



Discipline Digest

October 1993 Vol. 2 No. 1

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Misappropriation

Freyseng, John Edward

Toronto, Ontario

Age 55, Called to the Bar 1967

Particulars of Complaint:

- professional misconduct
- misappropriation

Recommended Penalty:

disbarment

Convocation's Disposition (Sept. 23, 1993):

disbarment

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

Douglas Crane

The Solicitor began experiencing financial troubles in the early 1980s. He was providing financial support for his first wife (from whom he was divorced), his second wife and for four children from both marriages. He had also invested heavily in a real estate development project which began to experience problems. Eventually he had to obtain financing for this project from a lawyer who was also a mortgage broker (and, at that time, his law partner).

In an effort to keep his creditors at bay, the Solicitor placed several mortgages on his home. In order to prevent the eviction of his wife and children from his home he misappropriated funds from a client to pay off a second mortgage.

In 1989, one of the Solicitor's clients was experiencing financial difficulties. Rental income from one of its properties was not covering mortgage payments or operating costs. To remedy this situation, the client authorised the Solicitor to arrange a mortgage loan. The mortgage that the Solicitor arranged, however, was for an amount that was much larger than necessary to cover the deficiency. The size of the mortgage was determined by the Solicitor's own financial requirements. He misappropriated approxi-

mately \$589,785 of the \$625,000 mortgage proceeds.

The Solicitor then began to misappropriate funds from the mixed trust account of his firm to provide him with a source of money to make most of the mortgage payments on the \$625,000 mortgage. He misappropriated approximately \$756,089 in this manner.

In total, he misappropriated \$1,345,874 from clients. Since \$316,181 had been repaid to clients or client's creditors, the net amount misappropriated was \$1,029,693.

The Discipline Committee recommended that the Solicitor be disbarred. Although the Solicitor co-operated with the Law Society's investigation, the Committee accepted the general rule "that in cases of large misappropriations, the lawyer should be disbarred unless there are extenuating mitigating circumstances."

Convocation accepted the recommendation of the Discipline Committee and disbarred the Solicitor.

Ungovernable solicitor

Vanular, Gregory Peter Linton

Pickering, Ontario

Age 38, Called to the Bar 1981

Particulars of Complaint

- professional misconduct
 - failure to reply to Law Society communications (9)
 - failure to honour financial obligations (2)
 - failure to account for funds entrusted to him (2)
 - failure to attend a motion for summary judgement
 - failure to inform a client of the date of his motion
 - failure to respond to a fellow solicitor
 - failure to return documents to a fellow solicitor

Recommended Penalty

disbarment

Convocation's Disposition (Oct. 21, 1993)

disbarment

Counsel for the Law Society
Gavin MacKenzie
Counsel for the Solicitor
not represented

The complaint against the Solicitor contained 17 particulars covering the period between May 1992 and January 1993. The matters were still outstanding as of the date of the discipline hearing. Nine of the particulars alleged failure to reply to complaints from nine different clients. Two of the particulars alleged failure to account for trust funds. Two alleged failure to honour financial obligations incurred in relation to the practice of law. One alleged failure to respond to a fellow solicitor. The final particular alleged failure to return documents delivered to the Solicitor in escrow. The Discipline Committee found that in each of these incidents, the client, the creditor or solicitor suffered frustration, inconvenience, and possibly financial loss as a result of dealing with the Solicitor. The various acts of misconduct covered a substantial number of the Rules of Professional Conduct.

The Solicitor had an extensive discipline history. It began with a finding of professional misconduct in May 1988. There were four subsequent findings of professional misconduct, the most recent complaint being dealt with by Convocation in January 1993.

The Discipline Committee found that the Solicitor felt no remorse for his conduct and noted that he failed to take the several opportunities given to him to change his style of practice. It was submitted by counsel for the Society that based on the Solicitor's record he was ungovernable and ought to be disbarred.

The Solicitor stated that the cause of his problems was that he was harassed unnecessarily by the Law Society and asked the Committee for permission to resign.

