



Discipline Digest

March 1993 Vol. 1 No. 4

Borrowing from clients

Giangioppo, Mario
North York, Ontario
Age 38, Called to the Bar 1982

Particulars of Complaint:

- professional misconduct
 - borrowing directly and indirectly from clients without ensuring that the clients' interests were protected
 - misapplication of client funds
 - failing to conscientiously and diligently serve clients
 - practising law while suspended
 - failing to file Forms 2/3
 - failing to reply to Law Society communications

Recommended Penalty:
disbarment

Convocation's Disposition (March 25, 1993):
disbarment

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

Peter Rosenthal

The Solicitor had exploited his role as a solicitor to borrow either directly or indirectly from clients an amount totalling \$488,720, and compounded this misconduct by failing to ensure that these loans were adequately secured. He had totally disregarded the rules against acting in a conflict of interest. In a number of instances clients were deprived of their life savings. The Solicitor had not made restitution.

The Solicitor also misapplied client funds, practised while under suspension, failed to file Forms 2/3 for two years and repeatedly failed to respond to communi-

cations from the Society's complaints and audit departments, among other misconduct.

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

Misappropriation

Mallal, Farouq
Ottawa, Ontario
Age 55, Called to the Bar 1983

Particulars of Complaint:

- professional misconduct
 - misappropriation
 - misapplication of client funds
 - borrowing from a client
 - abandoning practice

Recommended Penalty:
permission to resign

Convocation's Disposition (March 25, 1993):

permission to resign

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

Leonard Max, Q.C.

The Solicitor abandoned his practice in September, 1991, and left the country. The following month he telephoned his lawyer in Ottawa from out of the country with instructions to inform the Society that the Solicitor had misappropriated or misapplied over \$31,000 of his clients' funds.

He had withdrawn \$24,058 from the trust account of one client and had rationalized the misappropriation by viewing it as a loan. The misapplied funds consisted

Cases

- Mario Giangioppo
North York
- Moeen M. A. Janjua
Mississauga
- Farouq Mallal
Ottawa
- Richard M. Power
Toronto
- Andrew B. Tulk
Toronto
- Brian A. Whyte
Gloucester

of \$7,500 given to the Solicitor by a client in trust to be applied to an outstanding debt in the client's name to a third party. The Solicitor chose to credit these funds against a loan he himself had made to the client.

The Solicitor had also violated Rule 7 of the Rules of Professional Conduct by borrowing approximately \$112,500 from a client. Following the death of the client's husband she and the Solicitor had several discussions concerning investment opportunities and the benefits she would receive if she were to loan money to him. He assured her the money would be safe and that any funds she invested would earn a return of 17 per cent. The client received no security for the money she advanced to the Solicitor, and he failed to advise the client to seek independent legal advice on the transaction.

The Solicitor and the Society jointly submitted he be allowed to resign his membership. He had admitted the misconduct and thereby saved the Society time and expense prosecuting the complaint. He had voluntarily given an undertaking not to practise law in October, 1992. The amounts misappropriated were relatively small and there was almost immediate restitution of the funds. The amount borrowed from the client had been repaid. The discipline hearing panel reviewed letters from the clients whose funds had been taken. They were satisfied with the restitution and had withdrawn their complaints. Finally, the Solicitor was suffering from a longstanding substance abuse problem at the relevant time, a problem in relation to which he had since obtained professional assistance. In the light of these mitigating factors the panel agreed to recommend to Convocation that the Solicitor be permitted to resign. Convocation accepted this recommendation.

Improper securities transaction

Tulk, Andrew Bishop

Toronto, Ontario

Age 49, Called to the Bar 1970

Particulars of Complaint:

- professional misconduct
 - allowing himself to become the tool or dupe of a client in connection with a fraudulent securities transaction

Recommended Penalty:

three month suspension

Convocation's Disposition: (February 25, 1993)

six month suspension

Counsel for the Law Society:

Thomas J. Lockwood, Q.C.

