



Discipline Digest

January 1993 Vol. 1 No. 3

Misappropriation

Upshall, Phillip Cameron

Brampton, Ontario

Age 50, Called to the Bar 1969

Particulars of Complaint:

- professional misconduct
 - misappropriation
 - uttering forged documents
 - acting in conflict of interest

Recommended Penalty:

disbarment

Convocation's Disposition (Jan. 28, 1993):

disbarment

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

David M. Porter

Between 1989 and 1991, the Solicitor misappropriated more than \$700,000 from the mixed trust account of a law firm of which he was a partner, and over \$1,000,000 from the mixed trust account of his sole practice. Of the funds misappropriated, more than \$1,200,000 remains unpaid. The misappropriations included \$17,000 from the estate of his father, of which he was a co-executor. The Solicitor also improperly profited in the amount of \$340,000 from the sale of real estate that formed the assets of a joint venture in which he was involved with clients and friends. The Solicitor forged documents in connection with some of the transactions.

The discipline hearing panel recommended that the Solicitor be disbarred. Convocation accepted this recommendation.

Failure to honour guarantee

Vanular, Gregory Peter Linton

Pickering, Ontario

Age 37, Called to the Bar 1981

Particulars of Complaint:

- professional misconduct
 - personally guaranteeing a loan to a client and failing to honour the guarantee

Recommended Penalty:

(majority) disbarment

(minority) suspension for the longer of nine months or until judgement is paid, with costs of \$2,500

Convocation's Disposition (Jan. 28, 1993):

nine month suspension effective Feb. 13, 1993, and thereafter until judgement and costs of \$2,500 are paid

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

not represented

A longstanding client and business partner of the Solicitor needed financing for a business venture and approached the Solicitor for assistance. The Solicitor referred him to a mortgage broker, who arranged a loan. In June 1991, the Solicitor and the mortgage broker arranged for the lender to advance \$15,500 to the Solicitor's client. The lender was willing to make the loan only if the Solicitor would guarantee it, both personally and through his law firm. The lender's lawyer prepared the documentation for the loan.

The Solicitor's client made no payments on the loan, and the lender attempted to collect, first from the client and then from the Solicitor. After numerous demands that he honour his guarantee, the Solicitor sent the lender a cheque drawn on his firm's account to cover the debt. This cheque was returned by the bank N.S.F. The lender then sued the Solicitor and his client, and in April 1992 obtained judgement against the Solicitor and his firm in the amount of \$16,751, plus interest and costs. At the date of the discipline hearing in October 1992, the Solicitor had made no payments on this judgement.

The members of the discipline hearing panel were in agreement that the Solicitor's conduct in this particular matter alone called for a lengthy suspension. The majority considered the Solicitor's conduct in this instance within the context of his disciplinary record with the Society. On four prior occasions be-

Cases

- Meyer Feldman
Thornhill
- Gerald B. Fox
Newmarket
- Anthony W. Klymko
Toronto
- Yaroslav Mikitchook
Toronto
- Richard P. Ranieri
Toronto
- Christopher M. Reid
Toronto
- Phillip C. Upshall
Brampton
- Gregory P. Vanular
Pickering

tween 1988 and 1992 he was found guilty of professional misconduct. On two occasions he was a reprimanded in committee, on a third he was reprimanded in Convocation and on a fourth occasion he received a six-month suspension and a \$5,000 fine.

The majority recommended to Convocation that the appropriate penalty in this case was disbarment. A dissenting member of the panel recommended that the Solicitor be suspended for the longer of nine months or until the judgement is paid, and that he pay the costs of the Society in the amount of \$2,500. Convocation ordered that the Solicitor be suspended for nine months and indefinitely thereafter until the judgement and costs are paid.

Conduct unbecoming

Reid, Christopher MacDougall

Toronto, Ontario

Age 32, Called to the Bar 1987

Particulars of Complaint:

- conduct unbecoming
 - pleaded guilty to fraud under \$1,000 (section 380 (1) of the *Criminal Code*)

Recommended Penalty:

reprimand in Convocation

Convocation's Disposition (Jan. 28, 1993):

reprimand in Convocation

Counsel for the Law Society:

Stephen Foster

Counsel for the Solicitor:

not represented

In July 1989, the Solicitor went to a department store in Sault St. Marie and purchased a gas barbecue using a personal cheque. A security tag was placed on this barbecue after the purchase. The Solicitor then went to another outlet of the department store chain and took the same model barbecue from the shelves, placed the security tag on it that had been attached to the first barbecue, and took this second barbecue to the customer service desk and requested a refund. The Solicitor was informed that he would have to wait two weeks to pick up his refund. The Solicitor was arrested when he returned to claim the refund.

The Solicitor entered a plea of guilty to the charge of fraud under \$1,000 and was given a conditional discharge without probation.

The discipline hearing panel recommended that the Solicitor be reprimanded in Convocation. The recommendation was accepted by Convocation.

