



Discipline Digest

October 1992 Vol. 1 No. 1

Misappropriation

Gray, James Frederick Harris

Toronto, Ontario

Age 62, Called to the Bar 1959

Particulars of Complaint:

- professional misconduct
 - misappropriation (9)
 - breach of an undertaking
 - transfer of funds from trust to general accounts without delivering a statement of account to the client

Recommended Penalty:

permission to resign

Convocation's Disposition (Oct. 22, 1992):

permission to resign

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

Paul Jewell

Cases

- Arthur Chung
Toronto
- Mario Giangioppo
North York
- James F. Gray
Toronto
- Timothy J. Hilborn
Cambridge
- Adi M. Raman
Toronto
- Norman E. Roy
Oakville
- Gregory P. Vanular
Pickering

During the years 1988 to 1991, the Solicitor misappropriated approximately \$240,000 from trust accounts and estate bank accounts over which he had power of attorney by transferring monies to his firm's general account to cover the ongoing financial obligations of his practice, including obligations to beneficiaries of estates. Transfers were also made over this period through inappropriate billing practices wherein the Solicitor would transfer funds into his general account prior to rendering a bill to a client.

In January and February 1991, the Solicitor repaid approximately \$194,000 of these monies, in part through mortgaging his home. At the time of the hearing, the Solicitor had repaid all amounts owing either by injecting further monies into various trust accounts or by rendering fee billings.

Psychiatric evidence led on the Solicitor's behalf was to the effect that he was suffering from burnout and reactive depression. This depression stemmed from the death of his daughter in 1985, and the deaths of his father and his law partner. The evidence was that he had never learned to deal with the grief arising from these deaths, and that the death of his daughter had resulted in his inability to properly function at work.

In cross-examination, the psychiatrist testified that although the Solicitor "wasn't functioning as though he could tell the difference between right and wrong...if you could have pinned him down, at that moment, you would have found that he was not psychotic and that he did know that it was wrong." The committee concluded that the Solicitor had known that he was taking money from his clients' accounts to pay his office expenses and for personal draws and he had known that what he was doing was wrong. On these grounds the committee found the Solicitor guilty of professional misconduct.

The committee stated that the normal penalty for misappropriation was disbarment. It expressed its view, however, that the Solicitor was "fundamentally an honest and caring person" and that the Solicitor's actions had been largely caused by the depression over which he had no control.

The committee recommended that the Solicitor be permitted to resign his membership in the Law Society. Convocation accepted that recommendation.

Failure to maintain records

Raman, Adi Mullan

Toronto, Ontario

Age 67, Called to the Bar 1968

Particulars of Complaint:

- professional misconduct
 - failure to cooperate in a Law Society investigation
 - failure to maintain books, records and accounts
 - breach of an undertaking
 - failure to file Forms 2/3
 - practising while suspended
 - failure to pay Errors and Omissions deductible
 - failure to repay a loan guaranteed by the Law Society

Recommended Penalty:

permission to resign

Convocation's Disposition (Oct. 22, 1992):

permission to resign (effective Dec. 31, 1992)

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

Peter Rosenthal

As a result of an audit of the Solicitor's books in July 1989, the Society's auditor wrote the Solicitor seeking further information. The Solicitor did not provide the auditor with the information. The Law Society then obtained a written undertaking from him dated November 1, 1989 wherein he agreed to cooperate in all Law Society investigations. The Solicitor immediately breached this undertaking by not cooperating with the auditor's investigation of his books and records.

The Solicitor submitted his Form 2/3 for his fiscal year ending December 31, 1986 almost three months late. The Society had agreed to this extension. The form was returned to the Solicitor with a request that he provide certain missing information. He returned the form a year later, after the Society had written six follow-up letters requesting it. However, the form was again returned to the Solicitor because it had not been completed by a licensed public accountant. Three follow-up letters were sent requesting that the Form be properly completed and filed. This pattern was repeated for the Forms 2/3 submitted by him for his fiscal years ending in December 1987 and December 1988. The Solicitor was reprimanded in Committee for this and other misconduct in February 1990.

The Solicitor's rights and privileges as a member were suspended for approximately 4 1/2 of the five months from November 24, 1989 to April 27,

1990, due to his failure to pay fees and levies owing to the Society. The Solicitor continued to practise throughout this period of suspension.

In order to pay four errors and omissions deductibles totalling \$14,092 the Solicitor arranged a bank loan. In accordance with standard practice, the department of insurance guaranteed the loan. The Solicitor defaulted on the loan and the Society was called on to honour its guarantee. The Solicitor eventually repaid the Society.

