

New Westminster, B.C.

Called to the Bar: August 27, 1993

Discipline hearing:

Dates: November 22, 2000

Panel: (Majority) Gerald J. Lecovin, Q.C., Chair, Jo Ann Carmichael, Q.C. and (Dissent) Ralston S. Alexander, Q.C.

Reports: November 30, 2000 (Majority) and December 5, 2000 (Dissent)

Discipline hearing report indexed as [2000] LSBC 31

Counsel:

Todd Follett, for the Law Society

Jerome Ziskrout, for Mr. Apolinario

Summary

While working on an estate matter, Mr. Apolinario rendered an account to a client that contained an inaccurate statement of disbursements. On a litigation matter, he prepared and entered into a contingent fee agreement that did not comply with the Law Society Rules. In receiving \$400 from these clients for expenses in the litigation, he deposited the funds to his general account, rather than his trust account, and when the clients subsequently requested an accounting, he erred in the accounting and failed to properly account to them. A Law Society audit revealed that Mr. Apolinario failed to maintain a non-trust book or synoptic in his practice. Between 1995 and 1998, he also failed to eliminate certain shortages in his trust account; he did so after the audit. Mr. Apolinario admitted that he had breached sections of the *Legal Profession Act* and the Law Society Rules. The Discipline Committee and a majority of the discipline hearing panel accepted Mr. Apolinario's admission of a discipline violation and his proposed disciplinary action, and accordingly ordered that he be reprimanded, pay a \$2,000 fine and pay \$1,000 as costs.

Facts

While representing an executor of D Estate in 1994, Mr. Apolinario made distribution of the estate to the residual beneficiaries. In April, 1995 he transferred \$2,000 remaining in trust for the estate to his general account and subsequently disbursed \$1,000 of the funds to the executor and \$1,000 toward payment of his own credit card bill, which transfers he said were bonuses paid with the executor's approval. The statement of account he prepared indicated that the \$2,000 was used to pay taxes on the estate, which was inaccurate.

In February, 1995 Mr. Apolinario began representing the wife and daughter of a deceased man in their claim against ICBC arising from the man's death. Mr. Apolinario prepared and entered into a contingent fee agreement that did not comply with requirements of the Law Society Rules.

One of these clients paid Mr. Apolinario \$400 toward the litigation expenses. Mr. Apolinario failed to deposit these funds to his trust account, but rather deposited them to his general account. The client requested an accounting of the money in February, 1997 and made a request in writing in January, 1998. Mr. Apolinario provided a letter indicating that \$150 of the \$400 remained in trust and that the balance had been disbursed to pay various litigation expenses. The statement of account was in fact in error as none of the funds were in trust, and this amounted to a failure by Mr. Apolinario to properly account to his clients. From the date of receiving the funds to the date of his accounting, Mr. Apolinario had in fact expended more than \$400 in disbursements in the litigation.

In November, 1998 the Law Society conducted an audit of Mr. Apolinario's books and accounts. An audit report was produced in July, 1999.

The audit indicated that Mr. Apolinario's non-trust transactions were recorded on a computer spreadsheet program that did not track all requisite information and that the general account cash book did not record the date of receipt or the source of bank deposits.

The audit also revealed shortages in Mr. Apolinario's trust account from 1995 to 1998. These shortages showed on his monthly trust reconciliations but he did not eliminate them until they were drawn to his attention by the Law Society auditor. The largest of the shortages related to one client file: a \$974 shortage remained from June to August, 1995 and \$74 from August to November, 1995. The other shortages did not exceed \$50.

Admission and Penalty

Pursuant to Law Society Rule 4-22, Mr. Apolinario admitted that he breached sections of the *Legal Profession Act* and Law Society Rules by rendering an account containing an inaccurate statement of disbursements, entering into a contingent fee agreement that was not in compliance with the Rules, failing to deposit trust funds to his trust account, failing to properly account to clients, failing to maintain a proper non-trust cash book or synoptic and failing to eliminate trust shortages immediately upon discovering them.

The Discipline Committee and a majority of the discipline hearing panel accepted Mr. Apolinario's admission of a discipline violation and his proposed disciplinary action and accordingly ordered that he:

1. be reprimanded;
2. pay a \$2,000 fine; and
3. pay \$1,000 as costs of the discipline proceedings.

Both the fine and costs were ordered to be paid in equal monthly instalments over a period of three years.

The majority of the hearing panel noted that it did not believe it was the role of the panel in considering a Rule 4-22 conditional admission to second guess the Law Society as to whether the facts before it gave rise to a different citation and would not refuse to condone the admission on that basis.

Dissent

Mr. Alexander, in the minority, would have rejected Mr. Apolinario's Rule 4-22 admission. He noted that the public interest requires that discipline matters receive a full and proper review and that, if a panel hears a conditional admission under Rule 4-22 and is not satisfied of all the particulars proposed, it must refuse to accept the proposed admission and penalty.

Mr. Alexander noted that additional facts were disclosed during the hearing that were of concern to the panel and, in Mr. Alexander's view, these merited further investigation. Rejection of the conditional admission would have resulted in the matter being sent to a new panel for hearing and there would have been opportunity in that process for the new panel and discipline counsel to consider amendment of the citation to address the additional concerns.