R. Eric Fournie

Counsel for the Solicitor:

Donald J.M. Brown, Q.C.

The Solicitor's practice at the relevant time largely involved obtaining financing for small companies in such a way that they fell within the prospectus exemption regulations in the *Securities Act*. In early 1988 his firm was owed \$98,982 in legal fees by one of his clients. The client was the controlling shareholder in Permanent Acceptance Corporation Limited, a company without assets or income. The Solicitor knew that the client had no resources to pay this debt.

In October 1988, another of the Solicitor's clients instructed him to design a transaction whereby the client could acquire all of the shares in Permanent Acceptance held by the client who was indebted to the Solicitor's firm and at the same time eliminate *Securities Act* restrictions prohibiting the immediate resale of the shares to the public. If the plan succeeded, the Solicitor would recover the \$98,982 in legal fees owed his firm.

The Solicitor purposely designed the transaction so as to eliminate all of the regulatory checks and restraints that generally attach to such transactions. The Society's position was that by designing this transaction and counselling the clients involved in it the Solicitor facilitated a transaction that was abusive to the public.

The discipline hearing panel based its recommended penalty of a three-month suspension on the principle that lawyers have a duty that extends beyond the interest of their clients to the proper working of the legal system. The conduct of the Solicitor constituted a serious departure from the standard expected of a responsible and diligent lawyer.

The panel accepted as mitigating factors the facts that the Ontario Securities Commission had suspended the Solicitor's trading rights for a two-year period, that the Commission's decision had attracted widespread publicity and that as a result the Solicitor had effectively been out of practice for 13 months prior to the discipline hearing.

Convocation increased the period of suspension to six months.

Failure to serve clients

Whyte, Brian Alan

Gloucester, Ontario

Age 43, Called to the Bar 1977

Particulars of Complaint:

- professional misconduct
 - failing to serve clients in a competent and diligent manner
 - improperly charging disbursements
 - failing to discharge with integrity all duties owed clients

Recommended Penalty:

- four month suspension
- following the suspension, the Solicitor must practise under the supervision of another lawyer for a one-year period
- an undertaking to continue medical treatment
- \$2,500 in costs

Convocation's Disposition (March 25, 1993):

- four month suspension
- following the suspension, the Solicitor must practise under the supervision of another lawyer for a one-year period
- an undertaking to continue medical treatment
- \$2,500 in costs

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

James Keaney

A title searcher at the Solicitor's firm informed the Solicitor's partners that the Solicitor had been closing real estate transactions without conducting full searches of title. A subsequent review of his files for the period 1988-1991 revealed that the Solicitor had not performed full searches of title on 412 files. In these cases the title searcher would be instructed to obtain a copy of the abstract only. The instruments listed on the abstract were neither photocopied nor reviewed by the Solicitor.

The Solicitor also admitted that he had charged disbursements to clients when no expense had been incurred, or where the disbursement was merely an estimate. He stated that these charges rarely exceeded \$10, and were used to cover mileage and telephone expenses. He estimated that approximately \$500 to \$700 per year was charged in this way.

Character evidence put before the discipline hearing panel indicated that the Solicitor's actions had been totally out of character. The panel consid-

ered a number of other factors in arriving at the proposed penalty. He had fully cooperated with the Society's investigation. Over the period encompassed by the misconduct he had been abusing alcohol. The Solicitor was receiving treatment for this and other psychiatric problems, and this treatment appeared to be having the desired result. The personal costs to the Solicitor had been very high. In addition to the shame, guilt and embarrassment he had suffered, he had been out of practice for six months prior to the hearing.

The Solicitor had gained no personal or financial advantage from his actions. He had simply cut corners in a bid to find extra time to handle an increasing number of files. His billings had remained the same even as the volume of files increased.

