1992 he had misappropriated more than \$685,000 from clients of either his law practice or mortgage brokerage company. He admitted using these funds to cover bad business deals and also personal expenses.

In the light of these admissions, the panel was unanimous in recommending that the Solicitor be disbarred. Convocation accepted the panel's recommendation and the Solicitor was disbarred.

Borrowing from client

Royer, David Jean

Cornwall, Ontario

Age 41, Called to the Bar 1979

Particulars of Complaint:

- professional misconduct
 - borrowed from a client
 - swore false or misleading statutory declarations

Recommended Penalty:

- one year suspension with conditions
- costs of \$1,000

Convocation's Disposition (June 24, 1993):

- one year suspension with conditions
- costs of \$1,000

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

not represented

The Solicitor borrowed \$13,000 from a client in exchange for a promissory note that required him to make monthly payments. The payments represented mainly interest and the balance of the loan was due on February 1, 1992.

The Solicitor failed to advise his client that she should obtain independent legal representation or advice regarding the transaction.

The Solicitor made all of the monthly payments except for the last one, and he did not repay the balance of the loan. He owes his client more than \$11,200.

The Solicitor failed to disclose the borrowing on his Form 2's for the fiscal years 1989, 1990 and 1991. He acknowledged that he was aware of his requirement to disclose borrowings from clients and that he intentionally failed to do so.

The discipline hearing panel recommended that the Solicitor be suspended for one year; that he pay costs of \$1,000; that he file all forms required by the Law Society prior to his return to practice; and that his books and records should be audited for a period of three years.

In making its recommendation, the discipline hearing panel noted that the Solicitor had been disciplined previously for similar conduct. It also noted that it would be difficult for the Solicitor to re-establish his practice as he practises in a small town, his professional and financial problems had been the subject of extensive press coverage, he was virtually bankrupt, and he had been under administrative suspension since November 1992.

Convocation accepted the recommendation of the panel, though it amended the report to make it clear that the audits of the Solicitor's practice were to be conducted by the Law Society.

Practising while suspended

MacGregor, Roderick Grant

North York, Ontario

Age 41, Called to the Bar 1979

Particulars of Complaint:

- professional misconduct
 - practising while suspended

Recommended Penalty:

five month suspension

Convocation's Disposition (April 22, 1993):

five month suspension, commencing May 30, 1993

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

Between November 1990 and July 1991, the Solicitor was suspended on three occasions for failing to pay either his annual fees or his Errors & Omissions insurance premiums. These suspensions, averaging five weeks each, lasted until the outstanding fees were paid. Prior to each period he was notified of his impending suspension by the Society by registered mail.

The Solicitor continued to practice law during each of these suspensions.

The panel concluded that the Solicitor had knowingly practised while suspended and had taken the risk that he would not be caught. Counsel for the Society called for a penalty that included a four month suspension, which equalled the cumulated periods that the Solicitor had practised illicitly. The panel declined to accept this penalty and recommended to Convocation that the Solicitor be suspended for five months, maintaining that he should not be put in the same position as he would have been had he simply complied with his obligations as a member of the bar.

Failure to reply

Sherman, Brian Allen

Richmond Hill, Ontario

Age 42, Called to the Bar 1977

Particulars of Complaint:

- professional misconduct
 - failure to reply to Law Society communications (4)

- failure to reply promptly to a fellow solicitor (2)
- failure to honour a written undertaking (2)
- failure to serve clients in a diligent and efficient manner
- engaging in the practise of law while suspended
- failure to honour financial obligations

Recommended Penalty:

- six month suspension with conditions

Convocation's Disposition (June 24, 1993):

- six month suspension with conditions

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

Not represented

In 1990 and 1991, three lawyers representing three former clients of the Solicitor made numerous requests to have the Solicitor transfer client files. He failed to respond to any of these requests. Each solicitor eventually complained to the Law Society. The Society wrote to and telephoned the Solicitor on a number of occasions but he failed to respond to any of these communications.

A client complained to the Society that the Solicitor had assumed carriage of his file but that no further work had been carried out. The Solicitor failed to respond to requests made by the Law Society that he provide information concerning the complaint. In 1988, the Solicitor had given an undertaking to "respond promptly to Law Society correspondence as requested."