The Committee considered the degree of culpability of the numerous acts of professional misconduct in the current complaint together with the Solicitor's lengthy discipline history. It found no mitigating circumstances to justify the imposition of the lesser penalty sought by the solicitor and recommended that he be disbarred.

Convocation accepted the recommendation of the committee and ordered that the Solicitor be disbarred.

Misappropriation

Jarson, Gerald Oleh
Toronto, Ontario
Age 53, Called to the Bar 1970

Particulars of Complaint:

- professional misconduct
 - misappropriation
 - failed to maintain sufficient trust balances

Recommended Penalty:

- permission to resign and costs of \$2,000

Convocation's Disposition (Sept. 23, 1993):
- permission to resign and costs of \$2,000
Counsel for the Law Society:
Stephen Foster
Counsel for the Solicitor:
Derek R. Freeman

The Solicitor was nine months late in filing his Forms 2 and 3 for the fiscal year ending February 28, 1991. The Law Society commenced an investigation of the Solicitor's practice and its examination disclosed a shortage in his trust account. It became evident that between August 1990 and June 1991 the Solicitor misappropriated approximately \$22,397 from his trust account. Although this money had been replaced by July 1991, between August 1991 and May 1992 he misappropriated a further \$24,000 from the same account. These funds had been replaced by October 1992.

The Discipline Committee accepted a joint submission that the Solicitor be permitted to resign his membership in the Society and ordered to pay costs of \$2,000. In accepting this recommendation, the Committee referred to "fourteen impression testimonial letters from other solicitors and members of the public." It also noted that the Solicitor had had a severe alcohol problem and that medical evidence had linked his alcohol abuse to his misappropriations. The Committee noted that the Solicitor was receiving treatment for his alcohol problem and that "his prognosis is viewed as excellent."

Convocation accepted the Committee's recommendation.

Borrowing from client

Bellefeuille, Roger Edgar
Alexandria, Ontario
Age 42, Called to the Bar 1978

Particulars of Complaint:

- professional misconduct
 - failed to produce books and records for Law Society auditor
 - failed to maintain proper books, records and accounts
 - practised law while under suspension
 - borrowed money from client

Recommended Penalty:

- three month suspension and \$1000 costs

Convocation's Disposition (Sept. 23, 1993):

- three month suspension and \$1000 costs

Counsel for the Law Society:

Stephen Foster

Counsel for the Solicitor:

not represented

An examination of the Solicitor's books, records and accounts in March 1991 revealed minor discrepancies.

The Law Society then authorised an audit of the Solicitor's books and records. However, the Society's auditor was unable to arrange a meeting with the Solicitor despite making numerous attempts to do so between October 1991 and August 1992. The Solicitor failed to respond to telephone messages, stated that he was too busy to meet the Society, and arranged meetings only to cancel them at a later date.

Between March 27, 1992, and May 27, 1992, the Solicitor was suspended for non-payment of his annual fees. In May, he requested an exemption from the Society's Errors and Omissions Insurance Plan for the entire 1992 calendar year. Despite this, on April 21, 1992, he acted for a client in a matrimonial matter.

In April 1988, the Solicitor borrowed \$50,000 from one of his clients. Two months later he borrowed a further \$25,000 from the same client. He made some partial payments on the second loan but defaulted on the first. The client eventually obtained judgement in the amount of \$10,582 with regard to the \$25,000 loan and \$65,074 with regard to the \$50,000 loan. The Solicitor and his client entered a forbearance agreement and since the date of the judgement he has paid his client \$1,000.

The Solicitor had been reprimanded in Committee in June 1980 and ordered to pay \$565 costs in connection with a complaint that he had made a false affidavit of legal age and signed a jurat on that document.

The Discipline Committee accepted the joint submission that the Solicitor be suspended for three months and ordered to pay \$1000 costs. The Committee emphasised that "[i]t is a prime tenet of the Society's governance of the profession that upon reasonable demand, the Solicitor must produce for inspection... the proper books and records to ensure that the members of the Society are practising in accordance with the rules and regulations of the Society." The Committee considered that the Solicitor's borrowing money from a client was the "most serious" of the complaints brought before it. Under no circumstances, it stated, may a Solicitor borrow money from his or her client except in accordance with the Rules of Professional Conduct.

