



# Discipline Digest

November 1993 Vol. 2 No. 2

## Cases

- Spencer Black  
Toronto
- Ernest A. Dyck  
Toronto
- David W. Goldman  
Toronto
- John M. Hartley  
Toronto
- Ian T. McEachern  
Lindsay
- Peter Simons  
Toronto
- Henry P. Steponaitis  
Toronto

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## Misappropriation

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### Black, Spencer

Toronto, Ontario

Age 53, Called to the Bar 1967

#### *Particulars of Complaint*

- professional misconduct
  - Failed to conscientiously serve a client
  - Misappropriation from an estate

#### *Recommended Penalty*

disbarment

#### *Convocation's Disposition (Nov. 25, 1993)*

disbarment

#### *Counsel for the Law Society*

Christina Budweth

#### *Counsel for the Solicitor*

Alan Price

The Discipline Committee found that the Solicitor misappropriated \$126,616.20 from the estate of one of his clients of which he was the sole executor and solicitor. It emphasized that the general "rule" is that solicitors who deliberately misappropriate funds should be disbarred save in exceptional circumstances.

The Solicitor put forward two exceptional or extenuating circumstances. First, it was submitted that the Solicitor voluntarily disclosed the misappropriation. Second, it was submitted that the Solicitor voluntarily took steps to commence repayment of the funds. The Committee felt that both of these steps were not taken voluntarily, but rather that they were taken in light of an impending visit by a Law Society representative.

Convocation disbarred the Solicitor.

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## Ungovernable solicitor

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### Goldman, David William

Toronto, Ontario

Age 34, Called to the Bar 1986

#### *Particulars of Complaint*

- professional misconduct
  - Failed to reply to Law Society communications (5)
  - Failed to release files
  - Failed to communicate with a client
  - Failed to report to a client (3)
  - Abandoned his practice to the prejudice of clients
  - Failed to serve a client in a conscientious manner

#### *Recommended Penalty*

disbarment

#### *Convocation's Disposition (Nov. 25, 1993)*

disbarment

#### *Counsel for the Law Society*

Christina Budweth

#### *Counsel for the Solicitor*

E. Berlin (at hearing)

The Solicitor was represented by counsel but did not appear personally before the Discipline Committee. The Committee found that the evidence "established each and every particular charge beyond any reasonable doubt."

The Committee was of the opinion that the Solicitor was "ungovernable, that his practice has been abandoned and that he has shown an unexplained absence of responsibility to this profession and this community." It recommended that he be disbarred.

Convocation accepted the recommendation of the Discipline Committee.



## Conflict of interest

**McEachern, Ian Thomas**

Lindsay, Ontario

Age 56, Called to the Bar 1975

### *Particulars of Complaint*

- professional misconduct
  - Acting in a conflict of interest
  - Drew executor and legal fees from estate without rendering fee billings
  - Misappropriation
  - Failure to conscientiously and diligently serve a client
  - Borrowing funds from a client
  - Failure to satisfied financial obligations
  - Failure to reply to Law Society communications (6)
- conduct unbecoming
  - Agreed to provide certain mortgage security but provided less security

### *Recommended Penalty*

disbarment

### *Convocation's Disposition (Nov. 25, 1993)*

disbarment

### *Counsel for the Law Society*

Gavin MacKenzie

Christina Budweth

### *Counsel for the Solicitor*

R.U. Boriss (at hearing-penalty)

Six complaints had been issued against the Solicitor. The majority of the particulars contained therein were found to have been established.

While acting as the executor and solicitor for an estate, the Solicitor acted in a conflict of interest by loaning \$25,000 of estate funds to his cousin; he violated the *Law Society Act* and Rule 9 of the Rules of Professional Conduct by withdrawing both executor and legal fees from the estate without rendering fee billing; and he misappropriated \$72,000 from the estate.

While acting for the estate of another client, the Solicitor failed to respond to numerous requests for an accounting of the affairs of the estate and failed to resolve issues necessary to allow for a distribution of the estate in a timely manner.

The Solicitor misappropriated \$401.25 from a client who had given him the money to pay a debt. He also misappropriated approximately \$155,000 of client trust money and borrowed \$25,000 from a client.

The Solicitor misappropriated a further \$58,000 from mortgage funds advanced to him by a lending institution in trust to be paid to another lending institution to pay off a mortgage.

On three occasions, the Solicitor (not in connection with his practice) agreed to give first mortgage security on property in consideration for the advance of funds in excess of \$500,000; on two occasions he provided only second mortgage security and on one occasion he provided fourth mortgage security.

He also admitted that he had failed to satisfy a finan-

cial obligation incurred in relation to his practice in the amount of \$15,006.02.

The Solicitor failed to respond to the Law Society regarding the complaints of six individuals. The Society attempted to contact the Solicitor on a total of twenty occasions.

