

Salmon Arm, B.C.

Called to the Bar September 13, 1983

**Discipline hearing panel:** July 19, 1994

H.R. Berge, Chair, R.S. Tretiak and K.F. Warner

J.P. Whittow, for the Law Society

A.R. Perry, for the member

### **Summary**

On several client files, the member breached Law Society accounting rules by failing to maintain sufficient funds in trust to meet his trust obligations, by transferring money from his trust account to his general account before delivering an account to the client, by withdrawing money without making a notation on the relevant file, by failing to eliminate a trust shortage and by failing to report to the Law Society his inability to deliver up trust funds when due. On one file, the member failed to advise or seek consent of the Legal Services Society before converting a legal aid case into a private retainer, and on another file he failed to reduce a contingent fee agreement to writing as required. The member admitted, and the discipline hearing panel found, that, while he had not acted dishonestly, his conduct amounted to gross negligence and constituted professional misconduct.

### **Facts**

#### **Billing privately for a case authorized by legal aid**

In October, 1989 the member began acting for Mr. G whose children had been apprehended by the Ministry of Human Resources (MHR) because of alleged sexual abuse by G. In March, 1990 the member applied for legal aid on behalf of G, and the Legal Services Society subsequently authorized the representation back to October, 1989.

In November, 1990 G was charged criminally, and he asked the member to represent him on the criminal charges as well as the apprehension by MHR. The member said that he would require a \$20,000 retainer. G borrowed \$21,150 from a friend and gave this money to the member on November 28, 1990.

The member deposited the money to his trust account and transferred \$11,150 to his general account that same day: \$10,000 for all work done for G to date and \$1,150 for past unpaid accounts.

The member did not advise the Legal Services Society that he had received these funds from G, nor did he obtain the Society's consent to converting his legal aid representation of G to a private retainer, contrary to former Ruling G/8 of the *Professional Conduct Handbook*, which was in effect prior to May 1, 1993.

Between December 21, 1990 and January 15, 1991 the member transferred a total of \$8,000 from his trust account to his general account for work done for G. On instructions from G, the member transferred another \$2,000 from trust to a different client on January 18, 1991, leaving no funds in trust for G.

On February 2, 3 and 4, 1991 the member represented G on a hearing on the apprehension of G's children. On February 4 the court made a permanent apprehension order, and the member called the Legal Services Society for permission to appeal the order. He obtained oral approval for the appeal and permission to bill the apprehension matter on a legal aid basis, while billing privately on the criminal matter.

After G asked for his file to be transferred to another lawyer in February, 1991, the member deposited \$11,915 to his trust account on behalf of G and sent a trust cheque for this amount to the new lawyer, along with G's file. The member deposited the \$11,915 to trust after recalculating his bills on the basis that the Legal Services Society would fund the MHR apprehension case.

#### **Transferring money without client's consent**

In early 1990 the member found in his firm's safe \$5,000 in Canada Savings Bonds, along with unclipped coupons, in the name of Mr. D, who had been a client of the lawyers who had previously owned the law practice. The member called the Law Society and was told by a staff lawyer that he ought to try to locate the beneficiaries of the bonds.

On September 25, 1990 the member cashed the coupons and placed the proceeds of \$1,411 in his trust account. He prepared an account for \$1,411 that day and then transferred the money to his general account between September 25 and October 24. The member had no client in this matter and he did not send the bill to anyone.

The member took various steps to locate the beneficiaries of the bonds, but was unsuccessful.

In February, 1991 the member obtained a court order permitting him to convert the bonds to cash and place the funds in an interest-bearing bank account, pending a further order. The order also provided that the member was entitled to "all reasonable costs." The member subsequently cashed the bonds and put the proceeds of \$5,681.50 in a term deposit.

On April 29, 1991 the member cashed the term deposit and placed the funds (\$5,747.97) in trust. Between April and September, 1991 he made several transfers totalling \$5,000 from his trust account to his general account, leaving \$747.97 in trust. The member prepared accounts, but did not send them as he had not located the beneficiaries.

The member breached Law Society Rules 834 and 835 by billing and transferring money to himself without the consent of any client. The member furthermore never sought court approval for his accounts. On the basis of the February, 1991 court order, he believed he was entitled to bill the estate for his efforts in locating the beneficiaries, subject to their right to tax the accounts.

#### **Trust accounting breaches**

On July 19, 1990 the member began acting for T in connection with her purchase of a boat. That same day the member transferred \$5,000 from his trust to his general account. He disbursed \$99,000 in connection with the closing of the purchase. He then made two more transfers of \$500 from his trust to his general account on August 14 and 22. The member did not prepare any bills for his services. The member believed that he had a fixed fee agreement and that interim accounts were not required.