Failure to file

Feldman, Meyer

Thornhill, Ontario

Age 56, Called to the Bar 1962

Particulars of Complaint:

- professional misconduct
 - failure to file Forms 2/3
 - swearing an affidavit without due regard to its contents
 - failure to honour a judgement against him
 - failure to reply to Law Society communications

Recommended Penalty:

suspension until all outstanding forms and fees are paid, and subsequent to this a further three month suspension; an undertaking to practise only as an employee of another lawyer, and to undertake to pay the monies owing on a judgement against him.

Convocation's Disposition (Jan. 28, 1993):

indefinite suspension until all outstanding forms are completed and fees and other monies owing are paid

Counsel for the Law Society:

Stephen Foster

Counsel for the Solicitor:

not represented

The Solicitor failed to file with the Society his Forms 2/3 for his fiscal years 1990 and 1991, and his Forms 2/3 for the fiscal years 1988 and 1989 were not completed by a licensed public accountant. The Society brought these problems to the Solicitor's attention. As of the date of Convocation's disposition of the complaint these forms remained outstanding.

In 1983 a client obtained a judgement in the amount of \$77,273 against the Solicitor as a result of the Solicitor's negligence. The client's lawyer brought the judgement to the attention of the Law Society's Errors and Omissions branch which contacted the Solicitor. The Solicitor indicated that he did not wish to make a claim. He did make a claim some two years later and coverage was then denied by the Society.

In November 1988, the Solicitor and the client commenced an action against the Law Society and its insurers for the amount of the judgement. The Law Society brought a motion to dismiss the action. The Solicitor signed an affidavit which was filed in opposition to the motion. In his affidavit the Solicitor stated that upon receipt of the judgment he immediately notified the adjusters of the Law Society. The action against the Society was eventually dismissed. When the Society challenged the Solicitor to explain his statement in the affidavit, the Solicitor denied any intent to swear a false affidavit but conceded that in the circumstances he had been careless, at best.

The Solicitor had not paid his former client the monies owing from the judgment against him.

Another former client of the Solicitor complained to the Society in October 1990 that the Solicitor had overcharged for his services and withdrawn his fees directly from the client's bank account. The Society forwarded this complaint to the Solicitor and requested a response. The correspondence between the Society and the Solicitor that followed failed to clear up the situation, and eventually the Solicitor ceased to respond to the Society's inquiries.

The Solicitor had not practised since May 1990 and

had no plans to return to practice. He also had no money to pay the fees and other monies owing to the Society. The discipline hearing panel recommended that the Solicitor be suspended for three months definite and indefinitely thereafter until all outstanding forms are filed and fees are paid. Convocation accepted this recommendation.

Practising while suspended

Ranieri, Richard Paul

Toronto, Ontario

Age 38, Called to the Bar 1983

Particulars of Complaint:

- professional misconduct
 - practising while suspended
 - failing to diligently and conscientiously serve a client
 - failing to file Forms 2/3

Recommended Penalty:

six month suspension

Convocation's Disposition (Jan. 28, 1993):

six month suspension commencing Sept. 24, 1992, and thereafter until financial obligations are fulfilled

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

The Solicitor was suspended from practising law three times in 1989 and 1990 for failing to pay annual fees and levies. The last suspension began in February 1990, after the Solicitor had failed to pay fees that had accrued because of his failure to file Forms 2/3 for his 1989 and 1990 fiscal years.

In December 1990, the Solicitor gave a written undertaking to the Society not to practise law. The Society found lawyers to take over the Solicitor's existing files. In April 1991, one of these lawyers acknowledged that though files were being opened in his name, the Solicitor had the actual carriage of them. When confronted with this information the Solicitor admitted it was true.

A file the Solicitor acted on while suspended involved a claim for damages arising from an automobile accident. The Solicitor negotiated a settlement to this claim and received damages for his client totalling \$6,350. The client then made numerous requests of the Solicitor for these settlement funds. Eventually the Society was called in to investigate the whereabouts of the funds, and found that the Solicitor had incomplete and unsatisfactory records for the years 1988 through 1990, and that accordingly, no funds could be disbursed from his trust account. The Solicitor reconstructed his trust account with the assistance of the Society. Eventually it was determined that the Solicitor had not misappropriated any of the funds, and the client received a cheque to cover her settlement.

The discipline hearing panel considered the Solicitor's breach of Convocation's suspension of his right to practice, and his breach of his undertaking not to practice

to be serious matters. It recommended that he be suspended for six months. Convocation accepted this recommendation and noted that the suspension would continue thereafter unless and until the Solicitor's fees and levies were paid in full.