The panel recommended that the Solicitor be suspended for four months, and following this suspension that he practise under supervision for a one-year period. He was instructed to continue his medical treatment, and to pay the Society's costs in the amount of \$2,500. This penalty embodied the panel's belief that the Solicitor's personal recovery required some incentive for him to put these matters behind him and return to practise.

Convocation accepted the panel's recommendations on penalty.

Swearing false declaration

Janjua, Moeen Mahmood Ahmad

Mississauga, Ontario

Age 51, Called to the Bar 1976

Particulars of Complaints :

- professional misconduct
 - 1) swearing 11 false statutory declarations
 - 2) failing to file Forms 2/3

Recommended Penalty:

- 1) two month suspension
- 2) reprimand in Convocation and indefinite suspension until his filings are brought up to date

Convocation's Disposition (March 25, 1993):

- 1) six month suspension
- 2) reprimand in Convocation and indefinite suspension until his filings are brought up to date

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

In his role as counsel for the Janjua Family Trust, of

which he was a 20 per cent stakeholder, the Solicitor purchased for the trust eleven rental properties in Mississauga. The purchases were financed by first mortgages equal to 75 per cent of the price. A condition of the mortgage agreement was that the trust must supply the remaining 25 per cent, and the agreement precluded the use of any secondary financing to provide these funds. The Solicitor was asked to provide a statutory declaration for each purchase stating that this financing requirement had been met.

The Solicitor subsequently swore 11 separate statutory declarations over a four-month period deposing that the balance of funds used to purchase the various properties "are of my own resources and have not been borrowed". He swore these depositions knowing them to be false. He had arranged financing on the remaining 25 per cent of the price of each of the properties by taking out second mortgages on all of them.

The second complaint heard by the discipline hearing panel concerned the Solicitor's failure to file Forms 2/3 for his 1991 fiscal year. These were due in May 1991, and despite repeated requests from the Society for them, as of the date of the hearing in January 1993, the forms had still not been filed.

The panel viewed as serious misconduct the Solicitor's apparent willingness to repeatedly execute affidavits he knew to be false. There were, however, mitigating factors that the panel chose to take into account. No monies had been lost in the transactions and no claims had been made against the compensation fund. The panel also expressed its reluctance to severely punish a man they had been convinced was "in difficult and constraining circumstances and doing his best to keep his head above water".

After balancing all of the factors, the panel recommended to Convocation that the Solicitor be reprimanded in Convocation for his failure to file his forms, and that he be suspended two months for swearing false declarations. This suspension would continue indefinitely if after the two months the forms

had still not been filed.

Convocation concurred with the recommendation that the Solicitor be reprimanded in Convocation for failure to file, but chose to increase the period of suspension to six months on the complaint of swearing false declarations.

Failure to reply

Power, Richard Michael

Toronto, Ontario

Age 34, Called to the Bar 1984

Particulars of Complaint:

- professional misconduct
 - failing to file Forms 2/3
 - failing to reply to Law Society communications

Recommended Penalty:

suspension until all forms are filed; upon reinstatement, to be reprimanded in Convocation and pay costs of \$1,000.

Convocation's Disposition (March 25, 1993):

Reprimand in Convocation, suspension until all filings were in order, and costs of \$1,000

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

not represented

Following a review of the Solicitor's books and records, the Society sent the Solicitor a letter requesting further information on deficiencies it had uncovered. The Solicitor did not reply to this or three subsequent letters from the Society.

The Solicitor also failed to file Forms 2/3 for his 1991 fiscal year.

The Solicitor did not appear before the discipline hearing panel to explain his misconduct. The panel took this as a further indication that he was unwilling to be governed by the Society. To stem this misconduct the panel recommended the Solicitor's suspension until all outstanding matters had been resolved. The panel recommended that after his reinstatement the Solicitor should be reprimanded in Convocation and ordered to pay the Society's costs in the amount of \$1,000.

The Solicitor was reprimanded in Convocation and suspended until all filings are in order and he has addressed the concerns of the Society's audit department. The Solicitor was also ordered to pay costs of \$1,000.

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