The Discipline Committee found that "[t]he Solicitor's evidence was characterised by evasion, distortion, an astounding lack of memory for details of these complaints, and by convenient forgetfulness." It noted that he consistently blamed others for his predicament and concluded that "[i]t is simply not possible to believe a word that he says." The Committee also noted that in making its findings it "viewed the evidence as a whole and required that each complaint be proved beyond a reasonable doubt." The Committee concluded that the Solicitor ought to be disbarred. In explaining its decision, it cited the severe loss to the public and the Solicitor's failure to show any indication that he wanted to conform to the requirements of the Law Society.

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

## Misappropriation

**Steponaitis, Henry Peter**

Toronto, Ontario

Age 48, Called to the Bar 1971

### *Particulars of Complaint*

- professional misconduct
  - Misappropriation (2)
  - Misapplication of funds (2)
  - Breach of duty to clients
  - Acted in a conflict of interest (2)
  - Prepared a false notice of sale
  - Made false representations to a solicitor
  - Commissioned a false Affidavit
  - Borrowed funds from a client
  - Breached a trust agreement with a client
  - Failed to deposit trust funds into a trust account
  - Maintained two trust accounts for one client
  - Failed to maintain books and records for a trust account
  - Failed to enter cash receipts in books and records
  - Failed to send reporting letter (2)
  - Failed to file forms 2/3
  - Failed to determine how estate funds should have been distributed
  - Withdrew fees from an estate without rendering a fee billing

### *Recommended Penalty*

permission to resign

### *Convocation's Disposition (Nov. 25, 1993)*

permission to resign

### *Counsel for the Law Society*

Christina Budweth

### *Counsel for the Solicitor*

Paul French

The evidence before the Discipline Committee consisted



of four agreed statements of fact. The Solicitor admitted, amongst other admissions, to the misappropriation of about \$16,000 and the misapplication of \$30,690 of funds he had received in trust for a client.

The Solicitor also admitted to the misappropriation of \$16,675 and the misapplication of \$13,000 from funds he had received in trust on behalf of another client. The Solicitor repaid this client some 17 months later the sum of \$14,000 in full satisfaction of the client's investment. The other particulars which the Solicitor admitted varied in their degree of culpability. Nevertheless, there were a number of clients who had trusted the Solicitor completely and accepted his advice as to the investment of their money and his representation that the investments were safe and profitable. A number of these clients lost all or most of their money.

Evidence was led that the Solicitor was suffering from a combination of bipolar affective disorder and chronic alcoholism.

The Discipline Committee stated that the evidence before it would have inevitably lead to a recommendation of disbarment if there had not been significant mitigating circumstances.

Counsel for the Society and counsel for the Solicitor made a joint submission that the Solicitor be permitted to resign. The Discipline Committee accepted this submission and recommended that the Solicitor be given permission to resign.

Convocation accepted the recommendation of the Committee.

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## Practising while suspended

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### **Simons, Peter**

Toronto, Ontario

Age 31, Called to the Bar 1989

#### *Particulars of Complaint*

- professional misconduct (two Complaints)
  - Failure to inform the Law Society of the termination date of his fiscal year
  - Failure to file Forms 2 and 3
  - Practising law while under suspension (2)
  - Failure to co-operate with a Law Society investigation

#### *Recommended Penalty*

one year suspension or disbarment  
\$1,500 costs

#### *Convocation's Disposition (Nov. 25, 1993)*

permission to resign

#### *Counsel for the Law Society*

Stephen Foster

#### *Counsel for the Solicitor*

Not represented

In May 1991, the Solicitor was suspended for failing to pay his Errors and Omissions (E&O) premiums. Nevertheless, he continued to practise law during the period of his suspension.

The Solicitor was suspended again in November 1991 for failing to pay his E & O premiums. Once again, he practised during his period of suspension.

The Solicitor had not filed a Form 2 or 3 since his call to the Bar. In July 1992, a Law Society auditor attended the Solicitor's office, unannounced, to examine his books and records. The Solicitor said that he would have them ready for production the next day. The next day, the Solicitor did not have his books and records and did not produce them despite numerous requests.

The Discipline Committee recommended that the Solicitor be suspended for a period of one year if he produced his books and records and made his outstanding filings. It recommended that he be disbarred if he failed to do this. In making its recommendation, the Committee noted that the Solicitor had agreed that he should be disbarred should he fail to produce his books and records or make his filings.

The Solicitor advised Convocation that he had continued to practice law while suspended for a third time following the hearing before the Discipline Committee. The Solicitor requested permission to resign and this was granted by Convocation.