Between November 1991 and March 1992, the Errors & Omissions Department of the Law Society opened 21 claim files in respect of the Solicitor. Virtually all of the files were plaintiff personal injury actions. In approximately half of the files, the Solicitor issued a statement of claim but failed to serve it on the defendant within the six-month limitation period. In other cases, he did not even issue a statement of claim and the limitation period passed. Since March 1992, E & O has opened a further 18 files in the Solicitor's name, almost all files relating to his alleged failure to serve clients.

Since 1984, the Solicitor has been suspended on 19 separate occasions for failing to pay his E & O insurance levy or his annual fees in a timely fashion. He continued to practise throughout each period of suspension.

In 1991, the Solicitor had agreed to participate in the Society's practice review programme and implement the recommendations of the review. Al-

though he initially co-operated, the Solicitor soon failed to respond to correspondence from the Society.

The discipline hearing panel heard evidence that the Solicitor was suffering from psychiatric problems and that those problems were to blame for his misconduct.

The discipline hearing panel recommended that the Solicitor be suspended for a period of six months and that he not be permitted to return to practice until he met four conditions. First, he must continue a structured psychotherapy programme until such treatment is no longer necessary. Second, he must provide the Society with a report of a psychotherapist certifying that he is fit to return to practice. Third, he must practise under supervision or in partnership; and fourth, he must co-operate with E & O officials and respond promptly to future Society communications.

The Committee indicated that it was only with reluctance that it did not accept the recommendation of counsel for the Society that the Solicitor be disbarred.

Convocation accepted the recommendation with the exception of the third condition. It amended that condition to require that the Solicitor participate in the practice review programme upon his return to practice.

Failure to serve client

Salomaa, Timothy David

Mississauga, Ontario

Age 46, Called to the Bar 1976

Particulars of Complaint:

- professional misconduct
 - failure to diligently and conscientiously serve a client
 - violation of Rules 1 and 2 of the Rules of Professional Conduct

Recommended Penalty:

- one month suspension
- \$4,500 in costs, to be paid within six months of the end of the suspension

Convocation's Disposition (June 24, 1993):

- one month suspension
- \$4,500 in costs, to be paid within six months of the end of the suspension

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

The Solicitor acted for the purchaser in a real estate transaction. He also acted for a trust company that agreed to provide mortgage financing. The Solicitor reported to the trust company that he had conducted a preliminary search of title and that he was satisfied that upon registration the mortgage would be a first mortgage "with no prior liens or executions."

Shortly after the mortgage funds were transferred and the transaction closed, the Solicitor sent an agent to register, among other things, the transfer and the first mortgage. The agent discovered that there was an execution in the amount of \$117,605.71 against the vendor and two liens registered against the property totalling \$45,379. Nevertheless, the Solicitor had the transfer and the mortgage registered by a conveyancer. He then provided a solicitor's certificate of title and a final report to the trust company in which he certified that the company had a valid first mortgage.

The discipline hearing panel recommended that the Solicitor be suspended for one month; that he pay costs of \$4,500; and that he be given six months from the date of the completion of his suspension to pay these costs. In making its recommendation, the panel noted that the Solicitor had been found guilty of professional misconduct in 1991 for failing to reply to the Law Society. On that occasion he had been reprimanded in committee.

Convocation accepted the recommendation. At the request of the Solicitor, Convocation ordered that his suspension take effect as of June 26, 1993.

Failure to meet obligations

Reilly, Francis Lewis

St. Catharines, Ontario

Age 47, Called to the Bar 1976

Particulars of Complaints (2):

- professional misconduct
 - (1) -failing to meet the financial obligations of his practice
 - failing to reply to Law Society communications
 - (2) -failing to produce his books and records for inspection

Recommended Penalty:

one month suspension, and indefinitely thereafter until the Solicitor produces his books for inspection, and responds to all Society communications

Convocation's Disposition (April 22, 1993):

one month suspension, and indefinitely thereafter until the Solicitor produces his books for inspection, and responds to all Society communications

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

not represented

A complaint was made against the Solicitor by his former secretary in January, 1992. She had left his employ the previous fall after a number of her paycheques were returned by the bank uncashed due to insufficient funds. When she left, the Solicitor owed her seven weeks of pay.

The Society attempted to contact the Solicitor, first by letter and then telephone, concerning this complaint. He never answered the letters, and though the Society was successful in getting through to him over the telephone on April 1, 1992, the Solicitor failed to follow through on the actions he promised he would take to clear up the matter. The issue remained unresolved at the date of the discipline panel hearing in February, 1993.