When the complaint first came before the committee on September 11, 1991, and a finding of professional misconduct was made, the committee adjourned the hearing to give the Solicitor an opportunity to satisfy the matters which were delinquent. When the hearing resumed on January 23, 1991, the Committee was told that the Solicitor's books were still not up to date.

There was no evidence to suggest that the Solicitor had misappropriated any funds or was guilty of any dishonesty. This was a case of extreme dereliction in the maintenance of his books and records. The Solicitor was 67 years of age and expressed his wish to retire. He had cooperated with the Society by turning over what books and records he had. For these reasons, the committee accepted a joint submission that the Solicitor be permitted to resign his membership.

Preparing false document

Hilborn, Timothy James

Cambridge, Ontario

Age 41, Called to the Bar 1979

Particulars of Complaint:

- professional misconduct
 - prepared a letter containing information he knew to be false and which he knew was likely to be relied on as evidence in a civil proceeding

Recommended Penalty:

reprimand in Convocation

Convocation's Disposition (Oct. 22, 1992):

reprimand in Convocation

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

Frank Marrocco

Lynn Mahoney

In 1985, the Solicitor represented a couple in the purchase of their matrimonial home. The couple took title as tenants in common. In July 1990, the wife contacted the Solicitor and said she and her

husband had decided to transfer ownership from tenants in common to joint tenants. To the Solicitor's knowledge there had been at least two previous discussions with the couple concerning joint tenancy, and he was not surprised by her request. The wife told the Solicitor that the husband was in the hospital with a broken hip. The Solicitor inquired about the husband's mental condition and the wife told him there was "no problem".

The wife attended at the Solicitor's office the following week and signed the deed. The Solicitor told her that he would go to the hospital in a couple of days to get the husband's signature. He pointed out that, since the deed did not require witnesses, she could take it to the hospital herself to get it signed. She was going to the hospital and decided to take the deed with her. She later returned the executed deed to the Solicitor, who registered it.

The husband died October 23, 1990. His niece and nephew were the executors of his estate. In December 1990, the lawyer for the niece and nephew called the Solicitor and told him that they were concerned about the husband's mental capacity when he had signed the deed. The Solicitor then received a letter from the wife's lawyer inquiring into the matter. The Solicitor did not at first respond because he did not want to get involved, and because he believed that there were medical records that would sufficiently attest to the husband's mental capacity to sign the deed.

The wife's lawyer wrote a follow-up letter in January 1991. Before responding to this second letter the Solicitor called the wife to find out what was going on. She told him that the niece and nephew were trying to set aside the deed. She vehemently insisted that her husband had known exactly what he was signing. Largely because he himself had been present on previous occasions when the couple had discussed the desirability of joint tenancy, and because he believed on the basis of these discussions that the husband did want joint tenancy, and because he had no reason to doubt the husband's mental capacity on the date the deed was signed, the Solicitor told the wife that if it would be helpful he would say that he had been present when the husband had signed the deed. He then sent a letter to the wife's lawyer advising that he had attended personally to witness the husband's execution of the deed.

The lawyer for the niece and nephew had information that the wife had attended at the hospital without the Solicitor when the husband

executed the deed. Based on this information the lawyer commenced proceedings to have the deed set aside. Upon receiving the statement of claim, the wife's lawyer sent the opposing lawyer a copy of the Solicitor's letter wherein he claimed to have witnessed the execution of the deed.

In April 1991, the wife's lawyer contacted the Solicitor to advise that his client admitted the Solicitor was not present at the execution of the deed. The Solicitor acknowledged he had not been there.

The Solicitor maintained he never intended to give false evidence if called to appear in court. He had believed that the husband's medical records would be available and would prove his capacity to execute a deed, which would settle the matter.

The committee noted the Solicitor had not acted out of any desire for personal gain. It accepted that the misconduct was out of character and that, had the matter proceeded further than it did, the Solicitor had no intention to perjure himself in court. It was noted that he had no previous discipline history and had already suffered significantly from the pre-trial publicity.

Nevertheless, his actions could have had serious consequences and therefore called for a substantial penalty. After much consideration, the committee recommended that the Solicitor be reprimanded in Convocation. The recommendation was accepted by Convocation.

Failure to serve clients

Vanular, Gregory Peter Linton

Pickering, Ontario

Age 37, Called to the Bar 1981

Particulars of Complaint:

- professional misconduct
 - failure to serve clients promptly
 - failure to fulfil the financial obligations of his practice
 - failure to fulfil undertakings

Recommended Penalty:

reprimand in Convocation with conditions

Convocation's Disposition (Oct. 22, 1992):

reprimand in Convocation with conditions

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

The complaint against the Solicitor alleged that between May 1989 and January 1991, he exhibited a

standard of conduct in dealing with clients, fellow solicitors, the public and the Law Society which was below the standard expected of a member of the legal profession. The complaints involved a failure to serve clients in a prompt manner, a failure to fulfil the financial obligations of the Solicitor's practice, and failure to fulfil undertakings given to fellow lawyers. Each of the complaints was exacerbated by the Solicitor's persistent refusal to reply to Law Society communications.