In October T asked for an accounting. The member sent her undated statements for \$212.50, \$1,512.50, \$987.50, \$312.50, \$475 and \$500. On a review before a registrar taken by T, the registrar rejected the member's position that he had a fixed fee agreement with T. He ordered that the accounts be taxed at \$3,500 for fees and \$851.90 for disbursements, and ordered that the member repay \$851.90 to T.

The member breached Law Society Rules 834 and 835 and Ruling B/5(c) of the former *Professional Conduct Handbook* by transferring money from his general to his trust account prior to sending an accounting to his client.

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In October, 1991 Mrs. O gave the member a \$1,500 retainer to carry out legal services for her. Between her first meeting with the member on October 16 and the second meeting on December 12, O received no accounts from the member. During their second meeting the member gave O an account for \$1,200 and asked if she had received it in the mail. She said she had not.

The trust ledger indicated that the member deposited \$1,500 to his trust account on October 10, though it was, in fact, received and deposited on October 16. On October 10 the member withdrew \$1,300 from trust in relation to services rendered for O, though he failed to attribute this to her file in his accounting records. On October 16, 1991 he again withdrew \$1,300 in error, leaving an \$1,100 shortfall in funds held for O. The member was unable to replace the funds until he obtained a loan from his father.

The member breached Law Society Rule 830 by failing to maintain sufficient funds in trust to meet his trust obligations, Rules 834 and 835 by transferring money from his trust to his general account prior to delivering an account to the client, Rule 842 by withdrawing \$1,300 without making a notation on the

relevant file and Rules 861 and 862 by failing to eliminate a trust shortage and failing to report to the Law Society his inability to deliver up trust funds when due.

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In May, 1990, the member was retained by Mr. and Mrs. S to begin an action on behalf of their infant son. The member received \$500 from his clients for a medical report, but he never obtained one. He later accounted for the \$500 as fees for representing Mr. S in a separate criminal matter.

The clients settled with the defendants for \$22,500: \$15,794 as damages, \$1,081 for disbursements and \$5,625 as legal costs, representing the 25% contingent fee agreed to by Mr. and Mrs. S and the member. The member failed to reduce his contingent fee agreement to writing as required by Rules 1060 and 1065 and by Ruling B/5(e) of the former *Professional Conduct Handbook*.

On September 23, 1991 the member received and placed in trust the settlement funds of \$22,500. He transferred \$5,725 to his general account for fees. Of the remaining \$16,875, \$15,794 was to be paid into court for the infant and \$1,081 to be paid to Mr. and Mrs. S for disbursements they had incurred or paid. On November 28 the member, anticipating the disbursements would be higher than originally projected, transferred \$1,400 from his trust to his general account, leaving only \$15,475 in trust. Of the \$1,400 he withdrew from trust, he paid \$449 in disbursements directly, paid \$632 to Mr. and Mrs. S. for disbursements they had incurred and paid the balance into court for Mr. and Mrs. S.

The member breached Law Society Rule 830 by failing to maintain sufficient funds in trust to meet his trust obligations, Rule 834 by withdrawing funds from trust without rendering an account, and Rules 861 and 862 by failing to eliminate a trust shortage and failing to report to the Law Society his inability to deliver up trust funds when due.

### **Decision**

The member admitted, and the Discipline Committee and discipline hearing panel found, that the member had not acted dishonestly, but his breach of the Law Society Rules constituted gross incompetence amounting to professional misconduct.

### **Penalty**

The Discipline Committee and the discipline hearing panel accepted the member's admission of professional misconduct and his proposed disciplinary action. The panel accordingly ordered that:

1. the member be suspended from the practice of law for three months from December 1, 1994 through February 28, 1995;
2. prior to resumption of practice and as a condition of resuming practice, the member satisfy a board of examiners appointed by the Competency Committee that he is competent to practise in the areas of law he proposes practising in and that he is generally competent respecting his office administration and systems, including compliance with Law Society accounting rules;
3. the member endeavour to find as soon as practicable a practice situation as an employee or associate with one or more lawyers in the same office space, in a setting approved by the Competency Committee;
4. until such time as he finds such a practice situation, the member maintain his trust account with another practitioner and designate, with the approval of the Competency Committee, a mentor with whom he will undertake to meet regularly to review his files and discuss administration of his practice;
5. the member pay \$5,000 as costs of the discipline proceedings on or before August 1, 1996;
6. in the event that the Law Society must seek a custodian of the member's practice during his suspension, he must bear this cost;
7. the member pay the costs of any remedial programs, practice reviews or competency hearings that he participates in; and

8. the member undertake to have his accounts reviewed respecting Mr. D's estate and to pay into court \$7,159 (less any amount allowed by the court for his reasonable fees), plus interest.

*Discipline Case Digest — 1994: No. 14 December (Payne)*