The second complaint arose from his refusal to produce his books and records for inspection by the Society's auditors. An auditor telephoned him in March 1992 to arrange an appointment to review his books. The Solicitor cancelled this appointment a few days beforehand, and later cancelled the rescheduled appointment. He did not return the auditor's calls, and when the auditor eventually succeeded in contacting him and rescheduled the appointment for the second time, the Solicitor again failed to cooperate and meet with the auditor.

The Solicitor appeared before a discipline panel to answer to these complaints in September 1992. The Solicitor was found guilty of the misconduct, but the panel agreed to suspend the determination of penalty to allow the Solicitor a further opportunity to produce his books and records for inspection. Upon reconvening in February 1993, the panel was advised that the books had not been produced. He had also failed to take advantage of the adjournment to provide an adequate reply to the complaint lodged by his former secretary.

This was the second offence for the Solicitor. In

July 1992 he received a reprimand in committee and an order to pay \$1,000 costs for failing to reply to the Society. It was apparent that this penalty had had no effect. The panel recommended to Convocation that the Solicitor be suspended for one month and thereafter indefinitely until he had produced his books and records for inspection and responded to his former secretary's complaint. He was also ordered to pay \$1,000 towards the Society's costs in investigating and prosecuting these complaints.

Failure to serve clients

Martin, Donald George

Toronto, Ontario

Age 58, Called to the Bar 1964

Particulars of Complaint:

- professional misconduct
 - failure to serve clients in a conscientious, diligent and efficient manner

Recommended Penalty:

- Reprimand in Convocation
- costs of \$1,500

Convocation's Disposition (June 24, 1993):

- Reprimand in Convocation
- costs of \$1,500

Counsel for the Law Society:

Stephen Foster

Counsel for the Solicitor:

M.E. Royce

In 1984, a woman was injured after a golf ball struck a window in her home. She and her husband retained the Solicitor to commence an action against the owner of the golf course.

Throughout the next seven years the Solicitor failed to serve the clients in a conscientious, efficient and diligent manner. He failed to inform them of the merits or the probable results of their case and failed to provide them with an estimate of the fees and disbursements. He failed to provide them with a copy of the Statement of Claim and did not prepare them for the examination for discovery.

He also failed to list the action for trial and it was dismissed with costs. He took almost no steps to set aside the order dismissing the action.

Throughout 1987 and 1988 the Solicitor's clients attempted to contact him on a number of occasions but they were usually unable to speak with him directly and he did not return their calls. In Decem-

ber 1988, he told them that he thought that their case lacked merit and that they should consider consulting another lawyer. The clients contacted another lawyer but the Solicitor failed to transfer the file to that lawyer despite numerous requests between February 1990 and September 1991.

The discipline hearing panel recommended that the Solicitor be reprimanded in Convocation and that he be ordered to pay costs in the amount of \$1,500. The panel noted that the Solicitor had been practising for many years without incident and that the misconduct in question appeared to be an isolated case. Nevertheless, it noted that "the quality of work exhibited here, or more precisely the lack thereof, calls for more than a minimum penalty of reprimand in committee."

Convocation accepted the recommendation.

Failure to reply

Hauser, Gabriele Monika

Toronto, Ontario

Age 41, Called to the Bar 1986

Particulars of Complaint:

- professional misconduct
 - failure to reply to Law Society communications

Recommended Penalty:

- reprimand in Convocation

Convocation's Disposition (June 24, 1993):

- reprimand in Convocation

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

Between April and September 1992, the Society sent the Solicitor eight letters and left her eight telephone messages requesting that she respond to three complaints received against her. The Solicitor did not respond to most of the letters or messages and the responses that she did provide failed to resolve the matters.

In 1991, the Solicitor had been found guilty of professional misconduct and had received a reprimand in committee for her failure to report to a client and her failure to reply to the Law Society.

The discipline hearing panel recommended that the Solicitor be reprimanded in Convocation, that she pay costs of \$1,250, and that she participate in the Society's practice review programme.

Convocation accepted the recommendation.