The Solicitor had a substantial record of previous disciplinary proceedings for similar conduct. By Order of Convocation dated June 23, 1988 he was suspended from practice for six months and fined \$5,000 for misconduct that included arranging financing for his home that had been structured to disguise the fact that he was a borrower and to make it appear that the price paid for the property was higher than it actually was; for borrowing money from clients without ensuring that their interests were protected; and for frequent unreasonable delays in the completion of his work on behalf of clients.

The Solicitor was again found guilty of professional misconduct on February 26, 1991, for failing to reply to the Society. He was reprimanded in committee. On May 8, 1991, he was once more found guilty of professional misconduct. He had failed to meet the financial obligations arising out of his practice, including a \$33,000 judgement in favour of a client, and payment of an errors and omissions deductible. On this occasion also the Solicitor was reprimanded in committee.

Between November 1989 and March 1990, the Solicitor had been suspended on four separate occasions for periods ranging from two weeks to a month for non-payment of his errors and omissions levy and annual fees.

In the present proceedings the Solicitor made submissions on his own behalf to the effect that when he had returned from a period of suspension from practice in January 1989 he had found his practice in a state of disarray. At the same time he found he was indebted for various expenses including a substantial amount for legal fees incurred as a result of the previous disciplinary proceedings and related civil consequences. The Solicitor stressed that from the date of his return to practice he had been engaged in transforming his practice from one engaged largely in real estate matters to one focused on criminal law, to which he felt he was better suited. In March 1990 he had participated in

the practice review programme and implemented most of the recommendations that had resulted. He told the committee that he was prepared to return to the programme and have a further review performed to evaluate the changes he had implemented. He closed his submissions by advising the committee he now had his practice under control and was committed to maintaining that control.

The committee felt strongly that the Solicitor could be rehabilitated and that every effort should be made in that regard. The committee considered recommending a suspension but felt that such a disposition would perhaps "cause the Solicitor to suffer an unfortunate setback". For this reason the committee recommended that the Solicitor be reprimanded in Convocation on three conditions:

- (1) that he immediately re-enlist in the practice review programme
- (2) that he comply with all of the recommendations resulting therefrom
- (3) that he pay the costs of the practice review up to \$2,000.

Convocation accepted the committee's recommendation.

Practising while suspended

Giangioppo, Mario

North York, Ontario

Age 38, Called to the Bar 1982

Particulars of Complaints (3):

- professional misconduct
 - failure to reply to Law Society communications
 - practising while suspended
 - failure to honour financial obligations
 - failure to fulfil an undertaking

Recommended Penalty:

reprimand in Convocation plus \$2,000 costs

Convocation's Disposition (Oct. 22, 1992):

reprimand in Convocation plus \$2,000 costs on condition Solicitor not resume practice until he complies with any recommendations of the practice review programme.

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

The committee heard three complaints against the Solicitor. Each listed similar allegations. The conduct complained of occurred over a 17-month period spanning September 1990 to January 1992. Over this period the Law Society received 11

letters of complaint from clients and others involved in various transactions with the Solicitor. These complaints included allegations that the Solicitor had practised law while under suspension for non-payment of his annual fees and that he had failed to honour a personal undertaking.

Each of the three complaints before the committee described how the Solicitor's misconduct was compounded by his failure to respond to Law Society communications. The majority of the Society's letters elicited no reply from him, and they were followed up by telephone calls and registered letters. No responses were forthcoming until April 1992, when in a series of letters to the Society the Solicitor attempted to deal with all of the complaints against him.

By the time of the committee hearing the Solicitor had made the appropriate replies and satisfied the undertakings. He had signed an undertaking not to practise on April 13, 1992, and had not practised up to the hearing date, a period of three months.

The committee took into consideration that the Solicitor had ultimately cooperated fully with the Society's investigation and as a result a full hearing with extensive evidence was avoided. The committee recommended that the Solicitor be reprimanded in Convocation and ordered to pay the sum of \$2,000 toward the Society's costs.

Convocation accepted the committee's recommendation but added a term that the Solicitor not return to practice until he complies with any recommendations made as a result of his participation in the practice review programme.