Failure to reply

Klymko, Anthony William

Toronto, Ontario

Age 47, Called to the Bar 1973

Particulars of Complaint:

- professional misconduct
 - failure to reply to Law Society communications

Recommended Penalty:

reprimand in Convocation and payment of \$500 costs

Convocation's Disposition (Jan. 28, 1993):

reprimand in Convocation and payment of \$500 costs

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

not represented

As a result of a review of the Solicitor's practice, the Society sent a letter to him in March 1992 requesting further information and asking him to reply within two weeks. No reply was received, despite numerous follow-up letters and telephone calls. He neither requested an extension nor provided an explanation for his failure to reply to the Society's communications.

The Solicitor had received two reprimands in committee, one in 1982 and the second in 1990, for conduct similar to that described in the present complaint. In view of this disciplinary history, the committee recommended that the Solicitor's be reprimanded in Convocation and required to pay the Society's costs in the amount of \$500.

Failure to fulfil undertaking

Mikitchook, Yaroslav

Toronto, Ontario

Age 45, Called to the Bar 1975

Particulars of Complaint:

- professional misconduct
 - failure to fulfil an undertaking
 - failure to serve a client in a conscientious and diligent manner
 - failure to reply to Law Society communications

Recommended Penalty:

reprimand in Convocation and payment of \$3,000 costs

Convocation's Disposition (Jan. 28, 1993):

reprimand in Convocation and payment of \$3,000 costs

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

Earl Glasner

The complaint against the Solicitor arose from his han-

ding of a motion in court. In February 1987, he was instructed by his client, the plaintiff, to issue a statement of claim. The client delivered five letters to the Solicitor instructing him to bring a motion immediately to require delivery of a statement of defence. In March 1989, the Solicitor told the client that the motion was set down to be heard on April 12, 1989. In fact, however, the original notice of motion was not delivered until May 4, 1989. Over the following year the Solicitor made other misrepresentations to excuse the fact that the motion had not been heard in court. The client's exasperation with the delays and excuses led to a complaint to the Society. When a representative of the Society telephoned the Solicitor in March 1990, the Solicitor informed the representative that the motion material had been prepared and ready for argument for some time, and it was only through a variety of unfortunate or unavoidable incidents that the matter had not been heard. In May 1990, the Solicitor undertook to the Society that he would deal with the client's file promptly.

In May 1991, the client informed the Society that the motion had still not been heard. The Solicitor had led him to believe that court dates had been scheduled for January 18, March 28, April 24, May 3 and May 23, 1991, but just prior to each date the Solicitor had called and told him that he would not be able to make the court appearance and that the hearing would have to be adjourned. After the last postponement the client had obtained a copy of his court file and discovered that the motion had been adjourned *sine die* since February 1, 1991. No mention was made of the court dates listed above.

At the date of the discipline hearing in May 1992, the motion had still not been heard. The Solicitor undertook to retain and pay counsel to act on the motion, taking to retain and pay for counsel to act on the motion.

The discipline hearing panel recommended that the Solicitor be reprimanded in Convocation and required to pay the Society's costs in the amount of \$3,000. The panel added that in its view this penalty was in the "lower range" of appropriate penalties for this type of misconduct. Convocation accepted the recommendation of the panel.

Failure to reply

Fox, Gerald Bruce

Newmarket, Ontario

Age 46, Called to the Bar 1975

Particulars of Complaint:

- professional misconduct
 - failure to honour a financial obligation
 - failure to file Forms 2/3
 - failure to reply to Law Society communications

Recommended Penalty:

suspension for three months definite and thereafter indefinitely until all outstanding forms are filed, plus payment of \$1,500 in costs

Convocation's Disposition (Jan. 28, 1993):

suspension for three months definite and thereafter indefinitely until all outstanding forms are filed, plus payment of \$1,500 in costs

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

In December 1991, a client complained of the Solicitor's delay and failure to communicate with her regarding the status of her file. The Solicitor ignored the Society's written request for a response to this complaint.

He had also failed to file with the Law Society his Forms 2/3 for his 1991 fiscal year. These remained unfiled at the date of the discipline hearing in November 1992.

The Solicitor had contracted with a storage company to store his legal files for a monthly charge. In February 1992, the storage company notified the Solicitor that he had not paid his account since August 1990. The storage company complained to the Society and the Society wrote to the Solicitor. The Solicitor ignored the Society's calls and letters until June 1992. At the date of the discipline hearing, the Solicitor's delinquent account with the company had reached \$1,056.

The Solicitor had a discipline record for similar conduct. In 1983 and 1987 he was reprimanded in committee for failing to reply to Law Society communications, failing to cooperate with a fellow lawyer, breaching an undertaking and failing to serve a client in a diligent manner, among other things. In May 1990, he was reprimanded in Convocation for failing to reply to Law Society communications.

The discipline hearing panel recommended that the Solicitor be suspended for three months and that his suspension continue indefinitely thereafter until his forms were filed, and added that this penalty should be considered the "last break" that he could expect for this type of behaviour. By January 28, 1993, when the report was considered in Convocation, the Solicitor's forms had been filed and Convocation accordingly deleted the indefinite portion of the penalty that had been recommended.

The Law Society
of Upper Canada



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