

SUMMARY: The Legal Services Society appointed the member to defend C, who had been charged with two criminal offences. The member subsequently accepted from C a money order and a post-dated cheque, each for \$500. He cashed the money order but destroyed the post-dated cheque. The member did not notify or obtain the consent of the Legal Services Society as to receiving or retaining either instrument. After failing to remit these unauthorized payments to the Legal Services Society, the member billed the Society for professional services rendered to C. The member's conduct constituted professional misconduct.

DAVID CECIL TARNOW

87/3

Burnaby, B.C.

Called to the Bar September 13, 1977

Discipline Hearing Committee: February 27, 1987

H.A.D. Oliver, Q.C., Chairman, Pamela A. Murray, Q.C., and Donald L. Sperry

FACTS:

In August 1984 the Legal Services Society appointed the member to defend C on charges of assault with a weapon and aggravated assault.

In October 1985 the member accepted from C a money order for \$500, and two months later, a post-dated cheque for \$500. He did not notify or seek the consent of the Legal Services Society with respect to receipt of these payments.

The member represented C at his trial for aggravated assault. C was convicted and sentenced to four years in prison. The member subsequently billed the Legal Services Society for his representation of C. He did not advise the Society that he had received the money order or the post-dated cheque, and he remitted neither to the Society.

In March 1986 the member presented the money order for payment and received the sum of \$500. He destroyed the post-dated cheque. Following a complaint to the Legal Services Society over this matter, the member instructed his counsel to disburse \$500 to the Society. Counsel inadvertently failed to do so.

The member was cited for professional misconduct in:

1. failing to notify or obtain the consent of the Legal Services Society before:
 - (a) entering into a financial arrangement with C for the payment of fees other than those authorized by the Legal Services Society;
 - (b) accepting the sum of \$500 for professional services provided to C;
 - (c) accepting a post-dated cheque for professional services rendered to C; and

2. billing the Legal Services Society for professional services provided to C despite his failure to notify or obtain the consent of the Society with respect to receiving or retaining the sum of \$500 or the post-dated cheque, and despite his failure to remit either to the Society.

According to C's testimony before the Discipline Hearing Committee, the member demanded payment of \$1,000 from his client after having been appointed defence counsel in the case by the Legal Services Society. C said that he had protested this demand but eventually made payment in two instalments.

The member denied discussing or demanding payment of money. He testified that C had unexpectedly presented him with the money order and the post-dated cheque as a gift.

The Hearing Committee considered the credibility of C of primary importance. Although he at first appeared a straightforward and persuasive witness, on cross-examination C proved to be a vindictive and dissatisfied former client who blamed the member for his conviction.

The Hearing Committee doubted that C's evidence could safely be relied upon, and was not satisfied that the member had entered into a financial arrangement with his client for the payment of fees other than those authorized by the Legal Services Society. The member conceded, however, the truth of the facts as outlined in 1(b), (c) and 2 above.

DECISION:

The member admitted and the Committee found as a fact that his conduct constitutes professional misconduct.

PENALTY:

The Hearing Committee stressed that a lawyer's acceptance of even one "under the counter" payment from a Legal Aid client is likely to constitute a fraud or dishonest deprivation. It is also unfair to the many dedicated members of the profession who render a significant public service by representing indigent persons for the pitifully inadequate rates of remuneration provided under the Legal Aid tariff. The inadequacy of those rates cannot be remedied by the unilateral decision of a member to exact a supplementary fee.

Such action normally constitutes a breach of the Rule G/8 of the *Professional Conduct Handbook* and a single offence may result in a member's disbarment.

In this instance the Committee was persuaded that a substantially lesser penalty would suffice, in light of the member's immaculate record, his efforts to make restitution, and critically important psychiatric evidence that the member's conduct was largely attributable to anxiety, depression and other psychological problems.

The Hearing Committee noted that in reaching its conclusion, it had not lost sight of the principle of general deterrence. The Committee accepted the member's undertaking to accept psychiatric treatment and ordered that the member:

1. be suspended for three months; and
2. pay costs of the hearing totalling \$4,079.56.

No limitation was placed on the member's ability to employ an articled student.

R.R. Sugden and R. Blair, for the Law Society
J.F. Rowan and F.M. Rowan, for the member