

## Lawyer P

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Vancouver, B.C.

Called to the Bar: July 10, 1984

### **Discipline hearing:**

*Dates:* October 25, 2000 and May 17, 2001

*Panel:* Gerald J. Lecovin, Q.C., Chair, Ralston S. Alexander, Q.C. and Donald A. Silversides, Q.C.

*Reports issued:* January 31 and October 5, 2001

Indexed as [2001] LSBC 04

### **Counsel:**

Jessica S. Gossen, for the Law Society

Mr. P, on his own behalf

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## Summary

Mr. P rendered to clients a bill for fees based on a percentage of funds held in trust, even though his retainer agreement with the clients required that he bill for his fees on an hourly rate basis. The bill was far in excess of the value of the services provided when calculated on an hourly basis. Mr. P did not bill as a trustee of the money he held for the clients under the *Trustee Act*, and he had neither advance consent of the clients nor a court order to bill as a trustee. Rather he billed on a percentage basis because he realized that his neglect in recording some of his time on the file meant he would otherwise be unremunerated for that time. His conduct constituted professional misconduct. In considering penalty, the hearing panel noted that Mr. P had undergone five other discipline hearings in which there were adverse findings against him, as well as seven conduct reviews, several of which arose from complaints about his fees or billing for fees. The panel also observed, however, that Mr. P had made changes to his practice to dramatically reduce the number of complaints against him in recent years. Taking into account these factors, previous discipline decisions, the need to provide some measure of consistency and the need to communicate to Mr. P the gravity of his conduct, the panel ordered that he pay a \$12,000 fine and \$5,069.91 as costs of the proceedings.

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## Facts

In 1990 B, acting for Mr. and Mrs. V under a power of attorney, retained Mr. P's law firm to represent Mr. and Mrs. V in a Supreme Court action.

The retainer agreement provided that Mr. P would bill for his services on an hourly rate basis, with a discretion to adjust the final bill, depending on the complexity of the matter, the money at issue and the degree of success. The retainer also stated that the firm

normally sent interim bills to clients on a monthly or bimonthly basis and that the clients would be kept closely advised with respect to cost.

In March, 1991 the litigation was settled for \$35,000 plus accrued interest. It was agreed that the money would be held in trust pending resolution of another litigation involving Mr. and Mrs V in Greece, a further court order or agreement by the parties.

In April, 1991 Mr. P deposited the settlement proceeds of \$42,109.61 in a separate trust account on behalf of Mr. and Mrs. V. He held these funds until June, 1997 pursuant to the settlement.

Between June, 1990 and December, 1992, Mr. P billed the clients on an hourly basis pursuant to his retainer agreement.

During the six years he held these funds in trust, Mr. P's expenditure of time and effort was modest. He rolled over the funds into new term deposits, included a record of the funds in his Form 47 report and mailed out T5 statements of investment income to the clients.

When Mr. and Mrs. V's litigation in Greece settled in 1997, their attorney instructed Mr. P to disburse the trust funds, with provision made for Mr. P to pay his legal fees. In June, 1997, Mr. P sent a bill for \$2,838.93, plus taxes, to the attorney and Mr. and Mrs. V and withdrew these funds from trust. The bill was "*for all professional services rendered since April 1991 in connection with the deposit and investment of the original sum of \$42,109 into interest-bearing trust accounts from time to time up to and including May 1997 at the rate of one percent of the amount deposited each year.*"

In May, 1999 a B.C. Supreme Court registrar disallowed this bill and awarded costs and interest to the client. Mr. P subsequently refunded the clients.

While Mr. P was clearly acting as trustee of his clients' funds, the hearing panel noted the terms of a trust vary. Under the *Trustee Act* a trustee's remuneration can be based on a fee that has the beneficiaries' consent or, if that consent is not forthcoming, on a fee established by the court. Mr. P did not have client consent to bill on a percentage basis and he did not seek approval of the court. If he had, the court would likely have reviewed, among the relevant factors, the terms of his retainer agreement and the fact he billed for some services on an hourly basis.

In these circumstances, Mr. P was fully paid for all legal services for which he recorded his time in accordance with his retainer agreement. When he distributed the trust funds, he realized that he had neglected to record some of his time on the file and, absent some imaginative action, would not be remunerated for it. For that reason, he billed on a percentage basis. Although he subsequently raised the issue of a trustee fee entitlement, this notion came to him after the improper billing and was in the nature of a reconstruction designed to cast a colour of respectability on an account that otherwise lacked that characteristic.

## **Decision**

Mr. P billed for fees based on a percentage of funds held in trust, even though his retainer agreement required that he bill on an hourly rate basis. His bill was far in excess of the value of the services he provided when calculated on an hourly basis. His conduct was contrary to Chapter 1, Rules 3(9) and (10) and Chapter 9, Rule 1 of the *Professional Conduct Handbook* and constituted professional misconduct.

## **Penalty**

In determining penalty, the hearing panel took into consideration that Mr. P had been cited five times between 1991 and 1997, resulting in adverse findings of professional misconduct or conduct unbecoming. These matters related to Mr. P's failing to notify the Law Society of an unsatisfied judgment; failing to fulfil financial obligations incurred in the course of his practice; engaging in inaccurate or unverifiable marketing activities; refusing to refund money to a client when he knew the client was entitled to a refund and refusing to return clients' files once litigation respecting his accounts had been settled (a matter in which he admitted professional misconduct and offered a full apology). Mr. P had also attended seven conduct reviews, several of which arose from complaints about his fees or billing for fees.

The hearing panel was not persuaded of the need for a suspension in the circumstances, noting that Mr. P had modified his law practice so as to improve his client relations and reduce dramatically the number of complaints against him in recent years. It was, however, necessary to communicate both to Mr. P and the public that conduct of this nature will not be tolerated.

The panel took into account Mr. P's discipline record and the importance of consistency in penalty and in sending a significant message to Mr. P respecting the gravity of his conduct.

The panel ordered that Mr. P:

1. pay a fine of \$12,000 by December 31, 2001; and
2. pay \$5,069.91 as costs of the discipline proceedings.

The panel noted that it would consider a further written submission from Mr. P should he believe the timeframe to pay the fine is too onerous.