Appropriation of firm's funds

Benaiah, Elyahu Doron

Toronto, Ontario

Age 32, Called to the Bar 1986

Particulars of Complaint:

- professional misconduct
 - appropriation of \$5,600 from firm for Solicitor's own use

Recommended Penalty:

three month suspension; costs of \$1,500; conditional permission to resume practice following suspension

Convocation's Disposition (Sept. 23, 1993):

three month suspension; costs of \$1,500; conditional permission to resume practice following suspension

Counsel for the Law Society:

Gavin MacKenzie

Christina Budweth

Counsel for the Solicitor:

Mark Sandler

Between June 9, 1991, and March 11, 1992, the Solicitor received \$5,600 as retainers from various clients of the law firm for which he was working. He withheld these funds from the firm and appropriated them for his own use. The Solicitor provided a statement detailing the appropriations to the Society on April 14, 1992, and subsequently made full restitution to the firm to the satisfaction of the Law Society.

The Discipline Committee recommended that the Solicitor be suspended for three months. It also recommended that at the end of the period of suspension he be permitted to resume practice in accordance with an undertaking. The undertaking, which is to last for three years, includes the following terms: he is to practice only as the employee or employed associate of a member of the Law Society who is in good standing; he must have no authority over or involvement in the trust account of his principal; and he must not directly receive retainers from clients. In addition, the Committee recommended that the Solicitor be ordered to pay \$1,500 in costs.

The Discipline Committee noted that in the normal case, the minimum penalty would be for a suspension for a much longer period, if not disbarment. There were, however, a great number of mitigating factors in this case: it was not a classic case of misappropriation; the Solicitor was experiencing a great deal of stress arising out of an intense but failed personal relationship; the amount involved was small; and the Solicitor made complete restitution.

Convocation accepted the recommendation of the Discipline Committee.

Failure to reply

Reilly, Francis Lewis

St. Catharines, Ontario

Age 47, Called to the Bar 1976

Particulars of Complaint:

- professional misconduct
 - failed to reply to Law Society communications
 - failed to file Forms 2 and 3

Recommended Penalty:

three month suspension to continue until Forms filed

Convocation's Disposition (Sept. 23, 1993):

three month suspension to continue until Forms filed

Counsel for the Law Society:

Neil Perrier

Counsel for the Solicitor:

not represented

The Solicitor failed to respond to the Law Society re-

garding a complaint by another lawyer despite various correspondence between the Society and the Solicitor. He also failed to file with the Society his Forms 2/3 within six months of the fiscal year ending November 30, 1991.

The Discipline Committee recommended that the Solicitor be suspended for a period of three months and that the suspension continue indefinitely thereafter until such time as the filings are made. It decided not to make a costs award only because the Solicitor was impecunious. In making its recommendation, the Committee emphasised the importance of the Solicitor's past misconduct. In July 1992, he was given a reprimand in Committee and in February 1993 he was suspended for one month by Convocation.

Convocation accepted the recommendation of the Committee.

Failure to reply

Tam, Ping Kwan

Toronto, Ontario

Age 57, Called to the Bar 1979

Particulars of Complaint:

- professional misconduct
 - failed to reply to Law Society communications
 - failed to keep proper books and records
 - failed to comply with an undertaking

Recommended Penalty:

reprimand in Convocation or one month suspension

Convocation's Disposition (Sept. 24, 1993):

suspension for one month definite; thereafter until all outstanding matters are dealt with

Counsel for the Law Society:

Stephen Foster

Counsel for the Solicitor:

Not represented

The Law Society wrote to the Solicitor in January 1992 regarding discrepancies found in his filings for the 1991 fiscal year. The Solicitor failed to respond to that letter. He also failed to respond to three subsequent letters dealing with the same matter.

The Solicitor likewise failed to comply with an undertaking given to the Society to submit by the 25th day of the following month, monthly trust bank reconciliations.

