

West Vancouver, B.C.

Called to the Bar: September 14, 1976

**Discipline hearing:**

**Date:** November 21, 2001

**Panel:** Peter J. Keighley, Q.C., as a one-Bencher panel by consent

**Report issued:** December 4, 2001

Indexed as [2001] LSBC 36

**Counsel:**

James A. Doyle, for the Law Society

Richard R. Sugden, Q.C., for DD

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## Summary

In financing the purchase of a family home, DD borrowed money from E. DD performed legal services for E respecting security for her loan despite the fact that he had a personal interest in the transaction, contrary to Chapter 7 of the *Professional Conduct Handbook*. He placed his own interests in direct conflict with hers by negotiating a new loan on the property, to be secured by a second mortgage, in priority to E's mortgage on title. He did so without advising her on the nature of her security or recommending independent legal advice. When the property was later sold, there were insufficient sale proceeds to repay E and discharge the third mortgage. After recognizing his failure to obtain adequate security for E, DD further failed to advise her of her potential claim against him, failed to recommend that she obtain independent legal advice and failed to report to the professional liability insurer. After E successfully sued DD, insurance coverage was denied on the basis of DD's personal interest in the transaction. DD admitted, and the hearing panel found, that DD's conduct amounted to professional misconduct. After considering various factors respecting penalty, the hearing panel ordered that DD be suspended for one month, beginning February 1, 2002, and pay costs of the hearing. The panel noted that a longer suspension might have been imposed but took into account DD cooperated in expediting the discipline proceedings and, in particular, took steps to repay his debt to E.

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## Facts

To finance the purchase of a family home in 1992, DD obtained two loans from institutional lenders, secured by first and second mortgages respectively, and a \$50,000 loan from E, a friend of his wife. When DD later took steps to consolidate family debts, he sought a new loan from a private lender and agreed to provide that lender with a new

second mortgage on the family home as security. He intended the proceeds of the new mortgage to pay off the existing second mortgage and certain other debts.

At that time DD prepared and registered a third mortgage on title as security for E's loan, thereby performing legal services for her when he had a financial interest in the matter, contrary to chapter 7, Rule 1 of the *Professional Conduct Handbook*.

In 1996 DD and his wife separated and the property was sold after the commencement of foreclosure proceedings. The sale proceeds were sufficient to discharge the first mortgage and most of the second mortgage, but not the third mortgage, such that E was not repaid her loan. DD admitted that he breached the fiduciary obligations he had assumed in respect of E by placing his own interest in obtaining a new loan directly in conflict with her interest in having adequate mortgage security. At the time he prepared the third mortgage, he did not advise E that a new second mortgage would take priority over hers, did not send her either a copy of the mortgage or the state of title certificate for 10 months and did not recommend that she obtain independent legal advice.

After recognizing that he had not obtained adequate security for E, DD failed to advise E of her potential claim, failed to recommend that she obtain independent legal advice and failed to report to his professional liability insurer as required under his liability insurance policy, contrary to Chapter 4, Rules 5 and 5.1 of the *Handbook*. He in fact took steps to prevent the client from recovering from the program so as to reflect adversely on the profession, contrary to Chapter 2, Rule 1 of the *Handbook*.

E sued DD for negligence and breach of fiduciary duty. She obtained a judgment for the amount of the loan and special costs, but liability insurance coverage was denied on the basis of DD's personal interest in the transaction.

At the time of these incidents, DD was experiencing severe financial hardship, both personally and professionally, and was under significant stress.

## **Decision**

DD admitted, and the hearing panel found, that DD's conduct constituted professional misconduct.

## **Penalty**

The hearing panel considered a range of factors affecting penalty, noting the importance of undivided loyalty of a lawyer to a client, the fact that DD received a personal advantage from his misconduct and the fact that his client received no worthwhile security for her loan but was in fact obliged to commence legal proceedings to collect the debt he owed her.

The panel also noted, however, that DD's conduct arose in a period of considerable stress and was not typical of his practice. He had apologized to E, helped to expedite the discipline proceedings and was making monthly payments to E to settle his debt. The

panel found this latter point of particular significance, noting that without it, a longer suspension might otherwise have been imposed.

The hearing panel ordered that DD:

1. be suspended for one month, beginning February 1, 2002; and
2. pay \$5,923.22 as costs of the hearing.

On December 17 the Discipline Committee resolved to apply to the Benchers for a review of penalty in this decision pursuant to section 47 of the *Legal Profession Act*.

*Discipline Case Digest — 2001: No. 25 December (DD)*