Failure to fulfil undertakings

Chung, Arthur

Toronto, Ontario

Age 51, Called to the Bar 1983

Particulars of Complaint:

- professional misconduct
 - failure to fulfil undertakings
 - failure to reply to Law Society communications

Recommended Penalty:

one month suspension with conditions and payment of costs in the amount of \$2,500

Convocation's Disposition (Oct. 22, 1992):

one month suspension (effective November 1) with conditions and payment of costs in the amount of \$2,500

Counsel for the Law Society:

Christina Budweth

Counsel for the Solicitor:

not represented

Between December 1988 and April 1991, the Solicitor failed to fulfil the terms of four separate undertakings. The first was given to a fellow lawyer assuring him that the Solicitor would facilitate the transfer of a client's file from the lawyer by undertaking to pay the assessed fees owed the lawyer. In April 1990, the former lawyer forwarded to the Solicitor a copy of a certificate of assessment. The Solicitor's client had planned to sell his home to pay the bill but the poor real estate market had made this impossible. Over the next two years the issuance of a writ of seizure and sale against the former client and the intervention of the Law Society were required before the Solicitor honoured his undertaking.

In December 1989, the Solicitor, acting for the vendor in a real estate transaction, provided the purchaser and his lawyer with an undertaking that he would register discharges of three mortgages on the property within 30 days. Despite five letters over the following 11 months the purchaser's lawyer was unable to get a response to his queries regarding the discharges. In January 1991, the Law Society became involved. As of June 1992, the purchaser's lawyer had still not been informed by the Solicitor of the particulars regarding the discharge of two of the mortgages.

In order to facilitate the closing of another real estate transaction the Solicitor provided his client with a personal undertaking in April 1991 to produce a statutory declaration by the vendors concerning details of the property. In June 1991, the Solicitor forwarded to the vendor's lawyer the statutory declaration and requested that the lawyer have his client execute it as soon as possible. This was followed by another letter in July 1991 repeating the request.

After a complaint from the client that the Solicitor had failed to satisfy the undertaking the Law Society became involved. In December 1991, the Solicitor informed the Society that he had been unsuccessful in locating the vendors and that the declaration remained unsigned. The client went into receivership before the Solicitor succeeded in complying with the undertaking.

The fourth undertaking was given by the Solicitor to the Law Society in September 1990.

The Solicitor undertook to respond to all communications from the Society within one week of receipt. This undertaking was breached on numerous occasions when the Solicitor either failed to reply or delayed his response to Law Society communications relating to the investigations of the complaints described above.

The Solicitor had been found guilty of professional misconduct on a previous occasion for failing to file his Forms 2/3 and failing to produce books and records. The committee recommended that the appropriate penalty would be a one month suspension plus the costs of the investigation. The committee wrote that it was only by the "prompt fulfilment of appropriate undertakings sparingly given that the profession is able to carry on the practice of law in a civilized manner". Convocation accepted the committee's recommendation.

Failure to reply to Law Society

Roy, Norman Edward Joseph

Oakville, Ontario

Age 38, Called to the Bar 1982

Particulars of Complaint:

- professional misconduct
 - failure to file Forms 2/3
 - failure to reply to Law Society communications
 - failure to comply with an undertaking given the Law Society

Recommendation as to Penalty:

reprimand in Convocation with conditions

Convocation's Disposition (Oct. 22, 1992):

reprimand in Convocation with conditions

Counsel for the Law Society:

Gavin MacKenzie

Counsel for the Solicitor:

not represented

The Solicitor failed to file his Forms 2/3 within six months of the end of his fiscal year ending April

30, 1991. At the date of the Discipline hearing the Solicitor had yet to file the forms.

The Society received a letter of complaint dated January 16, 1992 from a client of the Solicitor. By letter dated February 18, 1992 the Law Society forwarded a copy of the complainant's letter to the Solicitor and requested that he provide written comments within two weeks. No reply was received. A follow-up sent by the Society on March 24, 1992 also failed to elicit a response.

By letter dated April 16, 1992, the complainant's new lawyer wrote a further letter of complaint to the Law Society. The Society forwarded a copy of this letter to the Solicitor on May 5, 1992. The Solicitor was advised that should a response not be received within seven days the matter would be referred to the discipline committee. No reply was received. At the date of the hearing the Solicitor had not requested an extension to reply nor had he provided an explanation for his failure to reply.

The Solicitor had provided the Law Society with a written undertaking dated March 17, 1992, which stated that he would respond promptly to all communications from the Law Society. He failed to reply to two letters and a telephone call concerning the complaint.

The committee had before it medical reports from the Solicitor's general practitioner and psychiatrist. Both wrote that they had been assisting the Solicitor in regard to stress management. The committee was also informed that the Solicitor had been accepted into the practice review programme.

The committee recommended that the Solicitor be reprimanded in Convocation if he replied to the complaints and filed the Form 2/3 before Convocation considered the matter. The Solicitor filed the required material and was reprimanded in Convocation.

The Law Society
of Upper Canada



Le Barreau
du Haut-Canada

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