Given discrepancies found in his filings and in his reconciliations, the Solicitor was also charged with failure to keep proper books and records as required by the *Law Society Act*.

The Discipline Committee recommended that the Solicitor be reprimanded in Convocation if he participated in the Practice Review Programme and took care of all outstanding matters prior to the May 1993 Convocation. Should he fail to do so, the Committee recommended that he be suspended for a period of one month and indefinitely thereafter until all outstanding

matters were dealt with. At the time of Convocation's disposition there were still outstanding matters.

In making its recommendation the Committee emphasized that "[t]here was no evidence of dishonesty on the part of the Solicitor" and that he merely appeared to have some difficulty in "understanding and implementing efficient office procedures."

Failure to reply

Hollyoake, Peter Michael

Burlington, Ontario

Age 45, Called to the Bar 1976

Particulars of Complaint

- professional misconduct
 - failure to serve a client in a conscientious manner
 - failure to reply to Law Society communications
 - failure to file Forms 2 and 3
 - failure to co-operate with a Law Society investigation

Recommended Penalty

suspension with conditions

Convocation's Disposition (Oct. 21, 1993)

suspension with conditions

Counsel for the Law Society

Neil Perrier

Counsel for the Solicitor

not represented

The Solicitor did not provide one of his clients with an accounting and a report on the sale of her property. The Solicitor contended that the property was owned jointly with her husband; that only her husband was his client; and that he had provided an accounting and report to her husband. The Committee felt that this defence could not be sustained on the evidence.

The Solicitor failed to respond to Law Society communications requesting him to respond to the complaint of the client in question. He argued that he did not need to respond as the person making the complaint was not his client. The Committee concluded that this defence also failed as the Solicitor had a professional obligation to respond to the Law Society despite the difference of view concerning his professional relationship with the client.

The Solicitor admitted that he had failed to file his Forms 2 and 3 for the 1990 and 1991 fiscal years.

The Solicitor also failed to give access to the Law Society's audit staff to conduct a spot audit. He argued that some of the materials requested could not be part of a spot audit. However, the Committee concluded that on a spot audit the Society is entitled to look at all books and records of a solicitor.

The Committee recommended that the Solicitor be suspended for one month and that the suspension continue indefinitely thereafter until he provides an accounting and a report to his client on the sale of her property; files his Forms 2 and 3; pays the late filing fee of \$1,500; and produces his books and records for

the audit staff of the Law Society.

In making its recommendation the Committee noted that while the particulars of the complaint had been made out, they represented more of a threat to the Solicitor's governability than to the public through the Solicitor's dishonesty. The Committee also noted that the Solicitor had been experiencing personal problems and that he had previously been reprimanded in Convocation.

Conflict of interest

Jaffey, John Mowatt

Mississauga, Ontario

Age 46, Called to the Bar 1975

Particulars of Complaint:

- professional misconduct
 - acted in a conflict of interest
 - failed to diligently and contentiously serve an estate
 - withdrew fees from an estate which were excessive
 - preferred his own interests over those of an estate
 - preferred the interests of one beneficiary over the other
 - failed to co-operate with the Law Society investigation
 - failed to adequately maintain books and records

Recommended Penalty:

Reprimand in Convocation and \$3,000 costs

Convocation's Disposition (Sept. 23, 1993):

Reprimand in Convocation and \$3,000 costs

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

W. Bruce Drake

A Society examiner attended the Solicitor's offices on four occasions in 1990. A review of the firm's books and records revealed that bank reconciling items were allowed to go uncorrected for a period in excess of one month; staledated trust cheques were used to reconcile the mixed trust account; and trust cheques were made payable in cash.

In 1989, one of the Solicitor's clients died. His will named the Solicitor as the sole executor and a beneficiary of his estate. The amount of money in the deceased's trust account was inadequate to administer the estate and pay debts such as funeral expenses. As result, the Solicitor contacted a client to obtain a loan for the estate. The client agreed to lend the estate \$30,000 at 15 per cent secured by a first mortgage on the estate property. The Solicitor failed to disclose that he was the solicitor and sole executor of the estate and did not advise his client to obtain independent legal advice.