Failure to file forms

Palamar, William

Toronto, Ontario

Age 67, Called to the Bar 1953

Particulars of Complaint:

- professional misconduct
 - failing to file his Forms 2/3

Recommended Penalty:

reprimand in Convocation and \$500 in costs

Convocation's Disposition (April 22, 1993):

reprimand in Convocation and \$500 in costs

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

T. George Gorrie

The Solicitor failed to file a Form 2 and 3 within six months of the end of his 1991 fiscal year. In February 1992, he was informed by the Society by registered mail that his filings were not up to date. When this complaint was heard in September 1993, the forms still had not been filed.

This misconduct was viewed against the background of his discipline history. He had been reprimanded by a discipline committee in 1983 for failing to maintain his books, records and accounts and for failing to file Forms 2/3 for the previous eight years. He was before a discipline panel in April 1987 for failing to file his forms, and on that occasion he received a conditional one-month suspension. He was reprimanded by a panel in November 1990 for once again failing to submit Forms 2/3 within the required time.

In light of the ineffectiveness of the previous penalties for similar misconduct, the discipline hearing panel proposed a more severe penalty for this latest occurrence. It recommended that the Solicitor be reprimanded in Convocation and ordered to pay costs of \$500.

The Law Society
of Upper Canada



Le Barreau
du Haut-Canada

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Discipline Digest

Policy Supplement

June 1993

This special supplement to the June issue of Discipline Digest is intended to highlight the major policy initiatives undertaken by the Law Society's discipline committee. Members are alerted to the following developments in discipline:

Invitations to disregard the law will trigger discipline

A February 1993 Law Society discipline decision included a clear direction to the Ontario legal profession that counseling juries to disregard the law may result in discipline proceedings in the future.

The 37-page decision, written by Discipline Chair Harvey Strosberg and supported by Vice-Chairs David Scott and Dennis O'Connor, stated explicitly that:

Counsel who urge juries to ignore the law invite anarchy. They also breach the solemn oath or affirmation, taken when called to the bar, that they "shall not pervert the law to favour or prejudice anyone".

By these reasons, I alert the profession that in the future the Chair and Vice-Chairs of Discipline will consider a clear invitation to a jury to disregard the law to be sufficient cause to initiate the discipline process by directing the issuance of a complaint.

Reasons to be issued when no complaint is authorized

In the future, written decisions will be released publicly in cases where the discipline chair or vice-chairs elect to reject the recommendations of either Law Society staff or outside counsel to issue a complaint against a lawyer.

LSUC to seek costs in discipline matters

Law Society counsel have been instructed to seek costs from members found guilty of professional misconduct. Costs will include counsel and professional fees as well as any disbursements such as expert witness fees.

Costs will be calculated according to the following updated tariff:

Senior counsel-discipline	\$200/hr
Discipline counsel	\$150/hr
Staff lawyers	\$125/hr
Auditors and investigators	\$100/hr
Examiners, paralegals and complaints officers	\$ 50/hr

Orders to pay costs will specify the amount awarded, the date by which costs are payable, and the interest payable in the event of default. The postjudgment interest rate applicable in civil proceedings will apply in such orders. Members will be required to tender payment for costs on or before the date on which their discipline report is considered by Convocation.

Separation of powers

The chair and vice-chairs of the Law Society's Discipline Committee will cease to participate in Discipline Convocation effective June 1993. The decision is based on the principle that there should be a separation of prosecutorial and adjudicative functions in the discipline process. As the discipline chair and vice-chairs are responsible for the authorization of professional misconduct complaints and play a role in the supervision of prosecutorial staff, the discipline committee concluded that they should take no part in the deliberative process.

Discipline adopts case management

A series of discipline management procedures have been implemented which are designed to increase efficiency and expedite the discipline process. Time limitations have been imposed on a number of procedures.

Depending on their complexity and severity, discipline matters will be assigned to either of the following: fast track matters to be heard within 90 days of issuance of complaints of a generally routine nature; standard track matters to be heard within four months; and, complex track matters which may only be so designated by an order from a procedural management benchler and which must be heard within six months.

Reinstatement fees to apply to suspended members

The Law Society is taking measures to curb the administrative and financial burdens created by members who are suspended for non-payment of annual fees, E&O levies and late filing fees. It is expected that reinstatement fees for administrative suspensions will be announced in the fall of 1993.

Approximately 700 members per year are suspended for administrative reasons requiring costly follow-up in the form of correspondence, publication of names in the Ontario Reports and the issuance of professional conduct complaints in cases where suspended members continue to practice.