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## Failure to reply

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### **Dyck, Ernest Arthur**

Toronto, Ontario

Age 43, Called to the Bar 1985

#### *Particulars of Complaint*

- professional misconduct
  - Failure to reply to Law Society communications (6)
  - Failure to conscientiously and diligently serve a client
  - Failure to honour a financial obligation (2)
  - Failure to comply with an undertaking to the Society (4)
  - Failure to satisfy an award for costs

#### *Recommended Penalty*

- four month suspension with conditions
- permission to resign or disbarment if the subject matter of the complaint is not dealt with

#### *Convocation's Disposition (Nov. 26, 1993)*

- four month suspension beginning Dec. 20, 1993, and indefinitely thereafter until Law Society receives psychiatric evidence regarding Solicitor's fitness to practice

#### *Counsel for the Law Society*

Christina Budweth

#### *Counsel for the Solicitor*

Not Represented at Hearing

Janet Leiper (at Convocation)

A number of the Solicitor's clients lodged complaints relating to the Solicitor's conduct. The Discipline Committee found that the Solicitor had frequently failed to reply to Law Society communications; failed to honour fi-



nancial obligations incurred in connection with his law practice; failed to comply with a number of undertakings given to the Society; and failed to satisfy an award for costs.

The Solicitor had been reprimanded in Convocation in April 1992 for failing to reply to the Society and breach of an undertaking. In August 1992, he was reprimanded in Committee for failure to reply to the Society and breach of an undertaking to the Society to reply.

The Discipline Committee recommended that the Solicitor should be suspended for four months if he could satisfy the Society that all the matters in complaint had been dealt with by the time he appeared before Convocation. However, it also recommended that suspension should continue indefinitely "unless or until credible psychiatric opinion has been provided to the Society that the Solicitor is ... able to be governed by the Society." The Committee further recommended that "[i]f the Solicitor has not by the first appearance at Convocation dealt with all of the matters that are the subject of complaint ... [he should] be permitted to resign his membership in the Society and in the absence of his agreement to do so, should be disbarred."

In making its recommendations the Committee concluded that it was "abundantly clear that the Solicitor has demonstrated an inability and apparent unwillingness to be governed by the Society." Although the Solicitor appeared to be forthright and remorseful in his appearance before the Committee, the Committee noted that he seemed to have demonstrated from his conduct, and from the evidence, a form of paralysis which rendered him unable to cope with the complaints and the demands of the Society.

The Solicitor had dealt with all the outstanding matters by the time of the appearance before Convocation. Accordingly, Convocation accepted the Committee's recommendation that the Solicitor be suspended for four months. The suspension, to begin Dec. 20, 1993, will continue until the Society receives a satisfactory psychiatric report regarding the Solicitor's fitness to practice.

## Failure to serve clients

**Hartley, John Melville**

Toronto, Ontario

Age 41, Called to the Bar 1978

### *Particulars of Complaint*

- professional misconduct

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- Failed to serve clients in a conscientious manner (2)
- Failed to comply with an undertaking to the Law Society (3)

### *Recommended Penalty*

Three month suspension with conditions  
\$5000 costs

### *Convocation's Disposition (Nov. 25, 1993)*

Three month suspension with conditions  
\$5000 costs

### *Counsel for the Law Society*

Neil Perrier

### *Counsel for the Solicitor*

Not Represented and did not attend at hearing

In 1986, the Solicitor was retained by a couple to commence an action regarding a motor vehicle accident. They contacted the Law Society after the Solicitor failed to respond to numerous telephone calls. The Society wrote to the Solicitor twice. It received no response to the first letter. The Solicitor responded to the second letter and indicated that he had been in contact with his clients and had set the matter back on track to their satisfaction. Although there was some indication that the Solicitor tried to deal with the file in the spring of 1989, the clients were unable to get him to respond to them between March and November 1989 and eventually had to contact the Society a second time. They finally retained other counsel.

In October 1992, the Society received a complaint against the Solicitor regarding his handling of a real estate transaction. The Society made numerous attempts to contact the Solicitor. It received no response despite the Solicitor having undertaken, in November 1989, to respond promptly to all Law Society communications.

In the fall of 1991, a husband and wife retained the Solicitor to change their wills. In February 1992, the wife's mother died and the couple retained the Solicitor to represent them with respect to her estate. Despite making numerous attempts to contact the Solicitor between July and September 1992 they did not hear from him. In addition, between July and October 1992, eight appointments were made with the Solicitor through his secretary. All of these appointments were either cancelled by the secretary or the Solicitor failed to show up for them. The Society made a number of attempts to contact the Solicitor in regard to this matter but received no response.

The Solicitor further failed to respond to Society communications after another client lodged a complaint with the Society.

The Discipline Committee recommended that the Solicitor be suspended for three months, such suspension to come into effect on the later of the date of the order of Convocation or the date upon which an administrative suspension for non-payment of the E & O levy has been lifted. It further recommended that the suspension ought to continue until the Solicitor has complied with his undertaking to respond to the Society communications. The Committee also recommended that the Solicitor be ordered to pay \$5000 costs.

Convocation accepted the Committee's recommendation.