As debts incurred by the estate mounted, the Solicitor secured a new mortgage. This new mortgage, from the same lender as the first mortgage, was for \$70,000 at an interest rate of 12.5 per cent. Out of this sum the Solicitor paid a bill for \$41,041 for the renovation of the deceased's house. He did not verify any

of the charges detailed in the bill and later admitted that a number were excessive.

The Solicitor also paid \$10,000 to one of the beneficiaries of the estate from the proceeds of the second mortgage in accordance with a bequest made to her in the will. Although the beneficiary had been pressing the Solicitor for payment, he did not seek or receive the approval of any of the other beneficiaries before or after making this payment.

Between April 3, 1990, and May 7, 1992, the Solicitor charged the estate a total of \$28,567 in legal fees, executor's compensation, and brokerage fees. Considering all the circumstances, this amount was excessive.

In August 1992, the Solicitor was asked by the Society to provide a list of assets and liabilities of the estate. The Solicitor replied that he would attend to this matter and provide the information. As of the date of the Discipline hearing he had not provided the information.

Two of the beneficiaries of the estate were charities. The *Charities Accounting Act* requires that the public trustee be notified of a charitable bequest within one month of the date of the death of the deceased. The Solicitor failed to make this report.

He also failed to report to several of the beneficiaries of the estate of their entitlements under the will and failed to inform others of developments in the administration of the estate.

The Discipline Committee accepted the joint submission that the Solicitor receive a reprimand in Convocation and that he pay the costs of the Society in the amount of \$3,000. In accepting this submission, the Committee noted that the Solicitor's misconduct could be characterised as the mismanagement of an estate. There was no evidence of dishonesty or misappropriation of funds. It also noted that the Solicitor had an unblemished career of fourteen years at the Bar and that he agreed to attend the Bar Admission Course seminar on Wills and Estates.

Convocation accepted the recommendation of the Committee.

Failure to maintain records

Houlahan, Q.C., John Ronald

Ottawa, Ontario

Age 53, Called to the Bar 1969

Particulars of Complaint

- professional misconduct
 - failure to maintain books and records
 - misappropriation
 - failure to render accounts to clients

Recommended Penalty

Majority: six month suspension

Dissent: no recommendation

Convocation's Disposition (Oct. 21, 1993)

reprimand in Convocation

Counsel for the Law Society
Gavin MacKenzie
Counsel for the Solicitor
Michael Neville

The Society conducted an audit investigation of the Solicitor's practice as a result of information it received from the Solicitor's former bookkeeper. The Society quickly determined that the Solicitor's books were neither current nor accurate. The Solicitor explained that he had placed complete trust and reliance on his bookkeeper who, after working with him for thirteen years, had suddenly left his employ in October 1990.

It was also alleged in the complaint that the Solicitor misappropriated \$12,491 from the estate of one of his clients. The Solicitor admitted that he used the money for his personal benefit, but said that he did so without any dishonest intent. He testified that the \$12,491 was used for personal purposes only because his bookkeeper had misled him as to the true state of his books and that he believed the funds were fees which he had previously earned and which had not been transferred into his general account.

The Solicitor also admitted that he had repeatedly transferred funds from his mixed trust account to his general account before or without rendering accounts to clients despite having given written assurances to the Society on two prior occasions that he would render accounts before transferring funds.

A majority of the Discipline Committee found the Solicitor guilty of professional misconduct in relation to each of the particulars. One member of the Committee concluded, however, that the Solicitor lacked the requisite *mens rea* to be found guilty of misappropriation. The majority of the Committee recommended that the Solicitor be suspended for a period of six months. It further recommended that the Solicitor be required to file monthly trust comparison statements with the Law Society's audit department for a period of two years following his suspension. In making its recommendation, the majority noted, among other things, that the Solicitor had no prior discipline record, that he had co-operated with the Society's investigation, that the proceedings would have a devastating effect on his practice, and that he spent \$27,000 to have accountants reconstruct his books and records.

Convocation accepted the minority report that the Solicitor be reprimanded in Convocation.

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